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WRITTEN OBSERVATIONS OF THE HELLENIC REPUBLIC

Case C-370/12 \*

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PRINGLE

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HELLENIC REPUBLIC

MINISTRY OF FOREIGN AFFAIRS

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

**WRITTEN OBSERVATIONS  
OF THE HELLENIC REPUBLIC**

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**in Case C-370/12 Pringle**

**[Referring Court: Supreme Court (Ireland)]**

The Hellenic Republic considers the questions referred to the Court for a preliminary ruling to be exceptionally important to the future of the Union at this critical juncture. The Court's ruling will be crucial in clarifying the framework for continuing efforts to overcome the financial crisis and its inherent challenges in a spirit of solidarity, with the goal of preserving the cohesion and unity of the euro area and of the Union as a whole.

**I**

**Background facts**

- 1 Under Article 48(6) of the Treaty on European Union ('TEU') 'the European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. *The decision referred to in the second paragraph shall not increase the competences conferred on the Union in the Treaties.*'

- 2 On 16 December 2010 the Belgian government submitted a proposal for revising Article 136 of the Treaty on the Functioning of the European Union (hereinafter ‘TFEU’), to allow the Member States whose currency is the euro to establish a stability mechanism. On the same day, the European Council decided to consult the European Parliament and the Commission regarding the proposal. The Council also decided to consult the European Central Bank. The European Parliament, the Commission and the European Central Bank issued the opinions required in accordance with the terms of Article 48(6) TEU.
  - 3 On 25 March 2011, the European Council adopted a decision amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro (Decision 2011/199/EU of 25 March 2011, OJ 2011 L 91, p. 1). In particular, it decided to add a third paragraph to Article 136 TFEU on the establishment of a stability mechanism by the Member States whose currency is the euro.
  - 4 The decision of the European Council was subject to the procedure for approval in accordance with the constitutional requirements of each Member State and will enter into force on 1 January 2013, once approval procedures have been completed in all the Member States or, failing that, on the first day of the month following receipt of the last approval notification.
  - 5 The third paragraph added to Article 136 TFEU reads as follows: ‘3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.’
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- 6 At the European Council meeting on 28 and 29 October 2010, the Heads of State or Government of the European Union agreed to establish a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole. On 17 December 2010 the European Council agreed on the need to establish the European Stability Mechanism (hereinafter ‘ESM’), to replace the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM), providing financial assistance to the Member States of the euro area as and when necessary. Further to the European Council conclusions of 25 March 2011, the Treaty Establishing the European Stability Mechanism (hereinafter ‘ESM Treaty’) was first signed by the Member States of the euro area. On 21 July 2011 it was decided to increase the flexibility of the ESM, linked to appropriate conditions, in order to increase the effectiveness of the mechanism. The modified ESM Treaty was signed by the Member States of the euro area in Brussels on 2 February 2012.

## II

### **Basic position**

- 7 The Hellenic Republic is of the opinion that the questions referred focus on the crucial issue of the validity of the amendment to the TFEU, and in particular the addition of a third paragraph to Article 136.
- 8 The Hellenic Republic's first observation is that the amendment to Article 136 TFEU is clearly limited in nature and that it fulfils the requirements of Article 48(6) TEU and does not go beyond its scope. The amendment to Article 136 TFEU does not relate to an exclusive competence of the Union and it is primarily (if not exclusively) designed to confirm, in the interests of legal certainty, that the establishment of a permanent stability mechanism is not incompatible with certain provisions of the TFEU on Economic and Monetary Union (hereinafter 'EMU'). With this as its starting point, the Hellenic Republic hereby submits the following observations on the questions raised by the referring court.

### **III**

#### ***Question 1: Amendment to Article 136 TFEU***

- 9 The Court has been asked to consider whether Article 48(6) was applied correctly in the present case, i.e. if the procedural and material requirements were observed.
- 10 All the procedural requirements (i.e. submission of a proposal for an amendment by a Member State, consultation with the European Parliament, Commission and European Central Bank and a unanimous decision by the European Council) were fully observed and this question does not appear to have arisen in the national proceedings.
- 11 The Hellenic Republic's observations on the material requirements (i.e. that the amendment relates to the provisions of Part Three of the TFEU on Union internal policies and actions and must not increase the competences conferred on the Union) are as follows:
- 12 Firstly, it should be noted that the amendment relates directly to provisions of Part Three of the TFEU, namely Article 136 TFEU regulating *economic policy* issues specifically for Member States whose currency is the euro. This is clear from the first paragraph of that article, which refers solely to budgetary discipline and economic policy guidelines for the euro area. There is nothing to suggest that other parts of the TFEU of an institutional nature are directly or indirectly affected.
- 13 Secondly, as regards any increase in the competences conferred on the Union, the purpose of the amendment is clearly defined: it recognises the power *of the Member States* to establish a permanent stability mechanism with the sole aim of dealing with crises that might jeopardise the stability of the euro area as a whole. In other words, no new legal basis has been established for action to be taken by

Union institutions. Action by the Member States of the euro area under the stability mechanism based on an intergovernmental agreement is not tantamount to action by Union institutions based on the provisions of the Treaties on EMU.

