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## COMMENT ON JUDGMENT OF THE COURT OF JUSTICE (FULL COURT) IN CASE C-370/12 ***THOMAS PRINGLE V. GOVERNMENT OF IRELAND***

### Keywords

*validity – Article 48(6) TEU – simplified revision procedure – economic and monetary policy*

### I. INTRODUCTION

The *Pringle*<sup>1</sup> case is one of the most interesting cases of the European Court of Justice (CJEU) for economic relations in the European Union. The annotated judgment is significant for this reason, that the Court, in times of economic and political crisis in Europe, once again underscores some international law principles, belonging to the core of the European integration process<sup>2</sup>.

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<sup>1</sup> *Thomas Pringle v. Government of Ireland, Ireland, the Attorney General*, Case C-312/12, Judgment of 27.11.2012, OJ C 303, 6.10.2012.

<sup>2</sup> On the broader legal reasons for the financial stability amendment, see for example: B. de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, European Policy Analysis 2011, vol. 6, pp. 1-8; J. Barcz, *Środki międzyrządowe konsolidujące strefę euro (w świetle wyroku Trybunału Sprawiedliwości UE w sprawie Pringle)* [Intergovernmental

The importance of the case, instituted by Thomas Pringle, a member of the lower house of the Irish parliament, appears from the fact, that the Court, for the first time, decided about the validity of the decision which had added to the Treaty on the functioning of the European Union (TFEU) a new provision (Article 136(3) TFEU) allowing for the creation of a financial rescue mechanism by the euro area countries. The Court laid down the criteria according to which Treaty amendments under the simplified revision procedure can be reviewed and they approved the creation of the European Stability Mechanisms (ESM) outside the EU legal order. The Court of Justice judgment opens up new avenues for further research into the European monetary and economic governance.

The ESM and the European Council Decision 2011/199/EU amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro<sup>3</sup> was subject to judicial review in five Member States' highest courts and tribunals: the Supreme Court of Ireland, the Estonian Supreme Court<sup>4</sup>, the German Federal Constitutional Court<sup>5</sup>, the Polish Constitutional Tribunal<sup>6</sup> and the *Austrian Constitutional Court*<sup>7</sup> and also before the Constitutional Committee of the Finnish Parliament and the European Union Committee of the House of Lords of the United Kingdom, but only the Supreme Court of Ireland decided to engage

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*Measures Consolidating the Euro Area (in the Light of Judgment of the Court of Justice of the EU in Pringle Case)* Państwo i Prawo [State and Law] 2013, vol. 8, pp. 3-19.

<sup>3</sup> European Council Decision 2011/199/EU of 25.03.2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ L 91, 6.04.2011, p. 1.

<sup>4</sup> Supreme Court of Estonia, Judgment of the Supreme Court *en banc* of 12.07.2012, Case No. 3-4-1-6-12, available at: <http://www.riigikohus.ee/?id=1347> [last accessed: 30.09.2013].

<sup>5</sup> Federal Constitutional Court, Judgment of the Second Senate of 12.09.2012, 2 BvR 1390/12, available at: [http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912\\_2bvr139012.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012.html) [last accessed: 30.09.2013].

<sup>6</sup> Polish Constitutional Tribunal, Judgment of 26.06.2013, K 33/12, available at: [http://www.trybunal.gov.pl/OTK/ezd/sprawa\\_lista\\_plikow.asp?syg=K%2033/12](http://www.trybunal.gov.pl/OTK/ezd/sprawa_lista_plikow.asp?syg=K%2033/12) [last accessed: 30.09.2013].

<sup>7</sup> Austrian Constitutional Tribunal, Judgment of 25.02.2013, G 104/12-8, available at: [http://www.vfgh.gv.at/cms/vfgh-site/attachments/6/3/5/CH0006/CMS1363689557948/esm\\_strache\\_g104-8.12.pdf](http://www.vfgh.gv.at/cms/vfgh-site/attachments/6/3/5/CH0006/CMS1363689557948/esm_strache_g104-8.12.pdf) [last accessed: 30.09.2013].

in a judicial dialogue with the CJEU pursuant to the preliminary reference mechanism<sup>8</sup>.

