

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

**CASE C-370/12**

**Between**

**Thomas Pringle**

**Appellant**

**- And -**

**The Government of Ireland,  
Ireland and The Attorney General**

**Respondents**

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**WRITTEN OBSERVATIONS OF THOMAS PRINGLE  
APPELLANT IN THE MAIN PROCEEDINGS**

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Submitted pursuant to Article 23 of the Protocol of the Statute of the Court of Justice on  
behalf of the Appellant by:

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## **A. Facts and the Questions referred**

The Appellant is a citizen of Ireland and the Union and a member of Dáil Éireann, one of the Houses of the Oireachtas, the national parliament. Having closely monitored the evolution of the Treaty establishing the European Stability Mechanism as well as the proposed amendment to Article 136 TFEU, the Appellant became concerned that a permanent stability mechanism was to be established in a manner that that would infringe both Irish domestic law and European Union law and which would violate the principle of respect for the Rule of Law. On 13 April 2012, the Applicant issued proceedings in the Irish High Court seeking declarations to that effect.

By judgment dated 17 July 2012, the High Court refused the Appellant's application, considering that the ESM Treaty was consistent with both the Irish Constitution and EU law. However, the High Court agreed that a question did arise as to whether the ESM Treaty could become operational prior to the entry into force of the proposed amendment to Article 136 TFEU. The High Court Judge proposed referring a question on that issue to the Court of Justice pursuant to Article 267 TFEU.

On 19 July 2012, the Applicant appealed the judgment of the High Court to the Supreme Court of Ireland. Due to the exceptional urgency and public importance of the matter, the Supreme Court granted an early hearing to consider certain questions of Irish constitutional law and to decide whether a reference to this Court would be required. The Supreme Court also heard an application for an injunction restraining ratification by Ireland of the ESM Treaty pending the determination of these proceedings.

By ruling dated 31 July 2012, the Supreme Court refused certain of the Applicant's domestic law claims. However, the Supreme Court agreed that the substance of the proceedings raised questions concerning the interpretation of Union law and the validity of a Union act and that the resolution of the national proceedings required the referral of such questions to this Court pursuant to Article 267 TFEU. The Supreme Court considered it unnecessary to restrain the Respondent from ratifying the ESM Treaty since any ruling of the Court of Justice would be binding on Ireland and all Member States. Consequently, if participation in the ESM Treaty were held to be incompatible with Union law, the ESM Institution would have to be wound up by the Member States. In these circumstances, the Supreme Court adjourned the Appeal and referred the following questions to the Court of Justice for a preliminary ruling:

### **Questions Referred:**

- (1) Whether European Council Decision 2011/199/EU of 25<sup>th</sup> 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?

## **B. Introduction**

### *(i) The substance of the proceedings: The Rule of Law*

The Appellant is a public representative, duly elected to Dáil Éireann, the Irish parliament. He acknowledges that the current economic and fiscal situation poses serious political challenges. It is his belief that these challenges can and must be addressed without doing violence to the Union, its structures and governing principles.

The present proceedings instituted in the Irish High Court and currently pending before the Supreme Court of Ireland are grounded on the Appellant's concern for the preservation of the Rule of Law, recognised as a founding value of the Union legal order in Article 2 TEU.

The ESM Treaty constitutes a fundamental alteration and subversion of the architecture governing Economic and Monetary Union. It is submitted that such a fundamental alteration could only be carried out *following* an appropriate amendment to the Union Treaties. The Appellant considers that seeking to effect a fundamental treaty amendment using a simplified revision procedure, and then seeking to rely on that amendment even prior to its entry into force, is inconsistent with a Union that claims to be founded on the Rule of Law.

The Appellant considers that the ESM Treaty entails the assumption by certain Member States of obligations that are incompatible with the Union Treaties and that no Member State can give effect to the ESM Treaty without breaching its obligations under the Union Treaties. The Appellant believes that Union law precludes Member States from collectively stepping outside the Union legal order in order to carry out tasks that fall within the scope of Union law and *which are expressly prohibited by the Union Treaties*.

The proposed actions of the Member States set a dangerous precedent and are harmful to the integrity of the Union legal order. In particular, they:

- undermine the constitutional framework of the European Union and introduce uncertainty into the conceptual boundaries of the Union legal order and that of its Member States;
- encroach upon the competences of Union institutions, in particular upon the exclusive role of the European Central Bank in the definition and implementation of monetary policy and upon the Union's competence in the field of economic policy;
- undermine the principle of equality by bringing about an inconsistent application of Union law as the Treaty prohibition on bail-outs would only apply to Member States outside the euro zone;
- result in the establishment of an international autonomous body that is not accountable in the manner it would be if it were established lawfully within the Union legal order. The ESM Treaty creates an entity conferred with powers which would affect matters regulated

by the Union Treaties, but which would largely be beyond the reach of Union law including the Charter of Fundamental Rights.

It appears that the European Council and the Member States appreciated that the ESM would entail the assumption of obligations in fundamental conflict with Economic and Monetary Union as enshrined in the Treaties. The Council and the Member States, it appears, considered that the ESM could not therefore be established within the EU under the current Treaty framework. Instead of making an appropriate amendment to the Union Treaties, the European Council Decision was adopted and it was decided to establish the ESM as a new international financial institution outside the Union and under a new international treaty.

The Applicant shares concerns expressed by the European Parliament that a permanent stability mechanism ought to have been established within the framework of the European Union.<sup>1</sup> This approach was also favoured by the ECB.<sup>2</sup> The ESM financial institution should be established as a Union institution, serving the eurozone States only (like the ECB). The institution should be accountable to the Court of Justice, to the ECB and to the European Parliament. The institution should be subject to the oversight of the Commission in its role as guardian of the Treaties. This is not what has happened.

The Applicant rejects any suggestion that the supposed urgency of the challenges facing the eurozone warrants or justifies the manifest violation of Union law, or the fundamental revision of a Union Treaty using an inappropriate simplified revision procedure. Any such argument is unconvincing in light of the fact that an amendment to the TFEU was proposed as far back as October 2010.<sup>3</sup> There would have been sufficient and indeed ample time to effect an appropriate Treaty amendment using the correct revision procedure, in a manner that conformed to the constitutional principles underpinning the Union legal order and that was consistent with respect for democracy and the Rule of Law.

This Court has consistently affirmed that the Union is based on the observance of the Rule of Law.<sup>4</sup> It is in times of crisis that the Union's commitment to its founding values is tested and it is

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<sup>1</sup> Resolution of the European Parliament of 23 March 2011. Paragraph 9 states the European Parliament “*Regrets that the European Council has not explored all the possibilities contained in the Treaties for establishing a permanent stability mechanism; considers in particular that, in the framework of the present Union competences with regard to economic and monetary union (Article 3(4) TEU) and monetary policy for Member States whose currency is the euro (Article 3(1)(c) TFEU), it would have been appropriate to make use of the powers conferred on the Council in Article 136 TFEU, or in the alternative to have recourse to Article 352 TFEU in conjunction with Articles 133 and 136 TFEU*”.

<sup>2</sup> Opinion of the European Central Bank of 17 March 2011 (2011/C 140/05). Paragraph 8 observes: “*A key element of the draft decision is that it provides for an intergovernmental mechanism instead of a Union mechanism. The ECB supports recourse to the Union method and would welcome that, with the benefit of the experience gained, the ESM would become a Union mechanism at an appropriate point in time.*”

<sup>3</sup> Conclusions of the European Council, 28-29 October 2010 (EUCO 25/1/10 REV 1).

<sup>4</sup> Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para 23; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v. Council and Commission* [2008] ECR I-635, para. 281. See in particular Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores* [2003] ECR I-6677. See also

in these times that such commitment is needed most. The European Union derives its political legitimacy from its commitment and adherence to its founding values. It is these values that are at issue in the present proceedings.

*(ii) Developments since the reference and the scope of Question Two*

Question two of the reference concerns a Member State's entitlement to enter into and ratify a treaty such as the ESM Treaty in light of the provisions of that treaty and in light of the existing obligations of Member States under the Union Treaties.

The Supreme Court considered an answer to this question to be necessary for the determination of the domestic proceedings even if Ireland ratified the ESM Treaty in the meantime.<sup>5</sup> In the domestic proceedings, both the Supreme Court and the Respondents accepted that if, post-ratification, ratification were found to be incompatible with obligations under Union law, Ireland – and indeed every Member State – would be required to withdraw from participation and terminate the ESM Treaty. It is on this basis that the Supreme Court did not consider it necessary to restrain Ireland from ratifying the Treaty pending the determination of this reference. Accordingly, regardless of ratification, the answer to question two remains necessary in order to establish whether ratification and participation in the ESM Treaty is permitted under Union law. The ruling of this Court will have a direct impact on the resolution of the Appeal before the Supreme Court. The answer to the question is also relevant to determine additional questions of domestic law raised by the Appellant and currently pending before the Supreme Court concerning the interaction between EU and national law.

*(iii) Sequence of the questions*

A fundamental question arising in these proceedings is whether Ireland and the Member States are permitted to ratify and participate in the ESM Treaty, in light of their obligations under the Union Treaties. Although the European Council has adopted a Decision to amend the TFEU to authorise the establishment of a permanent stability mechanism, this Decision, including the proposed amendment, has not yet entered into force. Even if considered valid, it can only enter into force, at the earliest, on 1 January 2013. Consequently, it is the provisions of the Union Treaties prior to any amendment which constitute the legal framework within which the compatibility of participation in the ESM Treaty is to be assessed.

In the interests of conceptual clarity, and to follow the relevant chronology, it is proposed first to address the question relating to the compatibility of the ESM Treaty. The validity and effect of the Decision (questions one and three) will be considered subsequently.

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F.G. Jacobs “The Rule of Law and Judicial Remedies in the European Union” in (2002) *Hibernian LJ*, page 1.

<sup>5</sup> Order for Reference of the Supreme Court, pages 2, 3 and 23.



### C. Executive Summary of the Appellant's Observations

At the time of these proceedings the European Council Decision proposing an amendment of the TFEU to authorise the establishment of a permanent stability mechanism has not yet entered into force. Consequently, in the interest of conceptual clarity and to follow the relevant chronology, Question two, relating to the ESM Treaty is addressed first.

#### I. Question Two: the Treaty establishing the European Stability Mechanism ("ESM Treaty")

- (1) The ESM Treaty is incompatible with the Union's commitment to the Rule of Law enshrined in Article 2 TEU. It subverts and undermines a number of the most fundamental "constitutional principles" developed by this Court throughout its case-law and so is liable to undermine the integrity of the constitutional legal structure and legal reasoning within the EU legal order.
- (2) The ESM Treaty constitutes a fundamental alteration and subversion of the legal order governing Economic and Monetary Union in a manner incompatible with Union law.
- (3) The ESM Treaty breaches the allocation of competences between the national and Union legal orders as defined in the Union Treaties. It confers on a supranational autonomous entity the competence to take measures to stabilize the eurozone and make decisions that will have a direct impact on price stability despite the fact that monetary policy falls within the exclusive competence of the Union and, in particular, the ECB.
- (4) The Appellant emphasises that it is the ECB that is entrusted with defining and implementing monetary policy and safeguarding the value of the euro. It is the ECB, working with the national central banks of Member States, as part of the European System of Central Banks (the "ECSB"), that is vested with the authority to exercise monetary functions in relation to the euro and to maintain price stability. The Union Treaties confer upon the ECB the exclusive power to regulate the availability and supply of money in the eurozone. The Treaties never envisaged and do not permit a second entity to perform such functions and act in parallel to the ECB outside the framework of the Union legal order.
- (5) The ESM Treaty entails, in parallel, such an entity exercising economic policy competences in relation to the granting of financial assistance where these competences have been conferred on and exercised by Union Institutions on behalf of the Union.
- (6) EMU was conceived and agreed as a "no bail-out" Union. The ESM Treaty entails a direct and substantive breach of the "no bail-out" provisions in Part Three, Title VIII of the TFEU. It entails the assumption of commitments and liabilities as between Member States in breach of Article 125 TFEU. Article 25(2) of the ESM Treaty expressly entails Member States guaranteeing each others' financial commitments in relation to the ESM Institution. The ESM encroaches upon the competence of the Union to grant financial assistance under Article 122 TFEU and purports to authorise the granting of such assistance without being subject to the conditions exhaustively set out in that article.

- (7) The ESM Treaty entails certain EU Member States circumventing prohibitions contained in the EU Treaties by using an Institution over which they exercise decisive control in a manner incompatible with the Union Treaties and in breach of the duty of sincere co-operation enshrined in Article 4(3) TEU. It is settled case-law that Member States may not “either *directly or through the intermediary of organizations set up or recognized by them*, authorize or tolerate any exemption from [Union] law” (see for example, Case 50/76 *Amsterdam Bulb* [1977] ECR 137, para. 35).
- (8) The Appellant submits that the breach of Union law resulting from the conferral of competences on an international autonomous body is exacerbated by the extensive and open-ended discretion conferred on the ESM; the operation of the ESM outside the supervision and control of the Union; and the very limited circumstances in which the ESM would be subject to limited judicial review by the Court of Justice.
- (9) The 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 and exceed the limits provided for in Article 13 TEU. Union Institutions may not be co-opted to perform tasks outside the Union legal order *which are incompatible with the EU Treaties*. Given that the Treaties now provide special procedures for the use of enhanced co-operation and the associated use of Union Institutions, it is clear that *it is these procedures* which must be followed if Member States are to use Union Institutions in furtherance of the objectives enshrined in the Union Treaties.
- (10) Article 273 TFEU confers jurisdiction on the Court of Justice only as regards disputes concerning “*the subject matter of the EU Treaties*”. However, the ESM Treaty is an autonomous international treaty and not an EU Treaty. Although Member States purport to authorise the use of EU Institutions by the ESM,<sup>6</sup> such authorisation refers only to the European Commission and the ECB. It does not authorise the conferral of any jurisdiction on the Court of Justice, even though the ESM Treaty purports to confer new competences on this Court in connection with the interpretation and application of the ESM Treaty.
- (11) The ESM Treaty breaches general principles of Union law including (a) fundamental rights, (b) the principle of effective judicial protection, and (c) the principle of equality.
  - (a) The decisions and acts of the ESM Institution, including the provision of financial assistance subject to strict conditionality, are liable to have a direct impact *inter alia* on economic and social rights enshrined in the Charter of Fundamental Rights. The effect of circumventing the prohibition laid down in the Treaties is that it places the ESM Institution outside the scope of Union law such that it will not be subject to the Charter and will be far less accountable than it would be if it were lawfully established within the Union legal order.
  - (b) The statement of the eurozone leaders dated 29 June 2012, and the decision effectively to amend the ESM Treaty so as to permit direct bank recapitalisation, illustrates the

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<sup>6</sup> Memorandum of 24 June 2011 from the Council of the European Union to Delegations (12114/11) (Ecofin 462 and UEM 220) available at: <http://register.consilium.europa.eu/pdf/en/11/st12/st12114.en11.pdf>

open-ended nature of the ESM Treaty and the extent to which it can adjust its own operational parameters in the course of its activities. Given the extent of the discretion afforded to the ESM Institution, judicial and democratic oversight of the institution is particularly important. In these circumstances, placing the institution outside the Union legal order exacerbates the breach of the principle of effective judicial protection.

- (c) The principle of equality is breached in that if the ESM Treaty comes into force, the prohibition of bail-outs would apply only to Member States outside the eurozone.
- (12) Without prior and appropriate Union Treaty change, Member States are prohibited from entering into, ratifying, or participating in a treaty such as the ESM Treaty.

## II. Question One: the validity of the European Council Decision

- (13) The nature of the amendment proposed by the Decision is such that it required adoption using the ordinary revision procedure.
- (14) The Decision proposes the amendment of Article 136 TFEU. This is incompatible with use of the Article 48(6) TEU procedure as the proposed amendment would increase the competences of the Union. The Decision is not confined to authorising Member States to perform certain acts themselves, but authorises them, in their turn, to establish a distinct supranational mechanism in an area that falls within the scope of the Union Treaties. The Decision essentially authorises Member States to enter into a form of enhanced co-operation in the fields of economic and monetary policy. It authorises Member States to enter into what the ESM Treaty itself describes as “*a stronger economic Union*”. Similarly, it is apparent from the ECB Opinion on the Decision that in its view establishment of a permanent mechanism forms part of a series of measures concerning the economic governance of economic and monetary union that is intended to lead towards *a deeper economic union that is commensurate with the degree of economic integration and interdependency already achieved by the Member States whose currency is the euro*. The Decision thus constitutes a disguised grant of competences to the Union that is contrary to Article 48(6) TEU.
- (15) The Decision seeks to authorise the amendment of provisions other than in Part Three TFEU and thereby breaches Article 48(6) TEU. The Decision entails an amendment to the principles governing the allocation of competences, which are contained in Part One, TFEU. In particular, it entails an amendment to the exclusive competence of the Union in monetary policy and an amendment to the Union’s competence in co-ordinating economic policy and, in particular, co-ordinating the granting of financial assistance to Member States, which has been conferred on and exercised by the Union.
- (16) The proposed amendment contained in the Decision is so imprecise and open-ended that it breaches the principle of legal certainty recognised as a general principle of Union law. In Case C-540/03 *Parliament v. Council*, the Court of Justice held that a provision of secondary EU law that would expressly or impliedly authorise Member States to act in contravention of primary norms would itself violate Union Law. It follows that a condition for the lawfulness of a Decision of the European Council proposing an amendment on the basis of Article 48(6) TEU is that it does not expressly or impliedly authorise acts that

exceed the substantive conditions to which such an amendment is subject pursuant to primary Treaty norms. However, the European Council Decision is capable of being interpreted as authorising Member States to adopt measures that exceed what may be permitted by an amendment adopted through the simplified revision procedure. It follows that the Decision is invalid.

