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WRITTEN OBSERVATIONS OF THE ITALIAN REPUBLIC

Case C-370/12 \*

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PRINGLE

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Avvocatura Generale dello Stato

Ct. 30855/12

**COURT OF JUSTICE OF THE EUROPEAN UNION**

**OBSERVATIONS**

of the **GOVERNMENT OF THE ITALIAN REPUBLIC**, represented by the Agent appointed for the case, with an address for service in Luxembourg at the Embassy of Italy,

in Case **C-370/12**

APPLICATION to the Court for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland) in the case of

**THOMAS PRINGLE**

*– plaintiff and appellant –*

v

**THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL**

*– defendants and respondents –*

\* \* \*

***I The question referred***

- 1 By a decision of 31 July 2012, lodged on 3 August following, the Supreme Court (Ireland) referred the following questions to the Court in civil appeal proceedings pending between the parties indicated above:

***(first question)*** *Whether European Council Decision 2011/199/EU of 25 March 2011 (hereinafter ‘the European Council Decision’) 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.

**(second question)** 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?*

**(third question)** *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?*

## ***II Facts and the dispute in the main proceedings***

- 2 Mr Pringle, a citizen of Ireland and a member of the national Parliament, brought proceedings against the respondents, claiming that, by reason of its adoption of the ESM Treaty, Ireland had inter alia undertaken obligations in contravention of the Treaty on European Union and the Treaty on the Functioning of the European Union concerning economic and monetary policy, directly encroaching on the exclusive competences of the Union in the matter of the euro and related policies.
- 3 In the context of that action, the applicant maintained that the European Council Decision had been adopted in breach of Article 48(6) TEU because it entails an alteration of the competences of the Union. Moreover, he claimed that the Council Decision breached certain provisions of the Treaties concerning economic

and monetary union and was inconsistent with the principle of legal certainty, which is one of the general principles of the law of the European Union.

- 4 Consequently, Mr Pringle asked the Irish court to restrain the competent Irish authorities from ratifying the ESM Treaty.
- 5 The application was originally lodged with the High Court, which dismissed the appellant's claims under all headings. Mr Pringle appealed against that decision to the Supreme Court, which raised the questions leading to the present preliminary stage in the proceedings.

### ***III Analysis***

#### ***III.1 The first question***

##### ***III.1.1 The jurisdiction of the Court***

- 6 By its first question, the referring court asks the Court to rule on the validity of a Council Decision giving rise to an amendment to the Treaty on the Functioning of the European Union (TFEU).
- 7 The question calls for the Court to examine an issue that typically arises in legal orders based on 'constitutional 'law' and relates to the assessment of the legality of legislation of a constitutional nature.<sup>1</sup>
- 8 That issue raises problems of two types:
  - in subjective terms, the problem of identifying the body competent to rule on the validity of legislative acts where the constitutional charter does not make express provision in that regard;
  - in objective terms, the problem of whether revision of the constitution is subject to any limits.
- 9 As regards the first aspect, under the differing constitutional arrangements of the Member States the answer to the question of the identity of the body competent to rule on the legality of primary legislation (where such an assessment is permitted) is generally unequivocal, in the sense that such power is conferred on the body with jurisdiction over the validity of secondary legislation (constitutional courts, in cases of so-called 'centralised' assessment, and the judicial authorities where assessment is 'dispersed'). Under this arrangement, the rationale for which is

<sup>1</sup> – Considering the body of legislation constituted by the Treaties to be the 'constitutional' charter of the European Union is a settled fact in the case-law of the Court; see, among many others, the Opinion of 14 December 1991, No 1/91, paragraph 21, but also the judgment in Case C-294/83 *Parti écologiste 'Les Verts' v Parliament* [1986] ECR 1339, paragraph 23.

intuitive, the body competent to rule on the legality of a provision amending the Treaties or of a provision of equivalent standing cannot be other than the Court of Justice, although Article 267 TFEU does not expressly grant it such power.<sup>2</sup>

