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Observations

In Case C-370/12

on the reference to the Court of Justice of the European Union by the Supreme Court, Ireland, by order of 31 July 2012 for a preliminary ruling in the case pending at that Court

Thomas Pringle

v

The Government of the Republic of Ireland, Ireland and the Attorney General

we submit the following observations on behalf of the Government of the Federal Republic of Germany, on the basis of the attached power of attorney:

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I. Introduction

1. The Supreme Court of Ireland is hearing an action by Thomas Pringle, a Member of the Irish Parliament (Dáil Éireann), who is opposed to the Treaty establishing the European Stability Mechanism (ESM Treaty)¹ and is seeking an injunction to stop Ireland ratifying the Treaty. He also considers European Council Decision 2011/199/EU of 25 March 2011 amending Article 136(3) TFEU² to be unlawful.
2. The Federal Government does not share the doubts raised in the main proceedings as to the validity of the two acts. The ESM Treaty is an essential means of safeguarding long-term financial stability in the euro area. That measure by the euro Member States does not affect or infringe the provisions of either the Treaty establishing the European Union (TEU) or the Treaty on the Functioning of the European Union (TFEU). In fact, the ESM Treaty is an addition to Union law that has proved urgently needed to combat the financial crisis.
3. The amendment to Article 136 TFEU in Decision 2011/199 merely provides clarification in that connection. It does not entail a substantive amendment to the treaties on economic and monetary union. The Member States could have signed the ESM Treaty in its present form even without the clarification that the new Article 136(3) TFEU is intended to provide.

II. Facts of the main proceedings and questions referred

4. Mr Pringle brought an action in the High Court on 13 April 2012, alleging that the ratification of the ESM Treaty was contrary to Irish constitutional law and Union law. Furthermore, Decision 2011/199 was unlawful. The High Court dismissed the action by judgment of 17 July 2012.
5. Mr Pringle lodged an appeal in the Supreme Court, which has referred the following questions to the Court of Justice for a preliminary ruling by order of 31 July 2012:
 1. Whether European Council Decision 2011/199/EU of 25th March 2011 is valid:

¹ Published by the Federal German Parliament under reference number BT-Drs. 17/9045 (German and English versions). All language versions are available on the Euro-Zone portal at www.Euro-Zone.europa.eu/esm-treaty-signature.

² – European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 L 91, p. 1).

- 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?

III. Preliminary remarks on the establishment and structure of the ESM and on Decision 2011/199

1. Establishment of the ESM and adoption of Decision 2011/199

6. For several years, the European Union and its Member States have been seeking to deal with the effects of the global financial and economic crisis and the problems with the refinancing of States and banks exacerbated or even caused by the crisis.
7. In 2010 and 2011 it was possible to prevent Greece, Portugal and Ireland becoming insolvent with temporary instruments created under considerable pressure of time. However, it was also clear that a permanent crisis management mechanism needed to be established in order to safeguard financial stability in the euro area as a whole for the long term. At the same time the causes of the severe problems need to be addressed, not least amongst them the economic and monetary policy of the Member States, which is not geared to the needs of monetary union.
8. The ESM is an integral part of a comprehensive crisis control and prevention strategy. Firstly, economic and monetary union is further reinforced by the fiscal treaty, after the Stability and Growth Pact has already been tightened up, the monitoring of competitiveness has been improved through the new procedure to avoid and correct macroeconomic imbalances and more efficient supervision of the European financial market has been introduced. Secondly, a robust crisis mechanism is being put in place with the ESM to supplement those preventive measures.
9. In order to create legal certainty for that mechanism, on 25 March 2011 the European Council adopted Decision 2011/199/EU amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro. Article 1 of the decision reads:

‘The following paragraph shall be added to Article 136 of the Treaty on the Functioning of the European Union:

“(3) The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality”’.
10. According to Article 2 of the Decision, it is to enter into force on 1 January 2013, provided that all the notifications on the conclusion of the procedure required for approval by the Member States according to their respective constitutional requirements have been received.