- (17) The supposed urgency of the challenges facing the eurozone did not and does not warrant or justify the fundamental revision of a Union Treaty using an inappropriate simplified revision procedure. In fact, an amendment to the TFEU had already been proposed since October 2010. There would have been sufficient and indeed ample time to have effected an appropriate Treaty amendment using the correct ordinary revision procedure in a manner conforming with the constitutional principles underpinning the Union legal order and consistent with respect for the Rule of Law.

III. Question Three: the relationship between the ESM Treaty and European Council Decision 2011/199/EU of 25 March 2011 (the “Decision”)

- (18) Seeking to effect a fundamental treaty amendment using a simplified revision procedure, and then seeking to rely on that amendment even prior to its entry into force is inconsistent with respect for the Rule of Law. Participation in a mechanism such as the ESM could only be permitted following a prior and appropriate amendment of the Union Treaties.
- (19) The amendment proposed in the Decision does not constitute such an appropriate amendment. Therefore even if the Decision were held valid and did enter into force, it would not remedy the incompatibility of the ESM Treaty with the EU Treaties.
- (20) The ESM Treaty could not derive its authority to increase competences of the Union from the Decision. An amendment adopted pursuant to Article 48(6) TEU is not capable of authorising an increase in the competences of the Union.
- (21) The ESM Treaty could not derive its authority to amend rules governing the allocation of competences of the Union from the Decision. Rules governing the allocation of competences are set out in Part One TFEU. However, the proposed amendment, adopted pursuant to Article 48(6) TEU, is not capable of authorising amendments outside Part Three TFEU.
- (22) The ESM Treaty continues to be in violation of the Union Treaties as a whole even if the amendment contained in the Decision enters into force. In particular, the breach of Articles 123 and 125 TFEU would not be cured by the entry into force of the Decision since the proposed amendment does not alter, modify, or repeal the prohibitions contained in those Articles.
- (23) Entry by a Member State into the ESM Treaty is incompatible with its obligations under the Union Treaties regardless of the entry into force of the European Council Decision.

IV. The Appellant proposes the Court of Justice answer the questions as follows:

**Proposed Answer to Question Two**

**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 respect for fundamental rights, the 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 equality;**

**Member States of the European Union whose currency is the euro, in the present State of Union law, are not entitled to enter into, ratify, or continue participation in an international agreement such as the ESM Treaty.**

**Proposed Answer to Question One**

**European Council Decision 2011/199/EU of 25<sup>th</sup> 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 invalid.**

**Proposed Answer to Question Three**

**Member States are precluded from entering into, ratifying or participating in an international agreement such as the ESM Treaty irrespective of the entry into force of the European Council Decision.**

## **D. Observations on Question Two: the ESM Treaty and Union law**

### **Question Two**

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?

#### **1. Succinct overview of the ESM Treaty**

- 1.1 The ESM Treaty establishes a “bail-out” fund, largely comprising borrowed money. It entails a *permanent* commitment by each Member State to a policy of providing financial assistance to participating Member States and their financial institutions in order to prop up the euro currency. The provision of financial assistance is subject to strict conditionality.
- 1.2 Accession is limited to Member States of the European Union whose currency is the euro.<sup>7</sup> Accession is to be mandatory for any Member State adopting the euro in future.
- 1.3 The ESM is governed by and under the control of representatives of the participating Member States. Each Member State appoints a Governor and an alternate Governor. Each Governor appoints a Director and an alternate Director.<sup>8</sup> The Board of Governors

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<sup>7</sup> Article 2 of the ESM Treaty.

<sup>8</sup> Articles 5 and 6 of the ESM Treaty.

appoints the Managing Director.<sup>9</sup> The Governors are to be the Member States' Finance Ministers.

- 1.4 The ESM's authorised capital stock is financed entirely by Member States in proportions set out in Annex II of the ESM Treaty. The initial authorised capital stock is 700 billion euro.
- 1.5 From its entry into force, Member States are to pay contributions to the ESM for the purpose of assuming financial commitments and liabilities of other Member States. The initial maximum lending capacity of the ESM fund was set at 500 billion euro. The ESM Member States have *already* decided on 30 March 2012 to raise the combined maximum lending capacity to 700 billion euro and to accelerate the payment of the initial paid-in capital.<sup>10</sup>
- 1.6 By decision dated 29 June 2012, Member States of the euro area have effectively agreed to amend the ESM Treaty so as to permit the ESM, by 'regular decision', to provide financial assistance directly to banks.<sup>11</sup> The number and fundamental nature of proposed changes to the ESM institution, even prior to its entry into force, is indicative of the ESM Treaty's flexible and open-ended structure. The ESM Treaty is drafted in terms which permit the evolution of its own operational parameters in the course of its activities.
- 1.7 Article 25(2) of the ESM Treaty expressly binds Member States to assume the commitments and liabilities of any Member State which fails to comply with the substantial obligations to contribute to the financing of the ESM.<sup>12</sup> Pursuant to that Article, should the ESM incur losses by reason of the failure of a Member State to repay financial assistance received from the ESM, the other Member States may be required to cover that loss up to the amount of their authorised unpaid capital.
- 1.8 Pursuant to Article 35 of the ESM Treaty, the Governors and Directors of the ESM are immune from legal proceedings with respect to acts performed by them in their official capacity. The Appellant submits that the ESM Treaty places fundamental and far-reaching decisions in the hands of an autonomous, independent, and essentially unaccountable institution that operates outside and beyond the reach of the Union legal order, is subject to only minimal judicial review, and the powers of which are cemented within the framework of a permanent international agreement.

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<sup>9</sup> Article 7 of the ESM Treaty.

<sup>10</sup> Statement of the Eurogroup dated 30 March 2012. This alters the terms of Article 39 of the ESM Treaty.

<sup>11</sup> Euro Area Summit Statement of 29 June 2012.

<sup>12</sup> Article 25(2) of the ESM Treaty.

**2. Succinct overview of the Economic and Monetary Union as initially envisaged and agreed in the Treaty on European Union, signed in Maastricht in 1992**

- 2.1 In the domestic proceedings the Appellant maintained that the ESM Treaty constitutes a fundamental contradiction and alteration of the legal order and operation of Economic and Monetary Union (“EMU”) as enshrined in the Treaty on European Union, agreed at Maastricht in 1992, and as approved by the people of Ireland in a referendum.
- 2.2 The Appellant submits that price stability is at the core of the single monetary policy. The primary objective of the European System of Central Banks (“ESCB”), which comprises the European Central Bank (“ECB”) and the national central banks,<sup>13</sup> is to maintain price stability.<sup>14</sup> The ECB is exclusively authorised to issue the euro currency.<sup>15</sup>
- 2.3 The framers of EMU considered fiscal or budgetary discipline to be key to ensuring price stability, and this is reflected in Part Three, Title VIII TFEU. In particular, it is reflected in the conferral of supervisory and coordinating competences on Union Institutions, in relation to *inter alia* the monitoring of government deficits and the granting of financial assistance as well as in relation to the prohibition on “bail-outs” or the monetary financing of budget deficits.
- 2.4 This approach is apparent not just from the express prohibitions in the TFEU, but also from documents and reports prepared during the negotiation of the Treaty on European Union. In the lead up to the Intergovernmental Conference on Economic and Monetary Union, a number of governments submitted proposals on the operation and regulation of EMU. Such proposals were submitted by Ireland, France, Germany, Luxembourg, Spain, and the United Kingdom, as well as by the European Commission.<sup>16</sup> Ireland’s proposal “favoured a Treaty prohibition on ‘bailing-outs’ and monetary financing of budget deficits.”<sup>17</sup> Similarly Germany, in its proposal, gave special attention to budgetary discipline: the prohibition of bailing-outs, and of monetary financing of budget deficits.<sup>18</sup>
- 2.5 On 11 June 1991, an inter-institutional conference was held on EMU.<sup>19</sup> At that conference, Germany’s State Secretary in the Finance Ministry, Horst Köhler, set out his

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<sup>13</sup> Article 282 TFEU.

<sup>14</sup> Article 127 TFEU.

<sup>15</sup> Article 282 TFEU.

<sup>16</sup> Report by European Parliament Committee on Economic and Monetary Affairs and Industrial Policy, 13 March 1991 [http://ec.europa.eu/economy\\_finance/emu\\_history/documentation/chapter13/19910313en09epdrafttreaty.pdf](http://ec.europa.eu/economy_finance/emu_history/documentation/chapter13/19910313en09epdrafttreaty.pdf).

<sup>17</sup> *Ibid.*, at p. 7.

<sup>18</sup> *Ibid.*, at p. 7.

<sup>19</sup> Inter-Institutional Conference on Economic and Monetary Union accompanying the Intergovernmental Conferences, held on Tuesday 11 June 1991. For the records of the proceedings (in French) see: [http://ec.europa.eu/economy\\_finance/emu\\_history/documentation/chapter13/19910611fr14analyticalsummary.pdf](http://ec.europa.eu/economy_finance/emu_history/documentation/chapter13/19910611fr14analyticalsummary.pdf)



Government's understanding of the central objectives underpinning EMU. Mr Köhler emphasised the essential requirement for "price stability and the fight against inflation", stating that these objectives must be guaranteed in EMU. Mr Köhler argued that monetary policy must be consistent and credible. The ECB must have the last word on interest rates and liquidity. According to Mr Köhler, it was critical that the ECB should be conferred with clear and unambiguous powers from the outset. He predicted that otherwise there would be a risk of creating a "grey zone" between its competences and the competences of Member States, which would be "very dangerous".

2.6 Mr Köhler further emphasised that EMU is an element of the political Union in which each Member State brings with it its own identity and will be respected on the basis of its efforts. In this context, it was claimed that economic and social cohesion cannot be understood in terms of simple redistribution, as this would constitute a psychological error. On the contrary, it was asserted that *everyone must help themselves*.<sup>20</sup>

2.7 Mr Trichet, representative of France at the conference, emphasised that the Union must have the necessary competence to coordinate the economic policies of Member States, including the competence to impose sanctions on Member States.<sup>21</sup>

2.8 This approach was clearly adopted in the version of the Treaty on European Union that was agreed and signed by the Member States in 1992 and which entered into force on 1 November 1993. The "no bail-out" clause was initially enshrined in Article 104b EC which, following renumbering, became Article 103 EC, and now appears in Article 125 TFEU.

### **3 The ESM Treaty constitutes a fundamental alteration and subversion of the rules governing Economic and Monetary Union that is incompatible with Union law**

3.1 The Union Treaties vest in the ECB exclusive authority for the definition and implementation of monetary policy in EMU. The ECB was established pursuant to the Treaty on European Union for this purpose and the exclusivity of its role is a cornerstone in the architecture of Economic and Monetary Union. The ECB is the sole authorised issuer of the euro and is the guardian of the currency.

3.2 If permitted to enter into force, the ESM Institution will create a parallel entity operating outside the framework of the Union legal order whose activities will trespass upon the exclusive competence of the Union in monetary policy, and more particularly upon the

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<sup>20</sup> *Ibid.*, at p.10 – « L'UEM est un élément de l'Union politique dans laquelle chaque Etat membre apportera son identité et sera respecté en fonction de ses efforts. Dans ce contexte, il insiste sur le fait que la cohésion économique et sociale ne doit pas être vue en terme de simple redistribution, ce qui constituerait une erreur psychologique, au contraire, chacun doit s'aider soi-même ».

<sup>21</sup> *Ibid.*, at p.13.

exclusive role and authority of the ECB. This is discussed further at paragraphs 3.21 to 3.30 below.

- 3.3 EMU as established in the Treaty on European Union in 1992 may be characterised as a “no bail-out” Union. It is manifest from the records of the negotiation of EMU in 1992 referred to above,<sup>22</sup> and from a number of Treaty Articles read together, that the EMU was not intended to permit the sharing or assumption of liability between Member States. This is expressed in the clearest possible terms by the European Commission itself on a section of its web-site concerning Economic and Monetary Union entitled “Myths and Facts”. The Commission explains that *“Some people might be under the misconception that in a single currency area with single monetary policy all such liabilities could become pooled together. This would mean, for example, that if a government-run pension fund in one euro-area Member State encountered financial difficulties, then the other euro-area members would be obliged to help bail it out. However, the Treaty on European Union explicitly excludes such a scenario. All EU Member States, including members of the euro area, are signatories to the Treaty, which states that no Member State is liable for any of the commitments or liabilities of any other.”*<sup>23</sup>
- 3.4 If permitted to enter into force, the ESM Treaty would alter the nature of EMU and would constitute a fundamental departure from the prohibition on bail-outs. The ESM Treaty subverts and reverses the “no bail-out” principle. It provides for a permanent “bail-out” scheme that would allow for massive – and after 5 years (or sooner, if agreed), unlimited – borrowing.
- 3.5 For the first five years (or less if agreed) 700 billion euro capital<sup>24</sup> may be used as security for stability support of 4.66 trillion euros.<sup>25</sup> In practice, the ESM involves Ireland and the other Member States participating in the ESM committing to the concept of unlimited potential borrowing and lending in order to bail-out other participating Member States. This is a most profound change from a “no bail-out” EMU to a “bail-out” EMU.
- 3.6 The fundamental conflict between the core obligations enshrined in the ESM Treaty and the provisions on “Economic and Monetary Policy” set out in Part Three, Title VIII of the TFEU is clear. This conflict is readily apparent such that the European Council itself considered the establishment of a permanent stability mechanism to require an amendment to the EU Treaties.

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<sup>22</sup> See Section D.2 above.

<sup>23</sup> Web-site of DG Economic and Financial Affairs at [http://ec.europa.eu/economy\\_finance/emu10/facts4\\_en.htm](http://ec.europa.eu/economy_finance/emu10/facts4_en.htm).

<sup>24</sup> Article 8 of the ESM Treaty.

<sup>25</sup> Article 41(2) of the ESM Treaty. This figure is calculated on the basis that there must be a minimum 15% ratio between paid in capital and the outstanding amount of ESM issuances.

- 3.7 In the Recitals of the European Council Decision, the Heads of State or Government agreed on the need for Member States to establish a permanent crisis mechanism and the European Council invited consultation on the “limited treaty change *required* to that effect”.<sup>26</sup>
- 3.8 Such consultations led to the adoption by the European Council of a Decision to amend Article 136 TFEU to include a new paragraph authorising Member States whose currency is the euro to establish a European stability mechanism. The ESM Treaty includes a Recital which refers expressly to the proposed amendment to the TFEU.
- 3.9 The Decision including the proposed amendment to the TFEU is to come into effect in January 2013 at the earliest. Nevertheless, the Government of Ireland and other EU Member States claim that they may enter and participate in the ESM Treaty *independently of and prior to the entry into force* of the Treaty amendment that purports to authorise the Member States to establish the ESM.
- 3.10 EU Treaty change is a significant and burdensome process that is not undertaken lightly. The process of Treaty change would not have been undertaken had the proposed ESM been considered to be in conformity with the EU Treaties.<sup>27</sup> It is clear from the wording of the Decision, and of the European Council Conclusions,<sup>28</sup> that the Member States and the European Council considered Treaty change to be *required* for an institution such as the ESM to be compatible with Union law.
- 3.11 It is submitted that the European Council was correct in this assessment. The Decision to amend the Union Treaties reinforces the Appellant’s assertion that the entitlement to establish a European stability mechanism is subject to prior and appropriate EU Treaty change and that the stability mechanism contemplated by the ESM Treaty is contrary to provisions in the EU Treaties which are in force at the time of this reference. The Appellant submits that the ESM Treaty is incompatible with the Union Treaties on the following grounds:
- (i) The ESM Treaty breaches the allocation of competences between the national and Union legal orders as defined in the Union Treaties.
  - (ii) The ESM Treaty entails a direct and substantive breach of the “no bail-out” principle reflected in Part Three, Title VIII TFEU.

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<sup>26</sup> Recital 2 of the European Council Decision.

<sup>27</sup> Paragraph 27 of the High Court Outline Submissions of the Respondents.

<sup>28</sup> Conclusions of the European Council, 28-29 October 2010 (EUCO 25/1/10 REV 1 – Brussels, 30 November 2010).

- (iii) The ESM Treaty entails certain EU Member States circumventing prohibitions contained in the Union Treaties through an institution over which the Member States exercise decisive control in a manner incompatible with the Union Treaties and in breach of the duty of sincere co-operation enshrined in Article 4(3) TEU.
- (iv) The ESM Treaty confers new competences on Union Institutions and entails performance by them of tasks incompatible with their functions as defined in the EU Treaties and the limits provided for in Article 13 TEU.
- (v) The ESM Treaty is incompatible with General Principles of Union law, including the principles of equality, legal certainty, and respect for effective judicial protection.
- (vi) The ESM Treaty is incompatible with the Union's commitment to the Rule of Law enshrined in Article 2 TEU.

