



Date of acceptance : 08/10/2012

**OBSERVATIONS OF THE GOVERNMENT OF THE FRENCH
REPUBLIC**

Case C-370/12 *

Document lodged by:

THE FRENCH REPUBLIC

Usual name of the case:

PRINGLE

Date lodged:

14 September 2012

MINISTRY OF FOREIGN AFFAIRS FRENCH REPUBLIC

Paris, 14 September 2012

TO THE PRESIDENT

AND MEMBERS

OF THE COURT OF JUSTICE

OF THE EUROPEAN UNION

OBSERVATIONS

OF THE GOVERNMENT OF THE FRENCH REPUBLIC

IN CASE C-370/12

PRINGLE

* Language of the case: English.

- 1 By decision of 31 July 2012 the Supreme Court of Ireland referred the following questions to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

‘(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?’

- 2 Those questions call for the following observations from the French Government.

I – FACTS AND PROCEDURE

- 3 The plaintiff at first instance, and appellant before the Supreme Court (‘the plaintiff’), is an Irish citizen and a member of Dáil Éireann, once of the Houses of the Oireachtas, the national parliament.
- 4 The plaintiff opposes the ratification by Ireland of the Treaty establishing the European Stability Mechanism (ESM), done at Brussels on 2 February 2012 (‘the ESM Treaty’), and for that reason brought an action before the High Court on 13 April 2012 against the Government of Ireland, Ireland and the Attorney General.
- 5 By judgment of 17 July 2012 the High Court dismissed all the plaintiff’s claims. The plaintiff immediately appealed to the Supreme Court against the decision of the High Court.
- 6 On 31 July 2012 the Supreme Court decided to refer to the Court of Justice for a preliminary ruling the questions set out at paragraph 1 of these observations.

II – THE ESM TREATY

- 7 Recital 4 to the ESM Treaty states:

‘Strict observance of the European Union framework, the integrated macro-economic surveillance, in particular the Stability and Growth Pact, the macroeconomic imbalances framework and the economic governance rules of the European Union, should remain the first line of defence against confidence crises affecting the stability of the euro area.’
- 8 Article 3 of the ESM Treaty provides:

‘The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.’
- 9 Article 13(2) and (3) of the ESM Treaty provides:

‘2. On the basis of the request of the ESM Member and the assessment referred to in paragraph 1, the Board of Governors may decide to grant, in principle, stability support to the ESM Member concerned in the form of a financial assistance facility.

3. If a decision pursuant to paragraph 2 is adopted, the Board of Governors shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding ('MoU') detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. In parallel, the Managing Director of the ESM shall prepare a proposal for a financial assistance facility agreement, including the financial terms and conditions and the choice of instruments, to be adopted by the Board of Governors.

The MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned.'

III – APPLICABLE EUROPEAN UNION (EU) LAW

10 Article 4(3) TEU provides:

'... 3. Pursuant to the principle of sincere cooperation the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

11 Article 13(2) TEU provides:

'2. Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.'

12 Article 48(6) TEU provides:

'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.’

13 Article 2(3) TFEU provides:

‘3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.’

14 Article 3 TFEU provides:

‘The Union shall have exclusive competence in the following areas:

...

(c) monetary policy for the Member States whose currency is the euro;

...’

15 Article 5(1) TFEU provides:

‘The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

Specific provisions shall apply to those Member States whose currency is the euro.’

16 Article 122(2) TFEU provides:

‘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.’

17 Article 125(1) TFEU provides:

‘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.’

- 18 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 (‘the European Council Decision’) provides in Article 1:

‘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 assistance under the mechanism will be made subject to strict conditionality.”

IV – ANSWERS TO THE QUESTIONS REFERRED

1. First question

- 19 By its first question, the Supreme Court seeks to ascertain, first, whether the European Council was entitled to have recourse to the simplified revision procedure under Article 48(6) TEU to adopt the new Article 136(3) TFEU and, second, whether the proposed amendment – that is to say, the new Article 136(3) TFEU – infringes the EU Treaty or the FEU Treaty or the general principles of European Union law.

a) First part of the first question

- 20 By the first part of its first question, the Supreme Court questions the validity of the European Council Decision, in so far as it was adopted under the simplified revision procedure provided for in Article 48(6) TEU.
- 21 As a preliminary point, the French Government observes that the European Council Decision is an act of an institution and that the Court therefore has jurisdiction to ascertain whether it was adopted according to the procedure laid down in the EU Treaty.