11. The decision is based on Article 48(6) TEU, which provides for a simplified procedure for the amendment of provisions in Part Three of the TFEU. According to the third paragraph of Article 48(6) TFEU, it is a condition of use of that procedure that the amendment 'shall not increase the competences conferred on the Union in the Treaties'. The European Parliament, the Commission and the European Central Bank had previously given their express consent to the use of the simplified procedure.³
12. The ESM Treaty negotiations concluded on 2 February 2012 with the signature of the Treaty by 17 Member States whose currency is the euro. It enters into force on the date when instruments of ratification, approval or acceptance have been deposited by signatories whose initial subscriptions represent no less than 90% of the total subscriptions set forth in Annex II (Article 48(1) ESM Treaty).
13. In the opinion of the Federal Government, there is an urgent need for the ESM to enter into force immediately, since there is as yet no enduring calm in the finance markets; in fact, the risks of contagion have significantly increased and the tense market situation is continuing. The position as regards financial stability in the euro area is currently very fragile; not only does it present considerable risks for any Member States involved, it also has the potential to generate consequences throughout the euro area and beyond that would be very hard to control.
14. On 29 June 2012 the German Parliament adopted the law on the Treaty of 2 February 2012 establishing the European Stability Mechanism at second and third reading by a two-thirds majority. In view of the constitutional objections raised against it and a judicial review, each involving applications for interim injunctions, the Federal Republic of Germany has not yet lodged the ratification documents for the ESM Treaty.
15. However, in its judgment of 12 September 2012,⁴ the Federal Constitutional Court dismissed the applications for interim judicial protection after

³ – See European Parliament Resolution P7_TA(2011)0103 of 23 March 2011 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 (00033/2010 – C7-0014/2011 2010/0821(NLE)); (ANNEX 1); Commission Opinion of 15 February 2011 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, paragraph 9 et seq. (ANNEX 2); and speech by Mr Barroso, President of the Commission, on 15 February 2011 (ANNEX 3); also ECB Opinion of 17 March 2011 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 (CON/2011/24), OJ 2011 C 140, p. 8, in particular paragraph 5.

⁴ – Federal Constitutional Court judgment of 12 September 2012: 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, accessible at www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012.html.

summary examination of the prospects of success in the main action. It took that decision with two provisos, relating to clarifications of the interpretation of Articles 8(5), 32(5), 34 and 35(1) of the ESM Treaty. The Federal Government will now fulfil the Federal Constitutional Court conditions in order to conclude the ratification procedure.

2. Structure and functions of the ESM

16. The ESM is intended to be able to provide the euro area Member States with stability support under the conditions laid down in Article 136(3) TFEU. The stability support instruments available to the ESM are contingency financial support, financial assistance to recapitalise the financial institutions of an ESM Member State, loans and the purchase of loans of an ESM Member on the primary or secondary market. In the medium term, the ESM takes over the functions of the European Financial Stabilisation Mechanism (EFSM) introduced as a Union instrument by Regulation (EC) No 407/2010⁵ and of the European Financial Stability Facility (EFSF) created under private law, which can grant financial support up to 30 June 2013.
17. The Contracting States will contribute EUR 700 000 million to the ESM in authorised capital stock, made up of EUR 80 000 million in paid-in shares and EUR 620 000 million in callable shares. The contribution key for all Contracting Parties is based on the key for subscription of the ECB's capital.
18. Under the ESM Treaty, stability support may only be granted if that is absolutely imperative to safeguard the financial stability of the euro area. Support is provided only under strict conditions, which are commensurate with the support instrument granted. In accordance with International Monetary Fund practice, in exceptional cases an adequate and proportionate form of private sector involvement will be considered.

IV. First question

19. The first question concerns the validity of European Council Decision 2011/199. It is divided into two parts. Firstly the referring court enquires whether the amendment to Article 136 TFEU involves an increase in the competences conferred on the Union in the Treaties, in which case the simplified procedure under Article 48(6) TFEU should not have been used. Secondly, it questions the compatibility of the amendment with the Treaties and the general principles of Union law.

⁵ – Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ 2010 L 118, p. 1).

