



Reports of Cases

VIEW OF ADVOCATE GENERAL
KOKOTT
delivered on 26 October 2012¹

Case C-370/12

Thomas Pringle

v

Government of Ireland, Ireland and the Attorney General

(Reference for a preliminary ruling from the Supreme Court, Ireland)

(Simplified procedure of Article 48(6) TEU for the revision of Part Three of the TFEU — Decision 2011/199/EU amending Article 136 TFEU — Economic policy and monetary policy — Treaty establishing the European Stability Mechanism)

1. Europe is experiencing a public debt crisis. To deal with the crisis the European Union and the Member States are adopting measures which are not wholly conventional. The Court of Justice must in this reference for a preliminary ruling clarify whether the ‘European Stability Mechanism’, as one of those measures, complies with the requirements of European Union law.

I – Legal framework

A – European Union law

2. Article 1 of the European Council Decision 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 (‘Decision 2011/199’) provides:

‘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.”

3. As regards the entry into force of Decision 2011/199, Article 2(2) provides as follows: ‘This Decision shall enter into force on 1 January 2013, provided that all the notifications referred to in the first paragraph have been received, or, failing that, on the first day of the month following receipt of the last of the notifications referred to in the first paragraph.’

4. The cited legal basis of Decision 2011/199 is ‘the Treaty on European Union, and in particular Article 48(6) thereof’.

¹ — Original language: German

B – Treaty establishing the European Stability Mechanism

5. On 2 February 2012 the Member States whose currency is the euro ('the euro area Member States') signed a Treaty establishing the European Stability Mechanism ('the ESM Treaty').

6. That 'European Stability Mechanism' ('ESM') is, under Article 1 of the ESM Treaty, an 'international financial institution' whose members are the euro area Member States, and which, in accordance with the first sentence of Article 3 of the Treaty, has the following mission:

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

7. Under the second sentence of Article 12(1) of the ESM Treaty the conditionality referred to in the first sentence of Article 3 of the ESM Treaty may 'range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions'.

8. Articles 14 to 18 of the ESM Treaty provide for the following possible 'Financial assistance instruments' for the benefit of ESM Members:

- a 'precautionary conditioned credit line' or an 'enhanced conditions credit line' (Article 14);
- loans for a specific purpose, which are to be used for 're-capitalising the financial institutions' of an ESM Member (Article 15);
- loans with no specific purpose (Article 16);
- the purchase of bonds of an ESM Member on the 'primary market' (Article 17), and
- 'operations on the secondary market in relation to the bonds' of an ESM Member (Article 18).

9. In accordance with Article 48(1) thereof, on the depositing of the instrument of ratification by the Federal Republic of Germany the ESM Treaty entered into force on 27 September 2012 for the euro Member States, with the exception of the Republic of Estonia.

II – The main proceedings and procedure before the Court of Justice

10. Mr Pringle, who is a member of the lower House of the Irish Parliament ('the applicant'), sought in proceedings brought against the Irish Government and Others before the Irish High Court a declaration that the intended amendment of Article 136 TFEU by means of Decision 2011/199 is impermissible and unlawful. He further sought an order restraining the Irish Government from ratifying, approving or accepting the ESM Treaty. The High Court dismissed both of the applicant's claims.

11. Hearing an appeal against the decision of the High Court, the Supreme Court, Ireland considers that answers to the following questions referred for a preliminary ruling are required:

- (1) Is European Council Decision 2011/199/EU of 25 March 2011 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) Is a Member State of the European Union whose currency is the euro, 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;

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?

12. At the request of the referring court, by order of 4 October 2012 the President of the Court of Justice ordered that the accelerated procedure under Article 104a of the Rules of Procedure be applied to the reference for a preliminary ruling.

13. Written observations were submitted in the proceedings by the applicant, by Ireland, by the Governments of the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the United Kingdom, and by the European Council and the Commission. At the hearing on 23 October 2012, in addition to the applicant, the European Parliament, Ireland, and all the abovementioned governments and institutions of the European Union participated, with the exception of the governments of the Republic of Cyprus and the Republic of Austria.

III – Legal assessment

A – Consideration of the first question referred: validity of Decision 2011/199

14. By its first question the referring Court seeks to ascertain whether Decision 2011/199 is valid having regard to the use of the simplified revision procedure pursuant to Article 48(6) TEU and having regard to the content of the proposed amendment.

1. Admissibility of the question referred

15. Various Member States question the admissibility, in whole or in part, of the first question referred.

a) Priority of an action for annulment under Article 263 TFEU

16. Ireland submits that the applicant ought to have challenged the validity of Decision 2011/199 by means of an action for annulment under Article 263 TFEU, that the time-limit for bringing such proceedings has however already expired, and that it follows from settled case-law of the Court of Justice that an indirect challenge to the validity of the act of an institution in the main proceedings and by means of a reference for a preliminary ruling on the matter is not possible if the conditions governing the admissibility of an action for annulment under Article 263 TFEU are thereby circumvented.

17. It is indeed correct that, in accordance with settled case-law, a person who could have challenged an act of an institution under Article 263 TFEU and who allowed the mandatory time-limit in that regard to expire is not permitted thereafter to call into question the legality of that act before the national courts.² It is nevertheless also settled case-law that that rule presupposes that an action based on Article 263 TFEU brought against the contested provision would beyond doubt have been admissible.³ That condition however is obviously not satisfied so far as concerns the applicant, because he is not a person to whom Decision 2011/199 was beyond doubt of direct and individual concern in accordance with the fourth paragraph of Article 263 TFEU and who therefore would have had a right to institute proceedings.

b) The jurisdiction of the Court of Justice

18. In addition, the European Council and various Member States consider that the second part of the first question, which concerns the compatibility of the content of Decision 2011/199 with primary law, is inadmissible.

19. Their view is that the Court of Justice has no jurisdiction to review the compatibility of Decision 2011/199 with the Treaties and with the general principles of European Union law. The Court of Justice may in the present case of a decision which amends a Treaty provision at most review compliance with the procedural requirements for the amendment which are laid down in Article 48(6) TEU, but may not review whether the content of the decision is compatible with primary law. Since the decision creates a new Treaty provision, a review of its validity is as a matter of principle outwith the powers of the Court of Justice. The consequence of reviewing the substantive compatibility of an agreed Treaty amendment with existing Treaty provisions would moreover be to preclude amendments to the Treaties.

20. The admissibility of the second part of the first question referred is governed by Article 267 TFEU. As a number of Member States have correctly submitted, it follows from indents (a) and (b) of the first paragraph of that provision that the Court of Justice does not have jurisdiction to give preliminary rulings on the validity of the Treaties, but only on the validity of acts of the institutions of the European Union.

2 — See inter alia Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraph 17, and Case C-550/09 *E and F* [2010] ECR I-6213, paragraph 46.

3 — See inter alia Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, paragraph 29, and Case C-343/09 *Afton Chemical* [2010] ECR I-7023, paragraph 19.

21. Decision 2011/199 can however not be placed in the category of ‘Treaties’ for the purposes of indent (a) of the first paragraph of Article 267 TFEU, but rather constitutes, under the first sentence of the second paragraph of Article 48(6) TEU, merely an act intended to effect a Treaty amendment. The European Council, which is the author of the decision is, in accordance with the second paragraph of Article 13(1) TEU, one of the Union’s institutions. Consequently, the Court of Justice, as various Member States and the Commission have stated, has, in principle, jurisdiction to rule on the validity of that decision.

22. However, the question then arises to what extent the Court of Justice can review the validity of a decision whose content consists of a Treaty amendment.

23. It must first be observed that a restriction on the jurisdiction of the Court of Justice to a review of compliance with procedural requirements cannot, in such terms, be found in the Treaties. That finding is particularly significant given that Article 269 TFEU expressly lays down such a restriction in other circumstances, namely in respect of acts adopted pursuant to Article 7 TEU. Consequently, the Court of Justice may in principle review not only the procedure relating to a decision on a Treaty amendment adopted pursuant to Article 48(6) TEU, but also its content.

24. Next, it is however necessary to clarify by what criteria the substantive validity of a Treaty amending decision is to be assessed.

25. The first criterion is offered by the third paragraph of Article 48(6) TEU, namely that the decision is not to increase the competences of the Union. That is not contested by either the European Council or the Member States, although that provision does not govern procedure, but rather imposes a requirement as to the content of the decision.

26. The second criterion for the substantive validity of the decision is constituted by the restriction, stated in the first sentence of the second paragraph of Article 48(6) TEU, to amendments of provisions of Part Three of the TFEU.

27. In that regard, it follows that the content of the decision cannot be assessed by reference to precisely those provisions of Part Three. An amending decision will almost inevitably be in conflict with the existing provisions of Part Three of the TFEU. That will be particularly clear in the case of a decision which – as expressly permitted by the first sentence of the second paragraph of Article 48(6) TEU – would amend all the provisions of Part Three of the TFEU. If a Treaty amending decision were to be assessed by reference to those very provisions of Part Three of the TFEU, it would equally inevitably have to be found to be invalid. That would render the use of the simplified revision procedure of Article 48(6) TEU impossible. From that perspective, such a decision cannot infringe provisions of the Treaty which are to be found in Part Three of the TFEU.

28. The restriction to an amendment solely of Part Three of the TFEU necessitates however an examination in the light of the provisions of primary law established elsewhere. That is because, pursuant to the first sentence of the second paragraph of Article 48(6) TEU, the European Council may not amend any provisions outside Part Three of the TFEU. That rule must be applied not only when considering the form, but also, as indeed the Italian Government emphasises, when considering the substance. A formal amendment of Part Three of the TFEU must not have as a consequence a substantive amendment of primary law which may not be amended by means of the simplified revision procedure.

29. Accordingly, the European Council is not merely barred from adopting a decision to amend the text of the Treaties outside Part Three of the TFEU. It is equally barred from amending the text of Part Three of the TFEU in a way that is incompatible with provisions of primary law outside Part Three.

