



Date of acceptance : 08/10/2012

OBSERVATIONS OF THE REPUBLIC OF CYPRUS

Case C-370/12 *

Document lodged by:

THE REPUBLIC OF CYPRUS

Usual name of the case:

PRINGLE

Date lodged:

14 September 2012

TO THE COURT OF JUSTICE OF THE EUROPEAN UNION

WRITTEN OBSERVATIONS

of the Republic of Cyprus, duly represented by Demetris Lysandrou and Nicholas Kyriakou, lawyers in the Law Office of the Republic of Cyprus (1, Apelli Street, 1403 Nicosia, Cyprus), with an address for service c/o Mr Demetris Lysandrou, Law Office of the Republic of Cyprus (1, Apelli Street, 1403 Nicosia, Cyprus), on whom documents may be served by facsimile (+357 22 88 92 30) or e-mail (headeudep@eudep.law.gov.cy)

IN CASE C-370/12

Pringle

Reference for a preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union from the Supreme Court (Ireland)

14 September 2012

- 1 The Republic of Cyprus has the honour of submitting the following observations in accordance with Article 104a of the Rules of Procedure of the Court of Justice of the European Union.

* Language of the case: English.

A. Questions referred

2 The Supreme Court (Ireland) has referred the following questions to the Court of Justice of the European Union:

‘(1) Whether European Council Decision 2011/199/EU of 25th March 2011 is valid:

- In 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 by the Treaties;
- In regard to the content of the proposed amendment, in particular whether it involves any infringement of the Treaties or of the general principles of law of the Union.

(2) In 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 co-ordinating economic policy, in accordance with Article 2(3) TFEU and Part Three, Title VIII TFEU;
- the powers and functions of Union Institutions pursuant to the principles set out in Article 3 TEU;
- the principle of sincere co-operation 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. Question 1:Question 1 Part 1 (whether there is any increase in Union competences):

- 3 The first part of this question relates to the validity of European Council Decision 2011/199/EU and, in particular, whether the proposed amendment to Article 136 TFEU involves an increase in the competences conferred on the Union by the Treaties, bearing in mind that, under Article 48(6) TEU, any such amendments must not increase the competences conferred on the Union by the Treaties.
- 4 The first issue that must be considered, before answering the substantive aspect of the question, is the jurisdiction of the Court of Justice.
- 5 The function and jurisdiction of the Court are described in Articles 251 to 281 TFEU. It is clear from these articles, read together, that the CJEU does not have jurisdiction to rule on the validity of the Treaties. Article 267 TFEU, which bears directly on the present case, states:

'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
 - (b) validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union'.
- 6 The question concerns, in essence, the *validity* of an amendment to an article in the Treaty on the Functioning of the European Union which, as part of primary Union law, manifestly is not subject to the powers of judicial review of the CJEU. To put it differently, Decision 2011/199/EU may, from a formal point of view, be an act by one of the institutions provided for under Article 13 TEU (namely the European Council); however, from a substantive point of view, it forms part of the Treaties in that it adds a new paragraph to them.
 - 7 On this point, Vassilios Skouris states in his book 'Interpretation of the Treaty on European Union and the Treaty establishing the European Community' ([2003] A. N. Sakkoula, pp. 184-185:

'It is in any event doubtful that the CJEU has the power, as in the aforementioned judgments which related to secondary law, to review the validity of an amendment to the Treaty made in breach of the mandatory consultation provided for in Article 48 EU Primary Union law is not the product of negotiation by the institutions and, therefore, its legality is not subject to review by the CJEU in accordance with Article 230 EC Similarly, the legality of the amending Treaties cannot be the subject of review by the CJEU in accordance with Article 230 EC ... Therefore, substantive review of the amending Treaties must be excluded even in respect of

compliance with any substantive limits of revision, at least in accordance with the procedure laid down in Article 230 EC ...’.