- 10 As to the objective aspect, comparative constitutional law is broadly unanimous in permitting *ab externo* assessment of the legality of laws amending the constitution or of laws of equivalent status, and hence in permitting scrutiny of compliance with the procedure for drafting the law and verification whether there are any preconditions that confer legitimisation on the legislative institution: in such cases, these are formal limits relating not to the actual exercise of the power to amend the constitution but to its very basis and which, if exceeded, determine that the act is non-existent as an act amending the constitution.
- 11 It appears that the case-law and literature on any substantive or ‘material’ limits is more varied: besides legal systems in which it is held that the correct exercise of the power to amend the constitution cannot be reviewed as to the substance if the formal conditions conferring such power have been respected, there are more than a few national courts which, on the basis of a widely-held technical opinion, also recognise substantive limits on the power to amend the constitution.
- 12 In Italy, for example, despite the absence of any explicit provision, examination of the formal legality of laws amending the constitution and other constitutional laws (which entails verification of compliance with Article 138 of the Constitution governing the procedure for drafting such laws) is taken for granted, and moreover the Corte Costituzionale (Constitutional Court) recognised in a judgment dating back some years that there are also substantive limits on the power to amend the constitution and asserted its own competence to assess them, and hence to rule, from this perspective, on the validity of laws amending the constitution and other constitutional laws.<sup>3</sup> That interpretation obviously implies a distinction between ‘constituent power’ and ‘power to amend the constitution’. The latter is a ‘constituted’ power, in other words one derived from a given

<sup>2</sup> – In the present case, moreover, the amendment of the Treaty stems from an act of the Council, so that it could be held that it is subject to autonomous review within the meaning of the part of Article 267(1)(b) TFEU that calls on the Court to verify the ‘*validity ... of acts of the institutions ... of the Union*’.

<sup>3</sup> – See Judgment No 1146 of 1988, in which the Corte Costituzionale stated that ‘the Italian Constitution contains a number of overriding principles, the essential content of which cannot be annulled or amended, even by laws amending the Constitution or by other constitutional laws. These include both the principles that the Constitution itself explicitly lays down as absolute restraints on the power of constitutional amendment, such as the republican form of government (Article 139 of the Constitution) and the principles which, despite not being expressly mentioned among those not subject to the constitutional amendment procedure, form part of the essence of the overriding values on which the Italian Constitution is based. ... It can therefore not be denied that this Court is competent to rule on the compliance of laws amending the Constitution and other constitutional laws with the overriding principles of the constitutional order. Moreover, were that not the case, one would arrive at the absurd situation of considering the Constitution’s system of judicial guarantees to be defective and ineffectual in relation to its rules of a higher order.’

constitutional arrangement, which can therefore not be overturned by the exercise of that power without losing its own legitimacy: it is a power subject to judicial limits and is clearly differentiated with respect to the constituent power, which, by contrast, is an *extra ordinem* power, with its origin in prejudicial events that created the constitutional order (revolutionary acts, secession, the end of dictatorships or wars, etc.).

- 13 This theoretical justification also determines the extent of the substantive limits on the power of amendment, in the sense that they would not be identified in all constitutional provisions of principle but only in the principles that form part of the essence of overriding values on which the given constitutional arrangement is founded, as the Italian Corte Costituzionale has made clear.
- 14 It is therefore possible to sketch the lines of the issues in the present case, which does not appear to be capable of resolution on the basis of only the past case-law of the Court.<sup>4</sup>
- 15 In the light of the considerations thus far, the Italian Government considers that the Court has jurisdiction to assess compliance with Article 48(6) TEU, and in particular:
  - (i) compliance with the procedure for drafting the decision, which in the present case is not disputed by any of the parties;
  - (ii) the fact that the amendment relates to Part Three of the TFEU: as we shall maintain, in all probability that requirement is to be understood not only in the ‘geographic’ sense but also in substantive terms;
  - (iii) the fact that the amendment does not extend the competences conferred on the Union and, in all probability, that it does not reduce those competences either: it appears that this second requirement must be deduced, by systematic interpretation, from Article 48(2) TEU, which entrusts amendments designed ‘*to increase or to reduce the competences conferred on the Union in the Treaties*’ to the ordinary revision procedure.
- 16 By contrast, the Italian Government considers it unnecessary in the present case to go into the subtle question of whether there exists a power to review the substance of the Council Decision as regards a possible contravention of prevailing primary legislation of the Union. In the light of the remarks set out above, even if it were accepted that such review were permissible, it would be limited to determining whether the Decision contravened the fundamental principles that complement the founding values of the Union as a community based on the rule of law, as it is not