- 22 The French Government is of the view that the European Council Decision was validly adopted according to that procedure and that it is therefore valid in that respect.
- 23 It should be borne in mind that Article 48(6) TEU authorises the European Council to adopt a decision amending all or part of the provisions of Part Three of the FEU Treaty. That simplified revision procedure entails consultation of the European Parliament and the Commission, and the European Central Bank (ECB) in the case of institutional changes in the monetary area, then the approval of the Member States in accordance with their respective constitutional requirements. That procedure is permitted only for amendments of the Treaty that do not increase the competences conferred on the Union in the Treaties.
- 24 In the present case, it is common ground that the European Council Decision is limited to amending a provision of Part Three of the FEU Treaty, in fact Article 136 TFEU. It is also common ground that the European Parliament, the Commission and the ECB were consulted. Last, Article 2 of the European Council Decision provides that the decision is to enter into force on 1 January 2013 after the Member States have complied with their respective constitutional requirements.
- 25 However, it remains to be determined whether the European Council Decision does or does not increase the competences of the Union.
- 26 In that regard, the French Government maintains that, as the Commission, the European Parliament and the ECB stated in their opinions on the proposal for a decision, the European Council Decision does not in fact increase the competences conferred on the Union in the Treaties.
- 27 Indeed, the new Article 136(3) TFEU merely recognises that the Member States of the euro area, and not the Union itself, have the power to create a stability mechanism on certain conditions. Thus, that provision does not establish a new legal basis in order to enable the Union to undertake an action which was not possible before the amendment of the FEU Treaty.
- 28 It is true that, as the plaintiff in the main proceedings maintains in essence, the new Article 136(3) TFEU does not preclude the possibility that an agreement between the Member States of the euro area establishing a stability mechanism should, as does, moreover, the Treaty establishing the EMS, entrust new tasks to the institutions of the Union.
- 29 Thus, in particular, articles 13 and 37 of the Treaty establishing the EMS entrust such new tasks to the Commission, the ECB and the Court of Justice.
- 30 However, the allocation of those new tasks to the Commission, the ECB and the Court of Justice does not constitute an increase of the competences conferred on the Union in the EU and FEU Treaties. Those institutions do not carry out the

tasks in question within the framework of those Treaties and on behalf of the Union, but do so on the basis of an international agreement between Member States, on behalf of those States.

- 31 Accordingly, the French Government proposes that the answer to the first part of the first question should be that the European Council Decision was validly adopted according to the simplified revision procedure under Article 48(6) TEU and that it is therefore valid in that respect.

b) Second part of the first question

- 32 By the second part of its first question, the Supreme Court asks whether the new Article 136(3) TFEU infringes the EU Treaty or the FEU Treaty, or the general principles of EU law.
- 33 The French Government considers that the Court does not have jurisdiction to answer the second part of the first question.
- 34 Although, under Article 267 EU, the Court has jurisdiction to interpret the Treaties and the acts of the institutions, its jurisdiction to assess validity extends only to the acts of the institutions. Thus, in the context of the preliminary reference procedure, as, moreover, in the context of an action for annulment, the Court does not have jurisdiction to assess the validity of primary law.
- 35 Admittedly, the European Council Decision is an act of an institution and, in the context of the first part of the first question, the French Government did not dispute the Court's jurisdiction to ascertain whether that decision was validly adopted under the simplified revision procedure in Article 48(6) TEU.
- 36 However, it does not follow that the Court would have jurisdiction to assess the validity of Article 1 of the European Council Decision, which provides that a paragraph 3 is to be added to Article 136 TFEU.
- 37 That new paragraph, which is to be inserted into the FEU Treaty, is a provision of primary law.
- 38 Consequently, for the reasons stated at paragraph 34 of these observations, the Court of Justice does not have jurisdiction to assess its validity.
- 39 Furthermore, it should be borne in mind that, in the framework of the ordinary revision procedure, the European Council is not called upon to adopt a decision such as the European Council Decision at issue. In effect, in the framework of that procedure, the revision of the Treaties is effected not by means of a European Council Decision but by means of an amending Treaty between Member States. Thus, in the framework of the ordinary revision procedure, the amendment of the Treaties is to be found not in an act of an institution but in a Treaty between Member States, the validity of which the Court clearly lacks jurisdiction to assess.