- 8 This implies that the jurisdiction of the Court to give a preliminary ruling on Decision 2011/199/EU is governed by point (a) rather than point (b) of the first paragraph of Article 267 TFEU and is therefore limited to the interpretation of the Decision and does not extend to its validity.
- 9 We must therefore conclude that the act in question is not subject to judicial review in terms of its validity. In this sense, the Member States enjoy complete freedom in respect of the contents of the Treaties and of the changes they may make to them, as the masters of the Treaties.
- 10 It follows from the preceding paragraph that, as the masters of the Treaties (‘Herren der Verträge’¹), the Member States have power to amend them, which power is:
 - (a) vested exclusively in them; and
 - (b) not subject to judicial review in respect of the material content of the amendment made.
- 11 Joseph Weiler and Ulrich R. Haltern have the following to say on the standing of the Member States as the masters of the Treaty:

‘The European legal order was begotten from public international law in the normal way that these things happen: there was a communion among some States - the High Contracting Parties - which negotiated, signed and subsequently ratified the constituent Treaties which brought into being first the nascent European Coal and Steel Community and then its twin siblings, the European Economic Community and Euratom. Today we know their progeny as the three-pillared European Union. This manner of conception would, in the normal course of international life, determine the genetic – as well as legal – code of the new infant: an international organisation with a separate legal personality but with no measure of independence or power to eradicate its subordination to its States parents and its subjection to the classical laws governing the States’ treaty relations. The States, like the Olympian Gods, would forever remain ultimate masters of their creation. The Germans have a nice phrase for this: the Member States are called the “Herren der Verträge”.

This mastery of the States over their offspring does not prevent, as with other Almightyies, acts of self-limitation: in the begetting of an international organisation through an international treaty, the High Contracting Parties may decide to bestow on their offspring the power to make decisions which will bind

¹ German Constitutional Court, Judgment of 12 October 1993, 89 BVerfGE 155, 190 (F.R.G.) and BVerfG, 2 Bve 2/08 of 30 June 2009, paragraph 235.

them. They may even privilege a few States in the process. But, at any point, as long as the Member States act in unison, they may change the status or the capacities of the organisation. The basic principles of the law of treaties would apply to privilege the makers of the treaty at all critical junctures in the life of a treaty – treaty-making, amendment, interpretation and termination. As masters of the treaty, States are also masters of the organisation. Thus, for example, not infrequently will States amend a treaty - including one state which set up an international organisation - in infringement of its specific amendment procedures. As long as the amendment is in accord with the collective will of all parties, it would be considered valid. Likewise, should there be a disagreement over the interpretation of a clause within a treaty, an agreement with all parties will normally be the final word as either an authentic interpretation or a de facto amendment’² (emphasis added).

- 12 The exclusive nature of the power of amendment is corroborated by Article 39 of the Vienna Convention on the Law of Treaties, which contains the following general rule regarding the amendment of treaties:

‘A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide’³.

The rule set out in Article 39 of the Vienna Convention is considered a rule of customary law,⁴ even though the procedural mechanisms for adopting amendments to which that article refers are not rules of customary law.

- 13 Alternatively, should the Court hold that it has jurisdiction to review the legality of Decision 2011/199/EU, the position of the Republic of Cyprus would be as follows:
- 14 The appellant’s argument before the national court that the amendment should have been made by means of the ordinary revision procedure provided for under Article 48(5) TEU and not by means of the simplified revision procedure provided for under Article 48(6) should be dismissed as unfounded. Article 48(6) TEU expressly states:

‘The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union’.

² Joseph Weiler and Ulrich R. Haltern, *‘The Autonomy of the Community Legal Order – Through the Looking Glass’* in *‘Who in the Law is the Ultimate Judicial Umpire of European Community Competencies?’*, available at <http://centers/law.nvu.edu/ieanmonnet/archive/papers/96/9610-11-2.html>.

³ Footnote concerns Greek translation of Article 39.

⁴ Olivier Corten and Pierre Klein, *‘The Vienna Convention on the Law of Treaties: a Commentary’*, Oxford University Press, pp. 963 et seq.

