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Observations of the Netherlands

Case C-370/12*

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PRINGLE

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WRITTEN OBSERVATIONS

**by the Netherlands Government, lodged pursuant to the second paragraph of
Article 23 of the Protocol on the Statute of the Court of Justice of the
European Union**

in Case C-370/12 Pringle

In the abovementioned case, the Netherlands Government, represented by Corinna Wisselsen and Mielle Bulterman, head and employee respectively at the Department of European law of the Legal Affairs Directorate of the Ministry of Foreign Affairs in The Hague, submits the following observations for the consideration of the Court.

I. Introduction

- 1 By an order for reference of 31 July 2012, the Supreme Court (Ireland) ('the referring court') referred a number of questions to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU concerning:
 - 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 (OJ 2011, L 91, p. 1; 'the European Council Decision').

* Language of the case: English.

- the compatibility with European Union law of the Treaty establishing the European Stability Mechanism concluded in Brussels on 2 February 2012¹ ('the ESM Treaty').
 - the relevance of the entry into force of the European Council Decision for the approval of the ESM Treaty.
- 2 The questions have been raised in the context of an action by Thomas Pringle ('Pringle') against the Irish Government, Ireland and the Attorney General ('the defendants') in relation to the ratification of the ESM Treaty by Ireland.

II. The facts

- 3 Pringle is a Member of the Lower House of the Irish Parliament (Dáil Éireann). On 13 April 2012, in his capacity as a natural person, he initiated proceedings against the defendants. In these proceedings he disputes inter alia the validity of the European Council Decision and the compatibility of the ESM Treaty with European Union law. On 17 July 2012, his action was dismissed on all points by the High Court.
- 4 Pringle lodged an appeal against the decision of the High Court with the referring court. The referring court has decided to refer questions for a preliminary ruling concerning the European Council Decision and the ESM Treaty. On account of the unusual urgency and the public interest of this case, the referring court has requested that the Court deal with these questions in accordance with the accelerated procedure under Article 104a of the Rules of Procedure.
- 5 On 14 August 2012, the President of the Court decided that the order for reference would be dealt with in accordance with the accelerated procedure.

III. Legal framework

International law framework

ESM Treaty

- 6 The most relevant recitals in the preamble to the ESM Treaty for these written observations read as follows:

'1. The European Council agreed on 17 December 2010 on the need for euro area Member States to establish a permanent stability mechanism. This European Stability Mechanism ("ESM") will assume the tasks currently fulfilled by the

¹ Concluded between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand-Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Austrian Republic, the Portuguese Republic, the Slovenian Republic, the Slovakian Republic and the Republic of Finland.

European Financial Stability Facility (“EFSF”) and the European Financial Stabilisation Mechanism (“EFSM”) in providing, where needed, financial assistance to euro area Member States.

2. On 25 March 2011, the European Council adopted Decision 2011/199/EU 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 adding the following paragraph to Article 136: “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”.

3. With a view to increasing the effectiveness of the financial assistance and to prevent the risk of financial contagion, the Heads of State or Government of the Member States whose currency is the euro agreed on 21 July 2011 to “increase [the] flexibility [of the ESM] linked to appropriate conditionality”.

4. Strict observance of the European Union framework, the integrated macro-economic surveillance, in particular the Stability and Growth Pact, the macroeconomic imbalances framework and the economic governance rules of the European Union, should remain the first line of defence against confidence crises affecting the stability of the euro area.

...

10. On 20 June 2011, the representatives of the Governments of the Member States of the European Union authorised the Contracting Parties of this Treaty to request the European Commission and the European Central Bank (“ECB”) to perform the tasks provided for in this Treaty.

...

16. Disputes concerning the interpretation and application of this Treaty arising between the Contracting Parties or between the Contracting Parties and the ESM should be submitted to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 of the Treaty on the Functioning of the European Union (“TFEU”).’

7 Article 3 of the ESM Treaty, entitled ‘Purpose’, reads as follows:

‘The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments

or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.'

8 Article 12, entitled 'Principles', reads as follows:

'1. If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.