1. Admissibility and subject matter of the question

20. Before discussing the two parts of the question in more detail, the Federal Government would like to make a preliminary remark on the admissibility and subject matter of the validity issue raised.
21. According to the first paragraph of Article 267 TFEU, the Court of Justice has jurisdiction to give preliminary rulings on the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. The validity of the Treaties, on the other hand, is not an admissible subject for a preliminary ruling procedure. That would then mean that the Court of Justice could call into question the basis prescribed for it by the Member States as authors of the Treaties.
22. In the present case, the validity of a European Council decision is being tested. According to Article 13(1) TEU, the European Council is a Union institution. Under Article 263(1) TFEU, its decisions may be contested if they have legal consequences for third parties. It must therefore be assumed that the validity of European Council decisions may also in principle be the subject of references for a preliminary ruling under Article 267 TFEU.
23. However, the decision at issue in this case does not establish secondary law but, albeit via the simplified procedure, amends the TFEU. Thus it creates new primary law, whose validity the Court of Justice cannot in principle scrutinise in a preliminary ruling procedure.
24. In those circumstances, the Federal Government is of the opinion that the first question is not entirely inadmissible, but a decision that results in an amendment to the Treaties can only be reviewed to a limited extent.
25. Hence the Court of Justice is called upon to assess compliance with the procedural rules of Article 48(6) TFEU. On the other hand, the substantive legality of the proposed Treaty provision in the light of the Union's existing primary law cannot be reviewed. Otherwise the existing Treaty law would be outside the control of the Member States and would virtually be fixed as the status quo. However, it must still be possible for Member States to amend existing primary law whilst complying with the procedural rules. It need not ultimately be decided here whether specific limits should be set for that, since there is no indication that relevant fundamental principles are infringed.

2. Applicability of the simplified procedure under Article 48(6) TFEU

26. The new paragraph 3 in Article 136 TFEU does not alter the system of economic and monetary union; in fact, its structure, based on stability and

- the obligation of budgetary discipline, remains unaffected.⁶ The provision merely makes it clear that Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.
27. The simplified Treaty amendment procedure in accordance with the second and third paragraphs of Article 48(6) TEU was applicable since the Treaty amendment does not increase the competences of the Union. In regard to the division of competences between the Member States and the EU, Article 136(3) TFEU makes it clear that it is the Member States that are responsible for establishing a stability mechanism, not the Union.
 28. Hence the Treaty amendment does not concern the action of the Union, but the action of the Member States of the euro area outside the Treaties. The Member States have freedom of action, as long as they do not encroach on the competences of the Union. That a provision that makes that clear could be seen as an increase of the competence of the Union is more than far-fetched.
 29. The Union law in force has not until now laid down any rules for the event that the stability of the euro area is placed at risk by a crisis. At the same time, the present concept of economic and monetary union does not exclude the right of Member States to establish a stability mechanism through which financial support can be granted to Member States facing a crisis as an *ultima ratio*, subject to conditions, if the stability of the euro area as a whole is at risk.
 30. In fact, under European law as it stands, support to secure liquidity is admissible subject to conditions if no other measure can avert the danger for economic and monetary union as a whole and the risk of financial collapse of Member States of the euro area. The EFSF could therefore come into force without primary law clarification.
 31. The new Article 136(3) TFEU confirms the current legal position. It creates the maximum possible legal certainty, making it clear that the original right of Member States to establish a stability mechanism must be exercised in accordance with the fundamental concept of economic and monetary union and the principle of independent responsibility for national budgets. It is not intended to define the scope and method of operation of a stabilisation mechanism precisely, but describes the scope Member States currently have for action.

⁶ – See Federal Constitutional Court judgment of 12 September 2012, cited in footnote 4, p. 53 of the reprint, paragraph 233 in the Internet version.

32. To that effect, the Federal Constitutional Court ⁷ also states:

‘Considered in that light, Article 136(3) TFEU confirms the sovereignty of the Member States in that it hands over the decision as to whether and how a stability mechanism is to be established’.

33. Article 136(3) TFEU also does not make any statement about a transfer of tasks to EU institutions. For that reason alone, Article 136(3) TFEU does not increase the primary law competences of the Union within the meaning of the third sentence of Article 48(6) TEU. Even if, when exercising the discretion confirmed by the new Article 136(3) TFEU, the Member States have organised the stability mechanism in such a way that Union institutions are assigned specific functions, that does not mean that a different view should be taken of the procedure chosen, since even in that case the Member States use the Union institutions only for the performance of certain tasks related to the ESM. The admissibility of that delegation of functions is explained in more detail in the answer to question 2.
34. It only remains to be stressed that the powers of the Union institutions under the TEU or TFEU are not increased by Article 136(3) TFEU. ⁸

V. Second question

35. In the second question, the referring court is seeking to clarify whether the Member States are entitled to enter into an international agreement such as the ESM Treaty or whether that infringes a series of provisions of the TEU and TFEU.
36. In the opinion of the Federal Government, the ESM Treaty does not encroach on the powers of the Union and is not contrary to the other provisions and principles of Union law referred to.