- 40 In order to add paragraph 3 to Article 136 TFEU, it would also have been possible to have recourse to the ordinary revision procedure, in which case the Court would clearly not have had jurisdiction to assess the validity of that amendment of the FEU Treaty.
- 41 Since the Court's jurisdiction to assess the validity of an amendment of the Treaties cannot depend on the revision procedure chosen, it necessarily follows that the Court has no jurisdiction to assess the validity of the new paragraph 3 of Article 136 TFEU, even though that provision is to be found in an act of the European Council.
- 42 Consequently, the French Government considers that the Court does not have jurisdiction to answer the second part of the first question.
- 43 Accordingly, the French Government proposes that the answer to the first question should be, first, that the European Council Decision was validly adopted under the simplified revision procedure in Article 48(6) TEU and that it is therefore valid in that respect. Second, the Court does not have jurisdiction to assess the validity of the new paragraph 3 of Article 136 TFEU forming the subject-matter of that decision.

2. Second question

- 44 By its second question, the Supreme Court asks in essence whether certain provisions of the Treaties and certain general principles of EU law must be interpreted as meaning that they preclude an international agreement such as the Treaty establishing the EMS.
- 45 The provisions of the Treaties to which the Supreme Court refers relate to economic policy, monetary policy, the powers and functions of the institutions and sincere cooperation, while the general principles of EU law to which it refers are the general principles of effective judicial protection and legal certainty.
- 46 *First*, the Supreme Court asks whether the Treaty establishing the EMS infringes Article 2(3) TFEU and also Articles 119 TFEU, 120 TFEU, 121 TFEU, 122 TFEU, 123 TFEU, 125 TFEU and 126 TFEU, which relate to the economic policy of the Union. With the exception of Article 2(3) TFEU, those articles are to be found in Chapter I of Title VIII of Part Three of the FEU Treaty, entitled 'Economic ... policy'.
- 47 In that regard, the French Government observes first of all that, pursuant to Article 2(3) TFEU and Article 5(1) TFEU, the Member States are to coordinate their economic policies within the Union and that, to that end, the Council is to adopt measures, in particular broad guidelines for those policies. Article 119(1) TFEU provides that the activities of the Member States and the Union are to include the adoption of an economic policy which is based, in particular, on the close coordination of Member States' economic policies, and Article 120 TFEU

provides that Member States are to conduct their economic policies with a view to contributing to the achievement of the objectives of the Union and in the context of those broad guidelines.

- 48 That coordination of economic policies is to be based on the broad guidelines of economic policy and the multilateral surveillance procedure laid down in Article 121 TFEU and on the excessive deficits procedure laid down in Article 126 TFEU.
- 49 The French Government observes that recital 4 to the Treaty establishing the ESM states that strict observance of the European Union framework, the integrated economic surveillance, in particular the Stability and Growth Pact, the macroeconomic imbalances framework and the economic governance rules of the European Union, should remain the first line of defence against confidence crises affecting the stability of the euro area.
- 50 Furthermore, the second subparagraph of Article 13(3) of the Treaty establishing the ESM provides that the memorandum of understanding relating to a financial assistance facility is to be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned.
- 51 It follows that the operations provided for in the Treaty establishing the ESM must comply with the objectives relating to economic policy coordination and the measures taken in that context in the framework of the Union. That is specifically the purpose of the strict conditionality referred to in Article 3 of the Treaty establishing the EMS, which must accompany to the grant of financial assistance.
- 52 Accordingly, the Treaty establishing the ESM does not infringe Articles 2(3) TFEU, 119 TFEU, 120 TFEU, 121 TFEU and 126 TFEU.
- 53 As regards Article 122 TFEU, it should be observed that paragraph 1 of that article, which provides for the adoption by the Council of measures if severe difficulties arise in the supply of certain products, notably in the area of energy, has no relevance to the present case.
- 54 As regards paragraph 2 of Article 122 TFEU, it provides that where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional circumstances beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. It was on that basis that the Council established the European Financial Stability Mechanism (EFSM), which, as stated at recital 1 to the Treaty establishing the ESM, the ESM is intended to replace.