... '

9 Article 13, entitled 'Procedure for granting stability support', reads as follows:

"1. An ESM Member may address a request for stability support to the Chairperson of the Board of Governors. Such a request shall indicate the financial assistance instrument(s) to be considered. On receipt of such a request, the Chairperson of the Board of Governors shall entrust the European Commission, in liaison with the ECB, with the following tasks:

(a) to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis under Article 18(2);

(b) to assess whether public debt is sustainable. Wherever appropriate and possible, such an assessment is expected to be conducted together with the IMF;

(c) to assess the actual or potential financing needs of the ESM Member concerned.

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

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

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

4. The European Commission shall sign the MoU on behalf of the ESM, subject to prior compliance with the conditions set out in paragraph 3 and approval by the Board of Governors.

5. The Board of Directors shall approve the financial assistance facility agreement detailing the financial aspects of the stability support to be granted and, where applicable, the disbursement of the first tranche of the assistance.

6. The ESM shall establish an appropriate warning system to ensure that it receives any repayments due by the ESM Member under the stability support in a timely manner.

7. The European Commission – in liaison with the ECB and, wherever possible, together with the IMF – shall be entrusted with monitoring compliance with the conditionality attached to the financial assistance facility.

10 Article 14, entitled, ‘ESM precautionary financial assistance’, reads as follows:

‘1. The Board of Governors may decide to grant precautionary financial assistance in the form of a precautionary conditioned credit line or in the form of an enhanced conditions credit line in accordance with Article 12(1).

2. The conditionality attached to the ESM precautionary financial assistance shall be detailed in the MoU, in accordance with Article 13(3).

...

6. After the ESM Member has drawn funds for the first time (via a loan or a primary market purchase), the Board of Directors shall decide by mutual agreement on a proposal from the Managing Director and based on an assessment conducted by the European Commission, in liaison with the ECB, whether the credit line continues to be adequate or whether another form of financial assistance is needed’

11 Article 15, entitled ‘Financial assistance for the re-capitalisation of financial institutions of an ESM Member’, reads as follows:

‘1. The Board of Governors may decide to grant financial assistance through loans to an ESM Member for the specific purpose of re-capitalising the financial institutions of that ESM Member.

2. The conditionality attached to financial assistance for the re-capitalisation of an ESM Member's financial institutions shall be detailed in the MoU, in accordance with Article 13(3).

...

5. Where applicable, the Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director and after having received a report from the European Commission in accordance with Article 13(7), the disbursement of the tranches of the financial assistance subsequent to the first tranche'

12 Article 16, entitled 'ESM loans', reads as follows:

'1. The Board of Governors may decide to grant financial assistance in the form of a loan to an ESM Member, in accordance with Article 12.

2. The conditionality attached to the ESM loans shall be contained in a macro-economic adjustment programme detailed in the MoU, in accordance with Article 13(3).

...

5. The Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director and after having received a report from the European Commission in accordance with Article 13(7), the disbursement of the tranches of the financial assistance subsequent to the first tranche.'

13 Article 17, entitled 'Primary market support facility', reads as follows:

'1. The Board of Governors may decide to arrange for the purchase of bonds of an ESM Member on the primary market, in accordance with Article 12 and with the objective of maximising the cost efficiency of the financial assistance.

2. The conditionality attached to the primary market support facility shall be detailed in the MoU, in accordance with Article 13(3).

...

5. The Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director and after having received a report from the European Commission in accordance with Article 13(7), the disbursement of financial assistance to a beneficiary Member State through operations on the primary market.'

14 Article 18, entitled 'Secondary market support facility', reads as follows:

‘1. The Board of Governors may decide to arrange for operations on the secondary market in relation to the bonds of an ESM Member in accordance with Article 12(1).

2. Decisions on interventions on the secondary market to address contagion shall be taken on the basis of an analysis of the ECB recognising the existence of exceptional financial market circumstances and risks to financial stability.

3. The conditionality attached to the secondary market support facility shall be detailed in the MoU, in accordance with Article 13(3).

...’

15 Article 37, entitled ‘Interpretation and dispute settlement’, reads as follows:

‘1. Any question of interpretation or application of the provisions of this Treaty and the by-laws of the ESM arising between any ESM Member and the ESM, or between ESM Members, shall be submitted to the Board of Directors for its decision.