- 14 Similarly, as regards any reduction in Union competences, which is only possible under the ordinary revision procedure (see Article 48(2) TEU and Declaration 18 in the Treaty of Lisbon ‘in relation to the delimitation of competences’), action by the Member States as parties to the ESM Treaty cannot be seen as affecting the specific support mechanisms in the spirit of solidarity provided for in Articles 122 and 143 TFEU. Thus, Union competences are not affected, i.e. they are neither increased nor reduced.
  - 15 The sole purpose of the amendment to the TFEU is to *confirm the power* of the Member States of the euro area to establish a permanent stability mechanism. At the same time, it subjects to strict conditions the activation and operation of the mechanism. Thus the amendment serves *legal certainty*, does not affect Union competences and does not grant the Member States *carte blanche* to act in this area.
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- 16 For the rest, the European Council has adopted a decision based on Article 48(6) TEU the objective of which is to amend certain provisions of Part Three of the TFEU. Therefore, the question of infringement of each provision of the Treaties and the question of an internal hierarchy between the provisions of the Treaties do not arise.
  - 17 However, one might also consider in the present case if, from the point of view of respect for the division of competences between the Union and the Member States, the reference to action by the Member States under the ESM Treaty illegally circumvents the powers of Union institutions to act within the EMU framework.
  - 18 On this note, it must be emphasised that the establishment of a permanent stability mechanism designed to safeguard the stability of the euro area is not a monetary policy measure within the meaning of Article 127 et seq. TFEU; on the contrary, it comes within the broader framework of economic policy (Chapter 1 ‘Economic Policy’, Article 120 et seq. TFEU). Economic policy within the EMU framework is not an area that comes within the exclusive competence of the Union or within the concurrent competence of the Union and the Member States; it is an area in which the Member States ‘co-ordinate their ... policies’ (Article 5(1) TFEU). ‘Co-ordination’ means convergence of national policies, not a reduction in national competences in the sense of precluding action in this area on the part of the Member States. When it comes to co-ordination competences, the choice between the Community method and other types of action between the Member

States is a political one in light of the current circumstances, not an attempt to circumvent the treaties.

- 19 In other words, the power of the Union to act in a spirit of solidarity (within the meaning of Article 122 TFEU) in exceptional circumstances does not preclude the Member States having power to act to safeguard the stability of the euro area. In fact, the power to provide financial assistance under an intergovernmental agreement presupposes the co-ordination of the economic policies of the Member States and the Union based on Article 121 TFEU and supports that co-ordination within the Council in sectors not covered by action of Union institutions. This is precisely why the Member States expressly linked the provisions of the ESM Treaty [recitals 16 and 17 of the preamble and Articles 13(3) and 37(3)] with the application of measures provided for under the TFEU.
- 20 From this point of view, the Member States co-operated and adopted the ESM Treaty with full respect for the powers of the Union institutions, especially by making it easier for the Union to achieve its primary objective of safeguarding the stability of the euro area. That is also why the question of failure to observe the principle of sincere co-operation in accordance with Article 4(3) TEU, by circumventing the treaties, does not arise either. On the contrary, this is an example of sincere co-operation – and at a critical juncture – in the extremely difficult sector of economic policy co-ordination.
- 21 Finally, as a restriction on the scope of the simplified revision procedure, its compatibility with general principles of Union law which, according to the case-law of the Court constitute the very *foundations* of the Union (cf. Opinion 1/91 [1991] ECR I-6079, paragraph 71), could be reviewed.
- 22 More particularly, the question of respect for human rights, as provisions of the Charter of Fundamental Rights ('the Charter') and as general principles of Union law (see Joined Cases C-402/05 P and C-415/05 P *Kadi and Another* [2008] ECR I-6351, paragraphs 282 to 285), could be reviewed. Firstly, however, it is doubtful that action by the Member States within the framework of an intergovernmental agreement constitutes action to implement Union law within the meaning of Article 51(1) of the Charter. Likewise, as the Irish government argues in the reference by the referring court, it is difficult to envisage circumstances in which the application of an intergovernmental agreement on the provision of assistance between States and international institutions, such as the ESM Treaty, would violate human rights protected within the Union, especially the right to an effective remedy as provided for in Article 47 of the Charter. Moreover, due account must be taken of the fact that Article 37(3) of the ESM Treaty directly grants the Court jurisdiction to resolve disputes in connection with its application. Furthermore, the Treaty itself states [Article 13(3)] that its application must be consistent with measures by Union institutions within the framework of EMU. Therefore, inasmuch as its application is interlinked with the application of the TFEU, it can be subject to review by the Court via that route.

