

**IN THE COURT OF JUSTICE OF THE
EUROPEAN UNION**

**REFERENCE FOR A PRELIMINARY RULING
CASE C-370/12 PRINGLE**

WRITTEN OBSERVATIONS OF THE UNITED KINGDOM

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Introduction

1. Pursuant to Article 23 of the Protocol on the Statute of the Court of Justice, the United Kingdom of Great Britain and Northern Ireland submits the following written observations on the questions referred for a preliminary ruling under Article 267 TFEU by the Supreme Court of Ireland.
2. As the order for Reference indicates, the plaintiff in the main action (now the appellant before the Supreme Court) is a Member of the Irish Parliament who opposes the participation by Ireland in the Treaty Establishing the European Stability Mechanism, signed on 2 February 2012.¹
3. Issues raised in the course of those proceedings concern the validity of European Council Decision (2011/199/EU) of 25 March 2011 amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro.² The European Council Decision was adopted under the simplified revision procedure laid down by Article 48(6) TEU. Under that procedure, the Decision will not enter into force until it has been approved by all the Member States in accordance with their respective constitutional requirements.
4. Other issues raised in the proceedings are as to whether an EU Member State is entitled, consistently with the EU Treaties, to enter into and ratify a Treaty such as the ESM Treaty; and whether such entitlement is dependent on the validity of the European Council Decision and on its having entered into force.

Question (1): Validity of the European Council Decision

5. The United Kingdom takes the view that the European Council Decision was validly adopted under the simplified revision procedure of Article 48(6) TEU. The wording of

¹ Hereinafter, "the ESM Treaty".

² OJ 2011 L 91/1. Hereinafter, "the European Council Decision" or, where the context permits, "the Decision".

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Article 48(6) identifies only two conditions governing the availability of the simplified revision procedure that the paragraph lays down: the procedure must only be used for amending provisions contained in Part Three of the TFEU relating to the internal policies and actions of the Union; and it must not be used to increase the competences conferred on the Union. In the submission of the United Kingdom, both conditions were amply fulfilled in the case of the Decision.

6. As to the first condition, the proposed amendment consists of the addition of a paragraph (3) to Article 136 TFEU, which is contained in Chapter 4 of Title VIII of Part Three of the TFEU. It does not affect any other provision of the Treaty.
7. As to the second condition, it is manifest that the proposed amendment does not confer any new competence upon the Union or increase its existing competences. Its sole purpose is to acknowledge the possibility for the Member States whose currency is the euro to establish a permanent crisis mechanism in order to safeguard the financial stability of the euro area as a whole, which can be activated in cases where it is indispensable for this purpose, any financial assistance granted under the mechanism to be subjected to strict conditionality.³
8. Nor again manifestly does the proposed amendment reduce any competence of the Union: it leaves existing ones intact. The United Kingdom respectfully submits that it is not necessary for the Court to address the wider point of principle in these proceedings, but for the avoidance of doubt wishes to state that in its view the simplified revision procedure of Article 48(6) can be used for the reduction of Union competences.
9. In the submission of the United Kingdom, the amendment is essentially declaratory in its effect, making explicit what is already legally the case under Part Three of the TFEU. There is nothing in the existing Treaties that prevents the Member States

³ European Council Decision, recitals (2) and (3).

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whose currency is the euro from taking action of the kind referred to in the proposed Article 136(3).

10. Such action would, in particular, be compatible with the "no bail-out clause" in Article 125(1) TFEU, which provides that the Union and Member States "shall not be liable for or assume the commitments" of any Member State's central government, local authorities or other public sector entities. That provision, it has been said "is an essential part of the 'budgetary code' of the Union", giving expression to the principle that each Member State is responsible for its own public finances.⁴ However, as the same learned author points out, the no bail-out clause does not mean that loans by Member States providing assistance to another Member State in financial difficulties are excluded.⁵ Nor *a fortiori* does it prevent collective action by the Member States whose currency is the euro designed to safeguard the stability of the euro area as a whole, provided that Member States' liability remains several. The requirement of strict conditionality, also present in the case of the Union financial assistance that can be granted pursuant to Article 122(2) TFEU, is a further element tending to reinforce the compatibility of the proposed amendment with a "budgetary code" based upon Member States' having to face up to their financial responsibilities.
11. Nor, it is submitted, is the European Council Decision incompatible with any other provision of the Treaties or with the general principles of law. In particular, the United Kingdom shares the view of Ireland, which is referred to under point 1. on page 14 of the Order for Reference, that the establishment of a permanent funding mechanism, as envisaged by the proposed amendment, cannot be regarded as impinging upon the exclusive competence of the Union, pursuant to Article 3(1)(c) TFEU, in the area of monetary policy for the Member States whose currency is the euro.