2. The Board of Governors shall decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty. The votes of the member(s) of the Board of Governors of the ESM Member(s) concerned shall be suspended when the Board of Governors votes on such decision and the voting threshold needed for the adoption of that decision shall be recalculated accordingly.

3. If an ESM Member contests the decision referred to in paragraph 2, the dispute shall be submitted to the Court of Justice of the European Union. The judgement of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court.’

European Union law framework

EU Treaty

16 Article 48(6) EU, entitled ‘Simplified revision procedures’, reads as follows:

‘The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.'

Treaty on the Functioning of the European Union

- 17 The most relevant provisions from Title VIII (economic and monetary policy) of the Third Part of the TFEU for these written observations are the following ones.

- 18 Article 122 TFEU reads as follows:

'1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.'

- 19 Article 123 TFEU reads as follows:

'1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as "national central banks") in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions.'

- 20 Article 125 TFEU reads as follows:

'1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.'

2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.'

21 The current Article 136 TFEU reads as follows:

'1. In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro: (a) to strengthen the coordination and surveillance of their budgetary discipline; (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.'

2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote. A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).'

IV. The questions referred for a preliminary ruling

22 The referring court has referred the following questions to the Court for a preliminary ruling:

'(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?

(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?’

IV. Answers to the questions**Question 1**

- 23 By its first question, the referring court wishes to ascertain whether the European Council Decision is valid. In that connection, the referring court is asking the Court to review the Decision in the light of (1) the criteria set out in Article 48(6) EU for the use of the simplified revision procedure and (2) the Treaties and general principles of law of the Union.
- 24 This first question of the referring court raises the important preliminary issue of whether and, if so, to what extent, the Court has jurisdiction to review the validity of the European Council Decision. The Netherlands Government will first consider this preliminary issue.

Jurisdiction of the Court of Justice to review the European Council Decision

- 25 The European Council has been a European Union institution since the entry into force of the Treaty of Lisbon. Article 267 TFEU states that the Court has
- 10

jurisdiction to give rulings concerning the validity and interpretation of acts of the institutions. This jurisdiction therefore also covers acts of the European Council.

- 26 It follows from the foregoing that the Court does have jurisdiction to give rulings concerning the validity of the European Council Decision. The Netherlands Government takes the view that there are limits to this jurisdiction in a case such as the present one.
- 27 On the basis of Articles 19 EU and Article 267 TFEU, the Court has jurisdiction to give rulings concerning questions relating to the interpretation and application of the Treaties. However, the Court does not have jurisdiction to give rulings concerning the validity of the Treaties. After all, treaty amendments are approved by the Member States in accordance with their national procedures. This means that the Court may not review the validity of treaty amendments. This is also confirmed by the case-law (see Case C-253/94 *Roujansky v Council* [1995] ECR I-7, paragraph 11; Joined Cases 31/86 and 35/86 *LAISA and CPC España v Council* [1988] ECR 2285, paragraphs 6 to 18).
- 28 Since the present case concerns a European Council Decision which provides for an amendment to the TFEU in accordance with the simplified procedure, this means, according to the Netherlands Government, the following. The Court has jurisdiction to give a ruling concerning the validity of this European Council Decision, in so far as that review does not amount to a review of the validity of primary law.
- 29 Thus, the Court does have jurisdiction to assess the validity of the European Council Decision in the light of Article 48(6) EU (question 1, indent 1), even though the Decision has not yet entered into force. However, the Netherlands Government takes the view that the Court does not have jurisdiction to carry out a substantive review of the European Council Decision (question 1, indent 2). The European Council Decision does admittedly have the form of secondary legislation, but must on the basis of its nature and substance be regarded as constitutional in nature. It has after all been adopted by the European Council in its capacity as Treaty author on the basis of Article 48(6) EU. The Decision includes an amendment to Article 136 TFEU. This means that a substantive review of the Decision would amount to review by the Court of the validity of primary law.

The European Council Decision fulfils the requirements of Article 48(6) EU

- 30 The European Council Decision is based on Article 48(6) EU. This provision provides for the simplified revision of the TFEU. Article 48(6) EU lays down the following conditions for amending the TFEU by means of the simplified revision procedure:
- The amendment must relate to all or part of the provisions of Part Three of the TFEU.