30. If an amending decision of the European Council adding a provision to Part Three of the TFEU which for example provided for the temporary suspension of a provision of Part Two, or established additional conditions for its application, were to be held valid, then the restriction of the simplified revision procedure to amendments of Part Three of the TFEU would be disregarded. All the provisions of the Treaties could then be amended using that procedure, provided only that the specific provision formally amended was in Part Three.

31. That finding does not call into question the fundamental power of Member States to amend all the provisions of primary law. If however the simplified revision procedure under Article 48(6) TEU is chosen – as it was without doubt in this case⁴ – for an amendment, then the restrictions on that procedure must be respected. To that extent, the scope of the review by the Court of Justice, contrary to the submissions of the French Government, is indeed subject to the specific revision procedure which is chosen.

32. Consequently, a decision of the European Council adopted pursuant to the first sentence of the second paragraph of Article 48(6) TEU must also be assessed by reference to provisions of primary law which lie outside Part Three of the TFEU. To that extent it is for the Court of Justice to review whether the object of such a decision is a Treaty amendment which is confined to an amendment of Part Three of the TFEU or constitutes an amendment of other provisions of primary law.

33. In the light of the foregoing, it appears to me that there is no justification, though the Commission has so proposed, for such a review to be confined solely to the general principles of other primary law. The first sentence of the second paragraph of Article 48(6) TEU provides no basis for such a distinction.

c) Interpretation of the first question referred

34. The scope of examination of the first question referred must therefore be confined to whether Decision 2011/199 is valid in respect of its compliance with all the conditions of Article 48(6) TEU. That includes, as seen above, consideration of primary law that is not governed by Part Three of the TFEU. Accordingly, the second part of the question referred, which seems to refer to the entire body of primary law, must be restrictively interpreted.

35. Moreover, examination of the validity of Decision 2011/199 must be limited to the grounds of invalidity which the referring Court has specified in the reasoning set out in its order for reference.⁵

36. Having regard to that reasoning, and notwithstanding the wording of the second part of the first question referred, the view cannot be taken that the referring court intended to call into question the substantive compliance of Decision 2011/199 with all the provisions of primary law.

37. In so far as it is suggested in the claims of the applicant as reproduced in the order for reference that the legality of Decision 2011/199 is also affected by the fact that it reduces the competences of the Union, the referring Court has not mentioned that as a ground of invalidity, and the applicant has not commented on that point in these proceedings.

4 — In that regard, see the citations in Decision 2011/199.

5 — See, with regard to such a restriction, Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, paragraph 34.

2. Increase of the competences of the European Union

38. The referring court first raises the question whether the amendment of Article 136 TFEU which is provided for in Decision 2011/199 leads to an increase in the competences conferred on the Union in the Treaties. Under the third subparagraph of Article 48(6) TEU, that is prohibited.

39. In that regard, the applicant has submitted that the addition to Article 136 TFEU covertly increases the competences of the Union. The addition empowers the euro area Member States to develop extended cooperation in the areas of economic policy and monetary policy. That cooperation takes place however within the framework of a supranational organisation whose decisions are binding on those Member States. Ultimately, the competences of the Union are increased, because European Union law henceforth is to govern an area of activity which previously had been retained by the Member States themselves.

40. I cannot share that view.

41. In accordance with the first sentence of the new Article 136(3) TFEU the euro area Member States may ‘establish a stability mechanism’. The second sentence of the new paragraph specifies that this ‘mechanism’ is to grant financial assistance.

42. Consequently, the proposed amendment is directed solely to the Member States and does not regulate any powers of the Union. Further, there is not thereby imposed on the Member States any obligation under European Union law to act.

43. Moreover, the mere fact that a rule of European Union law is affected at all cannot entail an increase in the competences of the Union within the meaning of the third subparagraph of Article 48(6) TEU. Otherwise that provision would prevent any Treaty addition in accordance with the simplified revision procedure of Article 48(6) TEU.

44. Finally, it is certainly true that obligations which European Union law imposes on the Member States could, depending on their subject matter, constitute a substantive increase in the competences of the Union. Such an obligation could, in the present case, be identified at most in the fact that the new second sentence of Article 136(3) TFEU provides that the granting of financial assistance ‘will be made’ subject to ‘strict conditionality’. It could be inferred that the Member States are to be prohibited under European Union law in the future from acting freely in the area of financial assistance.

45. In any event, it is however clear from the scheme of the provision⁶ and its legislative history⁷ that the subject matter of such ‘strict conditionality’ must be in the area of economic policy. Under the second part of the second sentence of the first subparagraph of Article 5(1), Article 119(1) and Article 120 et seq. TFEU, the Union already has a general competence for economic policy, including the rules relating to financial assistance.

46. Lastly, in relation to a submission by the applicant on the point, it must be observed that any conferral of competences on institutions of the European Union by the ESM Treaty is of no relevance to the assessment of the legality of the additional Article 136(3) TFEU. The Commission has in these proceedings also expressed that opinion. The only matter for consideration is whether the provision of the new Article 136(3) TFEU is itself in breach of the third subparagraph of Article 48(6) TEU.

⁶ — See recital 4 in the preamble to Decision 2011/199.

⁷ — European Council Conclusions of 20 April 2011 on the meeting of 24/25 March 2011, EUCO 10/1/11 REV 1, paragraph 16 et seq. and Annex II.

The ESM Treaty however does not define the regulatory content of Article 136(3) TFEU. Since the proposed Article 136(3) TFEU does not itself provide for any conferral of competences on institutions of the European Union, an infringement of the third subparagraph of Article 48(6) TEU is consequently excluded.

47. Consequently Decision 2011/199 does not increase the competences conferred on the Union in the Treaties. The decision therefore does not infringe the third paragraph of Article 48(6) TEU.

3. Infringement of Article 3(1)(c) TFEU

48. In relation to the second part of the first question referred it must now be examined whether the addition of Article 136(3) TFEU is restricted to an amendment of Part Three of the TFEU, as is laid down in the first sentence of the second paragraph of Article 48(6) TEU. That would not be the case if that provision were to amend substantive provisions of primary law outside Part Three of the TFEU.

49. According to the order for reference, the only doubt on which any argument is produced concerns Article 3(1)(c) TFEU, which provides that the Union has exclusive competence for the monetary policy of the euro area Member States.

50. In that regard, the applicant has claimed that the insertion of Article 136(3) TFEU by means of Decision 2011/199 infringes Article 3(1)(c) TFEU. Since by means of the new provision in the TFEU Member States are given the power to establish a stability mechanism for the stabilisation of the euro area, they thereby acquire, contrary to Article 3(1)(c) TFEU, competences in the area of monetary policy.

51. Irrespective of the question whether under Decision 2011/199 competence in the area of monetary policy is indeed conferred on Member States,⁸ an observation should be made on the legal significance of the Union having an exclusive competence. Under the second part of Article 2(1) TFEU the Member States may, even in areas where the Union has an exclusive competence, also act, if they are empowered to do so by the Union. Where the Union has an exclusive competence under Article 3 TFEU, that does not mean that only the Union may act in that area.

52. Any empowerment by the proposed Article 136(3) TFEU of Member States to act in an area where the Union has exclusive competence would therefore not mean that there was any substantive alteration of the provisions relating to the Union's exclusive competence under Article 2(1) and Article 3(1)(c) TFEU. The existing force of those provisions is unaffected.

53. Accordingly, having regard to Article 3(1)(c) TFEU, it must be held that Decision 2011/199 does not infringe the restrictions on the simplified revision procedure under Article 48(6) TEU.

4. Breach of the principle of legal certainty

54. Finally, the order for reference, in conjunction with the applicant's claims, raises the question whether the specified addition to Article 136 TFEU is in breach of the general principle of legal certainty.

⁸ — See, with regard to the subject-matter of the ESM Treaty, point 75 et seq., below.

55. In the applicant's opinion, the specified provision is so vaguely worded that it could permit the Member States to undertake action which might exceed the bounds of what is permissible on the basis of a Treaty amendment in the simplified revision procedure of Article 48(6) TEU. The applicant claims that the wording of Treaty provisions which are adopted using this procedure must expressly reflect the restrictions to be found in Article 48(6) TEU, because after such provisions enter into force the limits of the simplified revision procedure are no longer apparent.

56. This argument does not in fact concern any infringement of the principle of legal certainty, for instance in the form of the requirement that the law should be clearly defined.⁹ The applicant is not concerned that the proposed Article 136(3) TFEU as such is so imprecise that the addressee of the rule cannot discern what obligations are imposed by it and that the rule therefore can have no validity. His submission is rather that because the proposed insertion is made using the simplified revision procedure, the limits of that procedure must also be expressly reflected in the wording of the provision, because otherwise it could be interpreted as being unrestricted. Accordingly, the applicant is concerned with the scope of the requirements of Article 48(6) TEU as to the content of an amended Treaty provision.

57. The applicant is partly correct in so far as in this case it would not be acceptable to apply a provision added in accordance with the simplified revision procedure of Article 48(6) TEU in a way that, for example, contrary to the third subparagraph of that provision, entailed an increase in the competences of the Union. Such an application of the added Treaty provision would infringe the third subparagraph of Article 48(6) TEU.

58. For that reason it is imperative that a Treaty provision adopted in accordance with the simplified revision procedure of Article 48(6) TEU must be interpreted in a way that takes into account the restrictions on that procedure.

59. The applicant's insistence that these restrictions must necessarily be reflected in the wording of the amended Treaty provision is based on the false premise that a provision added using the simplified revision procedure could, after its entry into force, extend its normative content entirely without regard to the limits of Article 48(6) TEU. That is not the case. The limits which are imposed on a Treaty amendment in the procedure of Article 48(6) TEU also determine the limits of the normative content of the amended Treaty provision.