- 55 Although Article 122(2) TFEU authorises the Council to introduce financial mechanisms such as the EMSF, which are financed or guaranteed by the budget of the Union, there is nothing in that provision to prevent the Member States from establishing such mechanisms outside the framework of the Union and on the basis of their own resources.
- 56 Accordingly, the Treaty establishing the EMS does not infringe Article 122 TFEU.
- 57 As regards Article 123 TFEU, that provision prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility or from directly acquiring the debt instruments of the Member States.
- 58 However, that article is addressed only to the ECB and the central banks of the Member States and not to the Member States themselves.
- 59 Accordingly, the Treaty establishing the EMS does not infringe Article 123 TFEU.
- 60 As regards Article 125(1) TFEU, it provides that the Union is not to be liable for or to 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. In addition, a Member State is not to be liable for or to 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.
- 61 In the present case, it must be emphasised that, under Article 12(1) of the Treaty establishing the ESM, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to *strict conditionality*, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.
- 62 Furthermore, Article 20(1) of the Treaty establishing the ESM provides that, when granting stability support, the ESM is to aim to fully cover its financing and operating costs and is to include an appropriate margin.
- 63 It follows that the Treaty establishing the EMS complies with the objective of Article 125(1) TFEU, which is to ensure the budgetary discipline of the Member States.

- 64 Accordingly, the Treaty establishing the EMS does not infringe Article 125 TFEU.
- 65 On the basis of paragraphs 45 to 63 of these observations, the French Government considers that the Treaty establishing the EMS does not infringe any of the provisions of the FEU Treaty on economic policy to which the Supreme Court has referred.
- 66 *Second*, the Supreme Court asks whether the Treaty establishing the EMS infringes the exclusive competence of the Union on monetary policy, for Member States whose currency is the euro. In that regard, the Supreme Court refers to Article 3(1)(c) TFEU, Article 3(2) TFEU, Article 127 TFEU and, more generally, Title VIII of Part Three of the FEU Treaty.
- 67 In that regard, it is sufficient to observe that the establishment of a mechanism such as the ESM comes within the economic policy and not the monetary policy. The main objective of the monetary policy is to maintain price stability. Thus, the EMS does not share either the objectives and tasks or the means of the European System of Central Banks (ESCB), which defines and implements the monetary policy of the Union.
- 68 As stated in Article 3 of the Treaty establishing the ESM, the purpose of the ESM is to be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.
- 69 In those circumstances, the EMS, which is an international organisation quite separate from the ESCB, is designed to provide financial assistance to Member States in order to preserve the financial stability of the euro area, which does not correspond either to the main objective or to the means of intervention of the ESCB.
- 70 Thus the new provision of the FEU Treaty, which provides that Member States whose currency is the euro may establish a stability mechanism, was inserted into Article 136 TFEU, which provides special measures for the coordination of economic policies for those States.
- 71 Accordingly, the Treaty establishing the EMS does not violate the exclusive competence of the Union in respect of monetary policy.
- 72 *Third*, the Supreme Court asks whether the Treaty establishing the EMS infringes the power and functions of the institutions of the Union in the framework of the principles set out at Article 13 TEU. Thus, the Supreme Court asks essentially whether, in entrusting new tasks to the Commission, the ECB and the Court of Justice, the Treaty establishing the EMS infringes the obligation for each

institution to act within the limits of the powers conferred on them in the EU and FEU Treaties.

- 73 In that regard, the French Government observes that, in accordance with Article 13 of the Treaty establishing the EMS, the Commission, in liaison with the ECB, is to assess the request for financial assistance submitted by a Member State of the EMS, negotiate, in liaison with the ECB and, wherever possible, together with the IMF, with the ESM Member concerned a possible Memorandum of Understanding detailing the conditionality attached to the financial assistance facility, and sign the Memorandum of Understanding on behalf of the EMS, and is to be entrusted, in liaison with the ECB and, wherever possible, together with the IMF, with monitoring compliance with the conditionality attached to the financial assistance facility.
- 74 However, in accordance with the case-law of the Court of Justice, the Member States are entitled, outside the framework of the Union, to entrust new tasks to the institutions, provided that those tasks are not within the exclusive competence of the Union (see Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685, paragraph 16, and Case C-316/91 *Parliament v Council* [1994] ECR I-625, paragraphs 26 and 34), and that those tasks do not alter the essential character of the powers which the Union Treaties confer on those institutions (see, in particular, Opinion 1/92 [1992] ECR I-2821, paragraph 41, and Opinion I/00 [2002] ECR I-3493, paragraph 20).
- 75 In the present case, as the French Government observed at paragraph 67 of these observations, the establishment of a stability mechanism forms part of the economic policy and not of the monetary policy. It follows from Article 3(1) TFEU that while the Union has exclusive competence in monetary policy for the Member States whose currency is the euro, it does not have such competence in matters of economic policy.
- 76 Furthermore, the tasks entrusted to the Commission and the ECB by the Treaty establishing the EMS, and in particular Article 13 of that Treaty, do not appear to be substantially different from the competences conferred on them by the EU and FEU Treaties and therefore do not alter the essential character of those competences.
- 77 As regards the Court of Justice, Article 37(3) of the Treaty establishing the EMS provides that the Board of Directors is to decide on any dispute arising between the EMS and one of its Members or between ESM Members, in connection with the interpretation and application of that Treaty, and that a Member State of the EMS may challenge the decision of the Board of Directors before the Court of Justice.
- 78 In that regard, it should be borne in mind that Article 273 TFEU provides that the Court of Justice is to have jurisdiction in any dispute between Member States