1. ESM Treaty does not encroach on the exclusive competence of the EU

(a) No encroachment on the powers of the Union in the field of monetary policy

37. The conclusion of the ESM Treaty does not encroach on the existing exclusive powers in the field of monetary policy under Article 3(1)(c) TFEU, since the Union’s monetary policy competence is not in practice affected by the ESM.

⁷ – See Federal Constitutional Court judgment of 12 September 2012, cited in footnote 4, p. 54 of the reprint, end of paragraph 236 in the Internet version.

⁸ – Also to that effect, see Federal Constitutional Court judgment of 12 September 2012, cited in footnote 4, p. 54 of the reprint, paragraph 236 in the Internet version.

38. The Union's monetary policy governed by Articles 127 to 133 TFEU covers the complete transfer of monetary and exchange rate policy to the Union necessary for monetary union, i.e. the replacement of national currencies by the single euro currency. In addition, rules are laid down for the ESCB (European System of Central Banks).
39. However, financial and budgetary policy is not included in monetary policy; it continues to be a competence of the Member States and the Union has only a coordinating competence for economic policy. That is reflected in the clear division of that field of regulation into two chapters, Chapter 1, Economic Policy (Articles 120 to 126) and Chapter 2, Monetary Policy (Articles 127 to 133). Not every area of policy that relates to competition and the economic situation in the euro area and therefore indirectly affects the trend in the euro exchange rate falls within the scope of the (exclusive) competence for monetary policy.
40. The purpose of the ESM is to provide Members which are experiencing, or are threatened by, severe financing problems with financial support, if that is indispensable to safeguard the financial stability of the euro area (Article 3 ESM Treaty). The support is subject to strict economic conditions, which are commensurate with the financial support instrument concerned and are aimed in particular at eliminating the country's macro-economic or merely sectoral weaknesses (Articles 3, 12(1), 13(3) ESM Treaty).
41. Thus the ESM is designed to avoid or remedy refinancing problems by means of temporary financial support and to restore economic and budgetary stability by imposing reforms. Hence the sphere of activity of the ESM is clearly to be regarded as being in the field of economic policy (within the meaning of Union policies, i.e. including budgetary and finance policy). The ESM cannot adopt rules or measures relating to the euro monetary or exchange rate policy.

(b) No encroachment on the competence to enter into international agreements within the scope of Article 3(2) TFEU

42. The claim that the Member States are infringing Article 3(2) TFEU is also incorrect. The exclusive competence of the Union according to that rule is based on Court of Justice principles deriving from the *EART* case-law,⁹ which indicates that the Member States do not have the right to hamper the effectiveness of Union law by international agreements.
43. In any event, the Union has no exclusive competence under Article 3(2) TFEU to create an institution to grant financial support. There is no provision in a legislative act for an institution equivalent to the ESM to be established at Union level, nor is it required in order to exercise an existing

⁹ – Case 22/70 *Commission v Council 'EART'* [1971] ECR 263, paragraphs 17 and 18.

internal competence of the Union. It will also be explained below that the ESM does not prejudice the common rules already in force in the field of economic policy.

2. No encroachment on the coordinating competence of the EU in the field of economic policy, in particular no infringement of Articles 121 and 126 TFEU

44. The conclusion of the ESM Treaty between 17 Member States of the Union also does not encroach on the coordinating competence of the Union for economic policy. In addition to the Union law framework conditions laid down in Articles 123 to 125 TFEU for public finance policy, the rules of the first chapter of Title VIII of the TFEU ('Economic policy') mainly encompass, in Articles 121 and 126 TFEU, guidelines and monitoring procedures for economic and budgetary policy.
45. The Member States still have competence within the context of coordinating competence. In so far as no limits are set on the freedom of action of Member States by coordinating measures, they exercise their competence – together with other Member States if appropriate – in accordance with existing Union law. In the field of economic policy, the Union has made extensive use of its competence with the regulatory package for monitoring budgetary and economic policy based on Articles 121 and 126 TFEU – or, in the case of the rules specifically applicable to the euro States, also on Article 136(1) TFEU – and it has at its disposal a wide range of instruments for monitoring the budgetary and economic policy of the Member States.¹⁰

