TO THE PRESIDENT AND MEMBERS

OF THE COURT OF JUSTICE

OF THE EUROPEAN UNION

IN CASE C-370/12

Thomas Pringle* v. *The Government of Ireland, Ireland and the Attorney General

(Referring court: The Supreme Court of Ireland)

Written Observations of Ireland

Ireland, pursuant to the first paragraph of Article 23 of the Protocol on the Statute of the Court of Justice, *qua* Member State and respondent in the main proceeding, represented by Eileen Creedon, Chief State Solicitor, Osmond House, Little Ship Street, Dublin 8, acting as Agent, with an address for service at the Embassy of Ireland, 28 Route d'Arlon, Luxembourg, assisted by Michael Cush and Shane Murphy, both Senior Counsel, and by Noel J. Travers and Catherine Donnelly, both Barristers, all four of the Bar of Ireland, has the honour of submitting the following written observations to the Court of Justice on the questions referred for preliminary ruling pursuant to Article 267 TFEU by the Supreme Court of Ireland, by order of that Honourable Court of 31 July 2012, received at the Registry of the Court of Justice of the European Union on 3 August 2012.

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I — Overview

1. This preliminary reference concerns essentially Title VIII of Part Three of the TFEU concerning 'Economic and Monetary Policy' and the proposed insertion of an additional third paragraph into Article 136 TFEU, a key provision of Chapter 4 thereof on 'Provisions Specific to Member States whose Currency is the Euro'. The significance of the three questions referred cannot be overstated. They raise critically important issues regarding the proper interpretation of the key provisions of Title VIII, which, having regard to the current crisis in the euro zone, are of critical import for the future of European economic and monetary union.

II — Legal and factual context

2. The Plaintiff/Appellant, Mr. Pringle (who is an independent opposition member of Dáil Éireann, the lower house of the Oireachtas, the Irish Parliament) (hereinafter "the Appellant") commenced the main proceedings by plenary summons on 13 April 2012 in the High Court of Ireland ("the High Court"). His subsequent pleadings revealed his claim to be essentially three-fold.[1] *Firstly*, he challenged the validity of European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.[2] *Secondly*, he claimed that the Treaty establishing the European Stability Mechanism, signed in Brussels on 2 February 2012 (hereinafter "the ESM Treaty"), would, if ratified by Ireland, "*violate[] the constitutionally entrenched principles of the Treaty on the Functioning of the European Union*", with the result that any such ratification would be "*invalid, void, and of no effect*". *Thirdly*, he claimed that Decision 2011/199/EU could only be approved by Ireland if preceded by legislation approved by the People of Ireland in a referendum amending *Bunreacht na hÉireann* (the Constitution of Ireland, hereinafter "the Constitution") pursuant to Article 46 thereof so as to permit such ratification, and

[1] The Appellant delivered his statement of claim on 25 April 2012, replies to particulars on 29 May 2012 in response to the State Respondents' (Defendants at first instance) notice for particulars of 24 May 2012 and, finally, on 12 June 2012, he served a reply to the Respondents' defence, which was delivered on 31 May 2012.

[2] The European Council adopted this Decision (hereinafter "Decision 2011/199/EU") on the legal basis of Article 48(6) TEU, and it was published on 6 April 2011: see OJ (2011), L 91, at p. 1.

that the ESM Treaty could also only be ratified by Ireland if preceded by such a referendum. These constitutional claims were based, *inter alia*, on the alleged transfer of sovereignty that the Appellant considers ratification of the ESM Treaty by Ireland will involve, and his assertion that the entry into force of Decision 2011/199/EU, which is scheduled for 1 January 2013 under the second paragraph of Article 2 thereof, will involve a transfer of further competence to the Union from its Member States, including Ireland. The Respondents contested all of these claims.[3]

3. The High Court case-managed and, having regard to the manifest importance of the issues raised, then expedited the case. It came on for hearing on 19 June 2012 and was at trial for seven days, concluding on 29 June 2012, when judgment was reserved. During the trial, the Appellant brought a motion seeking an interlocutory injunction to restrain Ireland from ratifying the ESM Treaty and approving Decision 2011/199/EU pending the final determination of all issues in the case. He also brought a motion to amend his pleading to include in his prayer for relief declarations that both the European Stability Mechanism Act 2012 and the European Communities (Amendment) Act 2012 are unconstitutional.[4]

4. The High Court announced orally its decision and delivered a written summary thereof on 9 July 2012. The trial judge (Ms Justice Laffoy) indicated that she would shortly thereafter deliver her written judgment. The said judgment was delivered on 17 July 2012. In that judgment (hereinafter "the High Court Judgment"), the High Court rejected the Appellant's constitutional law claims and his claims that the ESM Treaty was incompatible with Union law, as well as all of the grounds advanced by the Plaintiff to support his contention that Decision 2011/199/EU was invalid. Taking the view that the Decision was "*completely valid*", the High Court concluded that no preliminary reference under Article 267 TFEU was necessary, having regard

[3] The Respondents' written submissions to the High Court may be found in Annex 2 to these Observations.
[4] The European Stability Mechanism Act 2012 is the domestic legislation enacted whilst the High Court challenge was pending, by which, in essence, effect has been given in Irish law to the ESM Treaty. Under the European Communities (Amendment) Act 2012, also enacted whilst the High Court challenge was pending, among other amendments to Union primary law, the amendment to Article 136 TFEU for which Decision 2011/199/EU provides is to be incorporated within the definition of "*treaties governing the European Union*" for the purposes of Irish law once Decision 2011/199/EU enters into force.

to this Court's ***Foto-Frost*** line of case-law.[5] The High Court also dismissed the Plaintiff's application for an injunction to restrain ratification by Ireland of the ESM Treaty and approval by Ireland of Decision 2011/199/EU.

5. However, experiencing a doubt regarding what would be the effect of one or more Member States not approving Decision 2011/199/EU in accordance with their obligations under Article 2 thereof for the *effect and operability* of the ESM Treaty, the High Court concluded that a question on that particular issue should be referred to this Court.[6] Thus, it declined in its order of 17 July 2012 to reject the entirety of the relief sought by the Appellant at paragraph 3 of the prayer for relief in his statement of claim as regards his application for a declaration that ratification of the ESM Treaty by Ireland would be "*invalid, void and of no effect*", and thereby retained jurisdiction to make the envisaged reference. On being informed that an appeal against all aspects of the High Court Judgment (save the decision to make a preliminary reference) to the Supreme Court was intended,[7] the High Court adjourned any further hearing before it regarding the formulation of the question it envisaged referring pending the outcome of that appeal.[8]

6. The Appellant appealed to the Supreme Court by notice of appeal dated 19 July 2012 and the 36 grounds of appeal covered all Union law and constitutional law aspects of his case, including the core claim as outlined above (paragraph 2), as well as the

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[5] Case 314/85 [1987] E.C.R. 4199. Whilst Ireland deposited its instrument of approval of the European Council Decision 2011/199/EU with the Secretary-General of the Council, pursuant to the first para. of Article 2 thereof on 1 August 2012, it is for the Minister for Foreign Affairs and Trade by order pursuant to s. 2 of the European Communities (Amendment) Act 2012 to determine when to bring into effect the amendment into regarding the Decision. It is the Government's intention that this will be done when it is clear that the Decision is going to enter into force.

[6] In its judgment, the High Court held that it would "*necessary*" for it *"to hear further submissions as to formulation of the question or questions to be referred to the CJEU*" (at para. 197).

[7] The Appellant had in fact mentioned the case in the Supreme Court on 10 July 2012, the day after the High Court orally announced its decision but before the High Court Judgment was delivered. His Counsel indicated that an appeal would be brought once that judgment was available, whereupon the Supreme Court gave directions for the expediting of the appeal.

[8] A copy of the High Court Order, perfected on 18 July 2012, the formal subject of the appeal to the Supreme Court in the main proceedings is included for information for the Court in Annex 4 to these observations.

refusal of the High Court to grant him an interlocutory injunction.[9] The appeal came on initially the next day, 20 July 2012, for a case-management hearing, at which the Supreme Court decided that it would hear as a matter of extreme urgency submissions on three of the issues arising therein: *i.e.* whether ratification of the ESM Treaty would involve a transfer of sovereignty to a degree incompatible with the Constitution, such that a referendum would be necessary to permit it; whether it should refer to this Court the questions of the validity of the Decision 2011/199/EU and whether, by entering into and ratifying the ESM Treaty, Ireland would undertake obligations incompatible with the Union Treaties; and whether it should restrain the State from ratifying the ESM Treaty pending the final determination of the proceedings.

7. The Supreme Court heard oral submissions on these issues on 24 and 26 July 2012. On 31 July 2012, it delivered a ruling wherein the Chief Justice (Denham CJ) stated that the Supreme Court considered that the ESM Treaty did not involve a transfer of sovereignty such as to make its ratification incompatible with the Constitution.[10] The ruling indicated that, in judgments to be delivered later, the Supreme Court would treat the ESM Treaty as one not involving an impermissible transfer of sovereignty but an agreement to pursue a defined Government policy. It also indicated that the Supreme Court had decided that it would refer three questions to this Court regarding the Union law issues raised regarding the ESM Treaty and Council Decision 2011/199/EU for the reasons set out in its attached order for reference. Finally, the Supreme Court indicated that it had rejected the appeal against the refusal of interlocutory relief applying the criteria laid down in national law, as informed by this Court's ***Zuckerfabrik*** and ***Atlanta Fruchthandelgesellschaft*** line of case-law.[11]

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[9] As regards the vague challenge to the compatibility with Union law of the Stability Treaty, it was expressly dropped in reply at the trial in the High Court and no reference is made to it in the points of appeal developed in the Notice of Appeal to the Supreme Court, and no submissions challenging its compatibility with Union law were advanced in the Appellant's written legal submissions to that Court. The Respondents submit that no issue in relation to the Stability Treaty arises any longer in the main proceedings and that that Treaty has no relevance for the issues raised by the questions that the Supreme Court has referred to this Court.

[10] A copy of the ruling of the Supreme Court may be found in Annex 1 to these Observations.

[11] Joined Cases C-143/88 & C-92/89 [1991] E.C.R. I-415 and Case C-465/93 [1995] E.C.R. I-3761.

Applying those criteria, the Supreme Court found that, if the Appellant were successful with the Union law claims the subject of the reference, which, as it confirmed in its order for reference, "*will determine these proceedings*", the declaratory relief to which he would then be entitled regarding the ESM Treaty and Decision 2011/199/EU would be an adequate remedy.[12]

8. Consequently, the Supreme Court has referred the following questions to the Court:

"*(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?

[12] See section VI of the order for reference, at p. 17. It also indicated in its ruling that its reasoning regarding this aspect of the appeal would be set out in the judgments it would deliver later.

(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?"*

9. In addition, the Supreme Court requested this Court to apply the accelerated procedure to the reference pursuant to Article 104*a* of the Rules of Procedure having regard to the exceptional urgency of the earliest possible determination of all the legal issues in the proceedings.[13] By letter dated 14 August 2012, the parties were informed of the decision of the President of this Court to apply the accelerated procedure. At a further hearing before the High Court on 31 July 2012, following the Supreme Court's ruling, the High Court confirmed that, having regard to the terms of the third question referred by the Supreme Court, there would be no need for it to make a discrete reference as that question covered the issue it had envisaged referring. Consequently, it adjourned the proceedings generally before it pending the determination by this Court of the Supreme Court's reference.