<sup>4</sup> – The statement contained in the Order of 13 January 1995 in Case C-253/94 P *Roujansky v Council* [1995] ECR I-7, paragraph 11, which appears to be very clear in the sense that the Court does not have jurisdiction, does not appear to be decisive, as it was delivered in a case in which the lack of jurisdiction – in that case the power to declare the entire Treaty void – was manifest.

possible, outside the realms of such hypotheses, to establish a priori the hierarchy of the various sources of primary law or of the general principles and the written sources of such law or, within the latter, of the various treaties or different parts of the same treaty.

- 17 It is clear from the order for reference that in the case in point there is no question of the disputed decision having contravened one of those fundamental principles. Apart from a possible breach of the principle of sincere cooperation, it raises the possibility of a conflict between the proposed Article 136(3) TFEU and other provisions of Part Three of the TFEU. It appears to the Italian Government that – leaving aside the possibility that such questions are unfounded, on which we shall present arguments below – no hierarchical relationship can be established between the provisions cited and Article 136(3) TFEU, only possibly a normal relationship of speciality between legislative sources of the same rank, the coordination of which must be subject to interpretation by the courts, and hence primarily by the Court of Justice, in exercising the jurisdiction to interpret the Treaties and other acts establishing the European Union conferred on it by Article 267(1) TFEU.

### ***III.1.2 The lawfulness of the use of the simplified revision procedure referred to in Article 48(6) TEU***

- 18 The Council Decision amending Article 136 TFEU makes it clear that 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, provided that the granting of any required financial assistance under the mechanism will be made subject to strict conditionality.
- 19 The purpose of the measure is patently to contribute, by ensuring the stability of the euro area, to the creation of a monetary union, as proclaimed in Article 3(4) TEU, while at the same time safeguarding – by means of the requirement for ‘conditionality’, obviously in terms of the budget adjustment policies of the Member States involved – the objective of stability of the currency and of inflation, which is the supposition for such policies.
- 20 The measure plainly falls within the scope of sectors governed by Title VIII of Part Three of the TFEU on ‘*economic and monetary policy*’, without introducing innovations or derogations in relation to provisions contained in other parts of that treaty.
- 21 Hence, the condition laid down in Article 48(6) TEU that the simplified revision procedures may be used to introduce amendments affecting exclusively Part Three of the TFEU is respected, not only formally but also substantively.
- 22 Equally, the condition that the simplified revision procedure cannot lead to an increase – or, presumably, a reduction – in the competences conferred on the Union is respected.



- 23 As stated above, the Council Decision merely makes it clear that the Member States of the euro area may establish a mechanism able to intervene in the markets to reinforce the coordination of the economic policies for which the Treaties already provide and that such a mechanism is established precisely because the European system of central banks, on which exclusive responsibility for monetary policy is conferred, cannot perform these functions.
- 24 Hence, no powers previously conferred on the Union are vested in intergovernmental bodies. This is clearly evident merely from the consideration that mechanisms for mutual assistance between Member States had been established – in similar or related sectors – despite the absence of express provision, such as that now introduced into Article 136 TFEU. We refer in particular to the European Financial Stability Facility (EFSF), established on 9 May 2010 as an intergovernmental organisation under international law, of which the ESM constitutes, so to speak, a further development of a permanent nature.
- 25 Nor is there any diminution of the powers conferred on the Union with regard to monetary policy (see Article 3(1)(c) TFEU), including pursuit of the objective of price stability referred to in Article 127(1) TFEU. As stated above, the ESM does not pursue that objective by means of monetary policy measures but contributes to it only indirectly by means of financial policy instruments.