- 15 Part Three contains Article 136 TFEU, to which Decision 2011/199/EU adds a new paragraph 3 (hereinafter ‘new paragraph 3’). This implies that the European Council has the power to use the simplified procedure to revise Article 136 TFEU. The Member States may use one of the two revision procedures at their discretion, the only proviso being that they must comply with the procedural requirements stipulated for each. The material grounds for selecting one procedure over the other are again not subject to judicial review.
- 16 Therefore, if the Court is found to have the necessary jurisdiction, the Court’s review should be limited to whether or not the procedural limits laid down in Article 48(6) TEU were respected.
- 17 The first procedural requirement of Article 48(6) TEU is that the European Council shall act after it has consulted the European Parliament, the Commission and, in the case of institutional changes in the monetary area, the European Central Bank.
- 18 In the present case, the European Council did indeed consult the European Parliament, the Commission⁵ and the European Central Bank.⁶ These institutions issued opinions in which they took a positive stand on the proposed amendment. Recital (5) of the preamble to Decision 2011/199/EU refers to the opinions adopted by those three institutions.
- 19 This means that in the present case, the procedural requirement of Article 48(6) TEU was fulfilled.
- 20 The second procedural requirement of Article 48(6) TEU is that the amending decision must be unanimously adopted by the European Council, further to a proposal by the government of any Member State, the European Parliament or the Commission and only enters into force once it has been approved by the Member States in accordance with their respective constitutional requirements.
- 21 Decision 2011/199/EU clearly fulfils this requirement, because:
- (a) Decision 2011/199/EU was unanimously adopted by the European Council further to a proposal by the Belgian Government, as stated in the preamble; and

⁵ Commission opinion on the draft European Council Decision 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, COM(2011) 70 final, 15 February 2011.

⁶ Opinion of the European Central Bank on a draft European Council decision 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 (CON/2011/24), 17 March 2011. Even though Decision 2011/199/EU did not make any institutional changes in the monetary area, the European Council consulted the ECB, as stated in recital (5) of the preamble to Decision 2011/199/EU.

- (b) Article 2 of the Decision states that it shall enter into force on a set date or once the Member States have notified the Council of the completion of the procedures for the approval of the Decision in accordance with their respective constitutional requirements, whichever is sooner.
- 22 The third procedural requirement of Article 48(6) TEU is that an amending decision cannot increase the competences conferred on the Union in the Treaties.
- 23 This requirement has also been fulfilled, as Decision 2011/199/EU (via the new paragraph 3 added to Article 136 TFEU) recognises and confirms the right of the Member States, not the Union, to establish a stability mechanism and, by extension, does not create a legal basis for Union action. Therefore:
- (a) it does not confer new competences on the Union; and
- (b) it does not increase (or reduce) the competences already conferred on it by the Treaties.
- 24 On the same note, it must be within judicial knowledge that the opinions of the three other institutions provided for in Article 48(6) [TEU] argue that the intended amendment does not increase the Union's competences.

Question 1 Part 2 (infringement of Union law):

- 25 The second part of the question asks the Court if the content of the proposed amendment involves any infringement of the Treaties or of the general principles of the law of the Union.
- 26 As stated above, the purpose of the amendment to Article 136 TFEU set out in Article 1 of Decision 2011/199/EU is to add a new paragraph 3 which, once it enters into force, will have the same validity as the other provisions of the Treaties, i.e. it will become primary law and will not be subject to judicial review by the Court, which only has jurisdiction to *interpret* the Treaties.
- 27 However, if the Court finds that its review can extend to the validity of Decision 2011/199/EU, that review should be conducted in light of the principles of the Court's case-law. In its judgment on 19 November 2009 in Case C-402/07 *Sturgeon* [2010] ECR I-10923, paragraphs [47 and 48], the Court summarised the jurisprudential principles as follows:

'47. Next, it must be stated that, according to a general principle of interpretation, a Community act must be interpreted, as far as possible, in such a way as not to affect its validity (see, to that effect, Case C-403/99 Italy v Commission [2001] ECR I-6883, paragraph 37). Likewise, where a provision of Community law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness (see, inter alia, Case

187/87 Land de Sarre and Others [1988] ECR 5013, paragraph 19, and Case C-434/97 Commission v France [2000] ECR I-1129, paragraph 21).