which relates to the subject-matter of the Treaty if that dispute is submitted to it under a special agreement between the parties.

- 79 The conditions stipulated by that article are satisfied in this case.
- 80 In the first place, under Article 37 of the Treaty establishing the EMS, only a Member State may bring a matter before the Court of Justice. Furthermore, an action brought against a decision of the Board of Directors determining a dispute must be regarded as being directed against other Member States, since those decisions are adopted by a qualified majority of the representatives of the Governments sitting on the Board of Directors.
- 81 In the second place, the Treaty establishing the EMS is closely linked to EU law, so much so that any dispute relating to its interpretation or application is necessarily closely connected to EU law.
- 82 In the third place, it is not necessary that a dispute has already arisen in order for Member States to be entitled to bring it before the Court of Justice on the basis of Article 273 TFEU. The Member States must therefore be able to agree in advance to submit any dispute to the Court of Justice and Article 37 of the Treaty establishing the EMS must be regarded as a special agreement within the meaning of that article.
- 83 In the fourth place, Article 37 of the Treaty establishing the EMS provides that the judgment of the Court of Justice is to be binding on the parties. Thus, that article does not alter the character of the function of the Court, as conceived in the Union Treaties, which is that of a court whose decisions are binding (see Opinion 1/92, paragraph 37).
- 84 The French Government further observes that recourse has already been made to Article 273 TFEU in the European Financial Stability Fund (EFSF) Agreement signed at Luxembourg on 7 June 2010 (Article 16(2)) and also in the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed at Brussels on 2 March 2012 (Article 8).
- 85 Accordingly, the French Government considers that the Treaty establishing the EMS does not violate the powers and functions of the Union in the framework of the principles set out at Article 13 TEU.
- 86 *Fourth*, the Supreme Court asks whether the Treaty establishing the EMS infringes the principle of sincere cooperation laid down in Article 4(3) TEU.
- 87 Under that provision, the Union and its Member States are, in full mutual respect, to assist each other and are to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

- 88 However, since the Treaty establishing the EMS would, as the French Government maintains, be compatible with the economic policy and the monetary policy, and also with powers conferred on the institutions, it is impossible to see how that Treaty could infringe the principle of sincere cooperation.
- 89 Accordingly, the French Government considers that the Treaty establishing the EMS does not infringe the principle of sincere cooperation laid down in Article 4(3) TEU.
- 90 *Fifth*, the Supreme Court asks whether the Treaty establishing the ESM infringes the general principle of effective judicial protection and the right to an effective remedy within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union, and also the principle of legal certainty.
- 91 The French Government questions the admissibility of this part of the second question. There is nothing in the decision making the reference on the basis of which it might be possible to understand why the plaintiff in the main proceedings or the Supreme Court itself entertained doubts on that point.
- 92 In that regard, it should be borne in mind that, according to the Court, the referring court must state the precise reasons which caused it to have doubts as to the interpretation of certain provisions of Community law and to consider that it was necessary to refer questions to the Court for a preliminary ruling. Thus, it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions of which it requests an interpretation and on the link it establishes between those provisions and the national legislation applicable to the dispute (see order in Case C-12/07 *Autostrada dei Fiori and AISCAT* [2007] ECR I-162, paragraph 17 and the case-law cited).
- 93 Nor can account be taken of any elements concerning the alleged infringement of the general principle of effective judicial protection and the principle of legal certainty that are among the documents on the file in the main proceedings.
- 94 In effect, the Court has held that the information provided in the decisions making references serve not only to enable the Court to give helpful answers, but also to give the Governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court. The Court has further held that it is its duty to ensure that that opportunity is safeguarded, in view of the fact that, by virtue of that provision, only the decisions making references are notified to the interested parties (see order in *Autostrada dei Fiori and ASISCAT*, paragraph 18).
- 95 It is for that reason that the French Government considers that, in that it refers to a possible infringement of the general principle of effective judicial protection and the right to an effective remedy within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union, and of the principle of legal certainty,

the second question referred by the Supreme Court must be rejected as inadmissible.