60. That requirement does mean that a certain hierarchy of provisions of primary law is created, with a consequent increase in the legal complexity of European Union law. That hierarchy is however the necessary consequence of the restrictions on the simplified revision procedure under Article 48(6) TEU.

61. It is imperative therefore that a future Article 136(3) TFEU should be interpreted in a way which, first, excludes any increase in the competences of the Union, and, secondly, ensures that the provisions of primary law laid down outside Part Three of the TFEU are not infringed. In the light of the foregoing, Decision 2011/199, notwithstanding its general wording, is not in breach of either Article 48(6) TEU or the principle of legal certainty.

5. Interim conclusion

62. Examination of the first question referred has disclosed nothing capable of affecting the validity of Decision 2011/199.

⁹ — See, *inter alia*, Case 169/80 *Gondrand and Garancini* ECR [1981] 1931, paragraph 17, and Case C-582/08 *Commission v United Kingdom* [2010] ECR I-7191, paragraph 49.

B – *The second question referred: right to conclude and ratify the ESM Treaty*

63. By its second question the referring Court seeks to ascertain whether a Member State, having regard to a number of provisions of primary law, is entitled to enter into and ratify an international agreement such as the ESM Treaty.

64. This question concerns the interpretation of the current law. In order to answer that question the third paragraph added to Article 136 TFEU by Decision 2011/199 – since it has not yet entered into force – cannot be taken into consideration. Although in that decision the European Council described the Treaty amendment as required for the establishment of the ESM,¹⁰ it cannot be ruled out that the conclusion and ratification of the ESM Treaty is also compatible with the existing Treaties. In that regard both the European Council and the Member States indeed submit that the Treaty amendment provided for in Decision 2011/199 is solely designed to provide clarification.

1. Admissibility of the question referred

65. A number of parties to the proceedings have called into question the admissibility of the second question referred, from a number of different viewpoints.

a) Jurisdiction of the Court of Justice

66. First, the Spanish Government has submitted that the Court of Justice has no jurisdiction to answer the second question referred. The ESM Treaty is an international agreement and not a matter of European Union law. In accordance with the Court's case-law, the Court is not competent to interpret such agreements unless the Union is a contracting party.¹¹

67. It is correct that under Article 267 TFEU the Court of Justice has jurisdiction only to interpret European Union law. The subject matter of the question referred however is solely the interpretation of European Union law, and not the interpretation of the ESM Treaty. The referring court seeks to clarify the nature of the obligations imposed on the Member States by the provisions referred to in the second question and whether those obligations preclude the conclusion and ratification of an international agreement such as the ESM Treaty. The subject matter of the present proceedings is therefore comparable to that of a reference for a preliminary ruling which concerns the compatibility of a provision of national law with European Union law. In such a case the Court of Justice is equally not called upon to interpret national law.¹² The interpretation of European Union law by the Court of Justice must however in such a case have particular regard to the content of national law as stated by the referring court.

68. The Court therefore has jurisdiction to answer the second question referred for a preliminary ruling.

b) Sufficient information in the order for reference

69. Further, various Member States have contested the admissibility of the second question in that the referring Court has not sufficiently explained in what way the provisions referred to in the second question are supposed to preclude the conclusion and ratification of the ESM Treaty. In particular, the French Government has in that regard mentioned the protection provided to the Member States by the opportunity to submit observations on a reference for a preliminary ruling.

10 — See recital 2 in the preamble to Decision 2011/199.

11 — See, inter alia, Case C-132/09 *Commission v Belgium* [2010] ECR I-8695, paragraph 43 and the case-law cited.

12 — See, inter alia, Case C-504/10 *Tanoarch* [2011] ECR I-10853, paragraph 43.

70. In accordance with settled case-law, the Court of Justice can refuse to rule on a reference for a preliminary ruling where it does not have before it the factual or legal material necessary to give a useful answer to the questions referred to it.¹³ Accordingly, the information provided in an order for reference must not only be such as to enable the Court to give a useful answer but must also enable the Governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice.¹⁴

71. In the light of the foregoing, the objections of the Member States to admissibility are in part well-founded. Within the second question referred the national court does refer to a host of Treaty provisions and even globally to Title VIII of Part Three of the TFEU. The reasoning stated in the reference for a preliminary ruling does not however contain a comment on each of the Treaty provisions there referred to. In particular there is no explanation in relation to a number of provisions – as is true for example of Articles 119 and 120 TFEU which have been highlighted by the Slovakian Government – of how their interpretation is unclear. To that extent, the second question referred requires a degree of concentration, in order to satisfy the requirements of the case-law on the necessary information in a reference for a preliminary ruling.

72. In the reasoning relating to the second question the national court refers to five claims of the applicant and has apparently transposed those claims into the six indents of the second question.¹⁵ The substance of the second question referred must therefore be determined on the basis of those claims, and it is not necessary here to discuss all the provisions of the Treaties specified by the national court.

73. According to those claims by the applicant, the ESM Treaty is contrary to the division of competences between the Union and Member States (Section 2 below) and is also contrary to the so-called ‘no bail-out’ clause in Article 125 TFEU (Section 3 below). The applicant is also of the opinion that contrary to the Treaties the ESM confers new competences on the institutions of the European Union (Section 4 below). The applicant further claims that the ESM Treaty is incompatible with the principle of effective judicial protection under Article 47 of the Charter of Fundamental Rights and with the principle of legal certainty (Section 5 below). Finally, he claims that the creation of the ESM as an independent international organisation is a circumvention of the provisions of European Union law which is incompatible with the principle of sincere cooperation under Article 4(3) TEU (Section 6 below).

2. Division of competences between the Union and Member States

74. The first matter to be examined is whether the conclusion and ratification of the ESM Treaty infringes the provisions of the Treaties on the division of competences between the Union and the Member States. The applicant is of the opinion that the Member States thereby encroach on the competences of the Union for monetary policy (subsection (a) below), the coordination of economic policy (subsection (b) below) and the conclusion of international agreements (subsection (c) below).

a) Monetary Policy

75. Under Article 3(1)(c) TFEU the Union has exclusive competence in the area of ‘monetary policy for the Member States whose currency is the euro’. Under Article 2(1) TFEU the Member States may themselves act in this area only ‘if so empowered by the Union or for the implementation of Union acts’.

13 — See, inter alia, the judgment of 19 July 2012 in Case C-470/11 *Garkalns*, paragraph 18 and the case-law cited.

14 — See, inter alia, Case C-241/09 *Fluxys* [2010] ECR I-12773, paragraph 30 and the case-law cited.

15 — See the order for reference, p. 12 et seq.: The first claim is set out in the first indent, the second in the fifth indent, the third in the second and third indents, the fourth in the fourth indent and the fifth claim in the last indent.

76. The applicant submits in that regard that the objective of the ESM Treaty is centred on the protection of the euro-currency. Moreover the activity of the ESM will obviously influence money supply and therefore price stability in the euro area. Consequently it has direct effects on monetary policy, which lies under the exclusive control of the Union and the European Central Bank.

77. The Member States who are parties to the proceedings state the contrary view that the ESM Treaty does not encroach on the Union's exclusive competence in the area of monetary policy. To the same effect various Member States have also expressed the opinion that the activity of the ESM represents economic, not monetary, policy.

78. No explicit definition of the concept of monetary policy is to be found either in primary law or, to date, in the case-law of the Court of Justice. None the less, the area of monetary policy for the euro area Member States is covered in Chapter 2 of Title VIII of the TFEU, which is headed 'Monetary policy'. Accordingly, a definition of the area of monetary policy must be found by examining the provisions of that chapter.

79. Articles 127 to 133 of the chapter on monetary policy essentially describe the tasks, powers and organisation of the European System of Central Banks ('ESCB') which, in accordance with the second sentence of Article 282(1) TFEU is alone to conduct the monetary policy of the Union. Article 127(2) TFEU describes, as 'basic tasks' of the ESCB monetary policy, foreign-exchange operations consistent with the exchange-rate policy under Article 219 TFEU, management of foreign reserves of the Member States and promotion of the smooth operation of payment systems. Those tasks therefore describe the scope of monetary policy within the meaning of Article 3(1)(c) TFEU.

80. It is necessary to examine whether the ESM Treaty and those tasks of the ESCB are compatible.

81. The first sentence of Article 3 of the ESM Treaty provides that the ESM is to provide stability support' to ESM Members when the access of an ESM Member to other sources of financing is impaired.¹⁶ The support must accordingly be 'indispensable' to 'safeguard the financial stability of the euro area as a whole and of its Member States'. As demonstrated by the individually specified 'Financial assistance instruments' in Articles 14 to 18 of the ESM Treaty, the object is that there should be available to the ESM Members, subject to certain requirements and conditions, the provision of loans to finance their public expenditure.

82. Such a provision of credit facilities does not fall as such under any of the tasks of the ESCB under Article 127(2) TFEU. In addition, Articles 123 and 124 TFEU, which directly concern the conditions governing the financing of Member States, are to be found in the chapter on economic policy and precisely not in the chapter on monetary policy.

83. Consideration of the conditions to be attached to loans leads to no other conclusion. The possible conditions, in accordance with the second sentence of Article 12(1) of the ESM Treaty, range 'from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions'. Admittedly, it is not immediately obvious from that wording what content, other than a macro-economic adjustment programme, the conditions could have. As is however clear from the second subparagraph of Article 13(3) of the ESM Treaty, the conditions agreed with the ESM Member concerned are to be 'fully consistent with the measures of economic policy coordination provided for in the TFEU'. Consequently, the conditions are to be categorised as relating to economic policy, not monetary policy.

¹⁶ — See also recitals 1 and 13 in the preamble to the ESM Treaty.