48. In that regard, all Community acts must be interpreted in accordance with primary law as a whole, including the principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (Case C-210/03 Swedish Match [2004] ECR I-11893, paragraph 70 and Case C-344/04 IATA and ELFAA [2006] ECR I-403, paragraph 95)'.

- 28 In this case the appellant before the national court argues that the amendment to Article 136 TFEU is designed to make the Member States competent in monetary policy, in which the Union has exclusive competence and that the amendment is designed to increase and/or restrict the Union's competences, thus exceeding the provisions of Article 48(6) TEU.
- 29 The Cypriot Government is of the opinion that the amendment is designed not to *increase*, but to *strengthen* economic co-operation between the Member States to prevent any trends that might destabilise the Economic and Monetary Union. As stated in recital (4) of the preamble to Decision 2011/199/EU, the establishment of a stability mechanism for the Member States whose currency is the euro will provide:

'the necessary tool for dealing with such cases of risk to the financial stability of the euro area as a whole ... and hence help to preserve the economic and financial stability of the Union itself'.

- 30 Likewise, as stated above, the addition of the new paragraph 3 to Article 136 TFEU does not create a new legal basis for use by the Union; it merely recognises the right under international public law of the Member States, whose currency is the euro, to establish a stability mechanism.
- 31 Inasmuch as it ensures the validity of Decision 2011/199/EU, the Court must subscribe to the above reasonable interpretation on the basis of the aforementioned case-law by recognising the validity of the decision in question.
- 32 As to whether Decision 2011/199/EU involves an infringement of the Treaties or of the general principles of law of the Union, the Cypriot Government considers, in accordance with its opinion of Question 2, that it does not.

C. Question 2:

- 33 In accordance with the proposed reply to Question 1, Decision 2011/199/EU is valid and therefore legally adds the new paragraph 3 to Article 136 TFEU.

- 34 As a provision of the TFEU, the new paragraph 3 is also valid as primary law with the same status as the other provisions of the Treaties, the general principles of law of the Union and the EU Charter of Fundamental Rights, including those provisions cited in the question referred.
- 35 As the new paragraph 3 is valid as primary law with the same status as the other provisions of the Treaties, the Charter and with general principles, it cannot be seen as infringing them or as being subordinate to them by remaining inapplicable, even in the event of incompatibility.
- 36 In light of the above, as the new paragraph 3 clearly recognises the right under international public law of the Member States whose currency is the euro to establish a stability mechanism, it ensures that the said right is not prejudiced by other legislative provisions or legal principles of the Union that might prevent that right from being exercised in the absence of the new paragraph 3.
- 37 Looking at the question from another angle, the sole *raison d'être* for the adoption of the new paragraph 3 is obviously to attach to the exercise of the aforementioned right legal certainty, by expressly recognising and confirming it (at no less than primary level), precisely so that it cannot be considered that other provisions of Union law cancel, restrict or affect in any way that right.
- 38 Thus the new paragraph 3 recognises and confirms the right of the Member States whose currency is the euro to enter into and ratify an international agreement such as the Treaty establishing the European Stability Mechanism (hereinafter 'ESM Treaty') and, as such, that right is not affected by any other provision or principle of law of the Union (even those valid as primary provisions and principles), including those cited in the question referred.
- 39 However, even if the above right might theoretically be affected by the said provisions or principles, the Cypriot Government is of the opinion that it is not affected in practice, because there is no incompatibility whatsoever between those provisions or principles and the new paragraph 3 (and hence between those provisions or principles and the right recognised and confirmed under the new paragraph 3) for the following reasons:

Article 2 TEU:

- 40 Article 2 sets out general principles of the Union (democracy, equality, rule of law, human rights) which do not clash conceptually with the European Stability Mechanism (hereinafter 'ESM'), as established under the ESM Treaty.
- 41 On the contrary, the absence of the stability mechanism needed in order to support and maintain the euro would clearly have serious socio-economic consequences to the point where the application of some of those fundamental principles might be impaired.