After a short overview of the General Court's reasoning and the view of the Advocate General, the questions will be only briefly discussed: could the Court of Justice review the legality of a European Council Decision which adopts amendments of the TFEU according to the two simplified procedures for Treaty amendment introduced by the Lisbon Treaty, and whether the European Council Decision 2011/199/EU amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro entails an alteration of the competences of the European Union contrary to the third paragraph of Article 48(6) Treaty on European Union (TEU)<sup>9</sup>.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Article 48(6) of the Treaty on European Union allows the European Council, acting in unanimity after consulting the European Parliament, the Commission and, in certain cases, the European Central Bank, to adopt a decision amending all or part of the provisions of Part Three of the Treaty on the functioning of the European Union. Such a decision may not increase the competences conferred on the Union in the Treaties, and its entry into force is conditional upon its subsequent approval by the Member States in accordance with their respective constitutional requirements.

In May 2010 the EU and the group of its Member States, decided to create two new legal instruments, called the European Financial Stability

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<sup>8</sup> E. Fahey, S. Bardutzky, *Judicial Review of Eurozone Law: The Adjudication of Postnational Norms in EU Courts, Plural – A Casestudy of the European Stability Mechanism*, Michigan Journal of International Law 2013, vol. 34, pp. 3-16, available at SSRN: <http://ssrn.com/abstract=2287917> [last accessed: 15.09.2013]. For a recent overview, see also: J. Tomkin, *Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy*, German Law Journal 2013, vol. 14, pp. 169-190, available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=1500> [last accessed: 15.09.2013].

<sup>9</sup> For a more elaborate discussion of this case see: B. de Witte, T. Beukers, *A Court of Justice Approves the Creation of European Stability Mechanism Outside the EU Legal Order: Pringle*, Common Market Law Review 2013, vol. 50, pp. 805-848.

Mechanism (EFSM) and the European Financial Stability Facility (EFSF)<sup>10</sup>. The European Council agreed on 17 December 2010 on the need for euro area Member States to establish a permanent stability mechanism.

At its meeting on 24–25 March 2011, the European Council unanimously adopted a decision under Article 48(6) TEU amending Article 136 TFEU. The decision 2011/199/EU provides that 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”.

On 2 February 2012 the Member States whose currency is the euro signed a Treaty establishing the European Stability Mechanism (“the ESM Treaty”). That “European Stability Mechanism” 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. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties”.

Thomas Pringle brought before the High Court (Ireland) an action against the defendants in the main proceedings in support of which he claimed, first, that Decision 2011/199 was not lawfully adopted

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<sup>10</sup> For a general discussion of a new set of regulations, procedures and institutions that have come to be known as the “new European economic governance” see: G.M. Barrett, *Does the Treaty Amendment on the European Stability Mechanism Require a Referendum in Ireland?*, available at: <http://dx.doi.org/10.2139/ssrn.1938659> [last accessed: 15.09.2013] and Ch. Degryse, *The New European Economic Governance (November 30, 2012)*, European Trade Union Institute Working Paper 2012.14. Available at: <http://dx.doi.org/10.2139/ssrn.220270> [last accessed: 15.09.2013].

pursuant to the simplified revision procedure provided by Article 48(6) TEU because it entails an alteration to the competences of the European Union contrary to the third paragraph of Article 48(6) TEU and that Decision 2011/199 is inconsistent with provisions of the TEU and TFEU Treaties concerning economic and monetary union and with general principles of European Union law. The High Court dismissed the claims. Hearing an appeal against the decision of the High Court, the Supreme Court has decided to stay the proceedings and to refer three questions to the Court for a preliminary ruling<sup>11</sup>. As to the first question the Supreme Court sought to ascertain whether Decision 2011/199 is valid in so far as it amends Article 136 TFEU by providing for the insertion, on the basis of the simplified revision procedure under Article 48(6) TEU, of an Article 136(3) relating to the establishment of a stability mechanism. As to the second question the Supreme Court asked whether a Member State of the European Union whose currency is the euro, is entitled to enter into and ratify an international agreement such as the ESM Treaty. As to the third question the Supreme Court asked 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.