- The amendment cannot increase the competences conferred on the Union in the Treaties.
- 31 If these two conditions are satisfied, the European Council, acting by unanimity on a proposal by the government of a Member State, the European Parliament or the Commission, and after consulting the European Parliament and the Commission, and the European Central Bank ('the ECB') (in the case of institutional changes in the monetary area), may adopt a decision amending Part Three of the TFEU. This decision does not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.
 - 32 The Netherlands Government submits that all conditions for the use of the simplified revision procedure have been satisfied.
 - 33 In the first place, the condition that the European Council Decision provides for an amendment to a provision of Part Three of the TFEU relating to Union policies and internal actions is satisfied, since the proposed amendment concerns Article 136 TFEU.
 - 34 The condition that the Treaty amendment is not to increase the competences conferred on the Union is also satisfied. The version of Article 136(3) TFEU as provided for in the European Council Decision reads as follows:

'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.'
 - 35 This new point 3 of Article 136 TFEU does not involve any increase in the competences of the European Union. The provision confirms merely that European Union law allows the Member States whose currency is the euro to establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area. As the Commission observes in point 12 of its Opinion of 15 February 2011 (COM(2011)70 def) concerning the Decision, it does not provide a legal basis enabling the Union to adopt measures that would not have been possible prior to the proposed Treaty amendment.
 - 36 The reason for introducing Article 136(3) TFEU is to create legal certainty concerning the competence of the Member States to establish and activate a stability mechanism. The introduction of Article 136(3) TFEU confirms the view that the Treaties, and in particular Article 125 TFEU, do not prevent the Member States whose currency is the euro from setting up a stability mechanism if (1) indispensable to safeguard the stability of the euro area as a whole and (2) the granting of assistance is made subject to strict conditionality.
 - 37 Finally, the procedural conditions for the application of Article 48(6) EU are also satisfied. The proposal for the European Council Decision was lodged on 16

December 2010 by the Belgian Government. The Commission, the European Parliament and the ECB² were consulted on this proposal. All three of these institutions have given a positive opinion with respect to the Decision.

- 38 On 25 March 2011, the Decision was adopted by unanimity. The Decision enters into force on 1 January 2013 on condition that all Member States have notified the Secretary-General of the Council of the completion of the national approval procedure or, failing that, two months after the last notification. At the time of writing these written observations, these approval procedures are still ongoing.
- 39 According to the Netherlands Government, it follows from the foregoing that the European Council Decision fulfils the conditions flowing from Article 48(6) EU in respect of the use of the simplified revision procedure.

The European Council Decision is not contrary to the Treaties or to general principles

- 40 The Netherlands Government submits that the Court does not have jurisdiction to review the validity of the Treaty amendment set out in the European Council Decision in the light of the Treaties and the general principles (see paragraphs 27 to 29 above). For the sake of good order, the Netherlands Government would make the following points.
- 41 As was explained above, Article 136(3) TFEU does not create any new competences for the Union or the Member States. This provision confirms that the Treaties allow the Member States the latitude to establish a Treaty such as the ESM Treaty. It follows already from this that the Treaty amendment set out in the European Council Decision is not contrary to the Treaties or to general principles.
- 42 In answering question 2 the Netherlands Government will examine the question whether the ESM Treaty is compatible with the Treaties and the general principles. The conclusion resulting from this examination, namely that the ESM Treaty is compatible with European Union law, confirms, in the Netherlands Government's submission, its view that Article 136(3) TFEU is not contrary to the Treaties or the general principles.

Conclusion

- 43 On the basis of the foregoing, the Netherlands Government is of the opinion that the first question of the referring court must be answered as follows: the European Council Decision is valid.

Question 2

² Commission Opinion of 15 February 2011, referred to above; European Parliament resolution of 23 March 2011(OJ 2011 C 247 E, p. 22); Opinion of the ECB of 17 March 2011 (OJ 2011 C 140, p. 8).

44 By its second question, the referring court essentially wishes to ascertain whether European Union law precludes a Member State entering into the ESM Treaty. The referring court refers in this respect to various Treaty provisions and general principles. The Netherlands Government observes that a large number of those provisions do not satisfy the requirement that they be sufficiently precise and unconditional to enable an individual to rely upon them directly against the ESM Treaty. That applies *inter alia* in respect of Articles 2 and 3 of the EU Treaty and of Articles 119 to 121 TFEU inclusive.