84. The activity of the ESM also does not, because it might directly affect money supply, therefore fall under Article 127(2) TFEU and constitute monetary policy. That is, contrary to the submission of the applicant, not the case. The ESM is not a commercial bank which by the extending of credit can create money. The loans granted by the ESM must on the contrary be wholly funded from paid-up share capital or, under the second sentence of Article 3 of the ESM Treaty, by the taking up of credit facilities.

85. Finally, it must be observed that – as the German Government to an extent correctly submitted – not every form of economic policy can be treated as equivalent to monetary policy solely because it may indirectly affect the price stability of the euro. If it were otherwise, the entire economic policy would be reserved to the ESCB and the rules of the Treaty on the coordination of economic policy within the Union would be devoid of meaning.

86. The conclusion therefore is that a legal arrangement such as the ESM Treaty does not affect the exclusive competence of the Union for the economic policy of the euro Member States under Article 3(1)(c) TFEU.

b) Coordination of economic policies

87. In that regard the question however arises whether entering into and ratifying the ESM Treaty is compatible with the competence of the Union for the coordination of the economic policies of the Member States.

88. Under Article 2(3) and Article 5(1) TFEU the Member States are to coordinate their economic policies within the Union. For that purpose Articles 120 and 121 TFEU in particular contain rules, including, inter alia, the provision in Article 121(2) TFEU for the Council to make recommendations for the broad guidelines of the economic policies of the Member States. In addition, the chapter on economic policy contains Article 126 TFEU which, in order to avoid excessive government deficits, subjects the Member States to specific procedures including, inter alia, the provision in Article 126(7) that the Council recommend the elimination of an excessive deficit and the provision in Article 126(11) of possible penalties.

89. The applicant is of the opinion that the conditions attached to the provision of stability support by the ESM serve the same function as the recommendations under Article 121 and 126 TFEU. He claims that because under the second sentence of Article 2(2) TFEU the Member States are entitled to act in an area of shared competence only to the extent that the Union has not exercised its competence, the ESM therefore unlawfully encroaches on a competence of the Union.

90. I do not share that view.

91. To the extent that the conditions of a financial assistance instrument granted through the ESM under the second paragraph of Article 13(3) of the ESM Treaty are in line with the coordination of economic policy within the Union, economic policy between Member States is not thereby coordinated, but effect is thereby given merely to the coordination already achieved at Union level.

92. On the other hand, to the extent that the conditions operate outside the area of the coordination of economic policy already achieved at Union level, it follows that there can be no question of coordination of the economic policies of the Member States by means of the ESM, for the simple reason that the conditions represent the requirements of the ESM as imposed on an individual Member State and not a harmonisation of the individual economic policies of the Member States. Moreover it cannot be seen that the conditions within the framework of the ESM are in the nature of penalties.

93. In the light of the foregoing, first, no decision needs to be made on the question whether the coordination of economic policy of Member States under Article 2(3) and Article 5 TFEU does indeed constitute a shared competence of the Union. That it does not is suggested by the fact that those provisions have a specific wording, which differs from other provisions in the Treaty governing competence, whereby the Union does not have competence for the coordination of the economic policies of the Member States, but instead the Member States are to coordinate their economic policies within the Union. Article 4 TFEU, which specifies the areas of shared competence, however presupposes in Article 4(1) the existence of a Union competence and does not in Article 4(2) establish any shared competence for economic policy.

94. Further, it is unnecessary to consider whether the view expressed in these proceedings on behalf of the Commission is correct, namely that Article 5(1) TFEU is to be interpreted in such a way that a coordination of the economic policies of the Member States may, as a matter of principle, be effected only within the Union, but not at other levels.

95. Consequently a legal arrangement such as the ESM Treaty also does not infringe Article 2(3) and Article 5(1) TFEU.

c) Conclusion of international agreements

96. As a final point with regard to the division of competences between the Union and the Member States it is necessary to examine whether the exclusive competence of the Union for the conclusion of international agreements under Article 3(2) TFEU precludes the conclusion and ratification of the ESM Treaty.

97. That provision states particularly that the Union is to have exclusive competence in so far as the conclusion of an international agreement ‘may affect common rules or alter their scope’. In the opinion of the applicants the purpose of the ESM Treaty is to affect the Union rules relating to economic policy and monetary policy.

98. It must in that regard be observed that Article 3(2) TFEU, as is clear when read with Article 216 TFEU, solely governs the exclusive competence of the Union for agreements with third countries and international organisations. Accordingly Member States are, under that provision, read together with Article 2(1) TFEU, prohibited only from concluding such agreements with *third countries*. The parties to the ESM Treaty are however exclusively Member States.

99. A priori therefore it cannot be accepted that by means of a legal arrangement such as the ESM Treaty there is any failure to observe Article 3(2) TFEU. In so far as the applicant’s submission on Article 3(2) TFEU ultimately concerns the fact that he regards the ESM Treaty as affecting the Union rules relating to economic policy and monetary policy, that will be considered below when I examine whether the conclusion and ratification of the ESM Treaty is in breach of the relevant provisions.

3. The ‘No bail-out clause’ in Article 125 TFEU

100. Article 125 TFEU might preclude the conclusion and ratification of a Treaty such as the ESM Treaty.

101. The view of the applicant is that the ESM Treaty is incompatible with Article 125 TFEU. He claims that, in effect, it constitutes a guarantee of the existing liabilities of the euro Member States. Article 125 TFEU further prohibits Member States undertaking a commitment such as that provided for, in the opinion of the applicant, in the ESM Treaty, to make available funds with the aim of assuming liability for the debts of another Member State. That argument is, he claims, not affected by the fact that the financial support under the ESM Treaty is granted only subject to conditions.

102. In the opinion of the applicant, not only the financial assistance instruments of the ESM but also the provisions for capital calls are in breach of Article 125 TFEU. The provision in Article 25(2) of the ESM Treaty concerning an increased capital call in the event of a default of an ESM Member constitutes a guarantee by the ESM Members of the debts of other ESM Members.

103. The question now to be examined therefore is whether Article 125 TFEU is to be regarded as a prohibition with regard to the financial assistance instruments provided for under the ESM Treaty (subsection (a) below) and with regard to the rules on capital calls (subsection (b) below).

a) Financial assistance instruments under Articles 14 to 18 of the ESM Treaty

104. Articles 14 to 18 of the ESM Treaty lay down rules relating to a number of ‘financial assistance instruments’. Articles 14 to 16 permit the granting of various forms of loans to the ESM Members. Under Articles 17 and 18, the ESM is additionally empowered to buy the bonds of ESM Members either from the member itself or from a third party. In accordance with Article 12(1) and (2) of the ESM Treaty, the ESM may provide those financial assistance instruments only subject to ‘strict conditionality, appropriate to the financial assistance instrument chosen’.

105. All the Member States and institutions of the European Union who are parties to proceedings submit that Article 125 TFEU does not in any way prohibit the financial assistance instruments of the ESM, if the conditions of the future Article 136(3) TFEU are met. Under that provision it is a prerequisite that action to safeguard the stability of the euro area is indispensable and that the financial assistance is made subject to ‘strict’ conditionality.

i) Acts of the Member States

106. It must first be clarified whether the conclusion and ratification by the Member States of the ESM Treaty is sufficiently connected with the deployment by the ESM of financial assistance instruments to justify an argument that the Member States are infringing Article 125 TFEU.

107. Some Member States have in this connection submitted that the second sentence of Article 125(1) TFEU is only a prohibition addressed to the Member States, not to an independent international organisation such as the ESM. Consequently that provision is a priori not applicable to the activity of the ESM.

108. In accordance with the second sentence of Article 125(1) TFEU ‘a Member State’ is not to be liable for the commitments of any public authorities, other bodies governed by public law or public undertakings of another Member State (the first alternative). Further that provision states that a Member State is also not to assume such commitments (the second alternative).

109. Although the ESM is to be treated as an independent international organisation, the Member States are to adjust their conduct within that organisation to the requirements of European Union law. When giving effect to commitments assumed under international agreements, Member States are required to comply with the obligations that European Union law imposes on them.¹⁷ Consequently the Member States, particularly when decisions are to be made on the financial assistance instruments under consideration, are bound by the requirements of Article 125 TFEU. The granting of such assistance requires, in accordance with Articles 14 to 18 of the ESM Treaty, on each occasion a decision of the Board of Governors, which under Article 5 of the ESM Treaty consists of representatives of each of the Governments of the ESM Members.

¹⁷ — See Case C-55/00 *Gottardo* [2002] ECR I-413, paragraph 33.

110. Whether the granting of such a financial assistance instrument is contrary to Article 125 TFEU is not necessarily dependent on whether the ESM is bound by that provision. The question is rather whether the Member States, by the fact that they bring about the granting of a financial assistance instrument by the ESM, disregard the requirements of Article 125 TFEU. Since the Member States have complete control over the ESM and since the funds of the ESM under Article 9 of the ESM Treaty at least in part are derived from the paid-up share capital of the Member States, the possibility that the Member States are in breach of Article 125 TFEU by reason of the granting of financial assistance instruments via the ESM is not a priori precluded by the fact that the financial assistance instruments are funded through the ESM and not directly from the budgets of the Member States. In connection with each individual financial assistance instrument of the ESM it is consequently necessary to examine whether its granting has the effect of causing *the Member States* to be liable for, or *the Member States* to assume, the commitments of another Member State.

111. Further, not only the actual granting of financial assistance instruments, but even the prior conclusion and ratification of the ESM Treaty by the Member States might be the basis of a breach of Article 125 TFEU. Admittedly, the financial assistance instruments of the ESM are not yet granted by conclusion and ratification of the ESM Treaty, because on each occasion they first require a decision of the Board of Governors. The Government representatives when exercising their voting rights after the entry into force of the ESM Treaty are, as seen above, in any event bound by Article 125 TFEU. Notwithstanding that obligation, the prior conclusion and ratification of the ESM Treaty would itself be in breach of Article 125 TFEU if the financial assistance instruments of the ESM Treaty could not be decided upon compatibly with Article 125 TFEU, because their granting would necessarily clash with that provision.