## IV

*Question 2: ESM Treaty*

- 23 The Hellenic Republic's first observation on the second question raised by the referring court is that, in entering into an intergovernmental agreement on financial assistance in the form of the ESM Treaty, the Member States of the euro area exercised their powers conferred by the amendment to Article 136(3) TFEU, remaining within its limits. In other words, the Member States have established an international financial institution whose sole purpose is to provide financial assistance, under strict conditionality, to Member States who face, or are threatened with, serious financial problems, in a bid to safeguard the stability of the euro area as a whole and the stability of its Member States. It is in this light that the individual aspects of the second question are considered below, in so far as they have not already been covered by the Hellenic Republic's observations on the first question.
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- 24 As regards the question of the division of competences between the Union and the Member States, the Hellenic Republic repeats its observations on the first question (cf. paragraph 12 above) that, as an agreement on financial assistance and given the terms on which it was agreed, the ESM Treaty does not fall within the area of defining and implementing the monetary policy of the Union, as provided for and specified in Article 127(2) TFEU. The provision of financial assistance within the meaning of the ESM Treaty may be linked to the operation of the euro area; however, it is not a measure of monetary policy as exercised by the European System of Central Banks. It is a measure being taken within the broader framework of the economic policy of the euro area. This is corroborated by the fact that Article 122 TFEU on Union financial assistance for Member States is included in the chapter on economic policy, not in the chapter on monetary policy.
- 25 Similarly, the ESM Treaty does not come within the exclusive competence of the Union under Article 3(2) TFEU, given that the Union has not concluded an international agreement of similar content, nor has it established a permanent support mechanism under internal rules similar to the mechanism established in the ESM Treaty. On the same note, the establishment and application of the ESM Treaty neither precludes nor limits the application of Article 122 TFEU and common Union rules are therefore not affected.
- 26 On the other hand, the provision of financial assistance is a measure which, even if it falls within the broader framework of economic policy in the euro area (Chapter 1 'Economic Policy, Article 120 et seq. TFEU), is not *stricto sensu* a measure to co-ordinate the economic policies of the Member States within the meaning of Article 121(3) TFEU. To be precise, it is a measure which *follows* co-ordination of the economic policies within the framework of Article 121



TFEU, i.e. within the Union framework, in keeping with the division of competences under Article 5(1) TFEU (see paragraphs 18 and 19 above).

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- 27 As regards the question of the material compatibility of the ESM Treaty with certain provisions of the TFEU on economic and monetary policy, the Hellenic Republic considers that the questions that must be answered relate primarily to Articles 123 and 125 TFEU.
- 28 As regards Article 123 TFEU, the Hellenic Republic's first observation is that the ban on overdraft facilities and other types of credit facilities is addressed to the ECB and the Member States' central banks and not to distinct international institutions such as the ESM. Furthermore, as Ireland submitted before the national court, the fact that a Member State undertakes to subscribe to the capital stock of the ESM does not mean that the Member State in question is providing a credit facility *per se* as envisaged by Article 123(1) TFEU to another Member State of the euro area. Similarly, the fact that a Member State has subscribed to the capital stock of the International Monetary Fund (hereinafter 'IMF') does not mean that it has provided a credit facility as envisaged by Article 123(1) TFEU if the IMF intervenes to support a Member State that also happens to be a member of the euro area.
- 29 Article 125 TFEU, i.e. the no bail-out clause, stipulates that the Union and the individual Member States shall not be liable for the commitments of central governments, other public authorities, other institutions or public undertakings of another Member State. In the Hellenic Republic's opinion, the *ratio* behind the no bail-out clause is to exclude the *obligation* to bail out individual Member States. However, that does not mean that Article 125 TFEU precludes a *discretion* on the part of the Union or a Member State to assist another Member State subject to conditions in keeping with the principle of budgetary discipline.
- 30 Furthermore, it is clear that collective action by the Member States within the framework of the ESM Treaty or the Union, depending on the current economic situation, in order to safeguard the *stability of the euro area as a whole*, does not fall within the ambit of Article 125 TFEU. In the present case, action within the framework of the ESM Treaty is designed not to bail out a Member State, but to provide financial assistance in the form of an interest-bearing loan subject to strict additional conditions, if and in so far as it is indispensable in order to safeguard the stability of the euro area. Therefore, the question of infringement of the no bail-out clause does not arise.
- 31 In fact, the addition of a third paragraph to Article 136 TFEU was intended not to amend Article 125 TFEU, but to clarify and confirm that the establishment of a financial assistance mechanism does not affect the no bail-out clause in Article 125 TFEU and it is precisely in this light that the specific provisions of the ESM

Treaty were adopted. That is the basic argument of the European Central Bank in its opinion during the procedure to amend Article 136 TFEU (see details in paragraph 35 below).