10. On 1 August 2012, Ireland lodged its instrument of ratification of the ESM Treaty with the General Secretariat of the Council. As of 13 September 2012, the Respondent understands that 14 of 17 euro area Member States have ratified the ESM Treaty, accounting for 54.8% of the ESM authorised capital stock for the purpose of Article 43 thereof, which requires ratification by euro area Member States representing 90% thereof for it to enter into force. The remaining Member States, including Germany whose *Bundesverfassungsgericht* (Federal Constitutional Court) ,in a judgment delivered on 12 September 2012[14], rejected a number of applications before it for an interlocutory injunction restraining the German President signing into law the bills passed by the German Parliament on 29 June 2012 approving *inter alia* ESM Treaty, are expected shortly to ratify that Treaty.[15]

III — Summary of the Respondents' Analysis

[13] See pp. 19-20 of the order for reference.
[14] No. 67/2012 in Case Nos. 2 BvR 1390/12, 1421/12, 1438/12, BvR 1439/12, BvR 1440/12 and BvE 6/12.
[15] The others being Estonia and Italy, whose parliaments have approved ratification of the ESM Treaty.

11. The Appellant has not denied that the establishment of a stability mechanism, such as the proposed establishment and activation of the international institution, the European Stability Mechanism ("the ESM institution"), for which the ESM Treaty provides, is indispensable to safeguarding the stability of the euro area. Indeed, he has declared through his Counsel before the High Court that he regards the goal of safeguarding the stability of the euro area as "*laudatory*".[16] His central contention is that both Decision 2011/199/EU and the ESM Treaty are incompatible with the bargain struck when provisions now essentially contained in Title VIII of Part Three of the TFEU were negotiated back in 1991 at the time of the adoption of the Treaty of Maastricht. He considers that the proposed ESM and Decision 2011/199/EU involve either an increase or a diminution of existing Union competences such that only an amending treaty negotiated and concluded pursuant to the ordinary revision procedure under Article 48(2) to (5) TEU could lawfully permit their entry into force.

12. The Respondents consider this view unfounded. As it has emerged from his pleadings and submissions in the High Court, as well from his written submissions to the Supreme Court, it is predicated on a rigid construction of the intention underlying the European economic and monetary union project, one of the cornerstones of the Treaty of Maastricht, that assumes the drafters of the relevant Treaty provisions did not allow for the possibility that euro area Member States, who have invested so much in the single currency, could, in a time of persistent and ongoing crisis such as that of the last four years, take practical steps to save it. The interpretation the Appellant has adopted of the ESM Treaty is based on an expansive, almost alarmist, construction of the powers it will confer on the ESM institution, particularly as regards its borrowing powers.

13. The Respondents consider it appropriate, firstly, to analyse the validity issue regarding Decision 2011/199/EU raised by the first question referred. If this Court agrees, as the Respondents respectfully submit it should, with the High Court's

[16] Transcript, Day 1, p. 57, line 28.

assessment as to the validity of that said Decision, it will be necessary to consider the third question, which essentially asks whether the entitlement of Member States whose currency is the euro to ratify an international agreement like the ESM Treaty is dependent upon the entry into force of the Decision, *i.e.* on the amendment of Article 136 TFEU for which it provides. The Respondents consider it is not. They will then consider the second question, by which the referring court has asked whether those Member States are entitled to ratify an international agreement such as the ESM Treaty. Regarding the latter, and in the interest of brevity, the Respondents respectfully refer this Court particularly to **section 1 of their written submissions to the Supreme Court**, where a comprehensive description of the nature of the ESM Treaty is provided.[17] In brief, the Respondents submit that euro area Member States do not require authorisation to enter into the ESM Treaty:

(1) As an exercise of their inherent sovereignty, Member States may enter into international agreements like the ESM Treaty; and

(2) Member States have not ceded this particular aspect of sovereignty to the Union. Nor are there any impediments arising from Union law to their ratifying the ESM Treaty. This remains the case regardless of whether the issue is considered on the basis of Article 136 TFEU as it is currently formulated, or as it will be formulated following the entry into force of Decision 2011/199/EU and the insertion of Article 136(3) TFEU.

14. The recitals of the ESM Treaty refer to European Council decisions, the European Union framework, the fact that all euro area Member States should become ESM Members, the fact that non-euro area Members may be observers, and the role of the Commission and the European Central Bank (hereinafter "the ECB"). Thus, the Respondents consider that entry into the ESM Treaty constitutes a fulfilment by participating Member States of their Article 4(3) of the TEU obligations — by

[17] The Respondents' written submissions to the Supreme Court may be found in Annex 3 to these Submissions. For the referenced narrative describing the ESM Treaty, see paras. 6 to 73 thereof, at pp. 4 to 27. For the assistance of the Court, the Respondents have also annexed two tables which they submitted in the national proceedings. The first table summarises the arguments made by the Appellant in the High Court regarding the interpretation and effect of the ESM Treaty and the reply of the Respondents and may be found in Annex 5 to these Observations. The second table summarises the arguments made by the Appellant in the High Court regarding the incompatibility of the ESM Treaty with Union law and the reply of the Respondents and may be found in Annex 6 to these Observations.

promoting tasks flowing from the Union. The Respondents' submissions in this respect are developed particularly in the analysis below of the second question referred. They consider questions one and three first.

IV — Questions 1 & 3

A. Validity of Decision 2011/199/EU

15. The purpose of Decision 2011/199/EU was to confirm and remove any doubt or debate as to whether the Member States whose currency is the euro could establish a stability mechanism and, if they saw the need and wished, permit such a mechanism to have available to it, for the purpose of safeguarding the stability of the euro area, a range of instruments and structures. The anticipated and planned entry into force of the ESM Treaty and establishment of the ESM prior to the entry into force of Decision 2011/199/EU demonstrates that the Decision is not itself a legal prerequisite for that Treaty. While the euro area Member States decided to bring the ESM Treaty in force before Decision 2011/199/EU enters in to force (which will be on or after 1 January 2013), the financial-assistance instruments available to the ESM manifestly have to comply with Union law.

16. The essence of the Appellant's challenge to the validity of Decision 2011/199/EU is his allegation that it purports to amend Article 136 TFEU in a manner that increases the competences conferred on the Union by the Treaties, such that utilisation of the simplified revision procedure was impermissible and that the amendment which will enter into force is vague and open-ended and in breach of both the Union Treaties and the general principles of Union law.[18] Clearly, this Court is alone competent conclusively to determine whether Decision 2011/199/EU has been validly adopted on the basis of Article 48(6) TFEU having regard to the limitations discussed below that apply to the use of that procedure for amending the TFEU.

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[18] See the summary in the High Court Judgment, at para. 152, and also grounds 8, 11, 17, 24 to 27 and 29 of the notice of appeal.

(i) Standing issue

17. The High Court rejected the Respondents' contention that the Appellant would have had standing to challenge Decision 2011/199/EU in a direct action under Article 263 TFEU, and that, given his knowledge and awareness of the Decision from shortly after its publication on 6 April 2011 (if not even from the date of its adoption on 25 March 2011), he should be precluded, under the principles developed in the ***TWD*** line of case-law,[19] from challenging it indirectly by way of the main proceedings, which were commenced a year later on 13 April 2012.[20] Although this finding has not been formally challenged by way of a cross-appeal in the main proceedings, the Respondents submit that it is open to this Court, as the Supreme Court has referred a question concerning the validity of Decision 2011/199/EU to it for determination, to raise of its own motion the issue whether the principles developed in ***TWD*** apply; *i.e.* whether the Appellant is entitled to pursue his challenge to the validity of Decision 2011/199/EU in the main proceeding. In this respect, the Respondents respectfully refer the Court to the submissions developed particularly in **section 5 of their written submissions to the High Court,**[21] and to the view it expressed that, if a definitive determination of the individual concern of the Appellant to challenge Decision 2011/199/EU had been necessary, it would have considered referring that issue to this Court.[22]

18. Given the importance of Decision 2011/199/EU and given the serious repercussions — constitutional, economic, political, public financial and fiscal — for the European Union of a finding of invalidity of the Decision, the Respondents submit that, even if the Appellant was entitled to bring his challenge to the validity of Decision before the Irish courts, to avoid abusing his right he was under a Union law obligation to bring

[19] See Case C-188/92 ***TWD Textilwerke Deggendorf GmbH v Germany*** [1994] E.C.R. I-833, and Case C-241/01 ***National Farmers' Union v Secrétariat général du gouvernement*** [2002] E.C.R. I-9079

[20] See the High Court Judgment, at paras. 164 to 178.

[21] See Annex 2 hereto, paras. 120 to 165 thereof in particular, at pp 55 to 72.

[22] See the High Court Judgment, at para. 178.

his proceedings with reasonable expedition, and, if not within the two-month period prescribed by Article 263 TFEU, at least within a much shorter time period than one year. By way of example of a generous time period — and one which would have afforded the Plaintiff a considerable length of time to seek legal advice and review his legal position — the Respondents refer to the six-month time period available for seeking an order of *certiorari* quashing Decision 2011/199/EU pursuant to the former judicial review procedural rules applicable in Ireland under the version of Order 84 of the Rules of the Superior Courts that applied in April 2011 when Decision 2011/199/EU was published (which period has since been reduced to three months by the new version of the Rules in force since 1 January 2012).[23] To wait for over a year before initiating his proceedings amounts to inordinate and inexcusable delay. Consequently, the Respondents submit that it would be open to this Court to consider that such a delay should not be countenanced, particularly but not only because of the gravity of the consequences of invalidity to the interests of the Union.

(ii) Nature of Decision 2011/199/EU

19. Decision 2011/199/EU constitutes a legal act of the European Council, which legal nature is not contested by the Appellant.[24] The Respondents submit that Decision 2011/199/EU has been correctly and validly adopted as a decision in accordance with Article 48(6) TEU. In this respect, it is noteworthy that, since the Treaty of Lisbon, the European Council has been an institution of the Union for the purpose of Article 13 TEU.[25] Article 13(2), first sentence, TEU provides that: "*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*". One of those powers, as regards the European Council, is the novel power conferred on it in respect of the amendment of the TFEU, by what are described as the 'simplified revision procedure'

[23] The time limit has been reduced by the Rules of the Superior Courts (Judicial Review) Regulations 2011, S.I. No. 691 of 2011.

[24] Appellant's Supreme Court Submissions, point 9.10. The Appellant had asserted, in point 3.16 of his submissions before the High Court, that Decision 2011/199/EU could not be considered to constitute a binding act of Union law.

[25] Accordingly, it is now listed second, just after the "*European Parliament*" and before the "*Council*", amongst "*the Union's institutions*" in Article 13(1) TEU.

for which Article 48(6) TEU provides. That power "*may*" be exercised by the European Council under Article 48(6) TEU by way of the adoption of "***a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union***" (emphasis added).