112. Consequently, the Member States would by the prior conclusion and ratification of the ESM Treaty be in breach of Article 125 TFEU if that provision prohibits them as a matter of principle from granting financial assistance instruments via the ESM under Articles 14 to 18 of the ESM Treaty. That presupposes that the granting of such financial assistance instruments is forbidden to the Member States themselves and their granting via the ESM would constitute acts of the Member States, a matter which must be examined below.

ii) The ESM as guarantee of the commitments of a Member State

113. With regard to the financial assistance instruments which are available it is first necessary to examine the applicant's submission that the ESM Treaty as a whole constitutes a guarantee of the existing commitments of the euro Member States and thereby is in breach of Article 125 TFEU.

114. As the Commission has correctly stated, the exclusion of liability laid down in the first alternative of the first part of the second sentence of Article 125(1) TFEU first makes clear that the existence of monetary union does not mean that there is any implicit mutual guarantee of the commitments of Member States. Under European Union law no Member State is under any obligation to satisfy the creditors of another Member State.

115. Further, Article 125 TFEU also contains a prohibition of the *voluntary* assumption of liability. The second part of the second sentence of Article 125(1) TFEU exempts from that provision mutual financial guarantees for the joint execution of a specific project. If such an exception is explicitly provided for, it follows *a contrario* that as a matter of principle the voluntary assumption of liability for the commitments of another Member States would be in breach of Article 125 TFEU.

116. However, the financial assistance instruments of the ESM Treaty do not constitute such guarantees of the commitments of another Member State. As stated above, the financial assistance instruments require on each occasion a decision of the Board of Governors,¹⁸ and to that extent there is no prior liability of the ESM. Moreover, neither loans nor the purchase of bonds guarantee to the creditors of a Member State repayment of the sums owed to them. Although it also appears to be a task of the ESM to increase confidence in the creditworthiness of ESM Members,¹⁹ no guarantee of the commitments of its Member States is involved in the financial assistance instruments which the ESM has at its disposal for that purpose. It can accordingly remain an open question whether any guarantee by the ESM should also be regarded as being granted by the Member States.

117. Consequently, the financial assistance instruments of the ESM Treaty considered globally do not constitute a guarantee by the Member States of the commitments of other Member States. To that extent the conclusion and ratification of the ESM Treaty are not in breach of Article 125 TFEU.

iii) Loans as the assumption of the commitments of a Member State

118. The next question which arises is whether Article 125 TFEU prohibits the Member States from granting loans to an ESM Member via the ESM. This presupposes that Member States are prohibited from granting such loans and that the granting of loans via the ESM is in fact by the Member States.

119. First, loans are not equivalent to becoming liable for the commitments of a Member State.²⁰ However, in addition to the exclusion of liability, the second alternative of the first part of the second sentence of Article 125(1) TFEU also prohibits Member States from assuming liability for the commitments of another Member State. It is necessary to examine whether that prohibition also extends to the granting of loans.

— Wording and scheme

120. The wording used in the German text namely the expression ‘Eintreten für Verbindlichkeiten’ does not correspond to any well-known legal concept.²¹ In accordance with the ordinary meaning of that German expression, it can describe both the assumption of liability in the place of the debtor, that is the creation of personal liability, and also the actual discharge of the liability of another party. While the French-language text of the provision, which uses ‘les prend à sa charge’ appears to have the same meaning, it may be that the English-language text which uses ‘assume the commitments’ focuses rather more on the assumption of liability than on its discharge.

121. While there appear to be certain nuances in the language versions, their common theme is however the direct acts of Member States with regard to the commitments of another Member State. The prohibition on assumption of commitments therefore prevents a Member State, in accordance with the wording of the first part of the second sentence of Article 125(1) TFEU, from taking upon itself the commitments of another Member State, either by discharging the commitment by making payment or by itself becoming the obligated party subject to the commitment, which it then has to discharge at a later date.

122. Those conditions are not satisfied by the granting of a loan. By granting a loan an existing commitment of another Member State is neither assumed nor discharged; instead a new commitment is imposed on that Member State.

18 — See point 109 above.

19 — See recital 4 in the preamble to the ESM Treaty.

20 — See point 116 above.

21 — There is occasional reference in German legal texts to ‘Eintreten “in” ein Schuldverhältnis’ [enter into a debtor relationship], see. § 563 of the German Civil Code on ‘Eintrittsrecht bei Tod des Mieters’ [right to take over a tenancy on the death of a tenant].

123. The other provisions of the Treaties also offer no basis for the argument that the first part of the second sentence of Article 125(1) TFEU prohibits the granting of loans among Member States. Admittedly, the Treaty subjects certain cases of the granting of loans to Member States to conditions. For example, Article 143(2)(c) TFEU provides for the ‘granting of credits’ to Member States whose currency is not the euro by other Member States. That may occur on the basis of a measure adopted by the Council in cases of balance of payments difficulties outside the monetary union. In addition, Article 122(2) TFEU provides for Union ‘financial assistance’ in favour of a Member State, which might also cover loans.

124. Contrary to the opinion of the applicant, it cannot however be inferred from the existence of those provisions that European Union law otherwise prohibits any granting of loans to a Member State. First, there is in Article 125 TFEU no reference to Articles 143 or 122 TFEU. It is not therefore evident that those provisions should be regarded as exceptions to a fundamental prohibition contained in Article 125 TFEU. Secondly, both those provisions of the Treaty, which have as their subject the granting of loans to Member States, do not relate to the case before the Court of a loan from and to euro Member States. While Article 122(2) TFEU concerns loans by the Union, the subject of Article 143(2)(c) TFEU is also a Union measure using the support of funds provided by Member States, which can be granted as loans only to Member States who do not have the euro as their currency. The conditions attached to the granting of loans under Articles 122(2) and 143(2) TFEU will therefore not become obsolete, if loans from and to the euro Member States are subject to no restrictions under European Union law.

125. In particular however, measures taken by the Union and measures taken by the Member States are in different contexts. For Union measures, in accordance with Article 4(1) and the first sentence of Article 5(1) TEU, the principle of conferred powers applies, while for the actions of Member States the principle of comprehensive power applies. In that light, Articles 122(2) and 143(2) TFEU empower the Union to grant credit facilities; a power which the Member States on the other hand do not need. To infer, from the fact that powers are conferred on the Union to grant credit facilities and that those powers are subject to restrictive conditions, that there is a comprehensive prohibition preventing the Member States from granting loans would be at variance with the principles relating to the division of powers between Member States and the Union.

— Objectives of Article 125 TFEU

126. However, it remains debatable whether the above findings on the basis of the wording and scheme of Article 125 TFEU are not called into question by the spirit and purpose of that provision.

127. For an understanding of the objective pursued by Article 125 TFEU the preparatory work and the background to the conclusion of the FEU Treaty can be taken into consideration. These can be used as supplementary guides to interpretation.

128. Article 125 TFEU is essentially a continuation of Article 104a EC which was introduced by the Maastricht Treaty.²² It is clear from the explanation in the Commission’s proposal which underlay Article 104a EC that that provision in conjunction with the current Articles 123 and 124 TFEU was designed to counteract excessive budget deficits and debts on the part of the Member States. Those were – inter alia because of the fear of instability on the financial markets – regarded as endangering monetary stability and the survival of the economic and monetary union.²³ In order that the debts of Member States should not be excessive, the Member States were, inter alia, required to practise budgetary discipline, and the incurring of debt was thereby to become more difficult.

22 — Treaty on European Union, signed in Maastricht on 7 February 1992 (OJ 1992 C 191, p. 1).

23 — See Draft Treaty for the amendment of the Treaty establishing the European Economic Community for the construction of an economic and monetary union, Commission Notice of 21 August 1990, Bulletin of the European Communities, Supplement 2/91, p. 25.

129. That is the purpose of Articles 123 to 125 TFEU. Article 123 TFEU denies to the Member States funding from the central banks. Article 124 TFEU further prohibits the Member States from having privileged access to other financial institutions.

130. Finally, according to the Commission proposal, Article 125 TFEU was to prevent a Member State from relying on an unconditional guarantee of its public debt by the Union or another Member State.²⁴ The draft Article 104a EC as it appeared in the proposal was then restricted to a prohibition of the ‘granting by the Community or the Member States of an unconditional guarantee in respect of the public debt of a Member State’. In the course of negotiations between the Member States on the Maastricht Treaty the prohibition was extended to its present form, as it first appears in a proposal by the Netherlands Presidency of the Council.²⁵ In particular, the addition of a prohibition on assuming liability for commitments is said to stem from a proposal by the German Government.²⁶ In any event however there are no publicly accessible sources for that proposal, its precise motives and in particular how it was understood within the Intergovernmental Conference of the Member States.

131. In the light of its legislative history, Article 125 TFEU was clearly designed at least to exclude the possibility of Member States relying on other Member States to pay their debts and to thereby ensure that they pursue a restrained budgetary policy.

132. Accordingly, I consider that the European Council and a number of Member States are correct in their submission that the objective of Article 125 TFEU is to maintain the Member States’ budgetary discipline by ensuring that the disciplinary effect of interest rate spreads on the capital markets according to the individual financial positions of Member States is preserved after the establishment of economic and monetary union. The extent of those interest rate spreads is ideally governed by the expectations of potential creditors with regard to differences in the creditworthiness of individual Member States. The factor which determines creditworthiness is the financial capacity of the Member State concerned. Consequently, the objective pursued by Article 125 TFEU is to ensure that that capacity is not dependent on the financial capacity of other Member States.