Each of these grounds will be considered in turn.

**(i) *The ESM Treaty breaches the allocation of competences between the national and Union legal orders as defined in the Union Treaties***

- 3.12 Article 3(4) TEU provides: "The Union shall establish an economic and monetary union whose currency is the euro". Pursuant to Article 3(1)(c) TFEU and Part Three, Title VIII TFEU the Union has exclusive competence over monetary policy for the Member States whose currency is the euro. Consequently, Member States must refrain from acting in that field.
- 3.13 Article 2(1) TFEU, "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."
- 3.14 By contrast with monetary policy, competence over economic policy is shared between the Union and Member States.<sup>29</sup> Member States may only exercise their competence to the extent that the Union has not exercised its competence. Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.<sup>30</sup>

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<sup>29</sup> Lenaerts and Van Nuffel, EU Law (3<sup>rd</sup> Edition, 2011, Sweet & Maxwell), para. 7-023 "Since all competences outside the areas referred to in Arts 3 and 6 are shared by the Union with the Member States (see Art.4(1) TFEU) [the coordination of the economic and employment policies of the Member States] can only be classified as falling within the general category of shared competences."

<sup>30</sup> Article 2(2) TFEU.

- 3.15 Pursuant to Article 2(6) TFEU, the scope of arrangements for the exercise of the Union's competences shall be determined by the provisions of the Treaties relating to each area.
- 3.16 Article 3(2) TFEU provides that the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.
- 3.17 Article 5(1) TFEU states that "The Member States shall coordinate their economic policies *within the Union*" (emphasis added).
- 3.18 In a contribution to the Intergovernmental Conference on Political Union (1991), the Commission emphasised that

The exclusive competence of the Union in [the field of external economic policy] is confirmed, making the Commission, *and the Commission alone*, responsible for representing the Union on the external scene, notably in dealings with International organizations.<sup>31</sup>

- 3.19 In Case C-459/03 *Commission v. Ireland*,<sup>32</sup> the Court of Justice held that Ireland had breached its obligations under Union law by referring a dispute to a United Nations Tribunal when in fact such dispute fell to be determined within the framework of the Union legal order. The Court emphasised that *an international agreement cannot affect the allocation of responsibilities defined in the Treaties*.<sup>33</sup> The Court held that in conferring competences reserved to the Union on another entity, Ireland breached its obligation of loyalty under Union law, enshrined in what is now Article 4(3) TEU.
- 3.20 Similarly in *Kadi*<sup>34</sup> the Court of Justice stated: *It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC [...]*.<sup>35</sup>

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<sup>31</sup> Commission Document SEC (91) 500, Initial Contributions by the Commission to the Intergovernmental Conference on Political Union (15 May 1991), Section C, page 28: <http://aei.pitt.edu/4679/1/4679.pdf>

<sup>32</sup> Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635.

<sup>33</sup> *Ibid.* para. 23.

<sup>34</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-635.

<sup>35</sup> *Ibid.* para. 282.

(a) The ESM Treaty encroaches on European Union Monetary Policy and on the role of the European Central Bank.

- 3.21 The Appellant submits that the ESM Treaty encroaches on the Union's exclusive competence in monetary policy. As a matter of Union law *only the Union* may legislate and adopt legally binding acts in that area.
- 3.22 It is submitted that the fundamental and defining purpose of the ESM is rooted in Union monetary policy. The ESM Treaty is intended to safeguard the stability of the euro currency. It is not contested that a number of the activities of the proposed ESM – for example, the provision of financial assistance and the imposition of conditionality – also concern economic policy and entail the exercise of economic functions, but this does not change the fact that the ESM entails the exercise of monetary competences.
- 3.23 The ESM Treaty seeks to embed the ESM as an integral part of EMU. Recital 7 of the ESM Treaty provides that all EU Member States whose currency is the euro will become ESM Members, including any Member States that join the euro area in the future. Article 3 emphasises that the purpose of the ESM is to provide stability support if indispensable to safeguard the financial stability of the euro area. It is manifest from this last sentence that stability support is the *means*; the safeguarding of the financial stability of the euro – or the propping up of the euro – is the object.
- 3.24 Pursuant to Part Three, Title VIII TFEU, and in particular Articles 119 and 127 TFEU, the primary objective of the single monetary policy is to ensure *price stability*. The priority of price stability was identified at the inception of the EMU and at the time of the negotiation of the Economic and Monetary Policy in 1992.<sup>36</sup>
- 3.25 It is self-evident that the injection of capital into Member States, or the recapitalisation of financial institutions, and the borrowing required to provide the necessary funding, on the scale envisaged by the ESM, will increase the sum of euro currency in circulation. Increases in the supply of money directly affect inflation, a fundamental factor in price stability. The functions and powers of the ESM are thus capable of having a direct impact on price stability in the euro area, an impact which would go to the very core of Union monetary policy.
- 3.26 The actions of the ESM are liable to have a direct impact on monetary policy – that is precisely why the ESM is to be established. If the ESM Treaty did not have an impact on monetary policy, it would not be fulfilling its purpose, the support of the euro.

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<sup>36</sup> See Section D.2 of these submissions.

- 3.27 The Appellant notes that when adopting the Decision the European Council clearly recognised that European stability mechanisms would necessarily concern monetary policy. Article 48(6) TEU provides for consultation with the ECB, where a proposed amendment to the TFEU would entail “institutional changes in the monetary area” (emphasis added). The fact that the European Council consulted the ECB in relation to the proposed amendment of Article 136 TFEU reflects the European Council’s view that the establishment of a European stability mechanism would concern the monetary functions of the Union.
- 3.28 Given that the ESM concerns monetary policy, the Appellant submits that its functions fall within the exclusive competence of the Union and in particular the ECB. It is the ECB that is entrusted with defining and implementing monetary policy and safeguarding the euro. It is the ECB, working with the national central banks of Member States, as part of the European System of Central Banks, that is vested with the authority to exercise monetary functions in relation to the euro, and to maintain price stability. It is the ECB, and solely the ECB, that is authorised to issue euro currency. By virtue of its monopoly, the ECB is able to manage the liquidity situation in the money market and influence interest rates. In other words, the Union Treaties confer on the ECB the exclusive power to regulate the availability and supply of money in the eurozone. The Treaties never envisaged and do not permit a second entity to carry out such functions and act in parallel to the ECB outside the framework of the Union legal order.
- 3.29 The Appellant submits that the “reconciliation clause” in Article 13(3) of the ESM Treaty, which requires any Memorandum of Understanding to be fully consistent with the measures of economic policy coordination provided for in the TFEU, does not cure the breach of the competence rules in the EU Treaties.
- 3.30 Firstly, the requirement relates only to “economic policy coordination” and not “monetary policy”. Secondly, in fields of exclusive Union competence, Member States simply have no scope or margin in which to act. Only the Union Institutions may act. Therefore, the mere assumption of a particular competence (or worse still, its conferral on a separate international body) is unlawful, regardless of how that competence is exercised. Thirdly, even if there is an intention to ensure compatibility, it is in practice impossible for the terms of any Memorandum of Understanding under the ESM to be compliant with Union law in circumstances where the very act itself – i.e. *the provision of financial assistance for the purposes of bailing-out a Member State* – is prohibited under Union law.

(b) The ESM Treaty encroaches on European Union Economic Policy

- 3.31 Competence in economic policy is shared between the Union and Member States. Pursuant to Article 2(2) TFEU, in areas of shared competence Member States may only exercise their competence *to the extent that the Union has not exercised its competence*. The Member States may only reclaim the entitlement to exercise competence to the extent that the Union has decided to cease exercising its competence.<sup>37</sup>
- 3.32 Pursuant to Article 119(1) TFEU, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based *inter alia* on the close coordination of Member States' economic policies, and on the internal market. The activities of the Member States and the Union in the field of economic and monetary policy are required to be in compliance with guiding principles laid down in Article 119(3) TFEU: stable prices, sound public finances and monetary conditions, and a sustainable balance of payments.
- 3.33 Article 121 TFEU confers on the Council the functions of formulating and adopting broad guidelines for the economic policies of the Member States and of the Union. The Union legislature has exercised the competence afforded to it by the adoption of a number of measures designed to strengthen the surveillance and coordination of economic policies.<sup>38</sup> Member States are obliged to develop and conduct their economic policies in a manner that respects parameters set by the Union and is consistent with the objectives of the Union as defined in Article 3 TEU.
- 3.34 Article 126 TFEU similarly confers on the Union Institutions a role in coordinating economic policy. The Commission is to monitor compliance with budgetary discipline on the basis of criteria laid down in the TFEU.<sup>39</sup> If the Council decides that an excessive deficit exists, the Council is authorised to make recommendations with a view to remedying the situation. Failure to comply with such recommendations may lead to sanctions such as are laid down in Article 126(11) TFEU.

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<sup>37</sup> Article 2(2) TFEU.

<sup>38</sup> See, for example, Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (1997 OJ L 209/1) as amended by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011; 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 (2011 OJ L 306/1); Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (2011 OJ L 306/8); Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances (2011 OJ L 306/25). Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (1997 OJ L 209/6) as amended by Council Regulation No 1177/2011 of 8 November 2011 (2011 OJ L 306/33).

<sup>39</sup> The criteria relate to the ratio of planned or actual government deficit to gross domestic product or the ratio of government debt to gross domestic product.



- 3.35 The Appellant submits that the “conditionality” envisaged in the ESM Treaty is the equivalent of these recommendations. Council recommendations would impose requirements on a Member State running an excessive government deficit to adopt such economic and budgetary measures as necessary to ensure reduction of the government deficit.
- 3.36 The co-ordination of the granting of financial assistance as between Member States in the context of EMU is a measure regulated at European Union level. Part Three, Title VIII TFEU contains provisions regulating the extent and conditions for granting financial assistance under the heading “Economic Policy”.
- 3.37 Pursuant to Article 125 TFEU, bail-outs between Member States are prohibited. Article 122 TFEU sets out the exceptional circumstances and means by which financial assistance may be given:
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.*
- 3.38 Arrangements for providing financial assistance to euro area Member States by way of the European Financial Stability Facility (“EFSF”) and the European Financial Stabilisation Mechanism (“EFSM”) have purportedly operated on the basis of Article 122 TFEU. Recital (1) of the ESM Treaty provides that the ESM will assume the tasks currently fulfilled by the EFSF and the EFSM. In so doing, it is clearly envisaged that the ESM should exercise a competence which has been both conferred on and exercised by the Union.
- 3.39 This observation is made without prejudice to the Appellant’s view that Article 122 TFEU does not in fact permit either the Union or Member States to provide “bail-outs” in connection with budgetary difficulties / financing problems. It is submitted that Article 122(2) TFEU only permits the Union to grant financial assistance in the event of severe and exceptional difficulties that have the character of a *force majeure* event, that are exceptional and unforeseeable in nature.

- 3.40 Considering the provisions of Articles 119, 120, 121, 122, 123, 125, 126, and 127 TFEU, individually and combined, it is apparent that there is a coherent economic principle underpinning Economic and Monetary Union. It is based on achieving price stability, *the prohibition of bail-outs*, and strict fiscal discipline, monitored and enforced by Union institutions.
- 3.41 The EU Treaties vest competence in co-ordinating economic policy in the Institutions of the Union. This competence includes competence over the coordination of provision of financial assistance to Member States in the context of EMU. This competence has not only been conferred on the Union, but it has also been exercised by the Union. The very establishment of the EFSF on the basis of Article 122(2) TFEU is evidence of the exercise of that competence. Moreover Article 5(1) TFEU emphasises that economic policy coordination shall take place *within the Union*.
- 3.42 The ESM Treaty entails the conferral of competences on an international body in the field of economic policy. This conflicts with the principles underpinning EMU, and involves the *assumption and delegation of competences that are vested in Union Institutions*.
- 3.43 Given that Member States are precluded from entering into international agreements that affect the allocation of competences between the Union and Member States, it follows that Member States are precluded from entering into an international agreement such as the ESM Treaty which purports to allocate Union competences to an autonomous international body.
- 3.44 The “reconciliation clause” in Article 13(3) of the ESM Treaty, which requires any Memorandum of Understanding to be fully consistent with the measures of economic policy coordination provided for in the TFEU, does not remedy the breach of the competence rules in the EU Treaties. Firstly, where the Union is conferred with and has exercised competence in a specific field of shared competence, Member States have no scope for action in relation to that particular competence – only the Union Institutions may act. Therefore, the mere conferral of a particular Union competence on another organisation is unlawful, regardless of how it is exercised. Secondly, it is impossible for a Memorandum of Understanding regarding arrangements for a particular act to be interpreted in compliance with Union law in circumstances where the act itself – i.e. *the provision of financial assistance to bail-out a Member State* – is prohibited under Union law.

(c) Considerations relating to both Economic and Monetary Policy

- 3.45 Under Article 3(2) TFEU the Union has exclusive competence for the conclusion of international agreements *inter alia* where such agreements may affect common rules or alter their scope. The ESM Treaty is an international agreement the operation of which is liable to affect common rules in the field of economic and monetary policy. For example, the operation of the ESM would affect rules regarding the provision of financial assistance and the terms of such assistance; and rules relating to conditionality that concern the regulation of Member States' public finances, monetary conditions, and the sustainable balance of payments. These areas fall within the competence of the Union, so only *the Union* may participate in the conclusion of such international agreements (typically with third countries). The terms of Article 3(2) TFEU – as well as the very existence of the provision – confirm the Appellant's view that Member States may not go outside the Union framework and enter into international agreements the effect of which is to modify provisions of EMU as enshrined in the Union Treaties.
- 3.46 The Appellant recalls that the ESM Treaty is drafted in terms which permit the evolution of its own operational parameters in the course of its activities. Thus, for example, the contracting Member States have *already* decided on 30<sup>th</sup> March 2012 to raise the combined maximum lending capacity to 700 billion euro and to accelerate the payment of the initial paid-in capital.<sup>40</sup> By decision dated 29 June 2012, Member States of the Euro Area have effectively agreed to amend the ESM Treaty so as to permit the ESM, by 'regular decision', to provide financial assistance directly to banks.<sup>41</sup> The number and fundamental nature of proposed changes to the ESM institution, even prior to its entry into force, is indicative of the ESM Treaty's flexible and open-ended structure.
- 3.47 Moreover, the ESM Treaty purports to give the Court of Justice limited competence to resolve certain disputes concerning the interpretation and application of that Treaty. This limited competence does not extend to determining whether actions of the ESM are in conformity with Union law, Union monetary policy, or the allocation of competences under the Treaties.
- 3.48 The Appellant submits that the breach resulting from the conferral of competences on an international autonomous body is exacerbated by the extensive and open-ended discretion conferred on the ESM; the operation of the ESM outside the supervision and control of the Union; and the very limited circumstances in which the ESM would be subject to judicial review by the Court of Justice.

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<sup>40</sup> Statement of the Eurogroup dated 30 March 2012. This alters the terms of Article 39 of the ESM Treaty.

<sup>41</sup> Euro Area Summit Statement of 29 June 2012.

It is clear that by conferring upon an autonomous international institution the power to grant financial assistance in circumstances outside those permitted by the EU Treaties, the Member States are breaching the allocation of competences set out in the EU Treaties and consequently are in breach of Union law.

(ii) ***The ESM Treaty entails a direct and substantive breach of the “no bail-out” principle reflected in Part Three, Title VIII of the Treaty on the Functioning of the European Union.***

3.49 The Appellant submits that the ESM Treaty involves the Member States acting in contravention of the EU Treaties under Part Three, Title VIII TFEU, and in particular Articles 123, 125, 126, 127, and 128 TFEU, and in breach of the duty of sincere co-operation enshrined in Article 4(3) TEU.

3.50 It is clear from Part Three, Title VIII TFEU, and in particular Articles 122(2), 123, and 125 TFEU, that their underlying objective is to regulate and limit the granting of financial assistance, directly or indirectly, to Member States. The exceptional circumstances in which the Council, on a proposal from the Commission, may offer financial assistance to a Member State are exhaustively laid down in Article 122(2) TFEU.

3.51 Indeed this prohibition on “bail-outs” reflects the well-documented positions of the Member States negotiating the Treaty on European Union.<sup>42</sup>

3.52 The ESM Treaty would establish an institution to carry out actions that are regulated and prohibited by Articles 122, 123, and 125 TFEU. The ESM Treaty is specifically designed to permit Member States to offer financial assistance to other Member States. It creates an institution, external to the Union, through which Member States may carry out precisely what is prohibited in the plainest possible terms by Articles 123 and 125 TFEU.

3.53 Article 125(1) TFEU, known as the “no bail-out” clause, provides that

*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*

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<sup>42</sup> See Section D.2 (above) of these submissions.