45 In answering question 2, the Netherlands Government will examine in turn the following issues, which, in its submission, form the substance of the present case:

1. The ESM Treaty does not infringe the competences of the Union in respect of monetary policy and the coordination of economic policy;
2. The ESM Treaty is not contrary to Articles 122(1) TFEU and 125(1) TFEU;
3. The ESM Treaty does not infringe the powers and functions of the institutions;
4. The ESM Treaty is not contrary to the principle of sincere cooperation.

No infringement of the competences of the Union in respect of monetary and economic policy

46 The Netherlands Government submits that the ESM Treaty does not infringe the competences of the Union in respect of monetary policy and the coordination of economic policy. The ESM Treaty is an instrument intended to support an ESM Member in the event of a temporary liquidity shortage. It is not an instrument of monetary policy. It does not give any direction to the monetary policy of the Union or the coordination of the economic policy of the participating EU Member States. The Netherlands Government will clarify this position below. The Netherlands Government will first examine the relationship between the ESM Treaty and the competence of the Union for monetary policy. It will then examine the relationship between the ESM Treaty and the competence of the Union in respect of the coordination of the economic policy of the Member States.

No infringement of the competence of the Union in respect of monetary policy

47 Monetary policy (as described in Article 119(2) TFEU and Article 127 TFEU) is primarily aimed at achieving price stability by influencing the quantity of money in circulation in the economy. To that effect, a central bank has a number of policy instruments at its disposal. As regards the euro, the monetary task has been entrusted to the European System of Central Banks. The monetary policy of Member States whose currency is the euro is an exclusive competence of the Union (Article 3(1)(c) TFEU).

- 48 The ESM Treaty is an instrument by which assistance can be given to an ESM Member subject to strict conditionality if that is indispensable for the stability of the euro area as a whole. These conditions are negotiated, in accordance with Article 13(3) of the ESM Treaty, by the Commission – in liaison with the ECB and (wherever possible) together with the International Monetary Fund – with the ESM Member concerned. The conditions are then fixed in an MoU with which the ESM Member agrees.
- 49 The fixing of conditions for an ESM Member's eligibility for assistance does not fall within monetary policy. The same applies with respect to instruments that are set up to make that assistance possible. Unlike in the case of monetary policy, the assistance granted by the ESM is aimed not at price stability, but at the stability of the euro area as a whole.
- 50 The granting of assistance in the context of the ESM Treaty is also not contrary to Article 123 TFEU. This provision prohibits monetary financing, that is to say overdraft facilities or any other type of credit facility with the ECB or with the central banks of the Member States. That is not the case at all in the context of the ESM Treaty since the capital originates from the ESM Members rather than from the ECB.

No infringement of the competence of the Union in respect of the coordination of the economic policy of the Member States

- 51 In addition, the ESM does not infringe the competence of the Union in terms of coordinating the economic policy of the Member States. The ESM Treaty does not involve any coordination of policy. The Netherlands Government takes the view that the measures that an ESM Member takes in order to be eligible for assistance as fixed in the memorandum of understanding constitute national policy.
- 52 These measures should of course be adopted in accordance with guidelines, opinions, warnings, recommendations or decisions of the EU. All ESM Members are indeed bound when giving effect to the ESM Treaty by their obligations as Member States of the European Union (see, to that effect, Case C-55/00 *Gottardo* [2002] ECR I-413, paragraph 33). According to the Netherlands Government, the ESM Treaty contains sufficient safeguards to ensure that these obligations are taken into account when the ESM Treaty is applied.
- 53 In recital 4 in the preamble to the ESM Treaty, the importance is emphasised of strict observance of the European Union framework, the integrated macro-economic surveillance, in particular the Stability and Growth Pact, the macroeconomic imbalances framework and economic governance rules as the first line of defence against confidence crises affecting the stability of the euro area. Article 13(3) of the ESM Treaty states expressly that the MoU is to be fully consistent with the measures of economic policy coordination provided for in the

TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned.