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- 32 As regards the remaining provisions of Title VIII of the TFEU on economic and monetary policy, the Hellenic Republic refers to its observations above and also notes the following:

(a) regarding Articles 2 and 3 TEU and 127 TFEU: the financing mechanism adopted under the ESM Treaty is not a monetary policy measure; it is a measure that comes within the broader framework of economic policy in the euro area (cf. paragraph 26 above);

(b) regarding Articles 119 and 120 TFEU: safeguarding the stability of the euro area is obviously the *ratio* behind all the regulations in Title VIII on EMU as a system and can even be seen as the ultimate objective in the midst of an acute crisis such as the present one;

(c) regarding Article 121 TFEU: the ESM Treaty is totally without prejudice to the general economic policy guidelines of the Member States of the Union. On the contrary, measures based on the ESM Treaty depend on the general guidelines and, given Article 13(3) of that treaty, the conditions are fully in keeping with every measure to co-ordinate economic policies based on the TFEU (cf. paragraph 26 above);

(d) also, the powers of the Union to provide financial assistance to a Member State in exceptional circumstances based on Article 122(2) TFEU do not preclude similar powers of the Member States (cf. paragraph 19 above);

(e) finally, the obligation to avoid excessive government deficits imposed under Article 126 TFEU still applies and the conditions for the activation of financial assistance based on the ESM Treaty precisely include compliance with the requirements of Article 126 TFEU.

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- 33 As regards the powers and mission of the Union institutions, the first observation that needs to be made is that their participation in the operation of the ESM Treaty has been envisaged precisely as a means of ensuring that the Treaty is applied in keeping with all the Union *acquis* and serves the purpose of EMU.

- 34 For the rest, the tasks of the Union institutions within the framework of the ESM Treaty are based on the founding treaties and do not exceed the powers conferred by them. In particular, the Commission's tasks under the ESM Treaty are based on Article 17 TEU, which states that the Commission shall 'exercise co-ordinating,

executive and management functions, as laid down in the Treaties’. Also, Article 282(4) TFEU, in conjunction with Article 23 of the Statute of the ESCB and the ECB (Protocol No 4 of the Treaties) allows the ECB to adopt such measures as are necessary to carry out its tasks, which include establishing relations with central banks and financial institutions in other countries and, where appropriate, with international organisations. Finally, as regards the jurisdiction of the Court of Justice of the European Union, the ESM Treaty expressly refers in recital 16 of its preamble to the special agreement clause in Article 273 TFEU, the preconditions of which are fulfilled in the present case.

## V

### ***Question 3: Relationship between Decision 2011/199 and ESM Treaty***

- 35 As regards the third question by the referring court, the Hellenic Republic endorses the opinion given by the Commission during the revision procedure relating to Article 136 TFEU. The Commission stated: ‘The new paragraph, which will be one of the treaty provisions specific to Member States whose currency is the euro, *confirms* that the legal framework of the Union does not prevent those Member States from establishing a permanent stability mechanism enabling them to obtain any necessary financial assistance’. On the same note, the opinion given by the ECB further clarified that ‘*even before its entry into force, the text of the new Article 136(3) TFEU helps to explain, and thereby confirms, the scope of Article 125 TFEU* with respect to safeguarding the financial stability of the euro area as a whole, i.e. the activation of temporary financial assistance is in principle compatible with Article 125 TFEU, provided that it is indispensable for such safeguarding and subject to strict conditions’.
  
- 36 In light of those opinions and the arguments set out above, the Hellenic Republic considers that the amendment to Article 136 TFEU is a valid amendment in accordance with Article 48(6) TEU. This amendment to Article 136 TFEU is designed to confirm *in the interests of legal certainty*, within the framework of the Treaties and at a critical economic juncture, that the establishment of a permanent stability mechanism is not incompatible with certain provisions of the TFEU on Economic and Monetary Union.
  
- 37 Thus it assures all the Member States which, due to the urgent economic situation, had already started the process to replace the temporary mechanism with a permanent financial assistance mechanism, that such a mechanism is in keeping with and is compatible with their obligations under the Treaties. This process has resulted in the conclusion of the ESM Treaty which, precisely because of the confirmatory nature of the amendment to Article 136 TFEU, does not depend, in terms of its entry into force, on the entry into force of Decision 2011/199. Therefore, in reply to the third question, the Hellenic Republic considers that the entry into force of Decision 2011/199 is not a procedural prerequisite of the conclusion and entry into force of the ESM Treaty .

**Agents of the Hellenic Republic**

**Mr Georgios Karipsiadis, Ms Katerina Samoni and Mr Kosmas Boskovits**