133. Both objectives – ensuring that neither debtor Member States nor the capital markets can rely on the financial capacity of other Member States – would be achieved to the greatest extent if Member States were prohibited from providing any financial support to other Member States. That is because any financial support can also be used by the recipient Member State to discharge its commitments. That is true not only in respect of support in the form of loans but also for example in respect of the provision of liquidity on the sale of goods of one Member State to another Member State. While that would indeed amount to a prohibition of trade and commerce between Member States as such, in the case of such a comprehensive prohibition it would be clear to all concerned that a Member State which incurs commitments is not receiving any financial assistance from other Member States, in any form whatsoever. The discharge of all commitments would then be dependent solely on the individual financial capacity of the debtor Member State.

134. That was however not the course taken by Article 125 TFEU. No rule can there be identified that there is a prohibition on any financial support to a Member State.

135. In the light of the objectives of Article 125 TFEU, it is however conceivable, by means of a broad interpretation of that provision, that there is at least an exclusion of such financial support as might have the effect of discharging the commitments of a Member State. The scope of the second alternative of the first part of the second sentence of Article 125 (1) TFEU would then be extended to

24 — Ibid.

25 — See Document SN 3738/91 (UEM 82): ‘Proposal by the Presidency to the Intergovernmental Conference on Economic and Monetary Union’ of 28 October 1991, Article 104a.

26 — See *Jan Viebig*, *Der Vertrag von Maastricht, Die Positionen Deutschlands und Frankreichs zur Europäischen Wirtschafts- und Währungsunion*, p. 314.

assumption of liabilities which is *only indirect*. That could, for example, be considered to be the case where a loan to a Member State just enables it to discharge its commitments. That would be particularly obvious where the amount of the loan corresponded to the level of the commitments to be discharged by the Member State in favour of its creditors.

– Basic structural principles of the European Union

136. To stretch the wording of Article 125 TFEU in such a manner, on the basis of its objective, might however come into conflict with the basic principles of the Union, which rank as of at least equal importance to Article 125 TFEU.

Sovereignty of the Member States

137. The first issue here is the protection of the sovereignty of Member States. The Union was established by still sovereign States. The principle stated in the first sentence of Article 5(1) TEU of conferred powers in order to define the competences of the Union is both an expression of that sovereignty and a safeguard of it.

138. The creation of the ESM does not however have the effect of transferring powers of the Member States to the Union and thereby restricting the sovereignty of the Member States. The ESM Treaty is rather, as a Treaty governed by international law, an expression of the Member States' sovereignty and their freedom to enter into treaties.

139. If a prohibition under European Union law even on indirect assumption of liabilities were recognised, that would hinder the Member States from deploying financial resources in order to attempt to prevent the negative effects of the bankruptcy of another Member State on their own economic and financial situation. Given the mutual interdependence of the Member States' individual economic activities which is encouraged and intended under European Union law, substantial damage could be caused by the bankruptcy of one Member State to other Member States also. That damage might possibly be so extensive that an additional consequence would be to endanger the survival of monetary union, as submitted by a number of parties to the proceedings.

140. There is no question here of finding that such a danger to the stability of the monetary union exists or of examining how such a danger should best be combated. It must only be emphasised that a broad interpretation of Article 125 TFEU would, also in such circumstances, deprive the Member States of the power to avert the bankruptcy of another Member State and of the ability thereby to attempt to avert damage to themselves. In my opinion, such an extensive restriction on the sovereignty of the Member States to adopt measures for their own protection cannot be founded on a broad teleological interpretation of a legal provision the wording of which does not unambiguously state that restriction.

141. That is particularly true in the light of the fact that the Treaties have in other cases laid down an explicit prohibition in respect of the loans here at issue. Article 123(1) TFEU expressly prohibits the European Central Bank and the national central banks from any 'overdraft facilities or any other type of credit facility' in favour of the Member States. The central banks are thereby prohibited from granting loans to the Member States.²⁷ On the other hand, Article 125 TFEU does not contain such wording with regard to the granting of loans to Member States.

Solidarity of the Member States

27 — See also Article 1(1)(a) of Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Article 104 and 104b(1) of the Treaty, which is based on Article 125(2) TFEU.

142. Further, a broad interpretation of Article 125 TFEU would be incompatible with the concept of solidarity, as laid down at various points in the Treaties. For example the parties to the EU Treaty are, in accordance with the preamble to that Treaty, pursuing the desire ‘to deepen the solidarity between their peoples’. Under the third subparagraph of Article 3(3) TEU the Union is to promote ‘economic, social and territorial cohesion, and solidarity among Member States’. In the chapter on economic policy, Article 122(1) TFEU refers explicitly to solidarity between Member States.

143. Admittedly, it cannot be inferred from the concept of solidarity that there exists a duty to provide financial assistance of the kind that is to be provided by the ESM. None the less, a broad teleological interpretation of Article 125 TFEU would also indeed prohibit the Member States, in a case of emergency, for example, to prevent the serious economic and social effects associated with a State bankruptcy, from *voluntarily* providing mutual assistance. Emergency assistance to any third State would be permitted, while emergency assistance within the Union would be banned. Such a prohibition, it appears to me, would call into question the very purpose and objective of a Union.

144. Basic fundamental principles of the Treaties therefore militate against a broad interpretation of Article 125 TFEU.

– Circumvention and protection of the objectives associated with Article 125 TFEU

145. The objection may however be made that it would deprive the prohibition in the second sentence of Article 125(1) TFEU of any sense, if the Member States were prohibited from directly assuming liabilities, but the provision could easily be circumvented by means of their indirectly doing so. I agree with that opinion up to a point, namely that Article 125 TFEU cannot be interpreted in such a way that the prohibitions laid down therein become entirely devoid of meaning.

146. That, however, is not the case. The exclusion of liability and the prohibition on the assumption of commitments, as laid down in the first part of the second sentence of Article 125(1) TFEU, still have an ‘effet utile’ even if they are applied on the basis of the regulatory content which is expressed in their wording.

147. Thus, by means of the first alternative of exclusion of liability, as the Greek Government in particular has rightly submitted, any *duty* on the part of a Member State to discharge the commitments of another Member State is excluded. Such a duty cannot be inferred from European Union law, nor may a Member State – with the exception of the guarantees mentioned in the second sentence of Article 125(1) TFEU – impose such a duty on itself. Every Member State and its potential creditors therefore know that a right to hold another Member State liable cannot exist.

148. Further, by means of the second alternative in the first part of the second sentence of Article 125(1) TFEU, the prohibition on the assumption of commitments, there is ultimately a prohibition on directly giving preference to creditors. The Member States may therefore not directly meet the demands of creditors of another Member State. Direct support of the creditors is prohibited, while indirect support, which arises as a result of the support to the debtor Member State, is not prohibited. The creditors of a Member State will therefore as a rule benefit from support given to that Member State. There remains however for the potential creditors of a Member State an additional uncertainty as to whether possible financial assistance to a Member State may actually lead to the satisfaction of their demands. To that extent, the voluntary support of a Member State need not inevitably be accompanied by either a complete or even partial satisfaction of the Member State’s creditors. That uncertainty is intended to promote the objective that Member States have differentiated interest rates on the capital markets.²⁸

28 — See point 132 above.

149. In the light of the above, loans by a Member State would only constitute assumption of the commitments of another Member State if the loans directly benefited the creditors of the recipient Member State. That might be considered to be the case if the Member State possessed no control over disposal of the loan funds.

150. As regards the interpretation which was in particular advocated by the European Council, namely that financial support to a Member State must in addition to the protection of the primary objective of maintaining Member States' budgetary discipline be accompanied by 'strict conditionality', if it is not to circumvent Article 125 TFEU, no decision need be made in the present case. In any event, the euro Member States have made provision for such conditionality under Article 12(1) of the ESM Treaty.

– Interim conclusion

151. Consequently, the second alternative of the first part of the second sentence of Article 125(1) TFEU, having regard to its wording, scheme and teleology, prohibits only the *direct* assumption of the commitments of another Member State in the sense of taking responsibility for or discharging those commitments, whereby the creditors are directly benefited. Accordingly the granting of a loan by a Member State to another Member State is in principle not prohibited.

152. By the conclusion and ratification of the ESM Treaty the Member States thus do not infringe Article 125 TFEU in respect of the loans to be granted by the ESM in accordance with Articles 14 to 16 of the ESM Treaty.

153. Should however the Court of Justice in the context of a broader interpretation of the first part of the second sentence of Article 125(1) TFEU come to the conclusion that the Member States are also prohibited from granting loans to each other, it would then have to be considered whether the granting of loans by the ESM constitutes acts of the Member States. If Article 125 TFEU is to be interpreted broadly that appears to me to be self-evident. If the granting of a loan to a Member State were to be regarded as indirectly discharging the commitments of that Member State, its granting by the ESM would have to constitute, at least indirectly, its granting by the Member States. For the Member States have established the ESM and control it. In addition it is they who, on the basis of the provisions on coverage of losses in Article 25(1) of the ESM Treaty, are ultimately to raise the loan funds in full.

iv) Purchase of bonds as assumption of liability for the commitments of a Member State

154. As regards the financial instruments, it remains lastly to be examined whether the purchase, under Articles 17 and 18 of the ESM Treaty, of the bonds of a Member State from that Member State itself or from a third party is compatible with Article 125 TFEU. That would again presuppose that the Member States are prohibited under Article 125 TFEU from making such bond purchases.

155. The acquisition of a bond directly from an issuing Member State under Article 17 of the ESM Treaty constitutes only a particular form of loan. As argued above, the granting of loans in accordance with the ESM Treaty is compatible with Article 125 TFEU.

156. The purchase of the bonds of a Member State from a third party in accordance with Article 18 of the ESM Treaty in principle also does not constitute the assumption of the commitments of that Member State, because thereby no commitment of a Member State is discharged. The Member State issuing the bonds continues to be the party subject to the commitment, as the Commission has correctly pointed out. The Member State's commitment therefore remains substantively unaltered, only the creditor changes.