Article 3 TEU:

- 42 Article 3 makes provision, *inter alia*, for the well-being of the peoples of the Union (paragraph 1), balanced economic growth and price stability aiming at full employment and social progress (paragraph 2(sic)), economic cohesion and solidarity among Member States whose currency is the euro (paragraph 3), economic and monetary union (paragraph 4) and the pursuit of these objectives by the Union by appropriate means commensurate with the competences which are conferred upon it in the Treaties.
- 43 The establishment of a stability mechanism – as a measure of economic policy – pursuant to the new paragraph 3 is not at odds with the above objectives; on the contrary, it safeguards them by supporting the euro and thus averting recession, which would clearly put the said objectives at risk.

Article 4(3) TEU:

- 44 Article 4(3) TEU imposes a reciprocal obligation on the Member States to facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.
- 45 The ESM established by the Member States, whose currency is the euro, will facilitate the attainment of the objectives provided for under Article 3 TEU and will help said Member States in receipt of financial assistance based on the ESM to maintain the budgetary discipline provided for under Article 126(1) TFEU.
- 46 This correlation between the ESM and the Treaty is illustrated by recitals (2) and (3) of Decision 2011/199/EU, recitals (5), (6), (9) and (10) of the preamble to the ESM Treaty and Article 13(3) of that Treaty.

Article 13 TEU:

- 47 The ESM Treaty does not infringe Article 13 TEU governing the Union institutions, because it makes provision for the institutions to be involved in the operation of the ESM (hence outside the framework of the Treaties), but based on the competences conferred on the said institutions in the Treaties themselves.
- 48 It should be noted that the Court stated in paragraph 41 of its judgment of 2 March 1994 in Case C-316/91 *Parliament v Council of the European Union* [1994] ECR I-625 that:

*‘41. [...] No provision of the Treaty prevents Member States from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up (see the judgment in joined cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685)’ (emphasis added).*

49 In fact:

- (a) the Commission's functions under the ESM Treaty correlate with the co-ordinating, executive and management functions vested in it under Article 17(1) TEU; furthermore, the Commission's involvement in the ESM (which safeguards the euro area) clearly discharges the Commission's obligation referred to in that article to promote the general interest of the Union;
- (b) Article 23 of the Statute of the ESCB and the European Central Bank allows the ECB to establish relations with international organisations and Article 282(2) TFEU requires it, as a member of the ESCB, to support the general economic policies in the Union in order to contribute to the attainment of its objectives; and
- (c) Article 37(3) ESM Treaty, which confers jurisdiction on the Court, is nothing more than an arbitration agreement that activates the jurisdiction of the Court based on Article 273 TFEU.

Article 2(3) TFEU:

- 50 Article 2(3) TFEU provides, inter alia, that Member States are to co-ordinate their economic policies within arrangements as determined by that Treaty, which the Union shall have competence to provide.
- 51 Clearly the ESM serves the purpose of Article 2(3) TFEU on the co-ordination of the Member States' economic policies by adopting, in Article 136(3), an arrangement provided for under the TFEU.

Article 3(1)(c) TFEU:

- 52 As regards Article 3(1)(c) TFEU, which confers exclusive competence on the Union for the monetary policy of the Member States whose currency is the euro, the Cypriot Government considers that the ESM does not infringe that article, because it is a financial support mechanism, not a monetary policy mechanism and, as such, does not affect the Union's exclusive competence for monetary policy pursuant to Article 3(1)(c).