20. Decisions for the purpose of Union law are defined in Article 288 TFEU. The fourth paragraph provides, in the first sentence, that: "*A decision shall be binding in its entirety*". This is qualified only by the second sentence, which provides that: "*A decision which specifies those to whom it is addressed shall be binding only on them*". Decision 2011/199/EU therefore constitutes a legal act of the European Council that has been adopted in exercise of that institution's powers under Article 48(6) TEU. It falls to be construed as being addressed to the Member States on whom it imposes the obligation to seek the approval of the amendment to Article 136 TFEU for which it provides in accordance with their respective constitutional requirements. This obligation arises **as a matter of Union law** under Article 48(6) TEU by virtue and on foot of the adoption of the Decision. There is no question of the Member States being bound to bind themselves under Article 48(6) TEU, as the Appellant has suggested.[26] Contrariwise, it is clear from Article 48(6) TEU that each Member State has the power not to approve (*i.e.* to veto) **at the level of the European Council** the adoption of a proposed decision providing for an amendment under that simplified revision procedure. However, once all Member States have through their representatives on the European Council, along with the President of the European Council and the President of the Commission, approved such a decision and adopted it, there is an obligation on each Member State to seek the approval of the amendment for which it provides . This is the case with Decision 2011/199/EU. Under the first paragraph of Article 2 thereof, the Member States are obliged, as a matter of Union law, to engage in the completion of the procedures for approval "*in accordance with their respective constitutional requirements*" of the amendment to Article 136 TFEU.

[26] Appellant's High Court Submissions, point 3.17.

(iii) Simplified revision procedure

21. The most notable distinguishing feature of the new 'simplified revision procedure' for which Article 48(6) TEU, as inserted by the Treaty of Lisbon, provides, as compared with the traditional amendment procedure (nowadays known as the 'ordinary revision procedure') for which Article 48(2) to (5) TEU now provides, is that the former is effected, as a matter of Union law, by a European Council decision adopted unanimously, whereas the latter requires a European Council decision, adopted by simple majority, to convene an intergovernmental conference, which conference must then seek to determine "*by common accord the amendments to be made to the Treaties*", and which resulting treaty, *i.e.* international agreement, must then, if it is to enter into force, be ratified by all of the Member States (see Article 48(3) and (4) TEU). That no legal obligation, as a matter of Union law, is imposed on Member States to ratify any resulting amending treaty emerges clearly from Article 48(5) TEU, which is a new provision added by the Treaty of Lisbon and designed to provide a political means of resolving difficulties that may arise with ratification of an amending treaty approved by an intergovernmental conference. It provides, in the event of the adoption but non-ratification of an amending treaty, that: "*If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council*". Critically, however, it does not impose any obligation, **as a matter of Union law**, on the Member States encountering the difficulties at issue to ratify the amending treaty in question.

22. The requirements governing when the European Council may resort to the simplified revision procedure under Article 48(6) TEU are essentially threefold. *Firstly*, the decision must be adopted by the European Council on foot of a proposal submitted by either a Member State Government, the European Parliament or the Commission in respect of Part Three of the TFEU and relating to the internal policies and action of the Union. *Secondly*, the decision may amend all or part of the provisions of Part

Three of the TFEU and may be adopted by the European Council acting unanimously and after consulting the European Parliament and the Commission, as well as the ECB in the case of institutional changes in the monetary area. *Thirdly*, the amendments must not "*increase the competences conferred on the Union in the Treaties*". If these conditions are satisfied the decision and the proposed amendments to Part Three of the TFEU adopted thereunder will stand validly adopted as a matter of Union law from the date specified therein. However, under the final sentence of the second paragraph of Article 48(6) TEU, the decision cannot enter into force until the Member States have "*approved*" it in accordance with "*their respective constitutional requirements*". The Supreme Court has held that no constitutional referendum is required in Irish law to permit approval of Decision 2011/199/EU because no transfer of sovereignty is involved in the amendment for which it provides. Consequently, and pursuant to a decision of the Government of Ireland, taken in exercise of the executive power of the State in or in connection with external relations under Article 29.4.1° of the Constitution, Ireland notified its approval of Decision 2011/199/EU to the Secretary-General of the Council on 1 August 2012.[27]

(iv) Validity of Decision 2011/199/EU

23. As a preliminary observation, the Court may consider, if satisfied that Decision 2011/199/EU has been validly adopted on the basis of Article 48(6) TEU, that it lacks jurisdiction to determine whether the amendment, when it enters into force, will violate the Treaties and/or the general principles of Union law. This is the aspect of its validity that is raised by the second bullet point to the first question referred. In any event, the Respondents, like the High Court, consider the Decision to be "*completely valid*" and will, for completeness, consider both aspects of the question referred.[28]

[27] The Respondents understand that 19 of the 27 Member States had notified approval of Decision 2011/199/EU in accordance with their respective constitutional requirements as of 20 August 2012.
[28] High Court Judgment, at para. 163.

24. The amendment proposed for Article 136 TFEU by Decision 2011/199/EU remains within what was envisaged by the conferral of the simplified revision procedure power on the European Council under Article 48(6) TEU. Firstly, the Decision which provides for an amendment to Article 136 TFEU, deals solely with matters that fall within Part Three of the TFEU. Secondly, its origin was a proposal from Belgium that has been adopted unanimously by the European Council having regard to the opinions of the European Parliament and the Commission and having voluntarily obtained the opinion of the ECB, since, although proposing a change to the provision of Title VIII of Part Three concerning 'Economic and Monetary Policy', it does not propose an institutional change in the economic or monetary policy area. All of the conditions of the sentence of the second paragraph of Article 48(6) TEU were thus satisfied, and indeed the Appellant has not argued otherwise. The kernel of the question referred is whether the stipulation in the third subparagraph of Article 48(6) TEU is satisfied, namely that the amendment for which the Decision provides does not increase Union competences. Interpreted in conformity with the limitations of Article 48(6) TEU, which it should be, any mechanism so established must not operate to increase the Union's competences. The Respondents submit that it is only if its entry into force on or after 1 January 2013, as provided for in the second paragraph of Article 2 of the Decision, would clearly increase the Union's competences that this Court should declare it to be invalid. The Respondents submit that this is manifestly not the case.

25. Decision 2011/199/EU does not increase the competences conferred upon the Union in the Treaties but will merely confirm, if the amendment to Article 136 TFEU for which it provides enters into force, that the Member States who have adopted the euro as their currency may establish "*a permanent stability mechanism*" provided same "*is indispensable to safeguard the stability of the euro area as a whole*". The amendment serves to confirm, for avoidance of doubt, that the establishment by the Member States concerned of such a mechanism is permitted in those strictly defined circumstances. Thus, it confirms that the Member States have the competence to establish a mechanism, not a particular mechanism. The establishment of such a

stability mechanism pursuant to the amendment will not increase the existing competences of the Union under the Union Treaties and in particular under Title VIII of Part Three of the TFEU. Consequently, the Decision does not involve the formation of a closer economic Union or entail "*the creation of new competences in connection with such closer Union to be implemented or exercised through a body and pursuant to Treaty rules which are outside and detached from the framework of the EU*".[29] Such claims are as devoid of foundation in the text of the Decision as is the assertion that it will increase the competences of the Union. Nothing in the proposed Article 136(3) TFEU will serve to create a closer economic Union, let alone one that is somehow simultaneously going to exist outside and detached from the framework of the Union as the Appellant has alleged. The amendment, in fact, does not affect the Union's competences: rather, it serves to confirm, or contain a clarification, of a competence that the Member States retain.

26. The Appellant's assertion that the stability mechanism referred to in Decision 2011/199/EU "*would in essence be an institution of euro Member States*" is equally unfounded.[30] Nothing in Article 136(3) TFEU will, when it enters into force, permit the creation of "*institutions*" in the Union law sense of that term exclusively for the euro area Member States. The institutions of the Union comprise the seven enumerated in Article 13 TEU, *viz.* the European Parliament, the European Council, the Council, the (European) Commission, the Court of Justice of the European Union, the ECB and the Court of Auditors. Decision 2011/199/EU does not add to or subtract from (nor does it purport so to do) that list of institutions and/or to their respective powers.

27. Recital 4 in the preamble to Decision 2011/199/EU states that the envisaged stability mechanism "*will provide the necessary tool for dealing with such cases of risk to the financial stability of the euro area as a whole as have been experienced in 2010, and hence help to preserve the economic and financial stability of the Union itself.*" It is

[29] See the Appellant's written submissions to the High Court, at point 3.4.
[30] Point 3.5 of the Appellant's written submissions to the High Court.

clear that the risk to which the recital refers is the risk that certain Member States whose currency is the euro may not be able to raise sufficient finance on the markets to finance themselves. Read in conjunction with the wording of the amendment to Article 136 TFEU for which Article 1 of the Decision provides, it follows that the envisaged mechanism is clearly conceived as a funding mechanism, *i.e.* one that will provide financial assistance that is required for that purpose, but also one whereunder any assistance that is provided "*will be made subject to strict conditionality*" and, thus, in a manner that will fully respect the Member States' obligation to comply with guiding principles of economic and monetary union as conceived in the TFEU and as articulated particularly in Article 119(3) TFEU.

28. The wording of the amendment is both clear and permissive. It confirms that Member States whose currency is the euro "*may establish a stability mechanism*". Such a mechanism would clearly not directly increase the competences of the Union. Nor, the Respondents submit, would it do so indirectly by increasing the powers of its institutions to the detriment of the Member States. It is the Member States that the amendment confirms are permitted to establish the mechanism. There is nothing in the mechanism that requires them, as such, to involve the Union or its institutions.

29. The Respondents accept that when it adopted Decision 2011/199/EU the European Council had probably in mind that there would likely be an input from the Commission and the ECB (particularly having regard to the opinions from those institutions on the proposal and that of the European Parliament) in any permanent stability mechanism established by the Member States. No such input is, however, made a precondition under the amendment. The Respondents consider, for the reasons developed below in relation to the second question referred, that such an involvement would not be incompatible with either the powers or roles conferred on those institutions.[31] Nor critically, for the purposes of responding to the first question referred, would such a role amount to, or necessarily bring about, an increase in the competences of the Union. The Commission, for instance, is charged under Article

[31] See paras. 80-88 below in relation to Question 2.

17 TEU with promoting the "*general interest of the Union*" and with taking "*appropriate initiatives to that end*". This, in the Respondents' respectful submission, clearly includes participating in a stability mechanism established by the euro area Member States with the objective of safeguarding the stability of the euro area.

30. The Appellant has conflated the issues of whether the amendment would increase the competences of the Union with arguments regarding what he perceives to be an incompatibility between the mechanism envisaged thereunder and Title VIII of Part Three. The latter is a theoretical argument since no mechanism has, in fact, been established by the Member States under the amendment, as it has not yet entered in to force. Thus, to the extent the Appellant advances before this Court, as he has done in the main proceedings, arguments to the effect that a superficial attempt to cover over such incompatibility has been made in the ESM Treaty "*by conferring roles on the European Commission and the ECB in the ESM Treaty,*" and that the involvement of those "*institutions underscores the fact that in reality, any stability mechanism designed to provide financial assistance to euro zone Member States is necessarily acting in an area that falls within Union competences*", such arguments are irrelevant to the issue of the validity of Decision 2011/199/EU. This is because, as submitted above, the Decision provides for the establishment of a mechanism and not any particular mechanism. Its validity cannot be assessed by reference to the potential incompatibility (which is denied) of any of the provisions of the ESM Treaty with the TFEU, particularly Part Three, Title VIII, thereof. More fundamentally, the validity of an amendment to the TFEU adopted under the simplified revision procedure by the European Council, acting *qua* constituent authority, cannot be assessed by reference to an international treaty concluded between some of the Member States.