*public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.*

- 3.54 The Appellant submits that the ESM Treaty makes ESM Member States liable to provide funds *precisely* to enable recipient Member States to meet their commitments. From the entry into force of the ESM Treaty, under Articles 8(4) and 41 of the ESM Treaty, Member States will *immediately be liable* in the sum of their capital subscription to facilitate the financing of Member States and State-owned banks so that they are able to pay their debts. The concept of a “bail-out” involves Member States being liable to contribute money for the assumption of other Member States’ debts.
- 3.55 Article 12 of the ESM Treaty provides that the ESM may provide stability support to a Member State where necessary to safeguard the financial stability of the euro area. Article 14 of the ESM Treaty authorises the Board of Governors of the ESM to grant precautionary financial assistance to a Member State. Article 15 of the ESM Treaty authorises the ESM Board of Governors to grant financial assistance through loans to a Member State *for the specific purpose of re-capitalising the financial institutions of that Member State*.
- 3.56 It is evident that the ESM constitutes a conduit by which Member States are liable to assume commitments of public undertakings and central governments of other Member States. The ESM entails obligations and commitments that are manifestly incompatible with Article 125 TFEU.
- 3.57 In the domestic proceedings, the Respondents argued that:
- (a) Articles 14 to 18 of the ESM Treaty do not involve Member States becoming liable for or assuming the commitments of other Member States particularly since financial assistance is subject to conditionality (and terms for repayment);<sup>43</sup>
  - (b) Article 125 TFEU is addressed to the Union and to Member States but not to an international organisation such as the ESM;<sup>44</sup>
  - (c) On the Appellant’s interpretation, Ireland could not participate in any other funding mechanism including the IMF;
- 3.58 It is anticipated that similar claims will be raised before this Court, and consequently the Appellant proposes to deal with each of these claims in turn.

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<sup>43</sup> *Pringle*, High Court judgment, p. 49 para. 73, which refers back to paras. 60 to 66 of the judgment, commencing at p. 41.

<sup>44</sup> *Pringle*, High Court judgment, p. 49 para. 73.

***(a) Whether the ESM Treaty involves Member States becoming liable for or assuming the commitments of other Member States.***

- 3.59 Before the High Court (hearing this case at first instance), the Respondents argued that the ESM Treaty does not involve Member States becoming liable for each others' liabilities or commitments. In particular, it was argued that the ESM Treaty did not entail an assumption of liability since financial assistance was subject to conditionality, and in particular an obligation to repay loans issued.
- 3.60 The ESM is a "bail-out" fund. This characterisation is based on a number of the provisions of the ESM Treaty. Pursuant to Article 3 of the ESM Treaty, funding or stability support is to be provided to Member States that are experiencing or threatened by severe financing problems, *if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States*. The ESM seeks to prevent financial contagion.<sup>45</sup> It provides "stability support" when regular access to market financing is impaired, or at risk of being impaired.<sup>46</sup>
- 3.61 In its "Independent Guide to the Fiscal Stability Treaty", Ireland's Referendum Commission referred repeatedly to the ESM as a "Financial assistance / Bail-out Mechanism", and described the ESM as "the permanent EU bail-out mechanism."<sup>47</sup>
- 3.62 This characterisation captures the essence of the ESM. The ESM is not an ordinary commercial institution that operates in ordinary financial circumstances. Bail-outs are required where the risk of default is so great that commercial funding is unavailable.
- 3.63 The fact that a grant of assistance may include terms for repayment does not alter the essential purpose and character of the ESM as a "bail-out" fund. Moreover, given recent events, the possibility of default on debt by Member States is far from hypothetical. Similarly, the fact that the assumption of liability is subject to conditionality<sup>48</sup> is irrelevant when defining the essential scope, purpose, and character of the ESM Treaty and of the finance granted pursuant to its provisions. The provision of financial assistance to enable Member States and their banks to discharge liabilities in limited and extreme circumstances is a bail-out; the imposition of terms does not alter the nature and purpose of the intervention, which is as stated in the ESM Treaty.

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<sup>45</sup> Recital 3 of the ESM Treaty.

<sup>46</sup> Recital 13 of the ESM Treaty.

<sup>47</sup> Page 11 of the "Independent Guide to the Fiscal Stability Treaty", published by the Referendum Commission accessible at: [http://www.referendum2012.ie/REF00377\\_Booklet\\_Information\\_online\\_English.pdf](http://www.referendum2012.ie/REF00377_Booklet_Information_online_English.pdf).

<sup>48</sup> Paragraphs 52 to 54 of the Respondents' High Court Submissions.

- 3.64 Liability under the ESM Treaty does not merely arise in the event of a default on repayment; it arises by virtue of the entry into force of the ESM Treaty. Member States must begin making capital payments within 15 days of the entry into force of the Treaty.
- 3.65 The ESM involves certain Member States combining to advance financial assistance to other Member States in order to allow them to fulfil their financial commitments. In the Appellant’s view, this is clearly and expressly prohibited by Article 125 TFEU.
- 3.66 In their submissions before the High Court, the Respondents suggested that in contrast to the provision of financial assistance, a guarantee of the debt of another Member State would constitute “the most obvious example” of prohibited financial assistance. This is precisely what the ESM entails.
- 3.67 In this regard the Appellant recalls, first, that the wording of Article 125 TFEU extends beyond guarantees, referring to a State *becoming liable for the commitments of another Member State* – and that is precisely what the ESM entails. If the ESM were to enter into force, Member States would be *liable* in the sum of their share of the authorised capital stock to meet the commitments of one or more Member States.
- 3.68 Second, a guarantee *does, in any event, underlie the operation of the ESM*. Article 25(2) of the ESM Treaty expressly creates a procedure whereby Member States guarantee each other’s obligations to contribute to the fund for the purposes of covering any losses incurred by the ESM or to avoid the ESM from defaulting on any scheduled or other payment obligation to creditors. Article 25 of the ESM Treaty, and the system of mutual guarantee as between Member States, form an essential component of the ESM Treaty as they facilitate the ESM in raising funds from the financial markets.
- 3.69 Article 25 of the ESM Treaty provides as follows:

*“Coverage of losses*

*1. Losses arising in the ESM operations shall be charged:*

- (a) firstly, against the reserve fund;*
- (b) secondly, against the paid-in capital; and*
- (c) lastly, against an appropriate amount of the authorised unpaid capital, which shall be called in accordance with Article 9(3).*

*2. If an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9(2) or (3), a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed. [...]*”

3.70 Article 9(2) of the ESM Treaty authorises the Board of Directors to call in authorised unpaid capital by simple majority decision in order to restore the level of paid-in capital if the amount of the latter is reduced by the absorption of losses below the level established in Article 8(2) of the ESM or as may subsequently be amended by the Board of Governors. The Board of Directors may grant an appropriate period of time for its payment by the ESM Members.

3.71 Article 9(3) of the ESM Treaty provides as follows:

*3. The Managing Director shall call authorised unpaid capital in a timely manner if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors. The Managing Director shall inform the Board of Directors and the Board of Governors of any such call. When a potential shortfall in ESM funds is detected, the Managing Director shall make such capital call(s) as soon as possible with a view to ensuring that the ESM shall have sufficient funds to meet payments due to creditors in full on their due date. ESM Members hereby irrevocably and unconditionally undertake to pay on demand any capital call made on them by the Managing Director pursuant to this paragraph, such demand to be paid within seven days of receipt.*

3.72 Reading Article 25(2) in combination with Article 9 of the ESM Treaty, it is apparent that Member States are required to assume the commitments of another Member State where it fails to make payments required under a capital call. In such circumstances, the ESM will make a *revised increased capital call* for which the remaining Member States assume liability. This provision therefore expressly requires Member States to indemnify the ESM against defaults by other Member States and assume liability for each other's commitments. This provision, in itself, constitutes an express and manifest breach of the second sentence of Article 125.

***(b) Whether the fact that Article 125 TFEU is addressed to the Union and Member States means that Member States may be free to carry out such acts through the establishment of an international organisation such as the ESM***

3.73 In domestic proceedings, the Respondents sought to distinguish between the obligations of Member States acting as Member States, and the obligations of Member States acting through an international organisation such as the ESM. The Appellant considers such distinction to be erroneous. Even if the Member States are using the ESM as an intermediary or conduit to administer the loans (which, it is submitted, is also prohibited and a breach of Union law),<sup>49</sup> it does not alter the fact that under the terms of the ESM

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<sup>49</sup> This “indirect” breach is considered in Section D. 3(iii) below.



Treaty, the Member States assume liabilities and commitments of other Member States as is prohibited by the Union Treaties.

- 3.74 It is the *Member States* that are financing the ESM Institution, it is the Member States that are required to cover losses of the ESM, it is the Member States that provide the security for the loans, it is the Member States that guarantee the payments into the ESM by other Member States pursuant to Article 25(2) of the ESM Treaty. Certainly, the ESM administers the loans, but under the ESM Treaty it is Member States that assume liability for other Member States. The ESM is a shell and without the Member States it has no assets upon which to raise loans. It is the Member States that are assuming the underlying financial commitments in a manner prohibited by the EU Treaties.

***(c) On the Appellant's interpretation, Ireland could not participate in any other funding mechanism including the IMF***

- 3.75 The Respondents maintained in domestic proceedings that the Appellant's arguments would by extension undermine the validity of Ireland's participation in the International Monetary Fund under Union law. In this regard, the Appellant notes that the present case concerns the compatibility of the ESM Treaty and does not concern other international treaties. Therefore, as a matter of principle, the conformity of other treaties to which Ireland or other Member States have acceded is of no relevance to the substance of the present reference which is solely concerned with the ESM Treaty. Whether or not the IMF is compatible with "no bail-out" provisions of the Union Treaties is immaterial for the purposes of determining the questions referred by the Supreme Court.
- 3.76 In any event the Appellant considers that the scope and purpose of the IMF, which pre-dates the Union,<sup>50</sup> are quite different from those of the ESM. The IMF is a global international institution that provides funding for a variety of different purposes, including the facilitation of the expansion and balanced growth of international trade, and the promotion of exchange rate stability.<sup>51</sup> By contrast, the stated objective of the ESM is to safeguard the financial stability of the *euro area* and to provide stability support to EU Member States whose currency is the euro. Participation in the ESM is restricted to euro Member States, and the specific purpose of the financial assistance offered by the ESM is to relieve the threat to a Member State of severe financing problems and to ensure that Member States are in a position to pay their debts.
- 3.77 Furthermore, the ESM creates a "guarantee mechanism" pursuant to which Member States are required directly to cover the inability of another Member State to comply

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<sup>50</sup> The IMF and World Bank were established at the UN International Monetary and Financial Conference, Bretton Woods, on 22 July 1944 and the Articles of Agreement entered into force on 27 December 1945.

<sup>51</sup> Article 1 of the Articles of Association of the International Monetary Fund.

with its commitment to contribute to the fund, or cover loss incurred by the fund, following a capital call.<sup>52</sup> The nature of the ESM is such that it entails Member States being entwined in each other's financial obligations in a direct manner which is very different from that which applies with the IMF.

**(iii) *The ESM Treaty entails certain Member States circumventing prohibitions contained in the Union Treaties through an Institution over which the ESM Member States exercise decisive control in a manner that is at odds with the Union Treaties and in breach of the duty of sincere co-operation enshrined in Article 4(3) TEU***

- 3.78 The Appellant submits that if the ESM Treaty entered into force, it would entail actions and functions that would put Member States in breach of their obligations under the Union Treaties. In addition to the direct substantive breach of the “no bail-out” clause in Article 125 TFEU (considered above), the ESM Treaty would further entail the circumvention of the prohibition on the provision of financial assistance in Part Three, Title VIII TFEU in a manner incompatible with Article 4(3) TEU.
- 3.79 Article 123 TFEU prohibits the ECB and the central banks of Member States from providing credit facilities in favour of, *inter alia*, central governments, regional, local, or other public authorities, other bodies governed by public law, or public undertakings of Member States. Article 123 TFEU similarly prohibits the direct purchase from Member States by the ECB and the central banks of Member States’ debt instruments.
- 3.80 This prohibition underscores the prohibition of bail-outs in Article 125 TFEU. It ensures that not just Member States, but also the ECB, are precluded from providing financial assistance to Member States.
- 3.81 Article 122(2) TFEU sets out exhaustively the *exceptional* circumstances in which financial assistance may be granted to Member States, *i.e.* where difficulties, or threatened difficulties, are caused by natural disasters or exceptional occurrences beyond their control. That provision further limits to Union Institutions the entitlement to authorise financial assistance. Financial assistance may only be authorised by the Council, following a proposal from the Commission.
- 3.82 The ESM Treaty seeks to establish a mechanism to circumvent the prohibition laid down in Articles 123 and 125 TFEU and provides for financial assistance outside the scope of Article 122 TFEU. It is noteworthy that while a previous temporary mechanism, the European Financial Stability Facility (“EFSF”), was ostensibly based on Article 122 TFEU, the ESM Treaty is not based on Article 122 TFEU nor is it subject to its substantive limitations.

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<sup>52</sup> Article 25 of the ESM Treaty.

- 3.83 The Appellant submits that it is manifest that the ESM is designed to carry out activities which for the ECB would be prohibited. The ESM entails Member States stepping outside the Union to engage in activity prohibited under Union law and in particular Articles 123 and 125 TFEU.
- 3.84 In the High Court the Respondents claimed that there is no breach of Union law since the prohibition laid down in Article 123 TFEU is only addressed to the ECB, and nothing prevents another entity from carrying out such functions. The Respondents further claimed that the ESM cannot be considered to constitute a conduit by Member States for the assumption of commitments, given that “*the most distinctive characteristic of an international organisation [is that] in international law, it has legal personality separate from its members.*” The Respondents deduce from this that “*the restriction imposed on individual Member States [...] cannot be extended to impose a restriction on an ‘independent international organisation’.*”<sup>53</sup>
- 3.85 The Appellant respectfully submits that such an interpretation of the obligations of Member States in relation to the Union Treaties is excessively formalistic in that it gives priority to consideration of legal form while totally disregarding the essential features and actual substance of the ESM Treaty. Such a formalistic approach is in contradiction with the consistent approach of this Court to the interpretation of the obligations of Member States pursuant to the Union Treaties.<sup>54</sup> The Appellant submits that, as a matter of Union law, the question of whether the ESM serves as an unlawful conduit for circumventing a prohibition should be decided through consideration of its provisions, operation, and effect, and not on the basis of its formal legal structure alone.
- 3.86 In a variety of different contexts the Court has prevented Member States from circumventing Union law obligations through the establishment of separate legal entities over which Member States exercise “decisive control”,<sup>55</sup> and has attributed the actions of such entities to Member States. In the context of public procurement, see *Connemara Machine Turf Co. Ltd v. Coillte Teoranta*,<sup>56</sup> where the Court observed that, by virtue of its shareholding, the State exercised indirect control over *Coillte*.<sup>57</sup> In the context of State Aid law, in *Van der Kooy BV* this Court looked behind the management and

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<sup>53</sup> *Pringle*, High Court submissions of the Respondents, p. 31 para. 55.

<sup>54</sup> Case 249/81 *Commission v. Ireland* [1982] ECR 4005; Joined Cases 67, 68 and 70/85 *Van der Kooy BV and others v. Commission* [1988] ECR 219; Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* [1998] ECR I-8761, and Case C-325/00 *Commission v. Germany* [2002] ECR I-9977. See also, by analogy, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995 concerning creation of legal structures designed to avoid tax.

<sup>55</sup> The “decisive control” test was advocated by Advocate General Van Gerven in his Opinion in Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313

<sup>56</sup> Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* [1998] ECR I-8761.

<sup>57</sup> Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* [1998] ECR I-8761, para. 34.

ownership of an energy company to find that the supply of gas to horticulturalists at preferential rates was prohibited.<sup>58</sup> In the context of determining the entities that may be subject to direct effect see *Foster v. British Gas*,<sup>59</sup> and particular the Opinion of Advocate General Van Gerven. This approach has also been adopted in the Court's case-law on the free movement of goods.<sup>60</sup>

- 3.87 The Appellant recalls the case of *Commission v. Ireland*<sup>61</sup> concerning the “Buy Irish” campaign. The Irish Government had established an “Irish Goods Council” to promote the sale and purchase of Irish products. The Commission considered that this restricted the free movement of goods. As in the present case, Ireland sought to distance itself from the measure, arguing that the promotional activity was carried out not by the Government, but by the Irish Goods Council.
- 3.88 This Court rejected that argument and focused instead on the constitution of the Irish Goods Council, noting that the Minister for Industry, Commerce and Energy appointed the Management Committee and its Chairman; that the Irish Goods Council was financed largely by Irish Government subsidies; and that the Irish Government defined the Council's aims. The Court concluded that “in the circumstances the Irish Government cannot rely on the fact that the campaign was conducted by a private company in order to escape any liability it may have under the provisions of the Treaty.”
- 3.89 A similar approach was adopted by the Court in Case C-325/00 *Commission v. Germany*,<sup>62</sup> which concerned a private limited company established to promote agricultural and food products made in Germany. The Court disregarded its legal form and focussed instead on the conformity of the substance of the measures adopted.
- 3.90 The Appellant submits that it follows from the above case law that when considering the conformity of a particular measure with the Treaties, it is necessary to look beyond form and to scrutinise the substance of that measure. The Appellant considers that applying the test of “decisive influence” which was enunciated by Advocate General Van Gerven in *Foster* and which has underpinned the Court's reasoning in a range of different contexts, it is apparent that Member States cannot use the separate legal identity of the ESM as a shield against infringement of obligations set out in the Union Treaties.