¹⁰ – 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, OJ 1997 L 209, p. 1, in the version of Regulation (EU) No 1175/2011 of 16 November 2011, OJ 2011 L 306, p. 12 (**preventive arm**),
Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 1997 L 209, p. 6, in the version of Regulation (EU) No 1177/2011 of 8 November 2011, OJ 2011 L 306, p. 33 (**corrective arm**),
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, OJ 2011 L 306, p. 1 (**sanction regulation**),
Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community, OJ 2009 L 145, p. 1, in the version of Council Regulation (EU) No 679/2012 of 26 July 2012, OJ 2010 L 198, p. 1 (**Maastricht reporting regulation**),
Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ 2011 L 306, p. 41 (**budgetary framework**),
Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ 2011 L 306, p. 25, 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, OJ 2011 L 306, p. 8.

46. The grant of financial support to euro Member States under the conditions laid down in the ESM Treaty is not governed by Union law and it is therefore not possible for Union competences to be prejudiced. In any event, economic policy conditions are agreed with a Member State seeking assistance from the ESM in a Memorandum of Understanding in accordance with the provisions of the ESM Treaty and the future Article 136(3) TFEU. Thus the ESM can enact measures in an area in which the Union also exercises its competence, in particular with the Stability and Growth Pact instruments.
47. It is, however, ensured that even in that area the competences of the Union are maintained. Regardless of whether the Member States were not already allowed to lay down stricter rules for the grant of financial support from Member States' resources, i.e. budgetary or economic obligations going beyond the conditions imposed under Union law, Articles 121 and 126 TFEU and the secondary law based on those articles have not in any case been infringed, since Article 13(3) of the ESM Treaty guarantees that the conditions to which a State has to conform in an ESM support scheme must be fully consistent with EU economic policy coordination measures. Any disparities between the Union instruments and the ESM conditions have to be eliminated before the Memorandum of Understanding is signed. Hence no conflict can arise with the requirements of Union law.¹¹

3. No infringement of Article 125(1) TFEU

48. The ESM Treaty and any financial support granted by the ESM do not infringe Article 125(1) TFEU.
49. The prohibition on assuming liability ('no bail out') in Article 125(1) TFEU is one of the cornerstones of European economic policy rules, whose purpose is to create and maintain a stable economic and monetary area. One of the preconditions for this is that all Members in that area should operate a sound budgetary policy. Article 125(1) makes an essential contribution to that and hence supplements the economic and budgetary surveillance provided for in Articles 121 and 126 TFEU and the relevant implementing provisions.
50. However, the prohibition on assuming liability in Article 125(1) TFEU also has certain limits. The wording of the rule gives various indications that its scope is to be restricted. In the opinion of the Federal Government, however,

¹¹ – Consistency will in future also be ensured by the macro-economic adjustment programme rule laid down in a proposal for an EU regulation on the 'two pack' (see Article 6 of the Proposal for a Regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area (COM (2011) 819).

the scope of the prohibition can only be sensibly determined through an interpretation of the meaning and purpose of the rule. Consequently, the rule does not prohibit the establishment of the ESM.

51. The prohibition on assuming liability in Article 125(1) TFEU is initially aimed at the maintenance of budgetary discipline by the euro area Member States through the obligation to take out loans on market conditions. Negative incentive effects from the assumption of liability are to be prevented and the disciplinary effect of interest-rate premiums is to be maintained. The resulting pressure to pursue a sound budgetary and economic policy ultimately contributes to the achievement of the overriding objective, namely the maintenance of stability and the protection of monetary union as a whole.
52. On that basis, the rule is to be interpreted restrictively in certain exceptional cases which were not foreseeable when the provision was adopted. If Article 125 TFEU precluded any financial support even when a Member State was at risk of insolvency, application of the provision might promote instability, not stability, and possibly even the collapse of monetary union as a whole.
53. In the present situation, automatic application of Article 125 TFEU without any regard to the context and purpose of the rule would severely jeopardise the economy and the currency in the euro area and beyond. If the Member States did not establish the ESM and grant financial support subject to strict conditions, the effects could be serious, and not just for the euro area. The rule would then have the opposite purpose. That shows that Article 125(1) TFEU is not appropriate to a situation in which the financial stability of the euro system is already at acute risk.
54. The prohibition in Article 125(1) TFEU should therefore be restricted by teleological reduction to make assistance between Member States admissible in cases where that is necessary as a last resort in order to ensure the stability of the euro area. Accordingly, it is also admissible to establish a support mechanism such as the ESM, which grants assistance under those conditions.
55. When organising support, however, consideration still has to be given to the avoidance of negative incentive effects ('moral hazard'), which is the purpose of the prohibition in Article 125(1) TFEU.
56. Any negative incentive effects are counterbalanced by the conditions imposed on the support. Depending on the type of financial support, the conditions vary from a full macro-economic adjustment programme, specific requirements or long-term fulfilment of acceptance criteria such as budgetary and economic policy monitoring. When the ESM is brought into operation, negative incentive effects that are to be avoided by the prohibition