Article 127 TFEU:

- 53 For the same reason, there is no incompatibility between the ESM Treaty and Article 127 TFEU, which likewise relates to monetary policy and regulates the monetary policy tasks of the European System of Central Banks (hereinafter 'ESCB') and of the European Central Bank.
- 54 The fact that the ESM Treaty is indeed linked to the operation of the euro area, but is not a monetary policy measure as exercised by the ESCB is corroborated by the

fact that Article 122 TFEU (which provides for similar financial support by a Member State within the framework of the Union) comes under Chapter 1 ('Economic policy') of Title VIII of Part Three TFEU and not under Chapter 2 ('Monetary policy') of that title, which includes Article 127 TFEU.

Article 3(2) TFEU:

- 55 Article 3(2) TFEU confers exclusive competence on the Union for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable the Union to exercise its internal competence or insofar as its conclusion may affect common rules or alter their scope.
- 56 In the present case, the conclusion of the ESM Treaty by Member States (rather than by the Union) does not infringe Article 3(2) [TFEU] because it does not fulfil any of the requirements of that article that must be fulfilled in order to confer exclusive competence on the Union in the matter.
- 57 In particular:
- (a) there is no legislative act providing for the conclusion of an international agreement such as the ESM Treaty by the Union itself;
 - (b) the ESM Treaty is not necessary to enable the Union to exercise its internal competence (e.g. pursuant to Article 122 TFEU);
 - (c) the ESM Treaty does not affect common rules or alter their scope, as explained in these observations.

Article 119 TFEU:

- 58 Article 119 TFEU makes provision for a uniform economic policy that, *inter alia*:
- (a) is based on the close co-ordination of Member States' economic policies (paragraph 1);
 - (b) includes the euro and the definition and conduct of a single monetary policy, the primary objective of which is to maintain price stability and support the general economic policies in the Union (paragraph 2); and
 - (c) entails stable prices, sound public finances, sound monetary conditions and a sustainable balance of payments (paragraph 3).
- 59 For reasons explained below in connection with Article 121 TFEU, the ESM is not inconsistent with the application of Article 119(1) TFEU; on the contrary it supports it, especially in light of Article 13(3) of the ESM Treaty, which makes provisions for conditions for financial assistance to be fully consistent with the measures of economic policy co-ordination provided for in the TFEU.

- 60 The ESM is not inconsistent with Article 119(2) TFEU, because it is not a monetary policy mechanism, as explained in connection with Article 3(1)(c) and Article 127 TFEU.
- 61 The ESM is not inconsistent with Article 119(3) TFEU; on the contrary, it supports its application (cf. Article 12 of the ESM Treaty, which provides for stability support from the ESM for members subject to strict conditionality and only if indispensable to safeguard the financial stability of the euro area as a whole).

Article 120 TFEU

- 62 To the extent that the stability mechanism is compatible with and supports the application of Article 3 TEU, the same clearly applies to Article 120 TFEU, which seeks to fulfil the same objectives as Article 3 TEU.

Articles 121 and 126 TFEU:

- 63 Article 121 TFEU refers to the Council's function of formulating broad guidelines of the economic policies of the Member States with a view to their co-ordination. As Article 13(3) ESM Treaty states that all the terms laid down by the ESM (in the form of a memorandum of understanding governing financial assistance) must be fully consistent with measures to co-ordinate the economic policies provided for in the TFEU, there would appear to be no margin for conflict between the ESM and Article 121 TFEU.
- 64 To be precise, the strict conditions to which Article 136(3) TFEU subjects the stability mechanism follow on from and strengthen co-ordination of the Member States' economic policies under Article 121 TFEU. The conditions also strengthen the effective compliance with the obligation imposed by Article 126(1) TFEU on Member States (which are in receipt of financial assistance via the ESM) to prevent excessive budgetary deficits.