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<sup>58</sup> Joined Cases 67, 68 and 70/85 *Van der Kooy BV and others v. Commission* [1988] ECR 219. See also C-305/89 *Italy v. Commission (Alfa Romeo)* [1991] ECR I-1603.

<sup>59</sup> Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313.

<sup>60</sup> Case 249/81 *Commission v. Ireland* [1982] ECR 4005.

<sup>61</sup> Case 249/81 *Commission v. Ireland* [1982] ECR 4005.

<sup>62</sup> Case C-325/00 *Commission v. Germany* [2002] ECR I-9977.

- 3.91 In Case 50/76 *Amsterdam Bulb*, the Court expressly held that “Member States may not [...] either *directly or through the intermediary of organizations set up or recognized by them*, authorize or tolerate any exemption from Community law”.<sup>63</sup>
- 3.92 It is manifest that the establishment of a separate legal entity that is concerned with the euro currency, but exists outside the Union legal order, operates parallel to the ECB, and takes actions which for the Member States and the ECB would be prohibited, breaches the clear and unambiguous wording of Part Three, Title VIII TFEU, and Article 4(3) TEU. The ESM Treaty entails a new institution, governed exclusively by EU Member States whose currency is the euro, performing acts that would be prohibited in the context of the Union legal order.
- 3.93 Member States are required to apply rules of Union law fully and uniformly from the date of their entry into force and for so long as they continue in force.<sup>64</sup> In the well established and leading case of *Simmenthal*,<sup>65</sup> the Court emphasised that *in so far as Treaty provisions and directly applicable measures are an integral part of, and take precedence in, the legal order applicable in the territory of each of the member states – they also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Union provisions*.
- 3.94 Indeed the Court went on to hold that *any recognition that national legislative measures which encroach upon the field within which the [Union] exercises its legislative power or which are otherwise incompatible with the provisions of [Union law] had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the [Union]*.
- 3.95 The Appellant submits that an equivalent obligation applies in connection with the assumption of new commitments under international law: Member States are under a general obligation not to enter into commitments or adopt measures that would be incompatible with Union law.
- 3.96 Even in fields over which Member States retain competence, Member States are still obliged to exercise such competence in a manner that respects Union law. This has been stated in several different contexts. In Case C-135/08 *Rottman*<sup>66</sup> the Court held that:

‘the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules

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<sup>63</sup> Case 50/76 *Amsterdam Bulb* [1977] ECR 137, para. 35.

<sup>64</sup> Case 106/77 *Simmenthal* [1978] ECR I-629, para. 14.

<sup>65</sup> Case 106/77 *Simmenthal* [1978] ECR I-629.

<sup>66</sup> C-135/08 *Rottman v. Freistaat Bayern* [2010] ECR I-1449.

concerned must have due regard to the latter (see, to that effect, Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 17 (as regards national provisions in the sphere of criminal legislation and the rules of criminal procedure); Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 25 (as regards national rules governing a person's name); Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 19 (as regards national rules relating to direct taxation); Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917, paragraph 78 (as regards national rules determining the persons entitled to vote and to stand as candidates in elections to the European Parliament)).<sup>67</sup>

- 3.97 It is on the basis of such considerations that this Court has held that the principle of loyalty in Union law precludes a Member State from entering into international agreements that would be incompatible with its obligations under the Union Treaties.<sup>68</sup> Thus, for example, this Court has repeatedly held that Member States are prohibited from entering into international bilateral agreements, either with Member States, or with third countries, where such agreements would result in conflict with the EU Treaties. In the case of *Gottardo*, the Court held:<sup>69</sup>

“32 *With regard to a bilateral international treaty concluded between a Member State and a non-member country for the avoidance of double taxation, the Court has pointed out that, although direct taxation is a matter falling within the competence of the Member States alone, the latter may not disregard Community rules but must exercise their powers in a manner consistent with Community law. The Court accordingly ruled that the national treatment principle requires the Member State that is party to such a treaty [...to grant advantages] provided for by the agreement on the same conditions as those which apply to companies resident in the Member State that is party to the treaty (see, in this connection, Case C-307/97 Saint-Gobain ZN [1999] ECR I-6161, paragraphs 57 to 59).*

- 33 *It follows from that case-law that, when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC, to comply with the obligations that*

<sup>67</sup> C-135/08 *Rottman v. Freistaat Bayern* [2010] ECR I-1449, para. 41.

<sup>68</sup> Case C-307/97 *Saint Gobain ZN* [1999] ECR I-413, paras. 33 and 34; Case C-55/00 *Gottardo* [2002] ECR I-413, paras. 33 and 34, and Case C-376/03 *D* [2005] ECR I-5821, para. 52.

<sup>69</sup> Case C-55/00 *Gottardo* [2002] ECR I-413, paras. 33 and 34. For example, in the context of Double Taxation Treaties agreed between Member States: Case C-376/03 *D* [2005] ECR I-5821, para. 52. Case C-307/97 *Saint Gobain ZN* [1999] ECR I-413, paras. 33 and 34, and Case C-55/00 *Gottardo* [2002] ECR I-413, paras. 33 and 34.

*Community law imposes on them. The fact that non-member countries, for their part, are not obliged to comply with any Community-law obligation is of no relevance in this respect.*

34 *It follows from all of the foregoing that, when a Member State concludes a bilateral international convention on social security with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so.”*

3.98 Similarly in Case 22/70 *Commission v. Council (AETR)*<sup>70</sup>, the Court emphasised that pursuant to the principle of loyalty (now enshrined in Article 4(3) TEU)

21 *[...T]he Member States are required on the one hand to take all appropriate measures to ensure fulfilment of the obligations arising out of the treaty or resulting from action taken by the institutions and, on the other hand, to abstain from any measure which might jeopardize the attainment of the objectives of the treaty .*

22 *If these two provisions are read in conjunction, it follows that to the extent to which community rules are promulgated for the attainment of the objectives of the treaty, the member states cannot, outside the framework of the community institutions, assume obligations which might affect those rules or alter their scope .*

3.99 In Case C-170/05 *Denkavit Internationaal and Denkavit France*<sup>71</sup> this Court was asked to interpret an international taxation convention between France and the Netherlands and held that the “*French Republic cannot rely on the Franco-Netherlands Convention in order to avoid the obligations imposed on it by the Treaty (see, to that effect, Case 270/83 Commission v France, paragraph 26)*” (emphasis added).

3.100 The Appellant observes that it has not been uncommon for this Court to review actions taken outside the scope of the Union Treaties and the Union legal order in order to

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<sup>70</sup> Case 22/70 *Commission v. Council (AETR)* [1971] ECR 263.

<sup>71</sup> Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949.

establish whether existing or proposed commitments are compatible with obligations deriving from membership of the European Union. In *Commission v. Austria*,<sup>72</sup> the Court interpreted Convention No. 45 of the International Labour Organisation, of 21 June 1935, concerning the employment of women on underground work in mines of all kinds, to which Austria had acceded in advance of Austria's accession to the Union, in considering whether that could constitute grounds for derogating from obligations enshrined in Union law.<sup>73</sup>

- 3.101 It follows from the case law referred to above that, as a matter of Union law, a Member State cannot legitimately hide behind the veil of the separate identity of an international institution to perform functions that are prohibited under Union law. The Respondents' admission before the national court that the "independent international organisation" would place Member States out of reach of restrictions placed on it by Union law<sup>74</sup> perfectly captures the fact that this mechanism is an attempt to circumvent the prohibitions established by Union law.
- 3.102 The ESM Treaty entails the creation of an autonomous international institution to operate in parallel with the ECB – such an institution was never envisaged as part of EMU under the Treaty on European Union. Moreover, the ESM is intended to serve as a conduit to carry out functions which for the Member States, the Union, and the ECB would be prohibited. The ESM Treaty expressly confers on the ESM the power to provide financial assistance, offer loans, and buy government debt, which is not just different from what was envisaged when EMU was established by the Treaty on European Union, but constitutes its very antithesis.
- 3.103 Furthermore, by its proposed expansive monetary activities, the ESM will clearly affect the functions of the ECB, and – which is of critical importance – affect price stability. The stated objective of the ESM is to provide stability support for the euro currency.<sup>75</sup> The regulation of the supply of money is a key element in ensuring price stability. It is precisely by virtue of its monopoly in issuing currency and setting interest rates that the ECB manages the liquidity situation in the money market.
- 3.104 Having regard to the provisions of the Treaties, as they exist at the relevant time, in addition to the direct and substantive breach of the Treaties, entry into a treaty such as the ESM Treaty would constitute an indirect breach of the provisions of Part Three, Title VIII TFEU and Articles 123 and 125 TFEU in particular, as well as of the obligation of sincere cooperation enshrined in Article 4(3) TEU.<sup>76</sup>

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<sup>72</sup> Case C-203/03 *Commission v. Austria* [2005] ECR I-935.

<sup>73</sup> Case C-203/03 *Commission v. Austria* [2005] ECR I-935, para. 58.

<sup>74</sup> Paragraph 55 of the Respondents' High Court Submissions.

<sup>75</sup> Article 3 of the ESM Treaty.

<sup>76</sup> This conclusion is made without prejudice to the further and separate claim that even if the European Council



(iv) *The 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 and with the limits provided for in Article 13 TEU*

3.105 Recital 10 of the ESM Treaty records that on 20 June 2011, the Contracting Parties of the ESM Treaty were authorised by representatives of the governments of the Member States of the European Union *to request* the European Commission and the European Central Bank (“ECB”) to perform certain tasks provided for in the Treaty.

3.106 The Decision of 20 June 2011 provides that the “Representatives of the Governments of the Member States of the European Union agree that the ESM Treaty include provisions for the European Commission and the ECB to carry out the tasks as set out in that Treaty.”<sup>77</sup> The Decision makes no reference to the Court of Justice of the European Union.

3.107 The ESM Treaty purports to confer a range of tasks on Union Institutions. Regarding the Commission, the tasks include:

- assessing requests for stability support pursuant to Article 13 of the ESM Treaty;
- assessing whether a failure to adopt a decision or implement financial assistance urgently would threaten the economic and financial sustainability of the euro area as provided under Article 4 of the ESM Treaty (the emergency voting procedure);
- negotiating a Memorandum of Understanding detailing the conditionality attached to each financial assistance granted in accordance with Article 13(3) of the ESM Treaty, pursuant to Article 5(6)(g) of that Treaty;
- monitoring compliance with the conditionality attached to the financial assistance facility, pursuant to Article 13(7) of the ESM Treaty;
- observing meetings of the Board of Governors and the Board of Directors of the ESM in accordance with Article 5(3) and Article 6(2) of the ESM Treaty;
- preparing reports on compliance with conditionality prior to (a) the determination of whether an existing credit line should be maintained,<sup>78</sup> whether it continues to be adequate, or whether another form of financial assistance is needed;<sup>79</sup> (b) the determination of the disbursement of the tranches of financial assistance subsequent

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Decision were held to be valid and the amendment to Article 136 TFEU proposed therein entered into force, such amendment would not be capable of remedying this breach. This claim is considered further in Section F of these submissions.

<sup>77</sup> Memorandum of 24 June 2011 from the Council of the European Union to Delegations (12114/11) (Ecofin 462 and UEM 220) available at: <http://register.consilium.europa.eu/pdf/en/11/st12/st12114.en11.pdf>

<sup>78</sup> Article 14(5) of the ESM Treaty.

<sup>79</sup> Article 14(6) of the ESM Treaty.

to the first tranche;<sup>80</sup> and (c) the determination of disbursement of financial assistance to a Member State through operations on the primary market.<sup>81</sup>

3.108 Regarding the ECB:

- assessing whether a failure to adopt a decision or implement financial assistance urgently would threaten the economic and financial sustainability of the euro area as provided under Article 4 of the ESM Treaty (the emergency voting procedure);
- observing meetings of the Board of Governors and Board of Directors of the ESM in accordance with under Article 5(3) and Article 6(2) of the ESM Treaty;
- liaising with the Commission in relation to (a) assessment of requests for stability support;<sup>82</sup> (b) negotiation of the Memorandum of Understanding and the terms of economic policy conditionality;<sup>83</sup> and (c) monitoring compliance with the conditionality attached to the financial assistance facility.<sup>84</sup>

3.109 Regarding the Court of Justice of the European Union:

- Adjudicating on disputes in relation to the interpretation and application of the ESM Treaty, pursuant to Article 37 of the ESM Treaty.

3.110 These functions are new. This is self-evident not only as they are derived from a new Treaty, but also because they would involve the Union Institutions in administering bail-outs, which are prohibited by the Treaties. The role conferred on the Court of Justice to interpret and apply the ESM Treaty is similarly a new competence for this Court.<sup>85</sup>

3.111 Where the roles assigned to the Union Institutions by an international agreement outside the framework of the Union legal order require the Institutions to carry out activities that are in conflict with the existing Treaty provisions, this will be incompatible with the functions of the Institutions as defined in the Union Treaties.

3.112 Pursuant to Article 13(2) TEU, *each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions, and objectives set out in them.*

3.113 Certainly, the Court has held that *in fields of non-exclusive competence*, Member States may act outside the framework of the Union Treaties and enlist Union Institutions to

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<sup>80</sup> Articles 15(5) and 16(5) of the ESM Treaty.

<sup>81</sup> Article 17(5) of the ESM Treaty.

<sup>82</sup> Article 13(1) of the ESM Treaty.

<sup>83</sup> Article 5(6)(g) and Article 13(3) of the ESM Treaty.

<sup>84</sup> Article 13(7) of the ESM Treaty.

<sup>85</sup> To the extent that the ESM Treaty is increasing the competences of Union Institutions, the ESM Treaty could not validly derive its legal basis from the amendment provided in the European Council Decision even if that Decision were considered valid and if it were to enter into force. See Observations in relation to Question 3 (set out in Section F of these Observations).

assist with such acts.<sup>86</sup> Nevertheless, such entitlement does not extend to permitting Union Institutions to perform acts (a) in a field of exclusive competence, or (b) that are at odds with and contrary to the Union Treaties.

- 3.114 Article 17 TEU provides that *the Commission shall promote the general interest of the Union and take appropriate initiatives to that end*. However, Article 17 goes on to state that the Commission *shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them*. As the Respondents have repeatedly asserted, the ESM Treaty is not a Union Treaty. It is equally apparent that the ESM does not operate within the parameters set out in the EU Treaties and does not operate on the basis of measures adopted by an EU Institution pursuant to the EU Treaties. On the contrary, the ESM Treaty purports to authorise acts that are in breach of the express wording and legal structure of EMU as enshrined in the EU Treaties.
- 3.115 Moreover, since the judgments in the *Bangladesh Aid* and *Lomé* cases, the Union Treaties have been amended expressly to allow for enhanced co-operation between Member States and to set out rules governing the use of Institutions in such co-operation. Article 20 TEU expressly entitles Member States to “*make use of [the Union’s] institutions and exercise [non-exclusive] competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements*” laid down in the Treaties.
- 3.116 Given that the Treaties now provide special procedures for the use of enhanced co-operation and the associated use of Union Institutions, it is clear that it is *these procedures* which must be followed if Member States are to use Union Institutions in furtherance of the objectives enshrined in the Union Treaties. The corollary is that Institutions may not be used outside such procedures, particularly if they would be assigned functions that conflict with Union Treaty provisions.
- 3.117 In their Decision of 20 June 2011<sup>87</sup> the representatives of the Member States refer only to the European Commission and the ECB. They do not authorise the conferral of jurisdiction on the Court of Justice, even though the ESM Treaty purports to confer new competences on this Court in connection with the interpretation and application of the ESM Treaty. Recital 16 of the ESM Treaty provides that the Court’s jurisdiction is based on Article 273 TFEU.
- 3.118 Pursuant to Article 273 TFEU the Court of Justice shall have jurisdiction in any dispute between Member States which *relates to the subject matter of the EU Treaties* if the

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<sup>86</sup> See Joined Cases C-181/91 and C-248/91 *Parliament v. Council and Commission (Bangladesh Aid)* [1993] ECR I-3685 and Case C-316/91 *Parliament v. Council (Lomé Convention)* [1994] ECR I-653

<sup>87</sup> Memorandum of 24 June 2011 from the Council of the European Union to Delegations (12114/11) (Ecofin 462 and UEM 220) available at: <http://register.consilium.europa.eu/pdf/en/11/st12/st12114.en11.pdf>

dispute is submitted to it under a special agreement between the parties. The ESM Treaty however envisages the Court of Justice having a role in reviewing contested decisions of the ESM, which is an autonomous legal body and is not a Member State of the Union. Further, the disputes envisaged under the ESM Treaty as being adjudicated by the Court relate to the subject matter of the ESM Treaty. The ESM Treaty is not an EU Treaty.