157. The objection may however be made that the situation which arises after the purchase of a bond is economically indistinguishable from an ordinary discharge of the commitment of a Member State to a third party, as a consequence of which the Member State effecting such a discharge acquires a claim for repayment against the Member State which is relieved of that commitment. It is true that such a claim for repayment and that which arises directly by means of a claim acquired through a purchase of bonds are substantively distinct. Further, the purchase price of the bonds of a Member State in need of assistance may consistently be markedly lower than the value of the commitment. The result, however, is that the existing creditor, when bonds are purchased, obtains at least a part of his claim directly from the acquiring Member State.

158. To that extent, the question arises whether the purchase of bonds from a third party is in breach of Article 125 TFEU for the reason that it directly benefits the bond holder as previous creditor of the Member State.²⁹ Although in the event of such a purchase of bonds the funds of the ESM flow directly to the creditor, in my opinion the prohibition on directly benefiting creditors continues to be observed if the bonds are acquired on normal market terms. The reason is that, in that case, the previous bondholder obtains his money as he would from any ordinary third party and does not derive any specific advantage from the capacity of another Member State. When an ordinary purchase is made on the securities market the creditor would also be unaware that the purchaser of the bond is a Member State. Such a bond purchase is therefore not designed to build up the confidence of potential creditors of a Member State in the capacity of another Member State.

159. It is not evident that the deployment of financial assistance instruments under Article 18 of the ESM Treaty would necessarily deviate from the circumstances described. The purchase of bonds by the ESM in accordance with that provision therefore is not a priori necessarily incompatible with Article 125 TFEU;³⁰ rather there exists in any event the possibility of effecting those purchases in a way that complies with its provisions. Accordingly, for the purposes of the present enquiry, in relation to bond purchases the question whether the activities of the ESM would, to that extent, have to be attributed at all to the Member States in the context of Article 125 TFEU can also remain open.

160. In any event therefore, the conclusion and ratification of the ESM Treaty with regard to the purchase of bonds by the ESM in accordance with Articles 17 and 18 of the ESM Treaty are again not in breach of Article 125 TFEU.

b) Capital call under Article 25 of the ESM Treaty

161. Finally, with regard to the prohibition in Article 125 TFEU, it remains to be examined whether the provisions for increased capital call, as governed by Article 25(2) of the ESM Treaty, are compatible with that prohibition.

162. The first alternative of the first part of the second sentence of Article 125(1) TFEU prohibits one Member State from voluntarily becoming liable for the commitments of another.³¹

163. The authorised capital stock of the ESM is, under the first sentence of Article 8(2) of the ESM Treaty, to be divided into paid-in and callable shares. In accordance with Article 9 of the Treaty, unpaid capital may be called in for payment by the Board of Governors and the Board of Directors subject to certain conditions. Article 25(2) of the ESM Treaty provides that if an ESM Member does not comply with such a capital call by the ESM, an increased capital call may be made to the other ESM Members.

29 — See point 148 above.

30 — See point 111 above.

31 — See point 115 above.

164. However those rules entail no voluntary taking of liability as a result of the conclusion of the ESM Treaty. Every ESM Member must, in accordance with those rules, comply only with its own obligation to make a capital contribution. In the event that an ESM Member does not comply with a capital call, the only consequence, under the first sentence of Article 25(2) of the ESM Treaty, is that other ESM Members are called upon to pay an increased amount in respect of their own obligations to contribute. They are, on the other hand, under no obligation to meet the obligation to contribute of another ESM Member. The defaulting ESM Member remains, as is clear from the second sentence of Article 25(2) of the ESM Treaty, as before under the obligation to make its contribution to the ESM.

165. That finding is moreover confirmed by the joint explanation of the parties to the ESM Treaty dated 27 September 2012, to the effect that the Treaty does not at all impose on any Member State an obligation of payment which exceeds its own share at any time in the authorised capital stock.³² Thus, if a Member State has fully paid its own contribution, then no increased capital call can subsequently be made on it under the first sentence of Article 25(2) of the ESM Treaty.

c) Interim conclusion

166. It can therefore be held that Article 125 TFEU does not prohibit the Member States from concluding and ratifying an agreement in which there is provision for an increased capital call such as that provided for in the first sentence of Article 25(2) of the ESM Treaty and which provides for financial assistance instruments of an international organisation, such as those provided for in the form of loans and bond purchases in Articles 14 to 18 of the ESM Treaty.

4. Conferral of new competences on the institutions of the European Union

167. It must next be examined whether the conclusion and ratification of the ESM Treaty is in breach of European Union law in so far as it confers new tasks on the Union's institutions. For example, the ESM Treaty at very many points provides for action on the part of the Commission, the Court of Justice and the European Central Bank, although within the ESM Treaty only the Member States are acting, but not the Union.

168. The applicant considers that conferral of tasks to be incompatible with the duties of the institutions laid down in the Treaties. In particular he holds the opinion that such use of the Union's institutions is only possible within the procedure for enhanced cooperation under Article 20 TEU.

169. It is therefore now necessary to examine whether the tasks laid down in the ESM Treaty for the Commission (Section (a) below), the European Central Bank (Section (b) below) and the Court of Justice (Section (c) below) are in breach of the first sentence of Article 13(2) TEU, which provides that each institution is to act within the limits of the powers conferred on it in the Treaties.

a) The Commission

170. The Commission, in accordance with the third sentence of Article 13(1) of the ESM Treaty, is to undertake, at the request of the Chairperson of the Board of Governors, various assessments of a request for stability support made by an ESM Member, which are to be the basis for the granting of financial assistance by the ESM. Further, in accordance with Article 13(3) and (4) of the ESM Treaty, it is to be the task of the Commission – in liaison with the European Central Bank and wherever possible with the International Monetary Fund – to negotiate the conditions of assistance to the ESM Member concerned with that ESM Member. Under Article 13(4), for the conditions to have legal force

³² — See the Note of the Permanent Representative of Cyprus to the European Union to the European Council General Secretariat of 27 September 2012, Document-No SGE12/010319.

however the approval of the Board of Governors is also needed. Again, monitoring compliance with the conditions, under Article 13(7) of the ESM Treaty, is to be undertaken solely by the Commission. In addition, the ESM Treaty provides for further assessments and reports from the Commission in various situations.³³

171. The Court of Justice had held, in relation to the former fourth indent of Article 155 of the EEC Treaty which described the tasks of the Commission, that that provision 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.³⁴ In a subsequent judgment the Court of Justice stated that no provision of the Treaty prevents Member States from using, outside its framework, procedural steps drawing on specific rules applicable to the European Union and from associating the institutions of the European Union with the procedure thus set up.³⁵ It follows from that case-law that the Commission, on the initiative of the Member States, may also act outside the tasks conferred on it in the Treaties.

172. The representatives of the Governments of all Member States adopted on 20 June 2011 a decision, according to which ‘the ESM Treaty is to contain provisions under which the European Commission and the European Central Bank are to perform the tasks provided for in the Treaty’.³⁶ That decision goes beyond the cited case-law, inasmuch as the ESM Treaty is not an act undertaken by all Member States and the exact content of the ESM Treaty concluded on 2 February 2012 was not yet known at the time of that decision.

173. None the less, on the basis of the cited case-law, I consider that the Commission is in principle entitled to carry out the tasks which are prescribed to it in the ESM Treaty. First, the support of the decision by representatives of all Governments demonstrates sufficient collective action on the part of the Member States. Secondly, the essential content of the ESM Treaty was known to the representatives of the Member States at the time of the decision, because the European Council had already on 20 April 2011 approved the essential features of the ESM.³⁷

174. I am not persuaded by the applicant’s view that the procedure for enhanced cooperation under Article 20 TEU involves a sort of bar on the conferral of tasks on the Union’s institutions. Admittedly, Article 20(1) TEU explicitly provides that the Member States in that procedure may ‘make use of ... institutions’ of the Union. Enhanced cooperation however goes further than a mere conferral of tasks in accordance with the cited case-law of the Court of Justice. It is not confined to the possibility of making use of the Union’s institutions, but primarily permits the adoption of legal acts of the Union which, under Article 20(4) TEU, are binding only on participating Member States. It is therefore not apparent that the parties to the Treaties wanted, by means of the insertion of rules on enhanced cooperation, to restrict the possibility, confirmed by the Court of Justice in the cited case-law, of making use of the Union’s institutions outside the scope of the Treaties.

175. It must moreover be emphasised that for the Commission, unlike the situation arising from enhanced cooperation under Article 20 TEU, there is no obligation to carry out the tasks imposed on it in the ESM Treaty. The cited case-law of the Court of Justice should not be understood as meaning that the Member States can oblige the Commission to act outside the framework of the European Union. Such an obligation can be imposed on the Commission as a Union institution only as a consequence of the tasks laid down in European Union law. It must be added that the Commission,

33 — See the first sentence of the first subparagraph of Article 4(4), Article 14(5) and (6), Article 15(5) Article 16(5) and Article 17(5) of the ESM Treaty.

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

35 — See Case C-316/91 *Parliament v Council* [1994] ECR I-625, paragraph 41.

36 — See Council Cover Note of 24 June 2011, Document-No 12114/11, and recital 10 in the preamble to the ESM Treaty.

37 — See Conclusions of the European Council of the meeting of 24/25 March 2011 with Cover Note of the European Council of 20 April 2011, Document-No EUCO 10/1/11 REV 1, Paragraph 17 and Annex II.

under the third subparagraph of Article 17(3) TEU, is to be completely independent in carrying out its responsibilities and its members are not to take instructions from any Government or other institution. The euro area Member States seem to be of the same opinion, if in recital 10 in the preamble to the ESM Treaty they refer to the authorisation from all Member States of the Union, to require [‘aufzufordern’³⁸] the Commission to perform the tasks provided for in that Treaty. Consequently, the ESM Treaty does not assume that the Commission is under any obligation to do so.