31. In any event, the Appellant's allegation is without foundation. The mechanism envisaged by the amendment to Article 136 TFEU will not prevent the Union from exercising its existing competences, for instance in relation to the provision of financial assistance in the specific circumstances for which Article 122(2) TFEU

provides. That certain Union institutions may perform roles under the mechanism is not a prerequisite under the amendment. In this respect, roles and functions to be performed by the Commission and the ECB, in particular, under the ESM Treaty, although new, do not involve the conferral of additional powers on those institutions. The Respondents' submissions in this respect are developed below in relation to the second question referred.

32. Nor is the amendment for which Decision 2011/199/EU provides contrary to the general principles of Union law. In the first place, it is open to doubt whether an amendment to the TFEU adopted under the simplified revision procedure by the European Council, acting *qua* constituent authority, may be considered to be invalid on the basis of being incompatible with the general principles of Union law. In any event, the Respondents consider that there is no such incompatibility. There is nothing in the proposed Article 136(3) TFEU that will operate to change those general principles. There is nothing in its wording that is suggestive of such an interpretation and it should not be so construed. In the event that the Court considers that there is any ambiguity (which is denied), the Respondents submit that it should construe the amendment in a manner that would remove any such doubt. The amendment merely seeks to confirm the entitlement of the euro area Member States to establish a stability mechanism and activate it "*if indispensable to safeguard the stability of the euro are as a whole.*" The Respondents consider that there is nothing in the Union Treaties and in the said Title VIII in particular that falls to be construed as indicating that the Member States, including the subset thereof whose currency is the euro, lack competence to establish such a mechanism.[32]

33. In this respect, it is important to stress that the second sentence of the amendment, whereunder: "*The granting of any financial assistance under the mechanism will be made subject to strict conditionality*" provides a very important limitation. It means that the financial assistance envisaged to be granted by the mechanism will be like

[32] The detailed reasons for this view are developed in the Respondents' analysis of the Question 2: see paras. 46-77 below.

financial assistance granted by any other financial institution; *i.e.* there will be terms and conditions which may or may not be accepted by the recipient of the assistance. However, if those terms are not accepted, the mechanism will not grant the assistance. This condition, which is discussed further below in the Respondents' analysis of the second question referred, will ensure that any mechanism that is established will not violate the Union Treaties, and especially the requirements of Chapter 1 of Title VIII of Part Three thereof. It will ensure, in particular, that any such mechanism will not violate Article 125 TFEU. By contrast, as submitted below in respect of the second question referred, the interpretation of Article 125(1) TFEU contended for by the Appellant is gratuitously distorted and would eliminate the possibility of a Member State participating in any international funding organisation if another Member State could benefit from loans received from that organisation. This is an extremely far-reaching interpretation that, if correct, would confer significantly greater reach on that provision than either its wording, its context or its purpose could, the Respondents submit, possibly have intended.

34. In brief, there is nothing that suggests that the mechanism envisaged by the amendment would violate the objectives of Title VIII set out in Article 119 TFEU, the Union's shared competence with the Member States in respect of economic policy under Chapter 1 or its exclusive competence in the field of monetary policy under Chapter 2 of that Title. That the Union, through the Council, may decide to grant financial assistance to a Member State under Article 122(2) TFEU, where "*a Member State is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences*", does not preclude the establishment by Member States of a stability mechanism where the circumstances are such that it is "*indispensable to safeguard the financial stability of the euro area as a whole*". As regards Article 126 TFEU, which imposes an obligation on Member States to "*avoid excessive Government deficits*" and provides for the enforcement of budgetary discipline by the Union on all Member States, there is nothing on the face of the proposed Article 136(3) TFEU that is incompatible with those budgetary disciplinary rules or that would preclude the new provision from being construed harmoniously with Article

126 TFEU. Indeed, the Respondents submit that the establishment by Member States of such a mechanism, in exceptional crisis circumstances such as those currently pertaining, is fully consistent with the Union's aims under Article 3(3) and (4) TEU of promoting "*solidarity among Member States*" and establishing "*an economic and monetary union whose currency in the euro*". In particular, the latter implies that steps may be taken in crises by the stakeholders of that economic and monetary union, namely the Union and the Member States who have adopted the euro as their currency, to safeguard the euro.

35. The Respondents note that this was the interpretation adopted by the High Court and commend it to this Court. The High Court held that the effect of the amendment was not vague and open-ended, stressing the requirement that financial assistance could only be made available under the envisaged stability mechanism subject to strict conditionality.[33] Having rejected the contentions of the Appellant regarding the incompatibility of the ESM Treaty with the Union Treaties — as discussed in detail below in respect of the second question referred — and given that there was "*an element of crossover*" between the arguments on incompatibility of the ESM Treaty and invalidity of the Decision, Laffoy J. rejected the Appellant's contention which alleged incompatibility of Decision 2011/199/EU with the Union Treaties, and held, having regard to the actual wording of proposed Article 136(3) TFEU and taking account of the opinions of the Commission, the European Parliament, the ECB and the European Council itself — all of which were satisfied that the Decision does not have the effect of increasing the competences of the Union —, that it could be regarded as "*clear that its effect will not be to increase the competences conferred on the Union in the Treaties*".[34]

B. Relationship between Decision 2011/199/EU & ESM Treaty

[33] High Court Judgment, at para. 162.
[34] *Ibid.*, at paras. 163; see also paras. 154 to 159. This is also essentially the view at which the German *Bundesverfassungsgericht* arrived in its abovementioned judgment of 12 September 2012.

36. The mere reference to Decision 2011/199/EU in recital 2 in the preamble to the ESM Treaty does not operate to render the entitlement of a Member State to enter into and ratify that international agreement subject to the entry into force of the Decision. Absent the latter, and independently of the Respondents' view (articulated above) that Member States have a Union law obligation to seek the approval of the Decision (in accordance with their respective constitutional requirements), the Respondents consider that Member States retain competence to enter into and ratify an agreement such as the ESM Treaty. That it would seem likely that the ESM Treaty will enter into force before Decision 2011/199/EU, since the completion of the ratification process by the three remaining euro area Member States is imminent, before the approval by all 27 Member States of the Decision is complete, does not affect its operability. This is because, for the reasons set out below in respect of the second question referred, the Member States whose currency is the euro may ratify an international agreement such as the ESM Treaty.[35] Hence, it is not dependent on the entry into force of the Decision and the new Article 136(3) TFEU. The amendment adopted in the Decision to amend Article 136 TFEU does not provide a legal basis for the ESM Treaty. That the European Council may have decided, at its meeting on 28 and 29 October 2010, to put forward a limited treaty change confirming the entitlement of Member States to establish a permanent crisis mechanism is not conclusive of any relationship of dependence between the limited amendment ultimately adopted in Decision 2011/199/EU and the ESM Treaty signed on 2 March 2012.

V — Question 2

A. Preliminary Objection to the Appellant's Challenge to the ESM Treaty

37. To make his argument that the ESM Treaty is incompatible with European Union law, the Appellant relies upon a large number of Treaty provisions, namely: Articles

[35] See also Annexes 2 and 3 to the Respondents' written legal submissions before High Court and Supreme Court, at section 4 of the former and 5 of the latter.

2, 3, 4(3), 13 TEU; Articles 2(3), 3(1)(c) and Article 3(2) TFEU; Part Three, Title VIII TFEU (and in particular Articles 119, 120, 121, 122, 123, 125, 126 and 127 TFEU); (together "the Treaty Articles"). The Appellant also invokes the principle of effective judicial protection and Article 47 of the Charter of Fundamental Rights of the European Union ("the Charter").

38. By way of preliminary submission, the Respondents respectfully observe that the Court may consider that that an individual like the Appellant is not entitled to rely before a national court in proceedings such as the main proceedings on any of the Treaty Articles to demonstrate the incompatibility of the ESM Treaty with European Union Law for the reason that none of the Treaty Articles is capable of direct effect.

39. It is well established in the Court's case-law that only Treaty provisions which create rights and obligations which are sufficiently complete, unconditional, clear and precise are capable of having direct effect such as to be capable of being invoked by individuals in national courts. For example, in ***Zaera v Institut Nacional de la Seguridad Social***,[36] it was held that the promotion of accelerated living standards in Article 2 EC — setting out the aims of the Community as does Article 3 TEU now in respect of the Union — did not confer rights on individuals. Similarly, in ***Petrie v Commission***,[37] the Court concluded that the principle of access to documents in Article 15 TFEU [ex Article 255 EC] was not unconditional and required further implementation and so could not be directly effective.

40. Of immediate relevance for the present case, in ***Echirolles Distribution SA v Association du Dauphine***,[38] the Court held that Articles 3a, 102a and 103 of the EC Treaty (now Articles 119 to 121 TFEU) were incapable of direct effect. Explaining its conclusion, the Court observed as follows:

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[36] Case 126/86, [1987] E.C.R. 3697, paras. 10-11.
[37] Case T-191/99, [2001] E.C.R. II-3677, paras. 34-35
[38] Case C-9/99, [2000] E.C.R. I-8207, para. 25.

> *"those provisions do not impose on the Member States clear and unconditional obligations which may be relied on by individuals before the national courts. What is involved is a general principle whose application calls for complex economic assessments which are a matter for the legislature or the national administration."*

41. It is respectfully submitted that ***Zaera*** and ***Echirolles*** establish beyond doubt that Article 3 TEU and Articles 119 to 121 TFEU are not capable of being invoked by individuals in national courts.

42. However, the reasoning in ***Zaera***, ***Petrie*** and ***Echirolles*** would, it seems to the Respondents, apply with equal force to ***all*** of the Treaty Articles at issue in these proceedings, given that:

    (1) None of the Treaty Articles purports to create rights for individuals;

    (2) None of the Treaty Articles could be regarded as imposing "*clear and unconditional obligations*" on Member States. Indeed, most of the Treaty Articles are not even addressed to Member States, such as: Article 2 TEU, which identifies the Union's values; Article 3 TEU, which sets out the Union's objectives; Articles 2(3), 3(1)(c) and 3(2) TFEU, which lists the Union's competences; Article 122 TFEU, which is addressed to the Council; and Article 13 TEU, which is directed to the Union's institutions.

    (3) Most of the Treaty Articles "*call for complex economic assessments*". Thus, even if certain of the Treaty Articles are capable of being regarded as addressed to Member States, the content of the obligations imposed require complex economic assessment before they can be articulated. This is particularly true of Articles 2(3), 3(1)(c) and 3(2) TFEU, the provisions of Part Three, Title VIII TFEU, and in this context also, Article 4(3) TEU.

    (4) All of the Treaty Articles involve "*general principles*" whether of, *inter alia*, human dignity, freedom, democracy, equality, rule of law and respect for human rights in Article 2 TEU; the wide-ranging objectives of the Union as set out in Article 3 TEU; economic and monetary policy (Articles 2(3), 3(1)(c) and 3(2) TFEU and Part Three, Title VIII TFEU); the Union's institutional framework (Article 13 TEU); or the principle of sincere co-operation as set out in Article 4(3) TEU.

43. Just as in ***Zaera*** and ***Echirolles***, in which the Court refused to permit individuals to challenge Member State action by reference to Treaty provisions that were not

directly effective, so too here, the Court may consider that a litigant before a national court such as the Appellant is precluded from relying on the Treaty Articles (which are similarly not directly effective) to challenge a sovereign decision, such as that taken by Ireland, to ratify the ESM Treaty.