Article 122 TFEU:

- 65 The fact that Article 122(2) TFEU authorises the Union to grant financial assistance to a Member State does not mean that it affects, limits or repeals:
- (a) the right of the Member States under public international law to enter into an intergovernmental agreement to establish a stability mechanism such as the ESM; or
 - (b) the right of the ESM itself (as a distinct entity from the Member States and the Union) to grant financial assistance.
- 66 On the same grounds, both financial assistance to a Member State from the International Monetary Fund and subscriptions to the capital stock of that Fund

when it so operates by other Member States are also compatible with Article 122 TFEU.

67 Therefore, there is no incompatibility between the article above and the ESM.

Article 123 TFEU:

68 Article 123 TFEU prohibits overdrafts or any other type of credit facility with the European Central Bank or with the central banks of the Member States in favour of Union institutions or Member States.

69 Manifestly Article 123 TFEU is not addressed to and does not concern the ESM, which is not an institution with the powers of a central bank.

70 As the Irish State notes in the reference for a preliminary ruling (pp. 14 to 15), the fact that a Member State undertakes to subscribe to the capital stock of the ESM does not mean that the Member State is thereby providing a facility of the type prohibited by Article 123 TFEU. Similarly, the fact that a Member State has subscribed to the capital stock of the International Monetary Fund which is providing financial support to another Member State does not mean that it is thereby providing a credit facility to that Member State in breach of the article above.

71 Accordingly, there is no incompatibility between the above article and the ESM Treaty.

Article 125 TFEU:

72 The Cypriot Government's observations on Article 125 TFEU are as follows:

73 Article 125 TFEU prohibits the Union and the Member States from accepting liability for the commitments of another Member State.⁷

74 Firstly, the prohibition in Article 125 TFEU relates to the Union and the Member States, not to a third party such as the ESM, which has a legal personality distinct from the Member States.

75 Even if the view were to be taken that the prohibition in Article 125 TFEU is binding also on the ESM, the effect of that prohibition, considering its meaning, is that guarantees for the debts of the Member States are inadmissible.

76 However, the article above does not go so far as to prohibit a Member State (or the ESM) from granting a loan or line of credit subject to strict conditions.

77 The fact that, by its very wording, Article 125 TFEU prohibits guarantees for the debts of a Member State but does not prohibit the granting of a loan or line of

⁷ Excluding mutual financial guarantees for the joint execution of a specific project.

credit is corroborated by its juxtaposition with Article 123 TFEU, which prohibits overdrafts or any other type of credit facility.

- 78 This implies that Article 125 TFEU would prohibit credit facilities, such as loans or lines of credit, only if the same wording had been used as in Article 123 TFEU.
- 79 As regards the power to grant loans or lines of credit subject to strict repayment terms, it should be noted that the new paragraph 3 added to Article 136 makes provision for the necessary financial assistance to be granted from the stability mechanism subject to strict conditions. The fact that the ESM grants financial assistance in the form of an interest-bearing loan, subject to strict conditions and not in the form of a gift, is a product of the general scheme adopted in the ESM Treaty.⁸

Charter of Fundamental Rights:

- 80 Article 51(1) of the Charter of Fundamental Rights (hereinafter ‘the Charter’) requires the Member States to comply with it when implementing Union law.
- 81 Inasmuch as the ESM has been established between Member States under an intergovernmental agreement governed by public international law and the new paragraph 3 in Article 136 TFEU recognises and confirms the right of the Member States to enter into such an agreement without thereby granting that right, it follows that the ESM Treaty does not constitute Union law and that the Charter has no bearing on the application of that Treaty.
- 82 Even if the Charter did have a bearing on the application of the ESM Treaty, the Cypriot Government agrees with the position of the Irish State in the reference for a preliminary ruling (p. 10) that:
- (a) it would be difficult to envisage circumstances in which the ESM would infringe human rights; and
 - (b) the jurisdiction of the Court of Justice to resolve disputes over the interpretation and application of the ESM Treaty, in accordance with Article 37(3) thereof acts as a safety valve in terms of respect for human rights.

General principles of law of the Union:

- 83 As with the Charter, it is difficult to envisage circumstances in which the ESM Treaty would infringe the general principles of law of the Union.

