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# The Judicial 'Bail Out' of the European Stability Mechanism: Comment on the Pringle Case

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Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland and The Attorney General*, [2012] not yet reported

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## The Judicial 'Bail Out' of the European Stability Mechanism: Comment on the *Pringle* Case

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Gianni Lo Schiavo\*

### Abstract

Since the beginning of the crisis, many responses have been taken to stabilise the European markets. *Pringle* is the awaited judicial response of the European Court of Justice on the creation of the European Stability Mechanism (ESM), a crisis-related intergovernmental international institution which provides financial assistance to Member States in distress in the Eurozone. The judgment adopts a welcome and satisfactory approach on the establishment of the ESM. This article examines the feasibility of the ESM under the Treaty rules and in light of the *Pringle* judgment. For the first time, the Court was called to appraise the use of the simplified revision procedure under article 48 TEU with the introduction of a new paragraph to article 136 TFEU as well as to interpret the no bail out clause under article 125 TFEU. The final result is rather positive as the Court endorses the establishment of a stability mechanism of the ESM-kind beyond a strict reading of the Treaty rules. *Pringle* is the first landmark ECJ decision in which the Court has endorsed the use of new and flexible measures to guarantee financial assistance between Member States. This judgment could act as a springboard for more economic, financial and, possibly, political interconnections between Member States.

### 1. Introduction

The *Pringle*<sup>1</sup> case is a seminal judgment of the European Court of Justice (hereafter the 'ECJ' or the 'Court') on one of the most remarkable crisis-related reforms, the establishment of the European Stability Mechanism (the 'ESM').<sup>2</sup> The judgment is twofold. The first part delves into the constitutional feasibility of the simplified Treaty revision procedure to create the ESM, namely the insertion of a new paragraph 3 to Art.136 TFEU through the European Council Decision 2011/199. The second part deals with the right of the Eurozone Member States to conclude and ratify an international agreement such as the ESM by way of interpretation of the Treaty rules and the general principles of European Union law. The questions posed to the Court are new in the Lisbon environment and raise a number of interesting legal issues, including in relation to the constitutional impact of the ESM Treaty (hereafter the 'ESMT') on the Economic and Monetary Union ('EMU') and, more generally, to the European constitutional system.

Before the delivery of the judgment, the adoption of the ESMT by Eurozone Member States had provoked a number of constitutional challenges in Member States. In particular, the Estonian Supreme Court was asked whether the ESMT was

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<sup>1</sup> Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland and The Attorney General*, [2012] not yet reported.

<sup>2</sup> For a more complete appraisal of the origins of the ESM see Alberto de Gregorio Merino, "Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance", (2012) 49 CML Rev., 16 13-1646.

compatible with the Estonian Constitution. The answer of the Estonian Court was positive.<sup>3</sup> Furthermore, the German Constitutional Court, in a much-awaited judgment, was invited to assess the compatibility of the ESMT with the German *Grundgesetz Norm*. The Karlsruhe judgment on 12 September 2012 paved the way for the entry into force of the ESMT.<sup>4</sup>

In *Pringle*, the ECJ endorses the Council Decision to amend the Treaty and declares the compatibility of the ESMT with the European rules brought to its attention by the referring Court. More importantly, the value of the *Pringle* judgment lies in the interpretation, for the first time, of a number of core EMU provisions such as the no bail out clause under article 125 TFEU. *Pringle* has the clear merits of endorsing the Treaty amendment of art.136 TFEU and of clarifying the relationship between the ESMT and the TFEU.

Before commenting upon the most interesting issues raised by the judgment, the legal background and the content of the ruling will be recalled.