44. For the sake of completeness, insofar as it may be argued that this analysis, if accepted by the Court, could produce a lacuna in the remedial framework of Union law, or undermine the value of the rule of law upon which the Union is founded (Article 3 TEU), the Respondents would respectfully submit that such arguments would be unfounded. If the Commission were of the view that the entering into the ESM Treaty by any Member State was inconsistent with or constituted a breach of Union law, it would have communicated that view to the Council and the Member State and could bring infringement actions pursuant to Article 258 TFEU against the participating Member States to ensure compliance. In short, it seems to the Respondents that, to the extent that the Treaty Articles impose obligations on Member States, it is inherent in the scheme of European Union law that those obligations — not being rights-conferring, unconditional or precise — should be enforced by the Commission in the form of infringement actions, not by individuals in national courts. For example, although not involving an infringement action against a Member State, at issue in ***Commission v Council***[39] was a challenge brought by the Commission contending effectively that the Council had not acted in accordance with Article 104 EC [now Article 126 TFEU] with respect to controlling excessive deficits. In brief, the Commission's complaint was upheld. The case demonstrates clearly that the Commission is entrusted with the task of enforcing the Treaty Articles at issue; direct effect is not required for that end.

45. If, however, notwithstanding the above observations, which are submitted to this Court so as to assist it in considering all the Union law issues posed by the broad Union law-based challenge brought in the main proceedings and reflected in the questions referred, the Court considers that the Appellant is to be regarded as entitled

[39] Case C-27/04, [2004] E.C.R. I-6649.

to rely upon the Treaty Articles, the Respondents respectfully submit that no conflict between the ESM Treaty and the Union Treaties arises for reasons set out below.

B. Articles 2 and 3 TEU and Part Three, Title VIII TFEU (in particular Articles 119, 120, 121 122, 123, 125, 126 and 127 TFEU)

(i) Alleged Incompatibility of the ESM Treaty with Articles 2 and 3 TEU

46. The Appellant has not identified any breach of Articles 2 and 3 TEU independently of the breaches he alleges in respect of the Treaty Articles and the principle of effective judicial protection and Article 47 of the Charter. Insofar as the Appellant may argue that participation in the ESM Treaty breaches the Union's values of the rule of law or human rights (Article 2 TEU), or interferes with the Union's objective to "*establish an economic and monetary union whose currency is the euro*" (Article 3(4) TEU), or indeed that the ESM Treaty gives rise to any other breach of Articles 2 and 3 TEU, the Respondents consider that such assertions may be dismissed by reference to the observations made below in respect of the specific breaches alleged by the Appellant in the main proceedings.

47. The Respondents observe, however, that far from breaching Article 3 TEU, the ESM — as an initiative undertaken by euro area Member States to establish a mechanism, involving a new international financial organisation, to offer stability support as required to other euro area Member States on the basis of strict conditionality — is consistent the economic objectives of Article 3(3) TEU and with the objective of "*solidarity among Member States*", which is also a Union objective under Article 3(3) TEU.

(ii) Alleged Incompatibility of the ESM Treaty with Part Three, Title VIII, TFEU

48. The Appellant alleges a number of breaches of Part Three, Title VIII, TFEU, none of which is sustainable in the Respondents' respectful submissions.

a. Article 119 TFEU

49. The precise basis upon which the Appellant asserts a conflict between the ESM Treaty and Article 119 TFEU is not entirely clear and the Respondents respectfully submit that no such conflict arises. Taking each element of Article 119 TFEU in turn:

(i) Article 119(1) TFEU

50. Article 119(1) TFEU identifies an obligation on Member States and the Union to adopt "*an economic policy which is based on the close coordination of Member States' economic policies*". However, the ESM Treaty has no bearing whatsoever on the operation of this obligation. The ESM itself is an international funding mechanism which has no role in the coordination of economic policy. In this regard, the Respondents rely, in particular, on Article 13(3) ESM, which provides that any conditions imposed by the ESM on Member States to which it is granting financial assistance must be "*fully consistent*" with measures of economic policy coordination provided for in the TFEU. This makes it clear that the activities of the ESM institution are to be distinct from, while also subordinate to and limited by, the coordination of economic policy which takes place pursuant to Article 119(1) TFEU (and the other provisions of Part Three, Title VIII, TFEU).

51. Moreover, it is an overstatement to assert, as the Appellant has done for the first time before the Supreme Court and may do also before this Court, that where competence is shared between the Union and the Member States, as in the case of economic policy, the latter are thereby prohibited from taking ***any*** measures at all in an area in which the Union has exercised its competence.[40] Article 2(2) TFEU actually provides that in areas of shared competence, "*Member States shall exercise their competence to the extent that the Union has not exercised its competence*".[41] It is therefore not

[40] Appellant's Supreme Court Submissions, points 3.104 and 3.111.
[41] Emphasis added.

the case, as the Appellant appears to suggest, that ***any*** action in the field of economic policy coordination by the Union would automatically exclude Member States from any action in that field of competence. Rather, whether Member States lose their competence pursuant to Article 2(2) TFEU would depend upon the ***extent*** to which the Union has exercised its competence; unless the Union action preempts the entirety of the possible field of action, the Member States retain residual competence to act. That this is the case is made clear in the Protocol on Shared Competence, which provides that where the Union has taken action in an area governed by shared competence, "*the scope of this exercise of competence only covers those elements governed by the Union act in question and* ***therefore does not cover the whole area***".[42] Consequently, even if, which is absolutely denied by the Respondents, participation in the ESM Treaty *per se* could be regarded as constituting a form of economic policy coordination, such activity could not give rise to a breach of Article 119(2) TFEU (or any other Treaty provision regarding the Union's competence in economic policy coordination) as the Union has not acted to regulate ***all*** such forms of coordination.

(ii) Article 119(2) TFEU

52. As for Article 119(2) TFEU, which refers to monetary policy:

(1) Again, the ESM Treaty, as an international funding agreement is limited in its scope and manifestly, has nothing to do with monetary policy. Monetary policy is part of broader economic policy and deals with the setting and management of interest rates and the money supply by policy makers usually at a central bank. More particularly, as is undisputed, euro area monetary policy falls within the exclusive competence of the Eurosystem, which comprises the ECB and national central banks of the 17 euro area Member States. The primary objective of the Eurosystem is to maintain price stability in the euro area, which is defined as inflation rates of below, but close to, 2% over the medium term. The Eurosystem achieves this objective through the provision of liquidity to eligible counterparties via open-market operations. The counterparties to these operations are banks resident in the euro area that seek liquidity from the Eurosystem in order to fulfil their funding needs.

[42] Protocol (25) to the Union Treaties on the exercise of shared competence (emphasis added).

(2) In sharp contrast, the financial assistance to be provided by the ESM seeks to fulfil the funding needs of euro area Member States that can no longer access international capital markets at reasonable and/or sustainable interest rates. This funding is raised by the ESM on international funding markets and lent to the relevant borrower government. As such, the funding provided by the ESM does not interfere in any respect with the formulation or implementation of monetary policy. In this respect, the Respondents consider it useful to quote the conclusion of the High Court on the matter, which conclusion they full endorse, namely:

> "*... an analysis of the purpose of the ESM and the contents of the provisions of the ESM Treaty, the objective of which is to achieve that purpose, supports the conclusion that the ESM has no competence in the area of monetary policy as regulated by the Treaties*".[43]

(iii) Article 119(3) TFEU

53. With respect to Article 119(3) TFEU, to the extent that the Appellant may suggest that the ESM Treaty would undermine stable prices, sound public finances and monetary conditions and/or sustainable balance of payments, such suggestions would constitute mere unproven assertion for which the Appellant has provided no factual or evidential basis. In this respect, the Respondents would draw this Court's attention to the fact that no expert evidence was given on behalf of the Appellant before the High Court. He relied, in essence, on his own opinion as articulated in his own evidence to the High Court and as developed in legal submission by his Counsel.

54. For at least three reasons, the Respondents submit that any assertions made to this Court by the Appellant in his submissions to it should not be accepted:

(1) First, according to Article 12 ESM, the ESM may only grant stability in support in limited circumstances, namely, "*[i]f indispensable to safeguard the financial stability of the euro area as a whole and of its Member States*";

(2) Second, the strict conditionality attaching to financial assistance offered by the ESM, which, in accordance with Article 13(3) ESM must be consistent with the economic policy coordination provisions of the TFEU and also with Union law, and, accordingly, is not inconsistent with Article 119(3) TFEU; and

[43] High Court Judgment, para. 76.

(3) Third, the assistance offered by the ESM would safeguard the financial stability of the euro and enable Member States — that can no longer access international capital markets at reasonable and/or sustainable interest rates — to return to budgetary responsibility and is consistent with the guiding principles set out in Article 119(3) TFEU.

b. Article 120 TFEU

55. Insofar as the first sentence of Article 120 TFEU requires Member States to conduct their economic policies with a view to contributing to the objectives of the Union and in accordance with the principles referred to in Article 121(2) TFEU, as has been noted above in respect of Article 119(1) TFEU, given that the ESM does not engage in economic policy and given that its activities are expressly subordinated by Article 13(3) ESM to the Union's economic policy, participation in the ESM Treaty by a Member State simply cannot result in a breach of Article 120 TFEU.

c. Article 121 TFEU

56. The Appellant asserts that the ESM Treaty conflicts with Article 121(2) TFEU — which confers on the Council the task, on a recommendation from the Council, of formulating "*a draft for the broad guidelines of the economic policies of the Member States and of the Union*" — on the basis that conditions imposed by the ESM on any financial assistance granted to Member States could conflict with guidelines formulated pursuant to Article 121(2) TFEU. Given the strict requirement in Article 13(3) ESM, which, as noted above, heavily curtails the capacity of the ESM to impose conditions on Member States to which it is granting financial assistance by requiring ESM operations to be conducted consistently with measures of economic coordination provided for in the TFEU, it is submitted that the only correct conclusion is that there is simply, as the High Court aptly put it, "*no scope within the ESM Treaty for conflict with Article 121*".[44]

[44] High Court Judgment, para. 70.

d. Article 122 TFEU

57. Article 122(2) TFEU provides for limited circumstances in which the Council of the Union, on a proposal of the Commission, may grant, under certain conditions, Union financial assistance to a Member State, namely: "*[w]here a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control*". The Appellant has contended that, if the conditions identified in Article 122(2) TFEU are satisfied, Union financial assistance and ***only*** Union financial assistance can be provided.[45]

58. It is respectfully submitted that for three reasons, there is no conflict between the ESM Treaty and Article 122(2) TFEU:

(1) First, Article 122(2) TFEU is simply irrelevant here; the purpose of Article 122(2) is to identify ***Union*** competence, via the Council, to grant financial assistance to Member States in exceptional circumstances. The ESM Treaty is an international agreement entered into by Member States, pursuant to which an ***international financial institution*** — *i.e.* not the Union — will be established to grant funding to Member States. The principle of conferral requires that the **Union** only act within the limits of the competence conferred upon it by the Member States in the Treaties, in accordance with Article 5(2) TEU. That competence under Article 122(2) TFEU is unaffected by the ESM Treaty.

(2) Second, the consequence of the Appellant's contention is that the Union would be the only entity that would be permitted to provide financial assistance to Member States. This is a far-reaching and unsustainable proposal and could potentially, for example, mean that Member States would violate Article 122(2) TFEU by their participation in the International Monetary Fund ("the IMF"). The Union does not have exclusive competence to grant financial assistance to a Member State experiencing financial difficulties. Indeed, if this had been the intention of the drafters of Article 122 TFEU, which dates back to the Treaty of Maastricht, express provision for this would have been provided.