The European Court decided to apply the accelerated procedure and, which is very extraordinary, to sit as a full Court (27 judges). Written observations were submitted in the proceedings by the applicant and eleven governments, the European Parliament, and the European Commission. The particular importance of this case for the Union is shown by the fact that the European Council also intervened.

### III. VIEW OF THE ADVOCATE GENERAL

Because the President of the Court decided that a reference for preliminary ruling is to be pursuant to an expedited procedure, the court ruled after hearing the Advocate General's View<sup>12</sup>.

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<sup>11</sup> For the complete text of the preliminary questions see par. 28 of the Judgment.

<sup>12</sup> Article 105 Rules of Procedure of the Court of Justice of the European Union.

In her legal assessment, Advocate General Kokott stated as a preliminary remark that 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. She held that a restriction on the jurisdiction of the Court of Justice to a review of the validity of a decision whose content consists of a Treaty amendment and its compliance with procedural requirements cannot 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.

According to the Advocate General, 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.

With regard to the problem of 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, the Advocate General held the view, that it does not increase the competences conferred on the Union in the Treaties and therefore does not infringe the third paragraph of Article 48(6) TEU.

#### IV. THE JUDGMENT

With respect to the first question of the High Court as to whether Decision 2011/199 is valid on the basis of the simplified revision procedure under Article 48(6) TEU, the Court first examined its jurisdiction, then admissibility and substance.

Most of the governments intervening in the case consider 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. In this regard, the court stated that the European Council is one of the Union's institutions listed in Article 13(1) TEU

and the Court has jurisdiction, under indent (b) of the first paragraph of Article 267 TFEU “to give preliminary rulings concerning (...) the validity (...) of acts of the institutions”, the Court has, in principle, jurisdiction to examine the validity of a decision of the European Council<sup>13</sup>. The duty of the Court, as the institution which, under the first subparagraph of Article 19(1) TEU, is to ensure that the law is observed in the interpretation and application of the Treaties, to examine the validity of a decision of the European Council based on Article 48(6) TEU<sup>14</sup>.

Various Member States questioned the admissibility of the first question referred. Ireland pointed out that the applicant ought to have challenged the validity of Decision 2011/199 by means of an action for annulment under Article 263 TFEU. The Court noticed that the recognition of a party’s right to plead the invalidity of an act of the Union presupposes that that party did not have the right to bring, under Article 263 TFEU, a direct action for the annulment of that act. For the Court, it was not evident that the applicant in the main proceedings had beyond doubt standing to bring an action for the annulment of Decision 2011/199 under Article 263 TFEU<sup>15</sup>.

Then the Court held, that the amendment of the TFEU envisaged by Decision 2011/199 concerns solely the provisions of Part Three of the TFEU and it does not increase the competences conferred on the Union in the Treaties. The amendment of Article 136 TFEU which is effected by Decision 2011/199 does not confer any new competence on the Union. It creates no legal basis for the Union to be able to undertake any action which was not possible before the entry into force of the amendment of the TFEU<sup>16</sup>.

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<sup>13</sup> Judgment in case C-370/12, par. 31.

<sup>14</sup> *Ibidem*, par. 35.

<sup>15</sup> *Ibidem*, par. 41-42.

<sup>16</sup> *Ibidem*, par. 73.

## V. REMARKS

### *1. COULD THE COURT OF JUSTICE REVIEW THE LEGALITY OF A EUROPEAN COUNCIL DECISION WHICH ADOPTS AMENDMENTS OF THE TFEU ACCORDING TO THE SIMPLIFIED PROCEDURES FOR TREATY AMENDMENT INTRODUCED BY THE LISBON TREATY?*

The principal legal question raised in the cases before the Court concerns the notion of the power of review of the European Council decisions granted to the Court under indent (b) of the first paragraph of Article 267 TFEU. The Lisbon Treaty integrates the European Council within the EU institutional structures and increases its decision-making powers. One of those new decision-making powers is the power to adopt a decision amending all or part of the provisions of part three of the Treaty on the functioning of the European Union.