- 96 In the alternative, the French Government considers that the Treaty establishing the EMS cannot infringe the general principle of effective judicial protection. As the present reference for a preliminary ruling demonstrates, the plaintiff has had the opportunity to challenge the compatibility of that Treaty with EU law.
- 97 As regards the principle of legal certainty, it should be borne in mind that that principle, which is a general principle of EU law, requires that European Union legislation be clear and precise, and that its application be foreseeable for all interested parties (see, in particular, Case C-606/10 *ANAFE*, not yet published in the ECR, paragraph 76).
- 98 However, the Treaty establishing the ESM is not an act of the Union and, in any event, it is impossible to see how that Treaty is not clear and precise and how its application should not be foreseeable for all interested parties.
- 99 Admittedly, the Board of Directors is entitled to amend certain provisions of that Treaty, as may be seen from Article 8 and from Annex II, on authorised capital stock, or Articles 14 and 18, on the financial assistance instruments available to the ESM. However, those amendments and additions are expressly provided for in the Treaty establishing the EMS and their adoption is subject to specific procedures.
- 100 Accordingly, the French Government considers that the Treaty establishing the EMS does not infringe the general principle of effective judicial protection and the right to an effective remedy within the meaning of Article 47 of the Charter of Fundamental Rights of the European Union, or the principle of legal certainty.
- 101 It follows from paragraphs 44 to 100 to these observations that 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 Treaty establishing the ESM.
- 102 Accordingly, the French Government proposes that the answer to the second question should be that Articles 2 TEU, 13 TEU, 2(3) TFEU, 3(1)(c) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and also the general principles of effective judicial protection and legal certainty, are to be interpreted as meaning that they do not preclude an international agreement such as the Treaty establishing the EMS.

3. Third question

- 103 By its third question, the Supreme Court asks whether, if the European Council Decision should be 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.

- 104 It follows from the French Government's answer to the first question that the European Council Decision is valid and from its answer to the second question that, in its current version, that is to say, before the amendment to Article 136 enters into force, the FEU Treaty does not preclude an international agreement such as the Treaty establishing the ESM.
- 105 Consequently, a Member States is entitled to ratify the Treaty establishing the EMS and to deposit its instrument of ratification without awaiting the entry into force of the European Council Decision.
- 106 Furthermore, it should be borne in mind that, at the European Council held on 9 December 2011, the Heads of State and of Government of the euro area declared that their common objective was that the ESM should enter into force in July 2012. Under Article 2 of the European Council Decision, however, the amendment of Article 136 TFEU provided for by that decision cannot enter into force before 1 January 2013.
- 107 It follows that, in the European Council's view, the ratification of the Treaty establishing the ESM by the Member States whose currency is the euro is not subject to the prior entry into force of the European Council Decision.
- 108 Accordingly, the French Government proposes that the answer to the third question should be that a Member State is entitled to ratify the Treaty establishing the EMS and to deposit its instrument of ratification without awaiting the entry into force of the European Council Decision.
- 109 For all the reasons set out above, the French Government proposes that the Court should answer the questions referred by the Supreme Court as follows:
- ‘(1) 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 validly adopted according to the simplified revision procedure in Article 48(6) TEU and is therefore valid in that respect. The Court of Justice does not have jurisdiction to assess the validity of the new paragraph 3 of Article 136 TFEU which forms the subject-matter of that decision.**
- (2) Articles 2 TEU, 13 TEU, 2(3) TFEU, 3(1)(c) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and also the general principles of effective judicial protection and legal certainty, are to be interpreted as meaning that they do not preclude an international agreement such as the Treaty establishing the European Stability Mechanism (ESM), signed at Brussels on 2 February 2012 by the Member States of the euro area.**

- (3) A Member State is entitled to ratify the Treaty establishing the EMS and to deposit its instrument of ratification without awaiting the entry into force of European Council Decision 2011/199/EU.'**

Edwige BELLIARD

Gérard de BERGUES

Diégo COLAS

Étienne RANAIVOSON

Agents of the French Government