- 54 Moreover, the ESM Treaty entrusts tasks and competences to the Commission, the ECB and the Court of Justice which contribute to ensuring that the EU-law framework is respected when the ESM Treaty is applied. This point will be examined in further detail below (paragraphs 71 to 81).
- 55 The Netherlands Government submits that it follows from the foregoing that the ESM Treaty contains sufficient safeguards to ensure that the implementation of the ESM Treaty is fully consistent with the measures of economic policy coordination provided for in the TFEU. For that reason, the view cannot be taken that conflict arises with Article 121(2) TFEU, which provides for the competence of the Union to adopt broad guidelines.
- 56 On the basis of the foregoing, the Netherlands Government concludes that the ESM Treaty does not infringe the competences of the European Union in respect of monetary policy and in respect of the coordination of the economic policy of the Member States.

No conflict with Articles 122(2) TFEU and 125(1) TFEU

- 57 The ESM Treaty does not infringe Articles 122(2) TFEU and 125(1) TFEU. The Netherlands Government will examine these points in turn below.

Article 122(2) TFEU

- 58 Article 122(2) TFEU provides for the possibility of Union financial assistance to be granted to a Member State where it is in difficulties or is seriously threatened with severe difficulties caused by exceptional occurrences beyond its control. The Netherlands Government submits that this provision does not prevent the ESM from granting assistance to a Member State in financial need. Article 122(2) TFEU creates a competence for the Union, but does not preclude the grant of financial assistance to a Member State by an international organisation such as the ESM or the IMF.

Article 125(1) TFEU ('no bail out' clause)

- 59 In the Netherlands Government's submission, Article 125(1) TFEU, the so-called 'no bail out' clause, does not constitute an obstacle to approval of the ESM Treaty. It reaches that view on the basis of a teleological interpretation of Article 125(1) TFEU.
- 60 Article 125(1) TFEU provides that Member States are not liable for the commitments of central governments, regional, local or other public authorities of other Member States. It therefore lays down a prohibition on the obligations of

Member States being assumed. This prohibition is aimed at enforcing budgetary discipline on Member States whose currency is the euro.

- 61 This works as follows. The prohibition ensures that a Member State can borrow money on the financial markets in accordance with market conditions. When a Member State does not operate a sound economic and budgetary policy, it will only be able to borrow money at a higher rate of interest. That compels the Member State to put its public expenditure and its policy in order, in respect of which the Member State enjoys broad discretion. The enforcement of budgetary discipline is not a goal in itself, but pursues a higher goal: safeguarding the economic stability of the EU and of the euro area in particular.
- 62 It is important when interpreting Article 125(1) TFEU to take account of that higher goal.
- 63 Member States whose currency is the euro have had to accept that the ‘no bail out’ clause has not had the preventive effect for a number of Member States, as just described. The interconnectedness of the Member States whose currency is the euro means that failure to support these Member States jeopardises the stability of the euro area as a whole.
- 64 The Netherlands Government submits that Article 125(1) TFEU does not preclude, in such a situation, measures from being taken the purpose of which is to avert this serious threat to economic and monetary union. To rely on the prohibition of Article 125(1) TFEU as an argument against taking such measures would have a counter-productive effect: it would prohibit a measure the purpose of which is precisely to attain the objective for which Article 125(1) TFEU was adopted. In such a situation, Article 125(1) TFEU cannot perform the function pursued by the prohibition laid down therein.
- 65 On the basis of the foregoing, the Netherlands Government is of the view that Article 125(1) TFEU does not preclude a treaty such as the ESM Treaty. Indeed, the purpose of the ESM Treaty is to make assistance to Member States possible, if indispensable to safeguard the stability of the euro area as a whole.
- 66 This teleological interpretation is also in accordance with the wording of Article 125(1) TFEU, which provides that Member States are not liable for the commitments of central governments, regional, local or other public authorities of other Member States. This means, according to the Netherlands Government, that, from an economic point of view, each Member State is itself responsible and remains so for compliance with its financial obligations. According to the Netherlands Government, this obligation is satisfied where assistance is granted in the framework of the ESM Treaty.
- 67 The assistance that an ESM Member in financial need may obtain can take the following forms: precautionary financial assistance in the form of a precautionary conditioned credit line (Article 14 of the ESM Treaty), financial assistance with

the purpose of re-capitalising a financial institution of an ESM Member (Article 15 of the ESM Treaty), ESM loans (Article 16 of the ESM Treaty), primary market support facility through the purchase of bonds (Article 17 of the ESM Treaty) and secondary market support facility in relation to the bonds of an ESM Member (Article 18 of the ESM Treaty).