176. In the light of the foregoing, the conclusion and ratification of the ESM Treaty would only infringe European Union law if that Treaty required the Commission to perform tasks which the Treaties prohibited. The Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights.

177. I can however not discern any infringement of European Union law. On the contrary, the fact that within the ESM the Commission is entrusted with the task of ensuring that the conditions attached to financial assistance instruments under the second subparagraph of Article 13(3) of the ESM Treaty are consistent with European Union law serves to protect European Union law.

178. Accordingly, the first sentence of Article 13(2) TEU is not infringed if the Commission performs the tasks specified for it in the ESM Treaty while respecting its obligations under European Union law.

b) The European Central Bank

179. The ESM Treaty also entrusts a number of tasks to the European Central Bank. Those tasks are relatively minor in comparison with those of the Commission. Individual tasks of assessment are provided for only in the first sentence of the first subparagraph of Article 4(4) and Article 18(2) of the ESM Treaty. For the rest, the Commission is, under Article 13(1), (3) and (7) and Article 14(6) of the ESM Treaty at times to act ‘in liaison’ with the European Central Bank. In those cases therefore it is not so much that tasks are allocated to the European Central Bank but that it has a qualified right to be consulted.

180. The abovementioned case-law of the Court of Justice on the delegation of tasks to the Commission can, as the Netherlands Government in particular has submitted, be transposed to the European Central Bank. That is in any event true where, as in the case of the ESM Treaty, there is a connection to the tasks associated with general economic policy, the support of which, under Article 282(1) and the third sentence of Article 282(2) TFEU, is one of the tasks of the European Central Bank.

181. It must however again be emphasised that the European Central Bank is under no obligation to perform the tasks allocated to it in the ESM Treaty. In the case of the European Central Bank that is of particular importance in the light of its independence as established in Article 130 TFEU.

182. Accordingly, it must also be held with regard to the European Central Bank that the conclusion and ratification of the ESM Treaty does not infringe the first sentence of Article 13(2) TEU if it performs the tasks specified for it in the ESM Treaty while respecting its obligations under European Union law.

38 — Clearer on that point is the version in French of the ESM Treaty, which speaks only of ‘demander’ (‘to ask’).

c) Court of Justice

183. Finally it must be clarified whether the envisaged role of the Court of Justice in the framework of the ESM is compatible with European Union law.

184. Under Article 37(2) of the ESM Treaty, the Board of Governors is to decide ‘on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty’. Under Article 37(3) the dispute is to be submitted to the Court of Justice, if an ESM Member contests the decision of the Board of Governors. As is clear from recital 16 of the ESM Treaty, the parties to the ESM Treaty base this role for the Court of Justice on Article 273 TFEU.

185. Under Article 273 TFEU, the Court of Justice ‘shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties’. It must be examined whether the quoted provisions of Article 37 of the ESM Treaty satisfy those conditions.

186. First, disputes on the interpretation and application of the ESM Treaty must relate to the subject matter of the Treaties. As is clear from a comparison with the provisions in Article 259(1) TFEU on actions brought by one Member State against another for an infringement of an obligation under the Treaties, Article 273 TFEU does not concern disputes on the actual interpretation of the Treaties. It is sufficient if the dispute is merely related. Since the allocation of tasks under Article 273 TFEU is dependent on a special agreement between the parties, it is moreover sufficient if the subject matter of such an agreement is related to the subject matter of the European Union Treaties. It is not a requirement that every single dispute arising from the ESM Treaty must imperatively be shown to be related to the European Union Treaties.

187. In the case of the ESM there is such a relationship, because the second subparagraph of Article 13(3) provides that the conditions attached to financial assistance instruments are to be consistent with the measures of economic policy coordination provided for in the TFEU. Moreover disputes on the interpretation of Article 125 TFEU (the ‘no bail-out clause’) might arise with regard to specific grants of financial assistance instruments. Accordingly, disputes on the interpretation and application of the ESM Treaty are, within the meaning of Article 273 TFEU, related to the subject matter of the Treaties.

188. The second question which arises is whether Article 37 of the ESM Treaty concerns disputes between Member States within the meaning of Article 273 TFEU. However, the ESM Treaty provides for the Court of Justice to be seised even where a dispute has arisen between an ESM Member and the ESM as an international organisation.

189. The parties to the ESM Treaty are exclusively the euro Member States, who under Article 5 of the ESM Treaty act through their Government representatives in the highest body within the ESM, the Board of Governors. As the Government of the United Kingdom in particular has correctly stated, in such circumstances a dispute between an ESM Member and the ESM is in fact, or at least can be assimilated to, a dispute between the ESM Member and the other ESM Members, who within the ESM have adopted a majority decision. Further, Member States when acting within the framework of the organisation are bound by particular European Union legal obligations. The competence of the Court of Justice thereby secures the uniform application of European Union law. In addition, it strengthens the Union system of legal remedies, which corresponds to the objective of Article 273 TFEU. It may be added that for the Member States that provision is optional. Accordingly, a broad interpretation of that provision is unexceptionable. Article 273 TFEU may be applied to the disputes of Member States within an organisation established solely by them, even when that organisation is itself party to the dispute.

190. The role allocated to the Court of Justice under the ESM Treaty is consequently compatible with the first sentence of Article 13(2) TEU.

5. Article 47 of the Charter of Fundamental Rights and the principle of legal certainty

191. It must next be examined whether the ESM Treaty is compatible with the right to an effective legal remedy under Article 47 of the Charter of Fundamental Rights and with the general principle of legal certainty.

192. In that regard the applicant has submitted that the ESM under Article 37(2) of the ESM Treaty is subject to only a limited power of review by the Court of Justice, although, by way of example, the conditions which the ESM may attach to stability support could particularly have an adverse effect on the social rights in Title IV of the Charter. Proceedings before the Court of Justice could however only be brought by the euro area Member States. The applicant claims that the activity of the ESM is not therefore subject to any legal remedy before a court as required by Article 47 of the Charter of Fundamental Rights.

193. The first sentence of Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States ‘only when they are implementing European Union law’. Accordingly the view of the Commission is that Article 47 of the Charter of Fundamental Rights is not applicable to the activity of the ESM. It can at this time be left open whether that view is correct. That is because in any event the right of individuals to an effective legal remedy in respect of the activity of the ESM is sufficiently protected.

194. The compatibility with European Union law of the acts of the Member States within the ESM – as indeed the present proceedings show – are subject under the ordinary procedure of Article 267 TFEU to review by the Court of Justice and the national courts and tribunals. The Member States have to that extent under the second subparagraph of Article 19(1) TEU provided for the required legal remedies to secure effective legal protection at least with regard to the national application of the conditions.³⁹

195. With regard to the principle of legal certainty also referred to in the question, it is not apparent in what way that principle might be infringed by the activity of the ESM.

196. The conclusion and ratification of the ESM Treaty accordingly are not in breach of either Article 47 of the Charter of Fundamental Rights or the principle of legal certainty.

6. Principle of sincere cooperation under Article 4(3) TEU

197. Finally the referring Court has doubts as to the compatibility of the ESM Treaty with Article 4(3) TEU. That provision establishes the ‘principle of sincere cooperation’ pursuant to which the Union and the Member State are, in full mutual respect, to assist each other in carrying out the tasks which flow from the Treaties.

198. In that regard, the applicant has submitted that the Member States are in breach of that principle because by creating an independent international organisation such as the ESM they intended to circumvent European Union law and in particular the prohibitions of Article 125 TFEU.

39 — See, to that effect, Case C-432/38 *Unibet* [2007] ECR I-2271, paragraphs 38 and 42 and the case-law cited.

199. It cannot however be held, as explained above,⁴⁰ that there has been any circumvention of obligations under European Union law, in particular Article 125 TFEU. The issue of circumvention of obligations under European Union law should moreover be assessed exclusively within the framework of interpreting the actual obligations. As regards the provisions of European Union law already examined for that purpose in the context of the second question referred it is impossible to discern in what way the principle of sincere cooperation is supposed to be adversely affected by the ESM Treaty. The tasks conferred on the Commission and the European Central Bank in the ESM Treaty seem to be evidence to the contrary.

200. The conclusion and ratification of the ESM Treaty is therefore not in breach of Article 4(3) TEU.

7. Interim conclusion

201. In the light of the foregoing the answer to the second question is that Article 4(3) and Article 13 TEU; Article 2(3), Article 3(1)(c) and (2), Article 122, Article 123 and Article 125 TFEU; Article 47 of the Charter of Fundamental Rights, and the principle of legal certainty do not prevent a Member State from concluding and ratifying an international agreement such as the ESM Treaty.

C – The third question referred: whether the answer to the second question is affected by the entry into force of the Decision

202. Finally, by its third question the referring court seeks to ascertain whether the right of Member States to conclude and ratify an international agreement such as the ESM Treaty is dependent on the entry into force of Decision 2011/199.

203. Since the Member States, as explained above in relation to the second question, may in accordance with current law conclude and ratify an international agreement such as the ESM Treaty, their right to do so is not dependent on the addition of a new paragraph (3) in Article 136 TFEU on the basis of Decision 2011/199. The third question referred must for that reason be answered in the negative.

IV – Conclusion

204. In the light of the foregoing considerations, I propose that the Court of Justice should reply as follows to the questions referred for a preliminary ruling by the Supreme Court, Ireland:

- (1) Consideration of the matter has disclosed nothing capable of affecting the validity of Decision 2011/199.
- (2) Article 4(3) and Article 13 TEU; Article 2(3), Article 3(1)(c) and (2), Article 122, Article 123 and Article 125 TFEU; Article 47 of the Charter of Fundamental Rights, and the principle of legal certainty do not prevent a Member State whose currency is the euro from concluding and ratifying an international agreement such as the ESM Treaty before the entry into force of Decision 2011/199.

⁴⁰ — See point 100 et seq. above.