## 2. The legal and factual background

*Pringle* should be seen in the wider context of the EMU. As is well known, the Treaty of Maastricht introduced a title on Economic and Monetary Policy. This framework has been defined as “asymmetric”<sup>5</sup>. This is because the monetary ‘pillar’ is far more advanced than the economic ‘pillar’. On the one hand, since 1999, monetary policy competences have been transferred to the European System of Central Banks (ECBS) where the European Central Bank (‘ECB’) is the principal institution for monetary policy in the Eurozone together with national central banks. On the other hand, economic policy is still dominated by Member States’ competences. As to monetary policy, article 3(1)(c) TFEU states that the Union has an exclusive competence. As to economic policy, the wording of article 5(1) TFEU affirms that “the Member States shall coordinate their economic policies within the Union (...)”. Economic policy is still retained by Member States and the EU has not been conferred any specific competence except from a role of coordination. Member States’ competences in the economic policy framework are still ‘considerable’.<sup>6</sup>

The imbalance between monetary and economic policy has been stigmatized by the outbreak of the financial crisis. The limited competences of the Union to control and supervise Member States’ budgets have had a clear impact on the EMU framework. Member States have been obliged to resort to special arrangements to assure liquidity to weaker Member States in the short run. These measures have taken the form of bilateral loans to Greece followed by loan facilities to Member States in economic distress. The European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) were established for this purpose.<sup>7</sup>

In order to ensure balance and sustainable growth, during the European Council meeting of 28 and 29 October 2010, the Heads of State and of Government

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<sup>3</sup> See the English translation to the Estonian’s Supreme Court judgment of 12 July 2012 available at <http://www.riigikohus.ee/?id=1347>

<sup>4</sup> 2 BverfG, BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, 12 September 2012 available in English at [https://www.bundesverfassungsgericht.de/en/decisions/rs20120912\\_2bvr139012en.html](https://www.bundesverfassungsgericht.de/en/decisions/rs20120912_2bvr139012en.html)).

There was also another judgment decided by the German Constitutional Court on 19 June 2012, 2 BvE 4/11, concerning the German Bundestag’s rights to be informed by the Federal Government (press release available in English at <https://www.bundesverfassungsgericht.de/en/press/bvg12-042en.html>).

<sup>5</sup> See Fabian Amtenbrink and Jakob de Haan, “Economic governance in the European Union: fiscal policy discipline versus flexibility” (2003) 40 CMLRev, 1078; Jean-Victor Louis, “The Economic and Monetary Union: law and institutions,” (2004) 41 CMLRev, 575.

<sup>6</sup> Rainer Palmstorfer, “To bail or not to bail out? The current framework if financial assistance for euro area Member States measured against the requirements of EU primary law, (2012) E. L. Rev., 773.

<sup>7</sup> The EFSM, adopted with Council Regulation 407/2010 establishing a European financial stabilization mechanism, OJ 2010, L 118/1, had a lending capacity of €60 billion, whereas the EFSF was set up by the Eurozone Member States and had a lending capacity of €440 billion. See more extensively, Alberto de Gregorio Merino, op .cit., 1615-1621.

convened on the need for the Member States to create a *permanent* crisis mechanism in order to safeguard the financial stability of the euro area. The President of the European Council agreed to undertake consultations for an amendment of the Treaty required to that effect. Heads of State and Government agreed that, as this permanent mechanism would be designed to safeguard the financial stability of the euro area as a whole, art. 122 paragraph 2 TFEU would no longer be needed. Hence, on 16 December 2010 the Belgian Government submitted a proposal for the review of article 136 TFEU, pursuant to art. 48 paragraph 6 TEU, with a view to add a paragraph 3 to that article. Decision 2011/233 was adopted on 25 March 2011.

This European Council decision adds a new paragraph to article 136 TFEU according to which: "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". According to article 2 of the decision, Member States proceeded with the completion of procedures for the approval of the decision in accordance with their respective constitutional requirements. The amendment entered into force on 1 January 2013.

At the same time, Member States whose currency is the euro concluded the ESMT with a view to assume the tasks of the EFSF and the EFSM. The ESM is a Luxembourg-based international organisation composed of a Board of Governors, a Board of Directors and a Managing Director. The ESM would provide, where needed, financial assistance to euro area Member States.<sup>8</sup> Following the adoption of the ESMT, all the euro area Member States have proceeded with the ratification of the ESMT according to their constitutional requirements and have paved the way for the entry into force of the agreement before the actual entry into force of the Treaty amendment.