- 68 For all these forms of assistance, it is the case that the ESM Member which receives assistance itself remains legally responsible for its financial obligations. The strict conditionality attached to the granting of assistance moreover encourages the ESM Member concerned to actually be in a position to comply with its financial obligations. This serves to prevent the ESM assuming obligations in an economic sense. In view of these specific safeguards, the granting of assistance in the framework of the ESM Treaty does not involve commitments being assumed for the purposes of Article 125(1) TFEU.
- 69 Finally, it is significant that this interpretation of Article 125(1) TFEU is also reflected in Article 136(3) TFEU. The latter provision sets out the criteria which, according to the Netherlands Government, are essential to ensure that assistance to a Member State is not caught by the prohibition laid down in Article 125(1) TFEU.
- 70 Pursuant to Article 136(3) TFEU, 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 assistance must moreover be made subject to strict conditionality. If these criteria are satisfied when assistance is granted to a Member State, commitments are not assumed for the purposes of Article 125(1) TFEU.

No infringement of the powers and functions of the institutions

- 71 The Netherlands Government submits that the ESM Treaty does not infringe the powers and functions of the Union institutions. There are three Union institutions which perform a function on the basis of the ESM Treaty: the Commission, the ECB and the Court.
- 72 The ESM Treaty confers on the European Commission and the ECB executive and advisory functions (Article 4(4), Article 13, Article 14(6), Article 15(5), Article 16(5), Article 17(5) of the ESM Treaty). The Court has jurisdiction to rule on disputes between an ESM Member and the ESM, as well as on disputes between ESM Members (Article 37(3) of the ESM Treaty).
- 73 These functions contribute to ensuring that, when the ESM Treaty is applied, EU law is respected. According to the Netherlands Government, the Treaties do not preclude the Commission, the ECB and the Court from performing these functions. In the case of the Commission and the ECB, this flows, according to the Netherlands Government, from the so-called Bangladesh doctrine. The

jurisdiction of the Court to rule on disputes is founded on Article 273 TFEU. The Netherlands Government will clarify this below.

Commission and ECB

- 74 In the context of the ESM Treaty, the Commission and the ECB have management and coordination tasks. On 20 June 2011, they were authorised by the representatives of the Governments of the Member States to perform these tasks (see recital 10 in the preamble to the ESM Treaty).
- 75 The competence of the Member States to entrust such tasks to the Commission outside the Treaties was recognised by the Court in Joined Cases C-181/91 and C-248/91 *Parliament v Council* [1993] ECR I-3713, paragraph 20). In that judgment, the Court stated that the Treaties do *'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'*. According to the Netherlands Government, that case-law is also applicable in respect of the entrustment of tasks to the ECB.
- 76 The management and coordination tasks of the Commission and the ECB in the context of the ESM Treaty fall moreover within their competences under the EU Treaty and the TFEU.
- 77 Pursuant to Article 17(1) EU, the European Commission has the task of promoting the general interest of the Union and of taking appropriate initiatives to that end. The ESM Treaty is of crucial importance to safeguarding the financial stability of the euro area. The financial stability of the euro area is evidently in the interest of the European Union. Through its involvement in the ESM Treaty, the Commission therefore promotes the general interest of the Union. Moreover, the Commission serves the general interest of the Union by ensuring that the ESM Treaty is applied in a manner consistent with European Union law.
- 78 On the basis of Article 282(2) TFEU, the ECB – as part of the European System of Central Banks – has the task of supporting the general economic policies in the Union in order to contribute to the objectives of the European Union. The role of the ECB in the framework of the ESM Treaty forms part of this. This Treaty has after all been established in order to safeguard an objective of the Union: namely, the safeguarding of the euro area as a whole.
- 79 Lastly, the Netherlands Government would point out that the tasks which the Commission has on the basis of the ESM Treaty are tasks that it already performs in the context of EU legislation in the field of economic governance of the EU and the euro area, the so-called 'sixpack'.³ In the context of this legislation, the

³ Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16

Commission performs a central role, which involves, for each Member State, specific assessments, monitoring, visits to Member States, recommendations and warnings. This allows the Commission to gain a deep insight into the state of Member States' public finances. The assessments carried out by the Commission in the framework of the ESM Treaty are not new in relation to those that it carries out in the context of the sixpack.