- 3.119 The Respondents before the High Court maintained that there are sufficient links between the ESM Treaty and the Union Treaties that the ESM Treaty may be regarded as relating to the subject matter of the Union Treaties. The Appellant considers that any such argument entails a contradiction in the Respondents' position, given that the Respondents have elsewhere sought to distance the ESM Treaty from Union law. At paragraph 55 of their observations before the High Court the Respondents argued that

*With regard to the second of the Plaintiff's objections, the Article 125(1) TFEU prohibition applies to "[a] Member State", while the ESM will be an international financial institution. The ESM will have full legal personality, which will be separate and distinct from the Member State signatories. As has already been discussed, it will have a Board of Governors, a Board of Directors, its own Managing Director and its own decision-making procedures. [...] Moreover, to suggest that the ESM is a "conduit" for the Member States conflicts with what has been described as "[t]he most distinctive characteristic of an international organisation ... that in **international law** it has legal personality separate from its members".<sup>88</sup> Consequently, the restriction imposed on individual Member States by Article 125(1) TFEU, cannot be extended to impose a restriction on an independent international organisation.*

- 3.120 As is evident from the passage above, the Respondents have been at pains to distance the ESM Treaty from the Union Treaties. However, in such circumstances, it cannot also be maintained that the interpretation of the ESM Treaty relates to the subject matter of the Treaties. The Respondents cannot have it both ways.

(v) *The ESM Treaty is incompatible with General Principles of Union law, including respect for fundamental rights, effective judicial protection, and the principle of equality*

- 3.121 The ESM Institution is given broad discretion in relation to the performance of its functions, including the entitlement to seek financing, to issue calls for capital, and to determine conditionality. Moreover, the ESM Institution is an evolving institution that is

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<sup>88</sup> A Aust *Modern Treaty Law and Practice*.

empowered to create and construct its structural and operational parameters in the course of its activities, as and when required. This is clearly evidenced by the fact that even prior to its entry into force, and within just months, the eurozone Member States have already twice agreed to amend or reinterpret important provisions of the ESM Treaty. On 30 March 2012, the eurozone Member States agreed to raise the combined maximum lending capacity to 700 billion euro and to accelerate the payment of the initial paid-in capital.<sup>89</sup> On 29 June 2012, Member States of the Euro Area effectively agreed to amend the ESM Treaty so as to permit the ESM, by “regular decision”, to provide financial assistance directly to banks.<sup>90</sup> The frequency and fundamental nature of proposed changes to the ESM institution, even prior to the entry into force of the ESM Treaty, are indicative of the ESM Treaty’s open-ended structure.

3.122 The measure of discretion afforded to the ESM Institution and the flexible structure of the ESM Treaty make judicial and democratic oversight of that institution all the more critical. However, placing the institution outside the Union legal order has the reverse effect, and will mean that the ESM Institution will not be so accountable.

3.123 In the case of *Kadi*,<sup>91</sup> this Court considered the relationship between the Union legal order and the international legal order. The Court held:

291 In this respect it is first to be borne in mind that the European Community must respect international law in the exercise of its powers (*Poulsen and Diva Navigation*, paragraph 9, and *Racke*, paragraph 45), the Court having in addition stated, in the same paragraph of the first of those judgments, that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.

292 Moreover, the Court has held that the powers of the Community provided for by Articles 177 EC to 181 EC in the sphere of cooperation and development must be exercised in observance of the undertakings given in the context of the United Nations and other international organisations (Case C-91/05 *Commission v Council* [2008] ECR I-0000, paragraph 65 and case-law cited).

3.124 These paragraphs indicate the deference that the EU legal order shows for co-existing legal norms in international law. Certainly, the Court emphasised that Union measures implementing international law are required to be in conformity with the Charter and

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<sup>89</sup> Statement of the Eurogroup dated 30 March 2012. This alters the terms of Article 39 of the ESM Treaty.

<sup>90</sup> Euro Area Summit Statement of 29 June 2012.

<sup>91</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-635, para 281.

General Principles. However, the ESM functions autonomously outside the scope of the Union and will therefore not be subject to that requirement.

- 3.125 Under the ESM Treaty, the jurisdiction of this Court (if any) would be limited to reviewing decisions of the Board of Governors (as opposed to decisions of the Board of Directors) that are contested by ESM Member States. The role of the Court of Justice would be confined to interpreting and applying the ESM Treaty.
- 3.126 There is a logical correlation between the discretion afforded to a body and the extent to which its decisions are subject to review. The broader the discretion, the narrower the review. The ESM Treaty confers broad discretion on the ESM Institution with respect to performance of its functions. It follows that any review by the Court of Justice will be narrow even within the limited area of review available.
- 3.127 This Court will not have jurisdiction under the ESM Treaty to review the compatibility of decisions of the ESM Institution with Union law, including the EU Treaties, the Charter, or General Principles of Union law. The Charter of Fundamental Rights only applies in relation to Union law – it has no application in the field of ESM law, and is not binding on the ESM Institution. Pursuant to Article 51 of the Charter the provisions of the Charter only apply to Member States in so far as they are implementing Union law. The ESM Institution, as an international organisation, operates outside the Union legal order.
- 3.128 At the same time, the activities of the ESM and, in particular, the “strict conditionality” attaching to financial assistance, are liable to impinge on economic and social rights protected by the Charter. Title IV of the Charter sets out a number of rights concerning fair and just working conditions, the entitlement to social security and social assistance, and access to health care. Economic conditionality has the potential to have a very close and direct impact on citizens’ social rights. However, the ESM, in the performance of its functions, will not be subject to review against the provisions of the Charter.<sup>92</sup>
- 3.129 The right to effective judicial protection enshrined in Article 47 of the Charter and in Article 6 of the European Convention on Human Rights has been held to apply in a variety of different contexts, including in the context of activities that are of a commercial or economic nature, for example, in the field of commercial and competition law.<sup>93</sup>

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<sup>92</sup> For example, see cases giving rise to a preliminary reference in Cases C-434/11 *Corpul Național al Polițiștilor*, Order of 14 December 2011 and C-134/12 *Ministerul Administrației și Internelor (MAI)*, Order of 10 May 2012. See cases giving rise to a reference in Cases C-128/12 *Sindicato dos Bancários do Norte and Others v. BPN* and C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v. Fidelidade Mundial* pending before this Court.

<sup>93</sup> For a recent and important example, see Case C-279/09, *DEB Energiehandels- und Beratungsgesellschaft mbH*, judgment of 22 December 2010 and cases cited therein.

- 3.130 In submissions before the High Court, the Respondents assured the learned judge that *the ESM Treaty is integrally linked to the European Union framework, and cannot thereby, contrary to the Plaintiff's suggestion, be regarded as transferring competences "to an entity that exists outside the framework of the Union legal order"*.<sup>94</sup> However, once again, it appears that this involves holding two contradictory and mutually exclusive positions. In their High Court submissions, the Respondents also emphasised that the ESM will have a full legal personality that is separate from the Member State signatories. Moreover, it was emphasised that obligations imposed by EU Treaties on Member States cannot be extended to apply to an independent international organisation.<sup>95</sup>
- 3.131 The whole tenor of that argument is that restrictions in Union law do not extend to an independent international organisation. It is difficult to reconcile this statement with the assertion that the independent international organisation will also be subject to Union law and the Charter, the latter of which expressly, by virtue of its Article 51, applies only to the "implementation of Union law".
- 3.132 A further difficulty with the ESM Treaty is that access to the very limited review available is restricted to ESM Member States. The Commission has no right to take the ESM or its officers before the Court of Justice, nor has any other EU Institution such as the ECB. Nor do any other interested parties, such as financial institutions, or the shareholders of such institutions, have any access to the Court of Justice. This is of particular concern where the ESM seeks to enter into agreements with the banks of Member States, as envisaged by a Statement issued by the Heads of State or Government of the Euro Area on 29 June 2012.<sup>96</sup>
- 3.133 Moreover, under the ESM Treaty, the Chairperson of the Board of Governors, the Governors, and Directors (including alternate Governors and Directors), as well as the Managing Director and other staff members, are immune from legal proceedings with respect to acts performed by them *in their official capacity*.<sup>97</sup>
- 3.134 In *Kadi* <sup>98</sup>, this Court recalled that the Union is based on the Rule of Law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the founding Treaties.<sup>99</sup> The Court further emphasised that fundamental rights form an integral part of the general principles of law whose observance the Court ensures.<sup>100</sup> Respect for human rights was stated to be a

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<sup>94</sup> High Court Observations of the Respondents, para. 93.

<sup>95</sup> High Court Observations of the Respondents, para. 55.

<sup>96</sup> Euro Area Summit Statement issued 29 June 2012 by the heads of State or Government of the Euro Area.

<sup>97</sup> Article 35 of the ESM Treaty.

<sup>98</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-635, para 281.

<sup>99</sup> *Ibid.*, para 281.

condition of the lawfulness of Union acts.<sup>101</sup> On the basis of such considerations, the Court concluded that “*the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.*”<sup>102</sup>

- 3.135 In delegating important powers in the field of economic and monetary policy to an autonomous institution not subject to Union law, without corresponding powers of scrutiny and review, the Member States are placing certain provisions that are central to the Union Treaties in a framework that is outside the reach of the Union legal order and Union citizens, and are thereby undermining the important principles elaborated by the Grand Chamber in the Judgment in *Kadi*.
- 3.136 In joined cases C-411/10 and C-493/10, *N.S and M.E.*<sup>103</sup>, the Court accepted that the obligation to protect fundamental rights not only required that such rights be guaranteed within the jurisdiction of the Member State, but also prohibited Member States from placing individuals in a situation in another legal jurisdiction where they are likely to suffer serious breaches of fundamental rights. The Appellant submits that an analogous principle, albeit in a different factual context, arises in the context of the ESM Treaty.
- 3.137 Certainly, the ECB enjoys independence in its functions; however, that institution is subject to a number of measures to ensure its accountability. Firstly, the ECB operates within the Union legal order and is fully subject to Union law. The ECB is required to prepare reports on the activities of the ESCB at least quarterly.<sup>104</sup> A consolidated financial statement of the ESCB is published each week.<sup>105</sup> The ECB is required to address an annual report on the activities of the ESCB and on the monetary policy of both the previous and the current year to the European Parliament, the Council, the Commission, and the European Council.<sup>106</sup> The President of the ECB is required to present this report to the Council and to the European Parliament which may hold a general debate on that basis. The European Parliament may further request the President of the Executive Board of the ECB to appear before competent committees of the European Parliament. The ECB institution has emphasised the importance of its own accountability and transparency.<sup>107</sup>

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<sup>100</sup> *Ibid.*, para 283.

<sup>101</sup> *Ibid.*, para 284.

<sup>102</sup> *Ibid.*, para 285. See also F.G. Jacobs “The Rule of Law and Judicial Remedies in the European Union” (2002) *Hibernian LJ*, page 1.

<sup>103</sup> Joined Cases C-493/10, *N.S and M.E.*, judgment of 21 December 2011. Comparable reasoning is also apparent in the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application No. 45036/98, Judgment of 30 June 2005, paras 155 and 156.

<sup>104</sup> Article 15.1 of the ECB Statute.

<sup>105</sup> Article 15.2 of the ECB Statute.

<sup>106</sup> Article 284(3) TFEU.



- 3.138 By contrast, the ESM, proposed to be situated outside the Union legal order, has no such accountability. There is a conspicuous absence of any reporting obligations to the European Parliament. The ECB states that “An independent central bank – like any public institution – needs to explain its decisions to the public and take responsibility for its tasks as well as possible [...] In a democratic society, accountability is a natural complement to central bank independence”.<sup>108</sup>
- 3.139 The ESM Treaty establishes an Institution that has a comparable function to the ECB but fails to preserve adequately the right of effective judicial protection in an area that falls within the scope of Union law. A dangerous effect of the Member States’ attempt to circumvent Union law is that they are transferring competences that fall within the scope of Union law to an entity that exists outside the Union legal order in a legal vacuum where general principles of Union law, fundamental rights, and the Charter have no application, and which is not subject to parliamentary or democratic scrutiny.

*The Principle of equality*

- 3.140 The ESM Treaty breaches the principle of equality and non-discrimination, recognised as a general principle of Union law.<sup>109</sup> It permits a situation where provisions of the Treaty *that are common to all 27 Member States* are nevertheless interpreted differently depending on whether or not a Member State is a part of the eurozone. The consequence of the ESM Treaty is that the prohibition on bail-outs provided for in Article 125 TFEU would only apply to Member States that do not form part of the eurozone. Eurozone Member States would be entitled to avail of an exemption that would not apply to the other Member States – which may, nevertheless, wish to obtain a bail-out.

**(vi) *The ESM Treaty is incompatible with the Union’s commitment to the Rule of Law enshrined in Article 2 TEU***

- 3.141 The Appellant submits that the manner in which certain Member States have sought to circumvent prohibitions in Union law, as outlined in the preceding sections, poses a grave threat to the credibility and legitimacy of the Union legal order. In relation to the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union, Professor Craig has noted:

*Whatever one believes about its desirability or not, this new treaty does raise an issue of principle, which you can call a rule-of-law issue of principle, that is*

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<sup>107</sup> See “The Monetary Policy of the ECB” (2001), published by the ECB. That publication includes an entire section entitled “Accountability, transparency and communication” explaining their importance.

<sup>108</sup> See “The Monetary Policy of the ECB” (2001), published by the ECB.

<sup>109</sup> Case C-144/04 *Mangold* [2005] ECR I-9981.

*concerned with whether we should bear with equanimity the idea of those decision making rules being circumvented by a treaty outside the fabric of the Lisbon Treaty in circumstances where the rules as to how change should be undertaken within the Lisbon Treaty are not capable of being met, particularly given that the SCG [Stability, Co-ordination and Governance] Treaty can only work through the participation of the EU institutions in the way that is written into that treaty.*<sup>110</sup>

- 3.142 The Appellant submits that analogous concerns apply in the context of the ESM Treaty. One serious consequence of the approach adopted to create the ESM Treaty is that it results in the creation of a legal framework that is riddled with conceptual contradictions, and is confusing, uncertain, and seriously at odds with the Union legal order as developed over years in the well established case-law of this Court.
- 3.143 Evidence of the difficulties inherent in the proposed legal framework governing the establishment of the ESM Institution is the fact that in order to defend it, Member States are compelled to engage in conceptual gymnastics, embrace contradictory positions, and prioritise form over substance.
- 3.144 The European Council indicates that EU Treaty change is required and presents an amendment to the TFEU. It then envisages ratification of the ESM Treaty prior to the entry into force of the EU Treaty change. It is argued that the ESM Institution is not subject to Union law, but asserted at the same time that it may exercise competences that relate to key objectives of the Union over EU Member States whose currency is the euro. It is argued that the ESM Treaty is not increasing the competences of the Union, but the ESM Treaty confers new functions on Union Institutions and confers qualified majority voting powers on a supranational entity whose decisions bind a sub-group of EU Member States. It is argued that the ESM is subject only to international law, but at the same time it is argued that the Court of Justice has jurisdiction to interpret the ESM Treaty and ensure compliance with fundamental rights protected in the Union legal order.
- 3.145 It is plainly and readily apparent that the ESM Treaty is a contrived legal construction designed to provide Member States with a vehicle through which they might do what they themselves would be prohibited from doing under the Union Treaties.
- 3.146 In a significant history of case-law this Court has developed a number of particularly important principles of a constitutional character that underpin the Union legal order. It is submitted that these principles encompass rules on:

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<sup>110</sup> Oral Evidence of Professor Paul Craig before the European Scrutiny Committee of the House of Commons. Answer to Question 12 available at: <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/uc1817-i/uc181701.htm>

- Remedies and the Rule of Law: That the Union is based on the Rule of Law and creates a comprehensive system of remedies<sup>111</sup>
- Mutual Respect for competences: That Member States and the Union must respect each others' competences and that Member States should refrain from adopting measures that may compromise Union competence.<sup>112</sup>
- Giving effect to Union law in the national legal order: Member States are required to ensure the full and correct effect of Union law in practice. In areas of Union competence, EU law is supreme and may be invoked directly against Member States and emanations of the State.<sup>113</sup> In considering whether Member States are giving effect to Union law, it is substance rather than form which is decisive.<sup>114</sup>

3.147 It is submitted that the type of conduct at issue in these proceedings subverts these fundamental constitutional principles and thereby undermines the legitimacy of the Union legal order and its legal and democratic foundations. The Appellant echoes the view expressed by Craig in the context of the Stability, Coordination and Governance Treaty, namely, that it is “*the integrity and equality of legal reasoning within the EU legal order that is at stake*”.<sup>115</sup>

3.148 The Appellant submits that a particularly dangerous effect of the circumvention is that the ESM Institution performing a significant function is deprived of the democratic and legal accountability that would exist if the ESM were properly adopted within the framework of the Union legal order. Moreover, it is submitted that such a departure from respect for the Rule of Law establishes a legal precedent that could potentially be very harmful to the Union legal order.

3.149 It is in light of these considerations that the Appellant submits that the provisions of the ESM Treaty are incompatible with Article 2 TEU.

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<sup>111</sup> Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23 and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-635, para. 281. For discussion on the critical relationship between remedies and the rule of law see: F.G. Jacobs “The Rule of Law and Judicial Remedies in the European Union” in (2002) *Hibernian LJ*, page 1.