⁴ See J-V. Louis, Guest Editorial, 47 CML Rev (2010), p. 978.

⁵ *Ibid.*, p. 985.

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12. In the result, the United Kingdom respectfully submits that the Court of Justice should reply to the first question that consideration of the European Council Decision has revealed no factor of such a kind as to affect its validity.

Question (2): Entitlement of a Member State whose currency is the euro to enter into and ratify an international agreement such as the ESM Treaty

13. Of the six matters identified by the Supreme Court of Ireland as falling to be considered in connection with Question (2), the United Kingdom will focus upon the fourth, concerning "the powers and functions of Union Institutions pursuant to principles set out in Article 13". The Supreme Court's reference to this matter was presumably prompted by the contention of the appellant, noted under point 4. on page 11 of the Order for Reference, that "[t]he ESM Treaty confers new competences on Union Institutions and entails performance by them of tasks that are incompatible with their functions as defined in the EU Treaties". In addressing that contention, the United Kingdom will first seek to define the conditions under which tasks may lawfully be assigned to one or more of the EU Institutions under an intergovernmental instrument, whether concluded by all or only a number of the Member States, and then go on to examine whether those conditions are fulfilled in the case of the ESM Treaty.

A. *Conditions governing the legality of the assignment of tasks to EU Institutions under an intergovernmental instrument*

14. In the submission of the United Kingdom, the legality of the assignment of tasks to one or more EU Institutions by an intergovernmental instrument depends upon compliance with two conditions. First, the tasking of the Institutions must be authorised by all of the Member States. Secondly, such tasking must be fully compatible with EU law; in particular, it may not alter the essential character of the Institutions concerned, as conceived by the Treaties.

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- (i) *The condition that the tasking of the EU Institutions under an intergovernmental agreement must be authorised by all of the Member States*
15. This first condition is derived from fundamental principles of the EU Treaties, which have been clarified in case law and are confirmed by institutional practice.
16. The condition is the corollary of a Union structure which has been designed by the Member States "to attain objectives they have in common", as stated in Article 1, first paragraph of the TEU. The Member States are, moreover, the source of the Union's revenue, because they determine the nature and quantity of "own resources" under the procedure set down in Article 311 TFEU. Their collective authorisation is, therefore, needed for any action by the Institutions outside the Union framework that entails expenditure funded out of such resources.
17. The role of the Institutions of the Union, as defined by Article 13(1) TEU, is "to promote *its* values, advance *its* objectives, serve *its* interests, those of *its* citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of *its* policies and actions".⁶ If a group of Member States were at liberty to conscript the EU Institutions for the performance of services outside the Treaty framework, there would be a risk of the Institutions being distracted from the duties and the loyalty they owe to the Union as a whole.
18. Article 13(2) TEU provides: "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 therein". On a literal reading, that provision might be thought completely to preclude the allocation of tasks to EU Institutions outside the Treaty structure, even with the blessing of all the Member States; however, the lesson of the

⁶ Emphasis added.

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case law appears to be different. There are only two cases directly in point, the *Bangladesh*⁷ and *European Development Fund (EDF)*⁸ cases.

19. In *Bangladesh* the disputed act was a decision by the Representatives of the Governments of the Member States meeting within the Council on the direct financing, from national resources, of humanitarian aid in response to a natural disaster.⁹ The Court found no legal objection to the Member States "entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting within the Council".¹⁰
20. The *EDF* case concerned the arrangements on the financing, by way of Member State contributions outside the Community budget, of development aid under the Fourth ACP-EEC (or Lomé) Convention. The arrangements were laid down by a so-called "Internal Agreement", which had, again, been adopted as a decision of the Representatives of the Governments of the Member States meeting within the Council. It was held by the Court that the commitments under the Convention in respect of development aid had been jointly undertaken by the Community and the Member States, and the latter were free to adopt an intergovernmental mode of implementation. The Court accepted without commentary the fact that the administration of the EDF had been entrusted to Community Institutions.
21. In both of those cases the intergovernmental act in question was adopted by the whole body of Member States. In the submission of the United Kingdom, the lesson to be drawn is that, for the tasking of the Institutions under an intergovernmental instrument, the collective authorisation of the whole body of Member States must be given; and this should be done in a way that provides a link to the legal order of the

⁷ Joined Cases C-181/91 and C-248/91, *European Parliament v Parliament and Commission* [1993] ECR I-3685.

⁸ Case C-316/91, *European Parliament v Council* [1994] ECR I-625.

⁹ The Member States took this action because there were insufficient funds in the relevant part of the Community budget to cover the aid.

¹⁰ At paragraph 20.