on reciprocal assumption of liability are offset by the obligation to implement reforms and pursue sound budgetary management. Compliance with the requirements is monitored for each tranche and is a condition for further financial support payments. In the medium term, the conditions should once again enable Member States to ensure stable and independent refinancing on a lasting basis. Once the support comes to an end, they are again fully exposed to the disciplinary effect of the market.

57. By those standards, the establishment of the ESM and the conditional grant of financial support are compatible with Article 125(1) TFEU.
58. Finally, the above interpretation of the prohibition in Article 125(1) TFEU is borne out by the clarification of the new Article 136(3) TFEU, which allows financial support under strict conditions if that is necessary to guarantee financial stability in the euro area as a whole or its Member States.

4. No infringement of Article 123 TFEU

59. The ESM Treaty also does not infringe Article 123 TFEU. That article contains the prohibition on the financing of public budgets of the Member States by the ECB and the national central banks. The rule concerns only those actors. Hence its purpose, apart from the avoidance of inflation risks, is to bring discipline to the budgetary policy of Member States. At the same time the rule guarantees the independence of the ECB. Thus Article 123 supplements the prohibition on the assumption of liability by the Member States under Article 125 TFEU, but is addressed to different parties.
60. The spirit and purpose of the ESM, as an institution with limited lending capacity set up and managed by the euro Member States, are not comparable to those of the central banks. The criteria for the ESM could therefore only be derived from Article 125 TFEU or the new Article 136(3) TFEU, with the conditions of which however it is, as shown, consistent, not from Article 123 TFEU.
61. Furthermore, there is no provision for the ESM to receive capital from the ECB or the national central banks, nor is that possible under the current ESM rules.¹² That would also not be compatible with the prohibition on the financing of public budgets in accordance with Article 123 TFEU, which has to be taken into account in interpreting the ESM Treaty according to Union law.¹³

¹² – See ECB Opinion of 18 March 2011, cited in footnote 3, paragraph 9.

¹³ – See also, to that effect, Federal Constitutional Court judgment of 12 September 2012, cited in footnote 4, p. 68 of the reprint, paragraph 276 in the Internet version. On the duty on Member States also to have due regard to Union law when entering into and interpreting international agreements: Case 235/87 *Matteucci* [1988] ECR 5589, paragraph

5. No infringement of Article 122 TFEU

- 62 The ESM also does not appear to infringe Article 122 TFEU, since that article refers only to measures at Union level, not intergovernmental measures taken by Member States.

6. No encroachment on the powers and functions of the Union institutions under Article 13 TEU

63. Mr Pringle also argues that the ESM Treaty transfers new competences to the Union institutions and results in their undertaking tasks that are incompatible with the functions laid down for them in the Union Treaties.
64. It is true that special tasks are conferred on the European Union institutions for the regular activity of the ESM. In particular, the Commission is assigned the task, together with the IMF and in consultation with the ECB, of assessing the debt sustainability of the Member State applying for financial assistance, drawing up the adjustment programme supporting the financial assistance and overseeing its implementation.
65. Those responsibilities were assigned by unanimous decision of the representatives of the Member States of the European Union on 24 June 2011 (annex to Council document 12114/11 of 24 June 2011). In that decision the institutions are mandated only under the delegation of functions.
66. That transfer of responsibilities under the delegation of functions does not infringe Union law. The Court of Justice already ruled in 1993 that the EEC Treaty did not ‘prevent the Member States from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council’.¹⁴ The Court has also ruled that 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’.
67. In addition, it should be pointed out that the activities assigned to the Commission and the ECB in the context of the ESM are essentially equivalent in nature to those that they also perform as part of their original competence.
68. It is therefore not apparent, or explained in detail, how the assignment of specific tasks to the institutions in the ESM Treaty could encroach upon the

16; Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraphs 57 to 59; and Case-C-55/00 *Gottardo* [2002] ECR I-413, paragraph 33.