⁸ Cf. recitals (6) and (13) of the preamble to the ESM Treaty and Articles 3, 12 and 13(3) of the Treaty.

D. Question 3:

- 84 The question referred basically asks if a Member State's right to enter into and ratify an international agreement such as the ESM Treaty is subject to the entry into force of Decision 2011/199/EU (if the Court recognises the validity of that decision) or if it is possible to enter into and ratify such a Treaty before Decision 2011/199/EU enters into force.
- 85 The first point that must be clarified is that, according to Article 2 thereof, Decision 2011/199/EU will enter into force no earlier than 1 January 2013, provided that all the notifications of completion of procedures for the approval of the decision by the Member States in accordance with their respective constitutional requirements have been received.
- 86 As stated above, Article 2 repeats one of the procedural requirements of Article 48(6) TEU.
- 87 The position of the Cypriot Government is that each Member State can set their internal constitutional procedures for approval/ratification/acceptance of the ESM Treaty in motion irrespective of the entry into force of Decision 2011/199/EU, i.e. before 1 January 2013.

The following reasons support the position taken by the Cypriot Government:

- 88 Under international law,⁹ the Member States may enter into an international treaty between them, such as the ESM Treaty, at any time, just as they did in the past when they established the (temporary) European Financial Stability Facility, before the new paragraph 3 of Article 136 TFEU had entered into force.
- 89 The Cypriot Government takes the view that the new paragraph 3 of Article 136 TFEU is of a declaratory nature, in the sense that it recognises and confirms (in the interests of legal certainty) the right of the Member States under international public law to enter into the ESM Treaty. It is not of an authorising nature in the sense that it grants them that right on a legal basis.
- 90 It should be noted that this interpretation was adopted both by the Commission and by the European Central Bank in their aforementioned opinions on the new paragraph 3 of Article 136 TFEU given to the European Council.
- 91 This implies that individual action by each Member State concerned to complete the constitutional procedures necessary for acceptance/ratification/approval of the ESM Treaty does not depend on and is not affected by the date on which the new paragraph 3 of Article 136 TFEU enters into force.

⁹ Article 6 of the Vienna Convention on the Law of Treaties: 'Every State possesses capacity to conclude treaties'.

Therefore, any such individual procedures may be completed by the Member States before the date on which Article 136(3) TFEU enters into force, provided that the ESM Treaty is compatible with and does not infringe Union law, as explained in connection with Question 2.

- 92 Thus, the answer to the third question referred must be that the Member States have the right, under public international law, to enter into and ratify an international agreement such as the ESM Treaty, irrespective of the date on which the new paragraph 136(3) TFEU enters into force.

E. SUGGESTED ANSWERS TO THE QUESTIONS REFERRED

- 93 In light of the above, the Cypriot Government suggests that the questions referred by the Supreme Court should be answered as follows:

Question 1:

The question is inadmissible, because the Court has no jurisdiction to review the validity of Decision 2011/199/EU as regards its content, i.e. as regards the addition of the new paragraph 3 to Article 136 TFEU.

Alternatively: Decision 2011/199/EU is valid and does not increase the competences conferred on the Union by the Treaties, nor does it infringe the Treaties or the general principles of law of the Union.

Question 2:

Article 136(6) TFEU recognises the right of a Member State (whose currency is the euro) under public international law, to enter into and ratify an international agreement such as the ESM Treaty and, as such, that right is not affected by other provisions of the Treaties (such as Articles 2, 3, 4(3) and 13 TEU and the provisions of Title VIII of Part Three [TFEU], especially Articles 119 to 127 TFEU and Articles 2(3) and 3 TFEU) or by general principles of law of the Union or the EU Charter of Fundamental Rights.

Question 3:

The right of a Member State to enter into and ratify an international agreement such as the ESM Treaty is not subject to the entry into force of Decision 2011/199/EU.

Agents of the Republic of Cyprus

Demetris Lysandrou Nicholas Kyriakou Nicosia

14 September 2012