***III.1.3 Compatibility of Article 136(3) TFEU with the provisions of primary law cited in the order for reference***

- 26 On the basis of the remarks set out in paragraphs 16 and 17 above, the Italian Government considers that in the present case there is no need to examine the intrinsic legality of the Council Decision, as the order for reference does not allege a breach of those fundamental principles which might hypothetically justify a review of the substantive legality by the Court.
- 27 The Italian Government therefore considers that the Court should declare that it has no jurisdiction to verify the validity of the Council Decision, at least as concerns the present case, and hence as concerns the provisions of primary law of the Union specifically cited by the court of reference.
- 28 In any case, it appears to the Italian Government that if the precise features of the Council Decision are determined by interpretation, that Decision can be reconciled perfectly with the aforesaid provisions.
- 29 Above all, the Italian Government cannot see how the Council Decision can be deemed to breach the principle of sincere cooperation or to conflict with the instruments of economic cooperation introduced by Articles 121 and 126 TFEU: far from authorising the creation of a parallel instrument of economic cooperation among the contracting States – such as to marginalise the cooperation bodies

envisaged by the cited provisions of the Treaty – the Council Decision clearly aims to contribute to the attainment of those objectives, not least because in pursuing them within the intergovernmental organisation the contracting States will obviously be bound to comply strictly with the principle of sincere cooperation with the other Member States and with the institutions of the Union, as well as with the requirements of economic cooperation laid down in the Treaty articles under examination here (which were duly recalled in the articles of the ESM mechanism: see Article 13(3)).

- 30 Furthermore, no conflict can be discerned with Article 122(2) TFEU, which provides for financial assistance in well defined circumstances (natural disasters or exceptional occurrences beyond the control of a Member State). In envisaging the granting of financial assistance by Union institutions, that provision does not give the Union exclusive competence in this regard, and hence does not prevent the Member States from agreeing among themselves on other financial assistance measures.
- 31 Nor can there be a conflict with the prohibition on financial assistance contained in Article 123 TFEU, since that prohibition does not apply to the individual Member States but exclusively to the European Central Bank and to the system of national central banks, and given that Article 136(3) TFEU does not envisage the creation of a monetary institution with functions overlapping those of a central bank but the establishment of a financial facility for the purpose of mobilising financial resources and supporting financial stability as a whole and that of the individual contracting States.
- 32 Nor can a prohibition on mutual assistance between Member States be deduced from Article 125(1) TFEU, which codifies the so-called *no bail-out clause*. We are aware that, according to some opinions that were aired in the public debate at the time of the first financial measures in favour of Greece, that clause supposedly excludes any assistance to a Member State in crisis aimed at safeguarding the stability of its public finances and the objective of ‘self-responsibility’ on the part of each Member State (to ensure sound national budgetary policies). By contrast, however, it may be noted that the literal wording of the article does not refer to any form of financial assistance, but simply prohibits the assumption of direct or indirect liability (that is to say, indirect in the form of guarantees) by the Union and Member States, such as their taking-over of the debt of another Member State. In other words, Article 125(1) TFEU merely prohibits the debts of one Member State from spreading to the Union and the other Member States, but does not prohibit any form of financial support. Moreover, as we have already seen, Article 122 TFEU explicitly authorises financial assistance to a Member State in special circumstances, which helps to make it clear that the purpose of the *no bail-out clause* was not to impose an absolute prohibition on mutual assistance between the Member States – assistance which, among other things, is rooted in the principle of solidarity enshrined in the preamble to the TEU and reiterated in Article 3 of that Treaty – but solely to prohibit those measures that endanger the

financial stability of the Union or of individual States or which are incompatible with the objective of ensuring what has previously been defined as the self-responsibility of national governments. While the Council Decision excludes the assumption of liability in any form by Member States for the debts of other Member States, it does not jeopardise the objective of the self-responsibility of national governments, but in fact reinforces it by the use of ‘conditionality’, in a form that is claimed to be strict: an instrument which, in international practice, has repeatedly been used to safeguard support measures for countries in debt crises, proving itself by its results.