¹⁴ – Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685, paragraph 20.

functions with which they are entrusted in accordance with Article 13 TFEU as part of their original activities.

7. No infringement of the principle of sincere cooperation under Article 4(3) TEU

69. Referring to the principle of sincere cooperation, Mr Pringle alleges that in the ESM the Member States have created an institution in order to circumvent the Union law prohibitions under Articles 123 and 125 TFEU. It has in any event already been explained above that those prohibitions are not a bar to the establishment and operation of the ESM. Furthermore, the Council decision to amend Article 136 TFEU ensures legal certainty and clarity for the Union. In that respect, it is not apparent how the establishment of the ESM by the Member States provided for therein could conflict with the duty to the Union to cooperate sincerely.
70. It should, moreover, be pointed out again that, according to the second part of the third sentence of Article 4(3) TEU, the Member States are required to refrain from any measure which could jeopardise the attainment of the Union's objectives. However, the Member States are doing precisely the opposite in establishing the ESM. The purpose in establishing the ESM, for which the Member States are providing substantial capital from their national budgets, is to further the EU aims referred to in Article 3(3) and (4) TEU and to safeguard the stability of economic and monetary union.

8. No infringement of the principle of effective judicial protection

71. Mr Pringle also alleges that the principle of effective judicial remedy and Article 47 of the Charter of Fundamental Rights have been infringed. However, the order for reference gives no indication of the nature of that infringement.
72. Furthermore, the Federal Government can see no evidence of a protection loophole in individual legal protection. According to Article 32(2) of the ESM Treaty, the ESM has full legal personality and may be a party to legal proceedings. Certainly it is not apparent that the ESM might adopt acts or measures that would directly impinge on individual rights. Indeed, the economic policy conditions that a State seeking assistance has to fulfil are set out in a Memorandum of Understanding with the State and that State then has to transpose them into its legal system. The normal national judicial protection applies to national transposition measures. It need not be determined how far the Union law conditions for effective judicial protection might be applicable to those national transposition measures; in any event, it is not apparent from the order for reference why they should not be met.

73. In so far as the conditions were also transposed to measures relating to budgetary and economic policy surveillance under Union law, the Union law provisions on judicial protection obviously apply. However, no argument has been put forward as to why this would not be sufficient.

VI. Third question

74. In the third question, the referring court is seeking to establish whether the Member States are only allowed to conclude the ESM Treaty once the amendment to Article 136 TFEU has entered into force.
75. The Federal Government is of the opinion that that question should be answered in the negative.
76. Certainly it would be an important political signal if the national ratification procedures are completed in parallel to the entry into force of the ESM Treaty and the amendment to Article 136 TFEU enters into force as planned on 1 January 2013. However, it is not inconceivable that not all notifications of the completion of the national ratification procedure will have been received by then, which is necessary for the Treaty amendment to enter into force. On the other hand, the ESM Treaty could already have entered into force, since no specific (later) deadline is laid down for that, but it has to be ratified by a number of Contracting Partners whose initial subscriptions represent no less than 90% of the ESM's total subscribed capital.
77. However, the Federal Government sees no legal problem with that. As already explained in the answer to the first question, Article 136(3) is not a constitutive authorisation or legal basis for the conclusion of the ESM Treaty by the euro States. The new Treaty provision is purely for clarification. It only defines the scope for action that the Member States have in any case. Therefore the ESM Treaty can be concluded and take effect irrespective of whether Article 136(3) has previously entered into force.
78. That is also borne out by the consideration of the second question, leading to the conclusion that the ESM Treaty did not encroach on the competences of the Union or entail any derogations from existing substantive Treaty provisions, which would only be lawful after prior adjustments to those provisions.
79. Finally, the Federal Government would point out again that it considers it very important for the ESM Treaty to enter into force without delay. Its instruments should be available for any financial support required as soon as possible, but certainly by the time the EFSF support comes to an end.

VII. Conclusion

80. In the light of the foregoing, the Federal Government proposes that the questions be answered as follows:

1. Consideration of the first question gives rise to nothing that might affect the validity of Council Decision 2011/199/EU of 25 March 2011.

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;

a Member State of the European Union whose currency is the euro is entitled to enter into and ratify an international agreement such as the ESM Treaty.

3. The entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty is not subject to the entry into force of that Decision.

[signed]

Henze

[signed]

Möller