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EU. The "hybrid character" of decisions of Representatives of the Governments of the Member States meeting within the Council would supply the necessary link: as Advocate General Jacobs noted in his *Bangladesh* and *EDF* Opinions, they are adopted in an institutional setting and they have been recognised as belonging to the *acquis communautaire*.¹¹

22. Institutional practice reflects the legal position as stated in the previous paragraph. A familiar illustration is provided by the numerous instances of authorisation, given by decisions of the Representatives of the Governments of the Member States meeting within the Council, for the Commission to negotiate the elements of mixed agreements relating to national competences. The same practice is followed when a common position has to be established for the purposes of a decision to be taken by a body established pursuant to a mixed agreement: the position is adopted, for the EU, by a Council decision under Article 218(9) TFEU and, for the Member States, by a parallel decision of their Representatives meeting within the Council.¹²

(ii) *The condition that any intergovernmental tasking of the Institutions must be fully compatible with EU law; in particular, it may not alter the essential character of the Institutions concerned, as conceived by the Treaties*

23. In the submission of the United Kingdom, this second condition can be seen as resulting, for the Member States, from the principle of sincere cooperation in Article 4(3) TFEU and, for the Institutions, once again from Article 13(2) TFEU. It is an application of the broader principle that intergovernmental acts cannot detract in any way from Treaty provisions; they may not be used to circumvent the amendment procedures laid down by Article 48 TEU.¹³

¹¹ See Article 3 (1) of the 1972 Act of Accession, which has been replicated in subsequent accessions texts.

¹² For a recent example, see Opinion 1/08 [2009] ECR I-11129.

¹³ Case 43/75, *Defrenne* [1976] ECR 455, paras 57 and 58.

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24. Useful guidance as to the operation of the condition can be found in leading cases on the requirements that the institutional provisions of international agreements must meet in order to ensure the autonomy of the EU legal order.¹⁴
25. Those cases are not precisely in point because they are concerned with agreements concluded by the EU, not with intergovernmental instruments; however, the issue of preserving the autonomy of the legal order arises *a fortiori* in respect of the latter. One of the requirements is that the essential character of the powers of the EU and its Institutions as conceived in the Treaties must remain unaltered. As regards the Court of Justice more particularly, two conditions have been identified in the case law as "indispensable" for safeguarding its powers: that the different aspects of its exclusive jurisdiction must not be called in question; and that neither must the binding nature of its decisions.¹⁵
26. The *Bangladesh* and *EDF* cases provide illustrations of the Commission and the Council being allocated tasks that were fully consistent with their respective institutional characters.

B. Application of the conditions of legality to the ESM Treaty

(i) Tasks assigned to the Commission and to the ECB

27. On 20 June 2011 the Representatives of the Governments of the Member States of the EU adopted a Decision agreeing to the inclusion in the ESM Treaty of provisions for the Commission and the ECB to carry out the tasks as set out in that Treaty. The Decision is referred to in recital (10) of the preamble to the ESM Treaty.
28. The first of the conditions of legality for the tasking of EU Institutions under an intergovernmental instrument has, accordingly, been fulfilled with respect to those

¹⁴ Opinion 1/92, *New Draft EEA Agreement* [1992] ECR I-1821; Opinion 1/00 [2002] ECR I-3493; Opinion 1/09, not yet reported.

¹⁵ Opinion 1/00, paragraphs 23 to 26.

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two Institutions. Although the parties to the ESM Treaty are fewer than the full complement of Member States, all 27 of the latter have authorised the assignment of tasks to those Institutions, through the adoption of the Decision of 20 June 2011.

29. Moreover, it is submitted, the tasks assigned by the ESM Treaty to, respectively, the Commission and the ECB are fully compatible with EU law. They comprise: participation in meetings;¹⁶ economic and financial assessments;¹⁷ the negotiation and signature of MoUs establishing the conditionality for granting stability support;¹⁸ and the monitoring of compliance with the conditions imposed.¹⁹ None of these tasks can be regarded as tending to alter the essential character of the Institutions concerned, as conceived by the Treaties.

30. With regard to the tasking of the Commission and the ECB, the second of the conditions of legality is thus also fulfilled.

(ii) The role given to the Court of Justice

31. Article 37(2) of the ESM Treaty confers jurisdiction on the Board of Governors to decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of the ESM Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with the ESM Treaty. Under Article 37(3), if an ESM Member contests the decision reached by the Board of Governors, the dispute is submitted to the Court of Justice. The Court's judgment will be binding on the parties to the procedure, who are required to take the necessary measures to comply with it within a period to be decided by the Court.

¹⁶ Articles 5(3) and 6(2).

¹⁷ Articles 4(4), 13(1) and 14(6).

¹⁸ Article 13(3) and (4).

¹⁹ Article 13(7). On the provision by the Commission of reports in fulfilment of its monitoring role respecting the different forms of financial assistance instruments see, respectively, Articles 14(5), 15(5), 16(5) and 17(5).