(3) Third, the Respondents derive further support for this position from the fact that both the European Parliament and the Commission, in their opinions to the European Council in the context of the proposal which resulted in Decision 2011/199/EU, considered whether a stability mechanism as envisaged in the proposed amendment of Article 136 TFEU would involve a reduction in the

[45] Appellant's Supreme Court Submissions, points 3.6 and 3.98.

competences of the Union and concluded that there would be no such reduction. Ratification of the ESM would likewise not reduce the Union's competence under Article 122.

e. Article 123 TFEU

59. The Appellant's assertion that the ESM Treaty violates Article 123 TFEU is without foundation.

60. Article 123 TFEU prohibits the provision of credit by the European System of Central Banks ("ESCB") (which comprises the ECB and national central banks of the 17 Member States) to euro area governments and other public bodies. It has no bearing on the lending of existing international financial organisations or on that proposed by an international financial organisation like the ESM.

61. Moreover, the fact that the Respondents and other euro area Member States have undertaken to subscribe to the authorised capital stock of the ESM does not mean that ESCB is providing overdraft facilities or any other type of credit facility as envisaged by Article 123 TFEU. This is because the ESM does not have access to the ESCB and will not receive funding from it. As such, the prohibition in Article 123 TFEU on the provision of credit by the ECB is not engaged.

62. As has already been explored above, it is also an erroneous proposition that the Union could be the only entity that is entitled to provide financial assistance to Member States, which appears to be the corollary of the Appellant's reasoning in respect of Article 123 TFEU.

f. Article 125 TFEU

63. In essence, Article 125(1) TFEU prohibits both the Union and Member States from being liable for or assuming the commitments of central governments, regional, local or other public authorities, or 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. Whether it is viewed literally, schematically or teleologically, it is apparent that Article 125(1) TFEU creates no impediment to the ESM Treaty.

(i) A Literal Reading of Article 125 TFEU

64. Applying a literal interpretation, the forms of financial assistance envisaged by the ESM Treaty do not fall within the type of assistance which is prohibited by Article 125(1) TFEU. The language employed in Article 125(1) TFEU is narrowly-drawn and the prohibition is on Member States (and the Union) "*[being] liable for or [assuming] the commitments of*" other Member States.

65. The ESM Treaty envisages only the grant of assistance subject to strict conditionality, *i.e.* in circumstances where the beneficiary ESM Member will be under an obligation to pay back its debts, pursuant to non-concessional terms, that is at the ESM's cost of borrowing plus any additional elements decided upon by the ESM institution in accordance with the ESM Treaty and which do not substantially differ from the market conditions prevailing under normal circumstances. That this is the case is apparent, for example, from:

(1) Article 3 ESM, which provides as follows: "*[t]he purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality*"; and

(2) Article 12 ESM Treaty, which provides that "*the ESM may provide stability support to an ESM Member subject to **strict conditionality***" (emphasis added).

66. The requirement of "*strict conditionality*" being attached to any financial assistance offered by the ESM is also emphasised by Articles 15 to 18 ESM . In this respect, the financial assistance granted by the ESM is like financial assistance granted by any other financial institution; there are terms and conditions which may or may not be accepted by the recipient of the assistance.

67. Thus, the ESM Treaty does not envisage an ***assumption*** of the debts of a Member State; rather, the beneficiary Member State will remain liable for the debt to the ESM given the "*strict conditionality*" that will be attached to any provision of funding or stability support.

(ii) A Schematic Interpretation of Article 125 TFEU

68. A schematic or contextual reading of Article 125 reinforces the deliberate specificity of its language. It can be contrasted, for example, with Article 122(1) TFEU, which permits the Union to grant "*financial assistance*" to a Member State in limited circumstances. Clearly, had Article 125 TFEU been intended to prohibit financial assistance other than financial assistance involving the assumption of a liability or a commitment, it could have been framed more broadly, and used the terminology that is found in Article 122(2) TFEU.

69. A similar point can be made when reading Article 125 TFEU alongside Article 123 TFEU. Article 123 TFEU prohibits "*overdraft facilities or any other type of credit facility* ..." with the ECB or with national central banks.[46] Again, had Article 125 TFEU been intended to prohibit financial assistance other than financial assistance involving the assumption of a liability or a commitment, it could have been so worded, as was Article 123 TFEU.

(iii) A Teleological Interpretation of Article 125 TFEU

70. It is generally accepted that the over-arching purpose of Article 125 TFEU is to reinforce Member States' fiscal discipline and budgetary responsibility. The ESM Treaty supports this purpose in the following manner:

[46] Emphasis added.

(1) As just observed, any stability support provided by the ESM must be subject to "*strict conditionality*";[47]

(2) Financial assistance offered by the ESM to a Member State is likely to assist that Member State to return to fiscal discipline and budgetary responsibility, thereby serving the objective of Article 125 TFEU.

71. In short, the Respondents respectfully submit that it cannot have been the intention of the authors of Article 125 TFEU to condemn Member States to default by prohibiting **any form of financial assistance** whatsoever. This situation would be oppressive, and could, as noted above in the context of Article 122(2) TFEU, potentially preclude participation in the IMF. This would be of such far-reaching consequence that it would require clear and unequivocal articulation in the TFEU for it to be the correct interpretation.

(iv) Additional Argument of Appellant Regarding Article 125 TFEU

72. The Appellant has also contended that the ESM constitutes a "*conduit*" by which Member States assume commitments of other Member States.[48] This contention is misfounded. The Article 125(1) TFEU prohibition applies to "*[a] Member State*", while the ESM will be an international financial institution. The ESM will have legal personality, which will be separate and distinct from the ESM Members.[49] It will have a Board of Governors, a Board of Directors, its own Managing Director and its own decision-making procedures.[50] In addition, to suggest that the ESM is a "*conduit*" for the Member States conflicts with what has been described as: "*[t]he most distinctive characteristic of an international organisation ...that in*

[47] Recitals (2) and (6); Articles 3, 5(6)(f), 5(6)(g), 12(1), 13(3), 13(7), 14(2), 15(2), 16(2), 17(2) and 18(2).
[48] Appellant's High Court Submissions, point 2.37; Appellant's Supreme Court Submissions, point 3.15.
[49] In this respect, the Respondents note that Article 8(5) ESM, second sentence, clearly distinguishes between the liabilities of the ESM and those of participating ESM Member States, and expressly precludes a liability of its Members for ESM obligations, a point noted by the German *Bundesaverfassungsgericht* in its abovementioned judgment of 12 September 2012, (at paragraph (bb) on p. 44).
[50] See ESM Treaty, Articles 4-7 and 32.

***international law** it has legal personality separate from its members*".[51] In short, the restriction imposed on individual Member States by Article 125(1) TFEU does not extend to the activities of an independent international organisation such as the ESM institution established under the terms of the ESM Treaty.

73. Indeed, the logical conclusion of the Appellant's argument that it be so extended could be that membership of any international funding mechanism would be incompatible with Article 125(1) TFEU, insofar as it might, depending on the circumstances, be interpreted as serving as a "*conduit*" by which Member States may assume the commitments and liabilities of other Member States. In fact, the interpretation of Article 125(1) TFEU contended for by the Appellant would eliminate the possibility of a Member State participating in ***any*** international funding organisation if another Member State could benefit from loans received from that organisation. This is an extremely far-reaching interpretation of Article 125(1) TFEU and, if correct (which is denied), would confer significantly greater reach on that provision than either its wording, its context or its purpose could, the Respondents submit, possibly have intended. The Respondents respectfully submit that the Court should decline to endorse such a rigid and wholly unrealistic construction of Member States' competence to enter into international financial agreements and to become members of autonomous international financial institutions such as the ESM institution and to access funding from such institutions.

74. In the circumstances, the ESM should not be regarded as violating, or capable of violating, Article 125 TFEU.

g. Article 126 TFEU

75. Article 126 TFEU imposes an obligation on Member States to "*avoid excessive Government deficits*" and, in broad terms, provides for the enforcement of budgetary discipline by the institutions of the Union on all Member States. The Appellant

[51] A Aust, ***Modern Treaty Law and Practice*** (2nd ed, 2007), p. 398 (emphasis added).

purports to assert that the ESM Treaty would require Member States to accept binding commitments in relation to their economic policy that would compromise their capacity to meet their obligations under Article 126 TFEU. Aside from the fact that ESM Members are free to decide whether or not to accept financial assistance on the conditions imposed by the ESM, Article 13(3) ESM ensures that no conflict can arise between the provisions of the ESM Treaty and the TFEU.

76. The Respondents would also make the following observations for the assistance of the Court:

(1) The purpose of Article 126 TFEU is to make it clear that fiscal or budgetary discipline, while a Member State responsibility (as, noted above, as indicated by Article 125 TFEU), is also a matter of wider concern for the Union and its Member States. Indeed, in the abovementioned Case C-27/04 ***Commission v Council*** [2004] ECR I-6649, the Court held (at paragraph 81) that "*it follows from the wording and the broad logic of the system established by the Treaty that the Council cannot break free from the rules laid down by Article 104 EC [now Article 126 TFEU]*".

(2) By facilitating the grant of financial assistance to Member States only on the basis of "*strict conditionality*", which conditionality must comply with economic coordination measures adopted pursuant to the TFEU, the ESM Treaty accords fully with the spirit and objective of Article 126 TFEU.

h. Article 127 TFEU

77. The Appellant's assertion that the ESM Treaty violates Article 127 TFEU — which deals with monetary policy — appears to have the same basis as his contention that the ESM Treaty violates Article 119(2) TFEU (also addressing monetary policy), and can be rejected for the same reason.

C. 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

(i) Article 3(1) TFEU

78. As has already been explained above, given that the ESM is a mere funding mechanism, the Appellant's contention that it violates Article 3(1)(c) TFEU — which provides that the Union shall have "*exclusive competence*" in "*monetary policy*" for Member States whose currency is the euro — should be rejected. The ESM Treaty does not give the ESM any role in defining or implementing the monetary policy of the Union or of any part of the Union. In the Respondents' view, it is therefore obvious that the ESM, as a "*funding mechanism*", is not engaged in any way whatsoever with monetary policy.

(ii) Article 3(2) TFEU

79. The Appellant's reliance on Article 3(2) TFEU is misplaced as none of the ***cumulative*** conditions required to trigger the Union's exclusive competence pursuant to Article 3(2) TFEU is present:

(1) The conclusion of the ESM Treaty has not been provided for in a legislative act of the Union;

(2) The ESM Treaty is not necessary to enable the Union to exercise its internal competence; and

(3) The ESM Treaty has not been shown to affect common rules or alter their scope.

D. Article 2(3) TFEU

80. Article 2(3) TFEU provides that "*[t]he Member States shall coordinate their economic and employment policies within the arrangements as determined by [the TFEU] which the Union shall have competence to provide*". As has already been explained above, the ESM does not engage in economic coordination, while its activities are expressly constrained by the economic coordination arrangements

provided by the Union. The Appellant's assertion of incompatibility between the ESM Treaty and Article 2(3) TFEU is without foundation.