The Court of Justice

- 80 As regards the jurisdiction of the Court to rule on disputes between an ESM Member and the ESM, as well as on disputes between ESM Members, the Netherlands Government makes the following observations.
- 81 On the basis of Article 273 TFEU, the Court has 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. This provision forms the basis of the Court's jurisdiction in the event of disputes in the context of the ESM Treaty (see also recital 17 in the preamble to the ESM Treaty).
- 82 Disputes concerning the interpretation and application of the ESM Treaty are evidently disputes which relate to the subject matter of the Treaties. The Netherlands Government submits that Article 37(3) of the ESM Treaty contains an authorisation for the purposes of Article 273 TFEU by the EU Member States which are parties to the ESM Treaty to refer such disputes to the Court.

No infringement of the principle of sincere cooperation

- 83 According to the Netherlands Government, the ESM Treaty does not infringe the principle of sincere cooperation as laid down in Article 4(3) EU. This is explained as follows.
- 84 First of all, it is important to note that the obligations flowing from EU membership do not constitute an obstacle to the approval by Member States of the ESM Treaty. As set out above, the ESM Treaty does not infringe the competences of the Union in respect of monetary and economic policy (see paragraphs 46-56). In addition, the ESM Treaty does not give rise to any conflict with specific Treaty provisions (see paragraphs 57-70). Furthermore, the ESM Treaty contains

November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States.

sufficient safeguards to ensure that European Union law is respected also when the ESM Treaty is applied in practice (see paragraphs 53-54). According to the Netherlands Government, the obligation under the second subparagraph of Article 4(3) EU for Member States to take any appropriate measure to ensure fulfilment of the obligations arising from European Union law is therefore satisfied.

- 85 The principle of sincere cooperation also requires that the Member States refrain from any measure which could jeopardise the attainment of the Union's objectives (third subparagraph of Article 4(3) EU). The ESM Treaty does not infringe this obligation either. This Treaty has after all been established in order to safeguard an objective of the Union: namely, the safeguarding of the euro area as a whole (see above paragraph 76 and Article 3 of the ESM Treaty).
- 86 The Netherlands Government concludes that there is no infringement of the principle of sincere cooperation.

Conclusion

- 87 On the basis of the foregoing, the Netherlands Government concludes that the ESM Treaty is compatible with the Treaties and general principles. It follows from this that European Union law does not prevent a Member State of the European Union whose currency is the euro from entering into and ratifying a treaty such as the ESM Treaty.

Question 3

- 88 By its third question, the referring court wishes to ascertain whether the entry into force of the European Council Decision is a precondition for entering into and ratifying the ESM Treaty.
- 89 The Netherlands Government takes the view that that is not the case. As was stated in the answer to question 2 (see above paragraph 87), European Union law does not prevent Member States whose currency is the euro from entering into and ratifying the ESM Treaty. The power to do so is not conditional on the entry into force of the European Council Decision. As was stated in the answer to question 1 (see above paragraphs 35-36), Article 136(3) TFEU merely constitutes confirmation of the competence of Member States whose currency is the euro to set up a stability mechanism.
- 90 The Netherlands Government therefore concludes that the entry into force of the European Council Decision is not a precondition for entering into and ratifying the ESM Treaty.

V. Conclusion

- 91 In the light of the foregoing, the Netherlands Government submits that the questions referred for a preliminary ruling should be answered as follows:

‘1. European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro is valid.

2. European Union law does not prevent a Member State of the European Union whose currency is the euro from concluding and ratifying a treaty such as the ESM Treaty.

3. The conclusion and ratification of the ESM Treaty is not conditional on the entry into force of European Council Decision 2011/199/EU of 25 March 2011.’

Corinna Wissels Mielle Bulterman

acting as Agents

The Hague, 14 September 2012