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32. The role given to the Court of Justice by Article 37(3) was not referred to in the Decision of 20 June 2011. However recital (16) of the preamble to the ESM Treaty treats the envisaged recourse to the Court as an application of an already existing jurisdiction, namely that conferred by Article 273 TFEU. Thus there is no new tasking of the Court requiring authorisation by all of the Member States and a demonstration of its conformity with EU law.
33. For Article 37(3) of the ESM Treaty to be considered a correct application of the Article 273 jurisdiction, three requirements need to be met: the procedure it provides for must be one for the resolution of disputes between Member States; the disputes in question must relate to the subject-matter of the Treaties; and the submission of those disputes to the Court of Justice must take place under a special agreement between the parties.
34. As to the first requirement, it is clear from the title of Article 37 and from the drafting of its paragraphs (2) and (3) that the procedure referred to is genuinely designed for the resolution of disputes. By definition, any dispute between ESM Members would be between Member States of the EU.²⁰ While the Court of Justice may also be seised under Article 37(3) in a dispute between an ESM Member and the ESM,²¹ this too, it is submitted, falls within the scope of Article 273 broadly interpreted in the light of its *effet utile*, given the composition of the ESM itself, of the Board of Governors and of the Board of Directors.²² Although the ESM is a legal entity independent of its Members, in any case where it reaches a decision that is contested by one or more Members the latter will, in fact, be in dispute with those Members constituting the qualified majority by which the ESM must have acted.

²⁰ ESM Treaty, Article 1 (2) and Article 2.

²¹ Reading paragraph (3) together with paragraph (2).

²² Pursuant to Article 5 (1) of the ESM Treaty, each ESM Member appoints a Governor and an alternate Governor; while, pursuant to Article 6 (1), each Governor appoints one Director and one alternate Director.

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35. In the submission of the United Kingdom, Article 37(3) also fulfils the second requirement. As defined by Article 3 of the ESM Treaty, the aim of the ESM is to mobilise funding and provide stability support, under strict conditionality, for the benefit of Members experiencing or threatened by severe financial problems, where this is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. The eighth recital of the preamble to the TEU refers to "a single and *stable* currency"²³ as something that the Member States are resolved to achieve, and Article 3(3) TEU identifies the establishment of "an economic and monetary union whose currency is the euro" as one of the objectives of the Union. It is submitted that a dispute on any matter falling within the remit of an entity created in order to counter threats to the financial stability of the euro area, which could in an extreme case put the very survival of the single currency – and hence the achievement of one of the objectives specified by Article 3(3) – at risk, would manifestly relate to the subject-matter of the Treaties. The addition of the proposed paragraph (3) to Article 136 TFEU, once the European Council Decision enters into force, will further strengthen the argument. However, it is submitted that the relevance of the role the ESM will play in relation to Article 136 is already implicit in the existing text of the Article. The conferral of power to adopt measures specific to the Member States whose currency is the euro only makes sense on the assumption that the financial health and ultimate survival of the eurozone remain possible.
36. As to the third requirement, in the view of the United Kingdom, the text of Article 273 covers the situation where Member States agree that they will submit a category of future disputes for resolution by the Court. Article 37(3) can, therefore, be regarded as constituting a "special agreement" within the meaning of Article 273 TFEU.

²³ Emphasis added.

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37. In the result, the United Kingdom submits the provisions of the ESM Treaty assigning tasks to EU Institutions provide no legal impediment to a Member State's entering into and ratifying such an international agreement.

Question (3): Whether, assuming the European Council Decision is found to be valid, the entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty is subject to that Decision's entry into force

38. In view of the answer given above to Question (1),²⁴ the United Kingdom is able to reply briefly to this Question. Since there is nothing in the existing Treaties that prevents the Member States whose currency is the euro from taking action of the kind referred to in the proposed Article 136(3), they could perfectly well conclude the ESM Treaty independently of the entry into force of the European Council Decision.

Conclusion

39. The United Kingdom, therefore, respectfully proposes that the Court of Justice should reply to the Questions referred to it by the Supreme Court of Ireland, as follows:

Question (1)

Consideration of the European Council Decision has revealed no factor of such a kind as to affect its validity.

²⁴ See paragraphs 9 to 12, above.

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Question (2)

The provisions of the ESM Treaty assigning tasks to EU Institutions provide no legal impediment to a Member State's entering into and ratifying such an international agreement.

Question (3)

Since there is nothing in the existing Treaties that prevents the Member States whose currency is the euro from taking action of the kind referred to in the proposed Article 136(3) TFEU, they could perfectly well conclude the ESM Treaty independently of the entry into force of the European Council Decision.


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