<sup>112</sup> Case 22/70 *Commission v. Council (AETR)* [1971] ECR 263, Case C-266/03 *Commission v. Luxembourg* [2005] ECR I-4805. See also Case C-433/03 *Commission v. Germany* [2005] ECR I-6985 paras 57 and 59.

<sup>113</sup> Case 106/77 *Simmmenthal* [1978] ECR I-629

<sup>114</sup> Case 249/81 *Commission v. Ireland* [1982] ECR 4005; Joined Cases 67, 68 and 70/85 *Van der Kooy BV and others v. Commission* [1988] ECR 219; Case C-188/89 *Foster v. British Gas* [1990] ECR I-3313, Case C-306/97 *Connemara Machine Turf Co. Ltd v. Coillte Teoranta* [1998] ECR I-8761, and Case C-325/00 *Commission v. Germany* [2002] ECR I-9977. See also, by analogy, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995 concerning creation of legal structures designed to avoid tax.

<sup>115</sup> Paul Craig, “The Stability, Coordination and Governance Treaty” (2012) 37 *E.L. Rev.* June 2012.

4 **Conclusion: Member States are prohibited from entering into, ratifying, or participating in a treaty such as the ESM Treaty**

4.1 It is well established that, as a matter of Union law, Member States are precluded from entering into international agreements and assuming commitments that are incompatible with the provisions of the Union Treaties.

4.2 Even in areas of shared competence between the Member States and the Union, the duty of sincere cooperation precludes Member States from entering into actions that would interfere with the exercise of Union competence. In *Commission v. Luxembourg*,<sup>116</sup> the Court held that

*[T]he Duty of genuine cooperation is of general application and does not depend either on whether [the Union] competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries.*

4.3 Even in circumstances where the competence had not yet been exercised, but the intention to exercise it had been communicated and a process commenced, the Member States were held to be subject “to special duties of action and abstention” in a situation in which the Union is exercising its competences.<sup>117</sup>

4.4 Article 351 TFEU (ex Article 307 EC), concerning international agreements entered into by Member States prior to their accession to the European Union, provides (at the second indent) that

*To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.*

4.5 In this context, the Court has consistently held<sup>118</sup> that the “*the appropriate steps for the elimination of such incompatibility referred to in the second paragraph of [Article 351 TFEU] include, inter alia, denunciation of the agreements in question.*”<sup>119</sup>

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<sup>116</sup> Case C-266/03 *Commission v. Luxembourg* [2005] ECR I-4805.

<sup>117</sup> Case C-266/03 *Commission v. Luxembourg* [2005] ECR I-4805. See also Case C-433/03 *Commission v. Germany* [2005] ECR I-6985 paras. 57 and 59.

<sup>118</sup> Case C-62/98 *Commission v. Portugal* [2000] ECR I-5171, and Case C-203/03 *Commission v. Austria* [2005] ECR I-935.

<sup>119</sup> Case C-203/03 *Commission v. Austria* [2005] ECR I-935, para. 61.

- 4.6 In light of all these considerations, the Appellant considers that in the context of the Union law applicable at this time, Member States are precluded from entering into and ratifying a treaty such as the ESM Treaty. In the event that the ESM Treaty has entered into force at the relevant time, Member States are obliged to terminate the Treaty.
- 4.7 Consequently, the Appellant proposes that Question Two should be answered as follows:

### **Proposed Answer to Question Two**

#### **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 respect for fundamental rights, the 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 equality;**

**Member States of the European Union whose currency is the euro, in the present state of Union law, are not entitled to enter into, ratify, or continue participation in an international agreement such as the ESM Treaty.**

***E.    Observations on Question One: Validity of European Council Decision***

**Question One**

Whether European Council Decision 2011/199/EU of 25<sup>th</sup> 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.

**5.    The Decision of the European Council proposing to amend Article 136 TFEU is invalid.**

5.1    At the outset, the Appellant recalls that as an instrument adopted on the basis of Article 48(6) TEU, the Decision is subject to compliance with the substantive conditions governing the simplified revision procedure laid down in that Article. In particular, it may

- (a) not be used to increase the competences of the Union;
- (b) be used to amend Part Three of the TFEU;
- (c) not be used to amend other provisions of the Treaties.<sup>120</sup>

5.2    The Decision, and the proposed amendment to Article 136(3) TFEU, do not comply with the substantive limitations to which such an amendment is subject.

5.3    The Appellant considers the breach so serious that he endeavoured to identify and obtain the legal advice upon which the European Council considered it would be in a position to authorise a stability mechanism using a simplified revision procedure. A request was made by Paul Murphy MEP to the General Secretariat of the Council of the EU for all or any documents containing legal advice relating to the adoption of the Decision. It emerged that there was no document which corresponded to the request.<sup>121</sup>

5.4    The Appellant submits that the nature of the amendment contained in the Decision is such that it ought to have been adopted by way of the ordinary revision procedure and not by a simplified revision procedure. Given that an amendment to the TFEU had

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<sup>120</sup> Article 48(6) TEU. For a discussion on the application and limits of the simplified revision procedure, see: Steve Peers, “The Future of EU Treaty Amendments” published in the Yearbook of European Law (Oxford, 2012).

<sup>121</sup> See letter requesting access to documents of 23 May 2012 and reply of 14 June 2012 in the Annex to these submissions.

already been proposed as far back as October 2010, it is not credible to suggest that the urgency of the challenges facing the eurozone warranted or justified amendment of the TFEU using an inappropriate and incorrect procedure.

**(i) *The European Council Decision is incompatible with Article 48(6) TEU as it authorises an increase in the competences of the Union***

5.5 The Appellant submits that the simplified revision procedure is an inappropriate tool for the authorisation of a mechanism as fundamental as a permanent stability mechanism.

5.6 The simplified revision procedure is an exception to the general means of Treaty amendment which is referred to in the Treaties as the “ordinary revision procedure”. As a consequence, its scope is to be interpreted restrictively.<sup>122</sup> It is precisely because the procedure is simplified that the Treaty imposes substantive limitations on the extent to which it may be used to amend the Union Treaties.

5.7 If a Treaty amendment is subject to substantive limitations, any authorisation it gives must necessarily be subject to the same limitations. A Treaty amendment that is prohibited from increasing the competences of the Union cannot then be regarded as authorising any measure that increases the competence of the Union. A Treaty amendment that is prohibited from amending parts of the Treaty other than Part Three, cannot be regarded as authorising Member State measures that amend provisions of the Treaties, beyond Part Three TFEU. To put it simply, the European Council Decision cannot give what it does not have.

5.8 As a matter of form, the amendment proposed by the Decision purports to authorise *Member States* to establish a European stability mechanism. The establishment of an ESM Institution might appear merely to constitute the expression of Member States’ reserved competence in economic policy outside the Union legal order.

5.9 However, such a view is incompatible with the fundamental features of a permanent stability mechanism as characterised by the amendment proposed by the Decision. It is manifest that any stability mechanism designed to safeguard the euro area is essentially engaged in a function and activity that falls within the scope of Union law. It is designed to stabilise the euro and is concerned with Economic and Monetary Union, which is listed in Article 3(4) TEU as an objective of the Union. Monetary Policy is an exclusive competence of the Union and the Union is conferred with and has exercised competence in coordinating economic policy, including the provision of financial assistance. Participation in a European stability mechanism is reserved to Member States of the European Union – and in particular EU Member States whose currency is the euro.

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<sup>122</sup> Steve Peers, “The Future of EU Treaty Amendments” published in the Yearbook of European Law (Oxford, 2012) p.11.

- 5.10 Authorising Member States to establish a stability mechanism is essentially authorising Member States to enter into a form of enhanced co-operation in the field of economic and monetary policy. Any new mechanism or institution established by the Member States that operates in the field of economic and monetary policy and whose actions are binding on a sub-group of Member States (those whose currency is the euro), is in fact exercising a new Union competence *as regards that sub-group of Member States* – even if it does so outside the framework of the Union Treaties. The amendment authorises the establishment of a new Union competence insofar as its terms are not confined to authorising Member States to take action themselves, as Member States, **but authorise them to establish a distinct supranational mechanism** that may be conferred with qualified majority voting powers in relation to them in an area that falls within the scope of the Union Treaties. The proposed amendment authorises an *increase in competence* since, without the amendment, the Union could not engage in the activities that are proposed to be carried out by a permanent stability mechanism as regards a sub-group of Member States the currency of which is the euro.
- 5.11 Similarly, in its Opinion on the Decision, the ECB recalls that it has sought a ‘*quantum leap*’ in the economic governance of economic and monetary union (EMU), and that the establishment of a permanent mechanism forms part of a series of measures intended to lead *towards a deeper economic union that is commensurate with the degree of economic integration and interdependency already achieved by the Member States whose currency is the euro.*<sup>123</sup>
- 5.12 In substance, the amendment proposed by the Decision indirectly authorises the Member States to increase the competence of the Union as regards a sub-group of Member States. It seeks to authorise Member States to enter into what the ESM Treaty itself describes as “*a stronger economic Union.*”<sup>124</sup>
- 5.13 This exceeds what is permitted by an amendment adopted using a simplified revision procedure.
- 5.14 It is noteworthy that the German Federal Constitutional Court described the ESM as having a “*hybrid character*”<sup>125</sup> and held that despite its “*qualified connection with Union law, this is a European Union matter*” within the meaning of Article 23(1) of the German Basic Law.<sup>126</sup> The German Court found that the proposed amendment to Article 136 TFEU and the establishment of a European Stability Mechanism would entail

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<sup>123</sup> Opinion of the European Central Bank of 17 March 2011 (2011/C 140/05).

<sup>124</sup> Recital 5 of the ESM Treaty.

<sup>125</sup> Judgment of the German Federal Constitutional Court, paragraph 144.

<sup>126</sup> Paragraph 136 of the Judgment of the German Constitutional Court “*Schon wegen dieses qualifizierten Zusammenhangs mit dem Unionsrecht handelt es sich um eine Angelegenheit der Europäischen Union.*”



“adding a policy area” that is referred to in the TFEU as belonging to the exclusive competences of the Union.<sup>127</sup> The German Court considered that the ESM Treaty allocated new responsibilities to the EU Institutions<sup>128</sup> and was being used to secure a policy area that had been allocated to the European Union as an exclusive area of competence.<sup>129</sup>

5.15 Professor Peers has proposed that an amendment under the simplified revision procedure would arguably infringe the substantive constraints imposed by Article 48(6) TEU if it permitted Member States to act by qualified majority voting or in some version of the ordinary legislative procedure, as “in that case the Treaty amendment would amount to a disguised grant of competences to the EU”.<sup>130</sup> This is precisely what is at issue here. The Decision purports to authorise Member States to establish a distinct mechanism which has powers to act by qualified majority and which increases the competence of the Union.

**(ii) *The European Council Decision is incompatible with Article 48(6) TEU in that it seeks to authorise the amendment of provisions other than Part Three TFEU, and is in breach of Article 48(6) TEU***

5.16 The amendment proposed by the Decision not only increases the competences of the Union, but also entails amendments to parts of the Treaties beyond Part Three TFEU. The European Council Decision also indirectly amends the allocation of competences as defined in Part One TFEU and the functions of the Union Institutions as set out in the TEU.

5.17 The creation of a permanent stability mechanism not only impacts on the legal structure of EMU as enshrined in the TFEU but also entails an amendment of the allocation of competences between the Union and its Member States.

5.18 Monetary competence is an exclusive competence of the Union. Therefore authorising Member States to take measures concerning the euro constitutes an amendment of that competence as enshrined in Article 3(1)(c) TFEU (which features in Part One TFEU).

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<sup>127</sup> Paragraph 143 of the Judgment of the German Constitutional Court

<sup>128</sup> Paragraph 137 of the Judgment of the German Constitutional Court “*Das Vorliegen einer Angelegenheit der Europäischen Union im Sinne des Art. 23 Abs. 2 Satz 1 GG wird auch dadurch indiziert, dass verschiedene Organe der Europäischen Union durch den Vertrag über den Europäischen Stabilitätsmechanismus neue Zuständigkeiten zugewiesen erhalten.*”

<sup>129</sup> Paragraph 143 of the Judgment of the German Constitutional Court. “*Der Europäische Stabilitätsmechanismus soll darüber hinaus der Absicherung eines Politikbereichs dienen, der der Europäischen Union als ausschließliche Zuständigkeit zugewiesen ist. Der Entwurf des Vertrages über den Europäischen Stabilitätsmechanismus ergänzt die Wirtschafts- und Währungspolitik.*”

<sup>130</sup> Steve Peers, “The Future of EU Treaty Amendments” published in the Yearbook of European Law (Oxford, 2012) at p. 23

- 5.19 Even if economic competence is a shared competence, the Union has been conferred with and has exercised competence over the coordination of the provision of financial assistance with respect to Members of the eurozone. Article 3(2) TFEU prohibits Member States from entering into international agreements that affect common rules and limits any such action to the Union. Article 5(1) TFEU, stipulates that economic policy coordination is to take place “*within the Union*”.
- 5.20 The provisions on competences are set out in Part One TFEU. The scope of the amendment proposed by the Decision is such that it entails an amendment to the provisions governing competences in Part One TFEU. As a consequence it exceeds what is envisaged and permitted by an amendment using a simplified revision procedure.
- (iii) ***The European Council Decision is open-ended and imprecise to an extent which is incompatible with the General Principle of legal certainty. It impliedly or expressly permits measures that are in contravention of Union law which is, in itself, grounds for invalidity***
- 5.21 In Case C-540/03 *Parliament v. Council*, the Court of Justice held that a provision of secondary EU law that would expressly or impliedly authorise Member States to act in contravention of primary norms would itself violate Union Law.<sup>131</sup>
- 5.22 Analogous considerations apply in the context of the Decision. The formulation of the proposed Article 136(3) TFEU is so vague and ill-defined that the proposed amendment to Article 136(3) TFEU is capable of being interpreted as authorising Member States to adopt measures that exceed what may be permitted by an amendment adopted through the simplified revision procedure.
- 5.23 The amendment proposed by the Decision authorises the establishment of a stability mechanism but does not offer a definition of this mechanism. Other than emphasising that any financial assistance must be subject to strict conditionality, the proposed amendment does not specify the parameters of the authority conferred on Member States and does not make it clear that the authorisation is necessarily limited by the substantive conditions attached to the use of the simplified revision procedure. On the contrary, it may be interpreted as not simply permitting Member States to perform certain acts themselves, but authorising them to confer competences on a new supranational mechanism acting within the scope of Union law that essentially represents a form of enhanced cooperation between them.
- 5.24 It is particularly critical that Treaty amendments adopted *using a simplified procedure* should clearly reflect the limits to which they are subject. Otherwise, upon adoption,

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<sup>131</sup> C-540/03 *Parliament v. Council* [2006] ECR I-5769, paragraph 23.

there will be no trace of the substantive limits which are inherent in any such Treaty provision. Once adopted, a Treaty provision introduced by way of a simplified procedure, on its face, looks like any other Treaty provision – the limited character of its scope is not reflected or highlighted in the Treaty.

- 5.25 For that reason, the substantive limits inherent in any Treaty amendment adopted using a simplified procedure must be reflected clearly in the wording of the amendment proposed. Otherwise, the Decision may be interpreted as having authorised more than it was empowered to authorise.
- 5.26 The fact that this danger is by no means theoretical is evident in the present case. There is an attempt to use a simplified procedure to authorise Member States to enter into a Treaty that refers to itself as forming part of “*a stronger economic Union*”,<sup>132</sup> and which in substance increases the competences of the Union, including Union institutions, and which indirectly amends provisions beyond Part Three of the TFEU.
- 5.27 In light of these considerations, the Appellant submits that amendments adopted by a simplified revision procedure must not be imprecise and open-ended and must not be capable of expressly or impliedly permitting Member States to act beyond the substantive limits attaching to such a Treaty amendment.
- 5.28 To the extent that the scope of the amendment is imprecise and fails to identify and delimit the substantive conditions to which its authorisation is subject, the Decision is in breach of the general principle of legal certainty. To the extent that the Decision expressly or impliedly permits Member States to act in contravention of the limits inherent in a treaty amendment by simplified revision procedure, that Decision itself violates Union law and, in particular, Article 48(6) TEU.

**(iv) Conclusion**

- 5.29 In light of the above considerations, the Appellant considers that the amendment proposed in the Decision entails an increase in the competence of the Union, and an amendment of the TFEU beyond Part Three, such that it is incompatible with Article 48(6) TEU.
- 5.30 The wording of the proposed amendment is so imprecise and open-ended that the Decision breaches the general principle of legal certainty. Moreover, it may be interpreted as, impliedly or expressly, authorising Member States to adopt measures that go beyond what is permitted by Article 48(6) TEU which, in itself, constitutes a condition for its invalidity.

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<sup>132</sup> Recital 5 of the ESM Treaty.

5.31 Consequently, the Appellant proposes that Question One should be answered as follows:

**Proposed Answer to Question One**

**European Council Decision 2011/199/EU of 25<sup>th</sup> 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 invalid.**

## **F. Observations on Question Three: European Council Decision and ESM Treaty**

### **Question Three**

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?