As Advocate General Kokott has correctly submitted, it follows from indents (a) and (b) of the first paragraph of Article 267 TFEU 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. The Treaty provides some limitation on the jurisdiction of the Court of Justice, and such restrictions are provided in Article 269 TFEU in other circumstances, namely in respect of acts adopted pursuant to Article 7 TEU<sup>17</sup>. The Treaty does not provide any exceptions to the European Council decisions taken under the simplified revision procedure.

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<sup>18</sup>. Hence, with a view to the rule of law and protection of the institutional balance, the European Council decision adopted pursuant to Article 48(6) TEU should be subject to judicial review<sup>19</sup>.

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<sup>17</sup> See: Opinion in case C-370/12, par. 23.

<sup>18</sup> Ibidem, par. 20-21.

<sup>19</sup> See: de Witte, Beukers, supra note 9, p. 827.



Special mention should be made in this connection of the criteria according to which Treaty amendments under the simplified revision procedure can be reviewed. The check which the Court is authorised to carry out in respect of the Article 48(6) TEU includes both verifying the procedure relating to a decision on a Treaty amendment adopted pursuant to Article 48(6) TEU and its content.

The procedural requirements of Article 48(6) include: first, that a proposal for revision must be submitted to the European Council by the government of a Member State, the European Commission, or the European Parliament and, when the amendments concern changes in the monetary area, with the European Central Bank. Secondly, that the decision of the European Council must be adopted unanimously after consultation with the European Parliament and the European Commission. Furthermore that the decision does not enter into force prior to approval by the Member States in accordance with their constitutional requirements.

The second subparagraph of Article 48(6) TEU noted two substantive requirements for implementation of the decision. Such decision “shall not increase the competences conferred on the Union in the Treaties” and the European Council may adopt only a decision amending all or part of the provisions of Part Three of the TEU Treaty.

## *2. WHETHER THE REVISION OF THE ARTICLE 136(3) OF THE TREATY INCREASES THE COMPETENCES CONFERRED ON THE UNION IN THE TREATIES?*

Fundamental doubts arise specifically over the appropriateness of Article 48(6) TEU as the legal basis for the revision of the Article 136(3) TFEU. As noted above, the implementation of the decision in simplified treaty revision procedure is limited – the amendment shall not increase the competences conferred on the Union in the Treaties. It should be considered whether or not use of that procedure in Decision 2011/199 was justified.

Under the 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. It must therefore be determined, whether the Decision 2011/199 encroaches on the Union’s exclusive competence in the area of monetary

policy and grants to Member States a competence in the area of monetary policy for the Member States whose currency is the euro.

In the light of recital 6 of the preamble to the Decision 2011/199, the amendment does not confer any new competence on the Union. As regards the grounds of the judgment in *Pringle* concerning the problem whether the revision of the TFEU increases the competences conferred on the Union in the Treaties, it must be stated that, in paragraph 73 of that judgment, the Tribunal in fact held that: “That amendment does not confer any new competence on the Union. The amendment of Article 136 TFEU which is effected by Decision 2011/199 creates no legal basis for the Union to be able to undertake any action which was not possible before the entry into force of the amendment of the FEU Treaty”. In her written observations, the Advocate General appeared to adopt the same position<sup>20</sup>.

Indeed, literally the Decision 2011/199, in so far as it amends Article 136 TFEU by adding a paragraph 3 which provides that “the Member States whose currency is the euro may establish a stability mechanism”, transfers new competences to those Member States whose currency is the euro. Of the 28 EU Member States today, 17 have adopted the euro. Two – United Kingdom and Denmark – have an opt-out from Euro membership. Most other states who currently have a “derogation”, because they have not yet met the conditions for the adoption of the euro, are prospectively joining the Euro membership and need to move towards economic convergence.