- 33 Lastly, Article 136(3) TFEU does not conflict with Article 127 TFEU and hence with the objective of maintaining stability: in this regard, the remarks made in paragraphs 25 and 31 of these observations apply, where it is noted that the intergovernmental mechanism envisaged by the Council Decision is not a monetary policy instrument nor can it be used for such purposes, but is an instrument of financial policy.

### *III.2 The second question*

- 34 By its second question the Irish Supreme Court seeks to know whether a Member State of the European Union whose currency is the euro is entitled to enter into and ratify an international agreement such as the ESM Treaty.
- 35 The order for reference describes a series of possible legal obstacles in this regard; the Italian Government maintains that it has dealt with many of these in its examination of the first question. Moreover, it considers that the arguments put forward by the respondents in the present case are well founded and deems it sufficient to recall them here in order to avoid tedious repetition, while nevertheless reserving the right, if necessary, to examine them in greater depth at the hearing, the date of which has already been set.
- 36 It is worth adding that, in assessing the legality of the ESM Treaty, account must be taken of Article 136 (3) TFEU, which makes it clear that such intergovernmental agreements do not conflict with the Treaty.
- 37 The issue appears to contradict the argument put forward here that this provision has not reduced the competences of the Union. The contradiction is only apparent, however, if it is considered that Article 136(3) TFEU does not constitute the legal basis of the ESM: the lawfulness of that treaty rests on the principles of contractual international law and is entirely independent of the provision on revision of the Treaty. We have already stated that the Member States of the euro area validly entered into the ESFS Treaty before the entry into force of Article 136(3) TFEU.
- 38 The function of that provision seems, in fact, to be primarily interpretative, designed to confer legal certainty about the compatibility of intergovernmental

stability agreements with the provisions and principles of the Treaty (in the first place, with the *no bail-out clause* laid down in Article 125 TFEU), within the limits in which such agreements comply with the conditions laid down in Article 136(3) TFEU. Plainly, the conditionality mechanism is also only codified in Article 136(3), given that, as stated above, its compulsory nature was derived by means of interpretation from the need to render the intergovernmental stability agreement compatible with the objectives of other provisions of the Treaty.

- 39 Hence, although it is true that Article 136(3) TFEU cannot constitute the legal basis of the ESM agreement, that does not mean that it is of no relevance in assessing the compatibility of that agreement with the treaties. On the contrary, short of stripping Article 136(3) of all legislative content, it must be stated that it prevents the participation of a Member State in a treaty such as the ESM Treaty from being declared unlawful, to the extent that the treaty complies with the conditions laid down in Article 136(3) (the incompatibility of such participation could therefore stem only from the inclusion in the intergovernmental agreement of articles that infringe Article 136(3) TFEU or which govern aspects not covered by that provision).

### ***III.3 The third question***

- 40 By its third question the court of reference seeks to know whether the entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty is subject to the entry into force of the Council Decision.
- 41 The reply to this question is in the negative, based on the considerations set out above in paragraphs 37 to 39 of these observations.

### ***IV Conclusions***

- 42 On the basis of the foregoing considerations, the Italian Government proposes that the Court should reply as follows to the questions referred:

*(1) European Council Decision 2011/199/EU of 25 March 2011 was lawfully adopted by the Council and hence there can be no question of a possible conflict with Articles 121(2), 122, 123, 125, 126 and 127 TFEU or with the principle of sincere cooperation laid down in Article 4(3), as there is no hierarchical relationship between those provisions of the Treaties and the Decision. In any event, the said Decision does not conflict with the stated provisions of the Treaties.*

*(2) A Member State of the European Union whose currency is the euro may lawfully enter into and ratify an international agreement such as the ESM Treaty.*

*(3) The entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty is not subject to the entry into force of European Council Decision 2011/199/EU.*

**Rome, 13 September 2012**

(sgd)  
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