**6. Even if the Decision is held to be valid, the prohibition on Member States from entering into, ratifying, or participating in an international agreement such as the ESM Treaty is unaffected by the entry into force of that Decision**

6.1 In relation to Question Two, the Appellant has submitted that the provisions of the ESM Treaty are incompatible with the Union Treaties in force at the present time. The Appellant therefore submits that Member States would only be entitled to enter and participate in a treaty such as the ESM Treaty, if there were an appropriate amendment to the Union Treaties that had entered into force at the relevant time.

6.2 Seeking to effect a fundamental treaty amendment using a simplified revision procedure, and then seeking to rely on that amendment even prior to its entry into force is inconsistent with a Union that claims to be founded on the Rule of Law. The Appellant submits that participation in an institution such as the ESM could only be permitted following a prior and appropriate amendment to the Union Treaties.

6.3 The amendment proposed in the Decision does not constitute an appropriate Treaty change that would permit Member States to participate in a treaty such as the ESM Treaty. The Appellant considers therefore that even if the European Council Decision were held to be valid and the proposed amendment eventually did enter into force, it would still not be capable of constituting a sufficient legal basis for the particular ESM Treaty which is at issue in the present proceedings.

**(i) *The relevant legal framework for assessing compatibility of the ESM Treaty***

6.4 **First** the Appellant recalls that Article 136(3) TFEU is proposed to be adopted through the simplified revision procedure, which is subject to substantive restrictions laid down in Article 48(6) TEU. In particular, such a simplified procedure

- (a) excludes revisions that increase the competences of the Union, and
- (b) only permits changes to Part Three TFEU and does not permit amendments to other provisions of the Treaties.<sup>133</sup>

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<sup>133</sup> Article 48(6) TEU. For a discussion on the application and limits of the simplified revision procedure, see Steve

- 6.5 Consequently, the European Council Decision cannot be interpreted as capable of constituting the legal authority for any measure that increases the competences of the Union or that amends primary norms beyond those of Part Three TFEU. As stated in the context of observations submitted in relation to Question One, the European Council cannot give what it does not have. (If the Decision were to be interpreted as capable of authorising amendments exceeding what is permitted by Article 48(6) TEU, then the Decision would be in manifest breach of primary law and therefore invalid).
- 6.6 **Second,** the proposed Article 136(3) TFEU neither amends nor repeals the provisions, prohibitions, and restrictions relating to Economic and Monetary Policy in the Union enshrined in Part Three, Title VIII TFEU. These provisions, including the prohibitions on bail-outs enshrined in Articles 123 and 125, continue to apply without qualification.
- 6.7 Indeed, it is of particular note that the European Council specifically stated that the scope of the amendment should not affect the prohibition on bail-outs. In the Conclusions of the European Council of 28-29 October 2010, the Heads of State or Government agreed to “*invite the the President of the European Council to undertake consultations with the members of the European Council on a limited treaty change required to [establish a permanent crisis mechanism], not modifying article 125 TFEU (“no bail-out” clause).”*<sup>134</sup>
- 6.8 It follows that any determination of the compatibility of provisions of a treaty such as the ESM Treaty with Union law (even post-amendment of the TFEU) must be assessed against *the Union Treaties as a whole* and not just Article 136(3) TFEU in isolation. More particularly, the scope of the new Article 136(3) TFEU must be read in light of all relevant provisions of the Treaties including existing restrictions and limitations set out in Part Three, Title VIII TFEU, and in accordance with Treaty provisions on the allocation of competences between the Union and Member States.
- 6.9 **Third,** the Appellant submits that to the extent that the proposed Article 136(3) TFEU authorises the Member States to take certain actions, such authority is limited and is granted directly to Member States (which, as Member States, are subject to Union law). Article 136(3) TFEU does not, however, authorise *Member States* to transfer onwards their competences to a distinct legal entity that could take decisions independently of them (for example by qualified majority) in fields that fall within the scope of the Union Treaties.

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Peers, “The Future of EU Treaty Amendments” published in the Yearbook of European Law (Oxford, 2012).

<sup>134</sup> Conclusions of the European Council, 28-29 October 2010 (EUCO 25/1/10 REV 1 – Brussels, 30 November 2010), at point 2 on page 2.

(ii) ***The ESM Treaty confers new competences on the Union and its Institutions exceeding the authority that would be provided for in the proposed amendment to Article 136(3) TFEU***

6.10 The Appellant submits that the ESM Treaty exceeds the scope of any authorisation that could be derived from the amendment proposed in the Decision since it creates new competences for the Union. It is manifest that the ESM Treaty confers new functions on Union Institutions in an area in which the Union had not (and could not have) previously acted: the administration of bail-outs, and the monitoring of compliance with the conditionality associated with such bail-outs.

6.11 For brevity, the Appellant refers the Court to **Section D.3(iv)** of these submissions where the new functions and powers conferred on the Union Institutions are set out. It is submitted that the conferral of such new functions is in itself sufficient to demonstrate that the ESM Treaty exceeds what could be authorised by the Decision. The conferral of new competences on Union institutions breaches the existing Treaties and such breach would not be remedied by the Decision.

6.12 In addition, the ESM Treaty entails the conferral of new Union competences on a supranational entity whose actions govern a sub-group of Member States (those whose currency is the euro), and is thereby, in essence, increasing the competence of the Union *as regards that group of Member States*. In particular, the ESM Treaty confers on the ESM Institution functions that are integral to the subject matter of the Treaties and which must involve the increase of competences since they could not previously have been exercised by the Union Institutions.

6.13 At first sight, the ESM Institution might appear merely to constitute the expression of *Member States'* reserved competence in economic policy outside the Union legal order. However, such a view is incompatible with the fundamental features of the ESM Institution, its overarching purpose, and the nature and scope of its functions and powers. Examination of the ESM Treaty reveals that

- The ESM Treaty is concerned with Economic and Monetary Union, which is defined in Article 3(4) TEU as an objective of the Union and falls within the scope of the Union Treaties.
- Monetary Policy is an exclusive competence of the Union and the Union has competence in coordinating economic policy.
- Participation in the ESM Treaty is reserved to Member States of the European Union whose currency is the euro.
- The defining purpose of the ESM is to safeguard the stability of the euro area as a whole.

- The ESM Treaty confers functions and competences on Union Institutions.
  - The ESM Treaty establishes an entity that is supranational in nature and which may operate by qualified majority voting.
- 6.14 The ESM Institution is a supranational entity that *in substance* represents a form of enhanced co-operation between Member States whose currency is the euro. In this regard, Recital (5) of the ESM Treaty provides that:
- On 9 December 2011 the Heads of State or Government of the Member States whose currency is the euro agreed **to move towards a stronger economic union** including a new fiscal compact and strengthened economic policy coordination [...] This Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union.*
- 6.15 The special proximity of the activities of the ESM with Union law was noted by the German Federal Constitutional Court in its judgment of 19 June 2012 which concerned the obligation of the Federal Government to keep the Bundestag informed regarding the negotiation of the ESM Treaty.<sup>135</sup> The Constitutional Court described the ESM as having a “*hybrid character*”<sup>136</sup> and held that despite its “*qualified connection with Union law, this is a European Union matter*” within the meaning of Article 23(1) of the German Basic Law.<sup>137</sup>
- 6.16 That Court further emphasised that the proposed amendment to Article 136 TFEU and the establishment of a European Stability Mechanism would entail “*adding a policy area*” that is referred to in the TFEU as belonging to the exclusive competences of the Union.<sup>138</sup> The German Court considered that the ESM Treaty allocated new responsibilities to the EU Institutions<sup>139</sup> and was being used to secure a policy area that had been allocated to the EU as an exclusive area of competence.<sup>140</sup>
- 6.17 Paragraph 144 of the judgment of the German Constitutional Court is of particular note. In that paragraph, the Court stated that

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<sup>135</sup> Judgment of the German Constitutional Court of 19 June 2012 2 BvE 4/11 accessible at: [http://www.bundesverfassungsgericht.de/entscheidungen/es20120619\\_2bve000411.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20120619_2bve000411.html)

<sup>136</sup> Judgment of the German Constitutional Court, paragraph 144.

<sup>137</sup> Paragraph 136 of the Judgment of the German Constitutional Court “*Schon wegen dieses qualifizierten Zusammenhangs mit dem Unionsrecht handelt es sich um eine Angelegenheit der Europäischen Union.*”

<sup>138</sup> Paragraph 143 of the Judgment of the German Constitutional Court.

<sup>139</sup> Paragraph 137 of the Judgment of the German Constitutional Court “*Das Vorliegen einer Angelegenheit der Europäischen Union im Sinne des Art. 23 Abs. 2 Satz 1 GG wird auch dadurch indiziert, dass verschiedene Organe der Europäischen Union durch den Vertrag über den Europäischen Stabilitätsmechanismus neue Zuständigkeiten zugewiesen erhalten.*”

<sup>140</sup> Paragraph 143 of the Judgment of the German Constitutional Court. “*Der Europäische Stabilitätsmechanismus soll darüber hinaus der Absicherung eines Politikbereichs dienen, der der Europäischen Union als ausschließliche Zuständigkeit zugewiesen ist. Der Entwurf des Vertrages über den Europäischen Stabilitätsmechanismus ergänzt die Wirtschafts- und Währungspolitik*”



*The fact that the European Stability Mechanism is to be drawn up as a separate international agreement outside the present structure of the Union law leads to no other conclusion. As set out, the formula “European Union matters” also included plans that are to be implemented intergovernmentally when they complement the law of the union or are in special proximity to it in some other way. That the European Stability Mechanism is to be brought into being through intergovernmental cooperation is thus of just as little significance as its description as an intergovernmental organisation without its own sovereignty. In any case, through the intertwining with supranational elements the European Stability Mechanism has a hybrid character, which makes it a European Union matter. **Whether the chosen form of intergovernmental agreement on the European Stability Mechanism is a circumvention of Union law, in particular whether the agreement is compatible with Article 48 TEU, is not to be decided on here.**<sup>141</sup>*

- 6.18 The German Constitutional Court rightly looked behind the *form* of the ESM Treaty to consider its substance. The German Court found that the ESM Treaty entails the conferral of new responsibilities and is effectively increasing the competences of the Union. In this regard, the German Constitutional Court raised the question of the compatibility of the ESM Treaty with Article 48 TEU, but found it was not necessary to provide an answer in the context of the proceedings before that Court.
- 6.19 Adopting comparable reasoning, Peers has observed that an amendment under the simplified revision procedure would arguably infringe the substantive constraints imposed by Article 48(6) TEU if it permitted Member States to act by qualified majority voting or in some version of the ordinary legislative procedure, as *“in that case the Treaty amendment would amount to a disguised grant of competences to the EU”*.<sup>142</sup> Any measure that seeks to increase the competences of the Union exceeds the scope of what Article 136(3) TFEU may validly authorise.
- 6.20 In summary, the ESM Treaty increases the competence of the Union as regards Member States whose currency is the euro. In particular it:
- (a) Confers new functions and responsibilities on existing Institutions; and
  - (b) Creates a new supranational institution that operates in the field of Economic and Monetary Union the decisions of which bind a sub-group of EU Member States; and

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<sup>141</sup> Paragraph 144 of the Judgment of the German Constitutional Court “*Ob in der gewählten Form des völkerrechtlichen Vertrages über den Europäischen Stabilitätsmechanismus eine Umgehung des Unionsrechts liegt, namentlich ob der Vertrag mit Art. 48 EUV vereinbar ist, ist hier nicht zu entscheiden.*”

<sup>142</sup> Steve Peers, “The Future of EU Treaty Amendments” published in the Yearbook of European Law (Oxford, 2012), at p. 23

entrusts that new institution with powers and functions that were not previously available to Union Institutions under the Treaties.

6.21 The breach of the existing Treaty provisions concerning competence (set out in the Observations on Question Two) would not therefore be remedied by the entry into force of the amendment proposed in the Decision.

**(iii) *The ESM Treaty is incompatible with the Union Treaties as a whole (even if the European Council Decision entered into force)***

6.22 The incompatibility of the ESM Treaty with Articles 123 and 125 TFEU, with the allocation of competences of the Union, and with the “no bail-out” provisions cannot be cured by the entry into force of the Decision. As mentioned above, Article 136(3) TFEU neither amends nor repeals the provisions, prohibitions, and restrictions on Member States assuming each others’ commitments or liabilities, the role and function of the ECB, or the allocation of competences under the Treaties. These provisions continue in force as binding Treaty norms. The scope of any authorisation envisaged in the new Article 136(3) TFEU must therefore be read in light of all relevant provisions of the Treaties including the existing restrictions and limitations set out in Part Three, Title VIII TFEU.

6.23 Article 136(3) TFEU, taken in conjunction with the rest of Part Three, Title VIII TFEU, and with the Union Treaties in their entirety, cannot permit a stability mechanism that entails Member States assuming liability for or guaranteeing each other’s commitments; or which affects the powers and functions of the ECB; or which affects the allocation of competences as set out in the Union Treaties.

6.24 The proposed Article 136(3) TFEU authorises the Member States to establish a “stability mechanism” if indispensable to safeguard the euro area as a whole, but does not define the nature, content, or operation of such mechanism. It merely states that any required financial assistance must be made subject to strict conditionality. Nothing in the wording of Article 136(3) TFEU suggests there was any intention to authorise a form of stability mechanism that would derogate from or modify the scope of other Treaty articles. In the absence of any specific definition of “stability mechanism”, it must be assumed that the only such mechanisms permitted would be those that were compatible with the Treaties as a whole and which did not otherwise modify the scope of Articles 123 and 125 TFEU.

6.25 This interpretation is reinforced by the Statement of the European Council affirming that amendment of the TFEU would not entail a modification of Article 125 TFEU (“no bail-out clause”).<sup>143</sup>

- 6.26 The Appellant submits that the form of stability mechanism proposed under the particular ESM Treaty at issue in these proceedings is one that entails a breach of Article 125 TFEU for the reasons out in **Section D.3(ii) and (iii)** of these Observations. Given that Article 136(3) TFEU does not modify Articles 123 and 125 TFEU, its entry into force would not affect or remedy the existing incompatibility with that provision.
- 6.27 Moreover, given that Article 136(3) TFEU is proposed to be adopted using the simplified revision procedure, it also cannot constitute the legal basis for an authorisation to amend provisions beyond **Part Three** of the TFEU.
- 6.28 The Appellant observes, however, that the provisions governing the allocation of competences are in **Part One** of the TFEU. Article 136(3) TFEU therefore cannot authorise a measure that otherwise would breach the allocation of competences defined in Part One of the TFEU. For reasons fully set out in **Section D.3(i)** of these submissions, the Appellant has explained that the ESM Treaty breaches the allocation of competences defined in the Treaty and refers this Court to the arguments set out under that heading. In particular, the Appellant observes that the alteration of the division of competences is exacerbated by the fact that it puts matters that are fundamental to the Treaties outside the scope of the Union legal order, such that the international institution at issue would not be subject to Union law, including the Charter of Fundamental Rights.
- 6.29 If the Court upholds the Appellant's submission that the ESM Treaty alters and thereby breaches the allocation of competences as defined in the Treaties, then that conclusion cannot be altered by the adoption and entry into force of the European Council Decision, as that the Decision could not in any event authorise an amendment to Treaties beyond Part Three TFEU.
- (iv) *The transfer of any reserved competences to a supranational entity not subject to Union law would exceed the authority provided for in the proposed Amendment to Article 136(3) TFEU*
- 6.30 The entry into force of the Decision may authorise Member States to take action to establish a stability mechanism, but it does not permit those Member States to transfer that authorisation to a supranational entity operating in parallel to the Union which would not be subject to such accountability or review as would apply to Member States and Union Institutions.

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<sup>143</sup> Conclusions of the European Council, 28-29 October 2010 (EUCO 25/1/10 REV 1 – Brussels, 30 November 2010), at point 2 on page 2.

6.31 As mentioned above, even in areas of reserved competence Member States must exercise such competence in a manner that respects Union law.<sup>144</sup> To use a reserved competence to establish a supranational entity that was not subject to Union law and was subject to only very limited judicial review, would exceed the authority derived from the proposed Article 136(3) TFEU. Such actions in particular would circumvent the application of the Charter and General Principles of Union law to acts that are integrally linked to the Union Treaties.

6.32 Consequently, the Appellant submits that even if Article 136(3) TFEU entered into force it would not authorise Member States to establish a stability mechanism that is operated by a separate supranational entity that is authorised to make decisions by qualified majority voting and which is not subject to the Union legal order.

**(v) Conclusion**

6.33 Having regard to the legal framework set out above, it is submitted that the ESM Treaty would still be in breach of the Union Treaties even if the amendment contained in the Decision entered into force. In light of the above considerations, the Appellant proposes that the Court should answer Question Three as follows:

**Proposed Answer to Question Three**

**Member States are precluded from entering into, ratifying or participating in an international agreement such as the ESM Treaty irrespective of the entry into force of the European Council Decision.**

Jonathan Tomkin BL

Roland Budd BL

John Rogers SC

Paul Callan SC

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<sup>144</sup> See cases cited in Section D.3(iii) of these submissions and in particular Case C-135/08 *Rottman v. Freistaat Bayern* [2010] ECR I-1449.