E. The Powers and Functions of the Union Institutions Pursuant to Principles Set out in Article 13 TEU

(i) General Comment

81. By way of general comment, it is well-established that Union law will not be violated where Member States associate Union institutions with international agreements entered into outside the framework of the Union Treaties. For example, in case ***Parliament v Council and Commission,***[52] the Court reviewed an application for annulment of a Council act to grant special aid to Bangladesh and the European Commission's actions to implement that act. At issue, *inter alia*, was whether a violation of Union law arose from the use of the Commission for the coordination of an intergovernmental treaty between the Member States and Bangladesh. The Court concluded as follows:

> *"The ... [EEC] 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."*[53]

82. Similarly, in ***Parliament v Council***[54]— in the context of an intergovernmental treaty regarding cooperation between the Member States and the African, Caribbean and Pacific Group of States — the Court, invoking the earlier Bangladesh case, concluded as follows:

> *"No provision of the Treaty prevents Member States from using, outside its framework, procedural steps drawing on the roles applicable to*

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[52] C-181/91 and C-248/91, [1993] E.C.R. I-3713.
[53] *Ibid*, para. 20.
[54] Case C-316/91, [1994] E.C.R. I-653.

Community expenditure and from associating the Community institutions with the procedure thus set up."[55]

83. Clearly therefore, it does not constitute a breach of the Union Treaties for the Union's institutions to be engaged in activities pursuant to international agreements entered into by Member States, such as the ESM Treaty. Moreover, the involvement of the Commission and the ECB in the ESM Treaty was actually approved by the representatives of the Governments of all 27 EU Member States, by decision adopted at the Conference of the Representatives of the Governments of 20 June 2011.

(ii) The Court of Justice

84. The Appellant suggests that Article 37(3) ESM, which provides that a referral may be made to the Court where an ESM Member contests a decision of the Board of Governors, would confer jurisdiction on the Court which infringes Union law. The Respondents submit that this is incorrect.

85. Article 273 TFEU provides as follows:

> "*The Court of Justice shall have 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 between the parties.*"

86. All of the criteria identified in Article 273 TFEU are, in the Respondents' respectful submission, satisfied here:

(1) There is a "*dispute between Member States*", since a referral pursuant to Article 37 ESM would either involve a direct dispute between ESM Members, who are all Union Member States, or would, in substance, comprise a dispute between ESM Members where one ESM Member contests the view taken by the others on the ESM Board of Governors;

(2) The ESM Treaty is aimed at mobilising funding to provide stability support if indispensable to safeguarding the financial stability of the euro area as a whole

[55] *Ibid*, para. 41.

and is therefore linked to Union activity, thereby satisfying the requirement of "*relating to the subject matter of the Treaties*"; and

(3) Article 37 ESM constitutes the "*special agreement*" between the parties. There is no impediment in Article 273 TFEU to establishing in advance of any dispute a mechanism that can be used in predetermined conditions if a dispute arises.

(iii) The Commission

87. Likewise, the Respondents are of the view that there can be no doubt that the Commission has the power to perform the functions conferred on it by the ESM Treaty for the following reasons:

(1) First, Article 17 TEU provides that "*[t]he Commission shall promote the general interest of the Union and take appropriate initiatives to that end.*" This ***duty*** of the Commission is clearly sufficiently far-reaching to encompass the tasks envisaged by the ESM Treaty for the Commission. As the opening recital to the ESM Treaty states, "*[t]he European Council agreed on 17 December 2010 on the need for euro area Member States to establish a permanent stability mechanism*". Insofar as the Commission performs tasks pursuant to the ESM Treaty to assist the ESM in achieving its functions, the Respondents submit that it falls to be regarded as performing its duty pursuant to Article 17 TEU to "*promote the general interest of the Union*".

(2) Second, the tasks performed by the Commission pursuant to the ESM Treaty are fully compatible with tasks it is already performing pursuant to five Council Regulations and one Directive (the so-called "Six Pack"), which were proposed by the Commission in October 2011 and approved by all 27 Member States and the European Parliament, all of which have a clear legal basis in the TFEU.[56] Across the Six Pack Regulations and the Directive — which pursue stronger preventive action and deeper fiscal coordination — a common element is the central role of the Commission in monitoring compliance, investigating alleged non-compliance and recommending sanctions. Moreover, provision is made for certain decisions of the Commission, such as with respect to fines, to be adopted unless a qualified majority of Member States votes against it.[57]

(3) Third, in the Respondents' respectful submission, these conclusions are fortified by the fact that the principal institutions of the Union, by approving Decision

[56] Regulation (EU) 1173/2011 (based on Articles 136 and 121(6) TFEU); Regulation (EU) 1174/2011 (based on Articles 136 and 121(6) TFEU); Regulation (EU) 1175/2011 (based on Articles 121(6) TFEU); Regulation (EU) 1176/2011 (based on Article 121(6) TFEU); Regulation (EU) 1177/2011 (based on Article 126(14) TFEU, second sub-para); and Directive 2011/85/EU (based on Article 126(14), third sub-para).
[57] See, e.g., Regulation (EU) 1173/2011, Article 6.

2011/199/EU in their abovementioned Opinions thereon, clearly were not of the view that the ESM Treaty conferred functions on the Commission which were at variance with Article 17 TEU.

(iv) The ECB

88. It is also submitted that the Appellant's contention that the ESM Treaty confers functions on the ECB that are not envisaged by the Union Treaties should be rejected. In this respect, the Respondents place particular emphasis on Article 282(2) TFEU, pursuant to which the ECB, as a constituent part of the ESCB, is under an obligation to "*support the general economic policies in the Union in order to contribute to the achievement of the latter's objectives.*" Furthermore, a similar consultative/liaison role to that envisaged by the ESM Treaty for the ECB is already enjoyed by the ECB in the context of the Six Pack,[58] as well as in the context of Articles 126 and 127 TFEU. Here again, the Respondents draw support and reassurance from the abovementioned opinion of the ECB on Decision 2011/199/EU.

(v) Summary on the Appellant's Contentions regarding Conferral of Functions

89. In short, the Respondents fully endorse the following emphatic comment of the High Court, which observed that: "*the ESM Treaty does not purport to affect the allocation of responsibilities defined in the Union Treaties*".[59]

F. The Principle of Sincere Cooperation Laid down in Article 4(3) TEU

90. The Appellant has also asserted that because the ESM Treaty violates the Union Treaties, the Respondents are in breach of Ireland's duty of sincere cooperation pursuant to Article 4(3) TEU to assist the Union in carrying out tasks which flow

[58] Regulation (EU) 1175/2011 (Preamble, Recital 23 and Article 10a); Regulation (EU) 1176/2011 (Preamble, Recital 19, Article 9 and Article 13); Regulation (EU) 1177/2011 (Preamble, Article 8).
[59] High Court Judgment, para. 78.

from the Treaties. This proposition was rejected by the High Court on two grounds, which are endorsed fully by the Respondents:[60]

(1) First, the ESM Treaty does not breach the Union Treaties.

(2) Second, given the links between the ESM Treaty and the Union Treaties — as evidenced by recital (3) to Decision 2011/199/EU, recitals (5), (6), (9) and (10) of the ESM Treaty, the role of the Commission and the ECB in the ESM framework and the constraints imposed on ESM activities by Article 13(3) ESM rather than constituting a breach of Article 4(3) TEU, entry into the ESM Treaty actually involves fulfilment of the Respondents' obligations under Article 4(3) TEU as it involves activities "*which flow from the Treaties*".

91. There is no substance whatsoever in the Appellant's assertion that entering into the ESM Treaty would violate the Member States' duty of sincere cooperation with the Union pursuant to Article 4(3) TEU. As the Respondents submit they have demonstrated above, there is no incompatibility between the ESM Treaty and the Union Treaties.

92. In any event, paragraph of Article 4(3) of the TEU provides as follows:

> "*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.*" (emphasis added).

93. Article 4(3) TEU falls to be given a broad and generous interpretation. For example, Chalmers, Davies and Monti[61] note that the duty of cooperation under Article 4 of the TEU:

> "*...**applies to tasks that 'flow from the Treaties'**. This is a more open-ended concept than the previous duty, which merely applied to tasks arising from fulfilment of Treaty obligations. Notably, it suggests that the duty of cooperation applies to projects such as the Lisbon Agenda, **whose ambitions both build upon and extend beyond the Treaties**.*

[60] High Court Judgment, para. 82.
[61] ***European Union Law*** (2nd ed., 2010) pp. 223-224

The fidelity provision carries both negative and positive obligations for the EU institutions. The negative obligation is that these must not simply not take measures that conflict with substantive EU laws but also must not adopt measures which obstruct the effectiveness of EU policies in more indirect ways. The positive obligation is to take a number of measures that contribute to the realisation of Union policies" (emphasis added).

94. It is apparent that the ESM Treaty falls within the category of a project that flows from and builds upon the Union Treaties. The recitals to the ESM Treaty refer to European Council Decisions, the European Union framework, the fact that all euro area Member States should become ESM Members, the fact that non-euro are Members may be observers, and the role of the Commission and the ECB.[62] Thus, to enter into the ESM Treaty constitutes a fulfilment by the participating Member States of their Article 4(3) TEU obligations — by promoting tasks flowing from the Union Treaties — rather than a rejection of same as the Appellant erroneously contends.

95. To support his contention of a breach of Article 4(3), the Appellant has relied upon ***Commission v Ireland***,[63] a judgment which refers to the competence of the Union and Member States but not that of the Union institutions, where the issue was whether Ireland was permitted to initiate dispute-resolution proceedings against the United Kingdom pursuant to United Nations Convention on the Law of the Sea ("UNCLOS"). The Court concluded that it could not because:

(1) The elements of UNCLOS had been enacted into and become part (at the time) of Community law;

(2) Pursuant to Article 292 EC (now Article 345 TFEU), Member States had undertaken not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein; and

(3) Consequently, this Court had exclusive jurisdiction over the issues in dispute.[64]

96. As has been explained — and unlike the Court which had exclusive jurisdiction to determine the dispute at issue in ***Commission v Ireland*** — neither the Union nor any

[62] See Recitals (1), (2), (4), (7), (9) and (10) thereto.
[63] Case C-459/03 [2006] E.C.R. I-4635.
[64] *Ibid*, paras. 110-121, 123-127, 132, 152 and 154.

of its institutions has ***exclusive*** competence to grant financial assistance to Member States and, accordingly, it cannot be said that its institutions have exclusive power to do so. Consequently, the Respondents consider that the Appellant's reliance on ***Commission v Ireland*** is misplaced as the principle it confirms is not relevant in this case.

G. *Alleged Breach of the Principle of Effective Judicial Protection*

97. The Respondents submit that the Appellant's contention that the ESM Treaty is incompatible with the principle of effective judicial protection as enshrined in Union Human Rights law and Article 47 of the Charter is unfounded.

(i) The Immunity of ESM Officials and Staff Members

98. The principle of immunity from suit of the officials and staff members of international organisations, like the ESM, is not uncommon.[65] Furthermore, as will be explained in detail below, such immunity is not regarded as problematic, given that the ESM Members will remain liable for any human rights violations for which they are responsible.

(ii) Review of the Board of Governors but not of the Board of Directors

99. The Appellant asserts that there is a "*fundamental ambiguity*" in the dispute settlement roles of the Board of Directors pursuant to Article 37(1) ESM, on the one, hand and of the Board of Governors pursuant to Article 37(2) ESM on the other.[66] However, this is not correct. The division of roles created by the ESM Treaty is straightforward:

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[65] See, e.g., Convention on the Privileges and Immunities of the United Nations, 13 February 1946, and Protocol (No 7) to the Union Treaties on the privileges and immunities of the European Union.
[66] Appellant's High Court Submissions, point 2.61.