However, if the stability mechanism “will provide the necessary tool for dealing with such cases of risk to the financial stability of the euro area and is designed to safeguard the financial stability of the euro area as a whole”<sup>21</sup>, it can be assumed that ESM leads to a substantial interference with the financial policies not only Member States in the euro area, but also Member States that are obliged to join the Euro membership.

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<sup>20</sup> See: Opinion in case C-370/12, par. 47.

<sup>21</sup> See: recital 4 of the preamble to the Decision 2011/199.

Those EU members will not have, as importantly, the impact on development of the ESM<sup>22</sup>.

The claimant argued that the stability mechanism realized the EU monetary policy because its primary purpose was to ensure price stability and save the euro. The Member States therefore had no competence to adopt legally binding acts in the form of an international treaty because the Union has exclusive competence in that area. The Member States, for a change, maintained that the stability mechanism was concerned with economic policy, which is not within the EU's exclusive competence. The CJEU ruled that: "the objective pursued by that mechanism is to safeguard the stability of the euro area as a whole, which is clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy. Even though the stability of the Euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro"<sup>23</sup>.

Nevertheless, it is not clear exactly what "safeguard the stability of the euro area as a whole" means. In economic terms, the stability of the euro area as a whole is surely a condition precedent to price stability within that area<sup>24</sup>, including monetary policy which is the exclusive competence of the Union.

We should ask also about the relationship between the Stability Mechanism law (ESW treaty) and EU law, which is unclear<sup>25</sup>. The Member States whose currency is the euro, as was noted by the Court, are entitled to conclude an agreement between themselves for the establishment

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<sup>22</sup> See: C. Mik, *Opinia w sprawie decyzji Rady Europejskiej z dnia 16-17 grudnia 2010 r. dotyczącej zmiany art. 136 Traktatu o funkcjonowaniu Unii Europejskiej, w szczególności procedury jej stanowienia w UE oraz procedury jej ratyfikacji* [Opinion on the Decision of the European Council of 16-17 December 2010 Amending Article 136 of the Treaty on the Functioning of the European Union, Particularly in Relation to the Procedure of Establishing It Within the EU and the Procedure for Its Ratification] *Przegląd Sejmowy* [The Sejm Review] 2012, no. 2 (109), pp. 158-159.

<sup>23</sup> See: Judgment in case C-370/12, par. 56.

<sup>24</sup> See: P. Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, *Maastricht Journal of European and Comparative Law* 2013, vol. 20, p. 5.

<sup>25</sup> P. Craig, *Pringle and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance*, *The European Constitutional Law Review* 2013, vol. 9, p. 263.

of a stability mechanism of the kind envisaged by Article 1 of Decision 2011/199. It goes without saying that, although Member States are required to comply with Union law when establishing a mechanism such as the ESM<sup>26</sup>, individuals might not be able to invoke Union law against measures designed by EU institutions and adopted by the Member States in their capacity as ESM Members. The establishment of the ESM outside the EU legal order might be seen as placing the ESM beyond the duties imposed by the Charter of Fundamental Rights<sup>27</sup>.

For the foregoing reasons, it would appear that the Article 136 TFEU Treaty change should be viewed as in some way increasing the competences or scope of the Union in such a way as to go beyond the existing scope or objectives of the Treaties. Therefore, it must be considered that a provision such as Article 48(6) TUE appears to be manifestly inappropriate for adopting Decision 2011/199. Hence, in this instance, the ordinary revision procedure would be preferable.

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<sup>26</sup> When giving effect to commitments assumed under international agreements, be it an agreement between Member States, they are required, subject to the provisions of Article 351 TFEU, to comply with the obligations that European law imposes on them. See in this connection, case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, par. 57 to 59 and case C-55/00 *Gottardo* [2002] ECR I-413, par. 33.

<sup>27</sup> See: P.A. Van Mallegem, *Pringle: A Paradigm Shift in the European Union's Monetary Constitution*, German Law Journal 2013, vol. 14, no. 1, pp. 155, 158.