(1) Where an answer to a ***question*** regarding the interpretation or application of the ESM Treaty and the by-laws of the ESM arises between any ESM Member and the ESM, an answer may be sought from the Board of Directors pursuant to Article 37(1), ESM Treaty. In this respect, the Board of Directors clearly performs an ***advisory*** role.

(2) By contrast, where there is a ***dispute*** between the ESM and any Contracting State, or as between the Contracting States, concerning the interpretation and the application of the ESM Treaty, that dispute shall be decided by the Board of Governors (Article 37(3)). Consequently, the Board of Governors performs an ***adjudicatory*** role.

100. As such, the division of roles between the Board of Directors and the Board of Governors is clear and those roles complement each other: a ***question*** arising is different from a ***dispute*** arising, while the giving of ***advice*** is different from ***adjudication***.

(iii) Role of this Court under ESM Treaty

101. The Appellant raises a number of concerns regarding the allegedly limited scope of review by the Court in the context of the ESM. However, these concerns are misplaced.

102. Insofar as the Appellant complains[67] that the role of the CJEU will "*necessarily be limited*" given the broad discretion conferred on the ESM Institution, this is also incorrect. At present, when reviewing the acts of Union institutions in circumstances in which the adopting institution may have a wide margin of discretion — such as common agricultural policy — the Union judicature will nonetheless examine whether the act "*has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion*".[68] It is respectfully submitted that the Court is well-used to reviewing decisions entailing the exercise of discretion in complex economic, political and social areas; there is no

[67] See Appellant's High Court Submissions, point 2.63; see also Appellant's Supreme Court Submissions, points 3.142-3.148.
[68] See, e.g., Case 331/88 ***FEDESA and others*** [1990] E.C.R. I-4203.

reason to expect that the Court would apply its power of review under the ESM Treaty more narrowly.

103. Thus, insofar as the Appellant suggests that the Court would not have jurisdiction to review the compatibility of decision of the ESM with Union law, including the Union Treaties, the Charter and/or General Principles of Union law, this is likely to be unproblematic, and is, in any event, incorrect, for a number of reasons:

(1) First, by way of general comment, it is difficult to envisage circumstances in which the ESM — given the nature of its activities — would violate individual human rights.

(2) Second, the Court will have jurisdiction to review any matter that arises in the dispute between the Member State or the Member State and the ESM. This dispute will have arisen out of a referral to the Board of Governors, pursuant to Article 37(2), regarding the "*interpretation and application*" of the ESM Treaty. Thus, if the question of EU Human Rights compliance arises in the course of a dispute about the "*interpretation and application*" of the Treaty, that question will be reviewable by the CJEU.

(3) Third, it is also apparent from the ESM Treaty that the issues that may arise in the "*interpretation and application*" of the Treaty are tied into Union law more generally, and the ESM Treaty is sufficiently broadly worded to incorporate the CJEU's human rights case-law. For example:

(a) Recital (4) of the ESM Treaty provides that "*[s]trict observance of the **European Union framework** ... should remain the first line of defence against confidence crises affecting the stability of the euro area*". Thus, the ESM Treaty is integrally linked to the European Union framework, and cannot thereby, contrary to the Appellant's suggestion,[69] be regarded as transferring competences "*to an entity that exists outside the framework of the Union legal order*". Given that the "*European Union framework*" incorporates Union human rights, those human rights will be relevant to the "*interpretation and application*" of the ESM Treaty.

(b) Moreover, recital (5) expressly links the ESM Treaty to the Stability Treaty[70] and provides that the two Treaties "*are complementary in fostering*

[69] See Appellant's High Court Submissions, point 2.71; see also his Supreme Court Submissions, points 3.142-3.148.

[70] See the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union signed in Brussels on 2 March 2012, the ratification of which by Ireland was endorsed by the People of Ireland in the referendum held on 31 May 2012.

fiscal responsibility and solidarity within the economic and monetary union."

(c) Further, Article 13(3) ESM, which sets out the procedure for granting stability support, provides that it shall be provided on the basis of a Memorandum of Understanding "*(an "MoU") detailing the conditionality attached to the financial assistance facility*". Negotiation of this is to be entrusted to the Commission, the ECB, and, where possible, the IMF. It further provides that "*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.*"

(d) On its face, therefore, the ESM Treaty envisages a close linkage with Union law, thereby pointing to the capacity of the Court to apply Union fundamental rights and general principles — insofar as relevant to the "*interpretation and application*" of the ESM Treaty.

(4) Fourth, as the Appellant points out, Member States are not entitled to enter into international agreements that would be incompatible with their Union obligations.[71] If the ESM Institution were permitted to violate human rights with impunity, this would effectively mean that the Member States had entered into an international agreement that is incompatible with their Union law obligations as Member States, which on the Appellant's case, is not permissible. The Respondents consider that it would be appropriate for this Court to interpret its own power of review pursuant to Article 37 ESM in a manner that permitted it to remedy any lacuna in human rights protection.

(5) Fifth, quite simply, the Appellant's argument underestimates the commitment of this Court to human rights review. It must be recalled that the Court initially concluded, within the framework of the EC Treaty, which, like the ESM Treaty, contained no express reference to human rights, that human rights could play an ***interpretive*** role when reviewing measures adopted pursuant to the EC Treaty.[72] Subsequently, it concluded —still at a time when the EC Treaty contained no reference to human rights — that the validity of EC measures could be tested by reference to human rights principles, and that, accordingly, the ***application*** of EC measures could be scrutinised for human rights compatibility.[73] Thus, in the absence of an EC Treaty reference to human rights, the Court nonetheless fashioned a sophisticated human rights case-law. The Defendants submit that it is, consequently, untenable that this Court would ignore, as the Appellant effectively suggests, that now very well-developed case-law in its review of the "*interpretation and application*" of the ESM Treaty in disputes referred to it

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[71] See Appellant's High Court Submissions, points 2.83-2.93; Appellant's Supreme Court Submissions, points 4.1-4.12.

[72] Case 29/69 ***Stauder v City of Ulm*** [1969] E.C.R. 419.

[73] Case 11/70 ***Internationale Handelsgesellschaft v Einfuhr-und Vorratststelle für Getreide und Futtermittel*** [1970] E.C.R. 1125.

under Article 37 ESM simply because there is no express reference in that Treaty to human rights review.

(iv) Review by Member States

104. With respect to the Appellant's complaint[74] regarding the fact that only Member States are entitled to seek review to the CJEU — and not interested parties, such as financial institutions, or the shareholders of such institutions — it is quite difficult to understand the basis of this complaint.

105. It is common practice in the context of international agreements, which entail mutual obligations as between the Contracting States, for there not to be any enforcement mechanisms for private parties. There is no general obligation under international law for States to open their courts to individuals to enforce treaty provisions, even those that are protective of or beneficial to those individuals. Such an obligation does not exist as a matter of international treaty law. For example, commentary to the *Restatement (Third) on the Foreign Relations Law of the United States* (1987) observes as follows:[75]

> "*International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts, but there are exceptions with respect to both rights and remedies. Whether an international agreement provides a right or requires that a remedy be made available to a private person is a matter of interpretation of the agreement*".

106. If the Appellant repeats his submission before this Court, he therefore appears to be suggesting that a feature of the ESM Treaty, that is in fact common to the vast majority of international treaties, violates EU Human Rights. The Defendants submit that this proposition is not tenable.

(v) The ***Kadi*** Case

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[74] Appellant's High Court Submissions, point 2.65; Appellant's Supreme Court Submissions, para. 3.142.
[75] See para. 907.

107. It is similarly difficult to understand the Appellant's reliance[76] on the ***Kadi*** case.[77] First, the ***Kadi*** case is distinguishable insofar as the issue in that case was with respect to Union regulations implementing a UN Security Council measure, which would not arise in the context of the ESM. Second, and more strikingly, insofar as the Court provided a robust defence of the importance of the rule of law in the Union legal order and the centrality of fundamental rights in the general principles of the Union law in the ***Kadi*** case, it only serves to emphasise the point made above, namely that the CJEU is highly unlikely to disregard human rights considerations when performing its review role pursuant to Article 37 ESM.

(vi) The ***NS*** Case

108. The Appellant has also invoked the ***NS and ME***[78] case in support of his contention that Member States are not permitted to transfer competences falling within the scope of Union law to an entity existing outside the Union legal order, where human rights have no application.[79] As has already been contended, entering into the ESM Treaty does not involve such a transfer. Furthermore:

(1) The ***NS and ME*** case involved factual circumstances that were emphatically different from those arising here. At issue was whether Member States — Ireland and the United Kingdom — could transfer asylum seekers to Greece, pursuant to the Dublin Regulation II,[80] which provides that the host State is required to transfer asylum seekers to the Member State where they first entered the Union, which in this case was Greece, even if they are aware of systemic deficiencies in the asylum procedure in Greece giving rise to a real risk that the asylum-seekers would be subjected to inhuman or degrading treatment. The Court held that

[76] See Appellant's High Court Submissions, point 2.66; Appellant's Supreme Court Submissions, point 3.243.
[77] Case C-402/05 ***Kadi and Al Barakaat International Foundation v Council and Commission*** [2008] E.C.R. I-6351.
[78] Case C-493/10 ***NS and ME***, 21 December 2011.
[79] Appellant's High Court Submissions, point 2.71; Appellant's Supreme Court Submissions, point 3.145.
[80] Council Regulation (EC) No 343/2003.

Member States could not transfer asylum-seekers to face such a risk. It is difficult to envisage how this case could have any implications for the exercise of powers in the context of an international funding mechanism.

(2) Moreover, rather than speaking to Member State competences as the Appellant suggests, the ***NS and ME*** case effectively mirrored the long-established human rights principle that States may not remove individuals from their territory to face a risk of inhuman or degrading treatment elsewhere. This obligation has been imposed by ECHR law since the case of ***Chahal v United Kingdom***;[81] it is not novel and it does not have wider implications for Member State competence in the Union law context.

109. By way of final comment on the issue of compliance with Union fundamental rights, it is also important to note that, insofar as tasks integral to the ESM Treaty are performed by the Commission and the ECB,[82] if those institutions breach human rights they will remain fully accountable within the Union legal order.

H. Overall Conclusion Regarding Alleged Incompatibility of the ESM Treaty with Union Law

110. The Defendants submit that none of the arguments raised by the Appellant is well-founded and none of them gives rise to any doubt, let alone serious doubt, as to the compatibility of the ESM Treaty with Union law.

VI — Conclusion

111. In the light of the foregoing, Ireland respectfully submits that the Court of Justice answer the questions referred by the Supreme Court of Ireland as follows:

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[81] (1997) 23 E.H.R.R. 413.
[82] Appellant's High Court Submissions, point 2.74.

(1) The amendment to Article 136 TFEU for which 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 provides, does not involve an increase in the competence conferred on the Union by the Union Treaties and nor does that amendment involve any violation of those Treaties or the general principles of Union law with the result that the said Decision is completely valid;

(2) Member States whose currency is the euro are entitled to ratify an international agreement like the Treaty establishing the European Stability Mechanism, signed in Brussels on 2 February 2012, and nothing in that Treaty is incompatible with the Union Treaties or the general principles of Union law;

(3) The said entitlement is not dependent on the entry into force of European Council Decision 2011/199/EU.

Dated this 14th day of September 2012

Eileen Creedon, Chief State Solicitor,
Agent for Ireland

The written observations herein are made on behalf of Ireland on this 14th day of September 2012

[redacted]

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