The ESMT provides a mechanism of financial assistance to Eurozone Member States in financial difficulties, subject to the requirement of strict conditionality. When a Eurozone Member State in distress needs financial assistance, the parties involved would prepare and sign a Memorandum of Understanding (MoU) which shall reflect the severity of the weaknesses to be addressed in order to receive assistance.<sup>9</sup> The ESMT provides for a number of options to assist the Eurozone Member States. Financial assistance might be used to recapitalize the financial institutions of a specific Member State.<sup>10</sup> The ESM can provide precautionary financial assistance when the economic condition of a Member State is sound enough to retain access to the market, but financial aid is necessary in order to avoid a crisis.<sup>11</sup> Further, the ESM can grant loans to Eurozone Member States who have lost access to financial markets either through excessive costs or lack of lenders. The Primary Market Support Facility (PMSF) allows the ESM to buy bonds in the primary bond market of the Eurozone Member State either to facilitate that it returns to the financial markets or to increase the efficiency of other ESM financial aid.<sup>12</sup> Intervention in the secondary bond markets is designed to reduce interest rates in the secondary market and to help Eurozone Members struggling with the refinancing of their banking systems.<sup>13</sup> At the time of writing, Spain has been the first Eurozone Member State to make use of the ESM funds. It has been granted financial assistance to recapitalize

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<sup>8</sup> *Ibidem*, 1621 et seq..

<sup>9</sup> ESMT, Article 13(3).

<sup>10</sup> *Ibidem*, Article 15.

<sup>11</sup> *Ibidem*, Article 14.

<sup>12</sup> *Ibidem*, Article 17.

<sup>13</sup> *Ibidem*, Article 18.

the country's banking sector.<sup>14</sup> More recently, Cyprus has been granted financial assistance through the ESM in the aftermath of its banking crisis in early 2013.<sup>15</sup>

The ESM entrusts the EU institutions with crucial tasks in granting and supervising financial assistance. The European Commission and the ECB assess the needed financial needs<sup>16</sup> as well as the sustainability of the Member State's public debt and the corresponding risk of financial stability to the Eurozone as a whole.<sup>17</sup> Following the decision to grant aid and in liaison with the ECB, the Commission negotiates the MoU with the concerned Member State.<sup>18</sup> Thereafter, the Commission signs the MoU on behalf of the ESM.<sup>19</sup> In the implementing phase, the ESM and the ECB monitor compliance with the conditionality laid down in the MoU.<sup>20</sup> Finally, the ECJ is entrusted with the task of adjudicating disputes between the ESM and a Member State or among several Member States relating to the interpretation and application of the ESMT when a decision of the Board on the matter is contested.<sup>21</sup>

During the process of ratification of the ESMT Mr. Pringle brought an action before the High Court of Ireland. In turn, he contested the lawful adoption of the Decision 2011/199 because, in amending the Treaty, it entailed an alteration of the competences of the EU and it was inconsistent with EU rules on economic and monetary policy and with general principles of EU law. Further, the claimant asserted that the entry into force of the ESM would create obligations to Ireland which, among others, would be in contravention with the Treaty rules on economic and monetary policy and would encroach with the exclusive competence of the Union in relation to monetary policy. Then, he criticized that the creation of an autonomous and permanent international institution would circumvent the rules contained in the Treaty as regards economy and monetary policy.

Following the claims brought forward by Mr. Pringle, the Irish High Court dismissed his action in its entirety. Mr. Pringle appealed before the Supreme Court of Ireland which decided to refer a number of questions to the Court of Justice for preliminary ruling.<sup>22</sup> Given the urgency of the subject, the ECJ applied the accelerated procedure. The case was assigned to the full Court.

### 3. The judgment

Following the A.G. Kokott 'views' on 26 October 2012,<sup>23</sup> the Court delivered its judgment on 27 November 2012. The Court's judgment comprises three questions.

#### 3.1 *The first question: the validity of Decision 199/2011*

The first question referred to the Court concerns the validity of the Treaty amendment of article 136 TFEU and the use of the simplified revision procedure under article 48 paragraph 6 TEU.

After having established that the Court has jurisdiction and that the question is admissible,<sup>24</sup> the Court scrutinises the impact of the amendment to the TFEU and ascertains whether the effects of such amendment concern solely provisions of Part Three of that Treaty and whether such amendment increases the competences

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<sup>14</sup> Relevant information on the Spanish financial assistance programme can be found at <http://www.esm.europa.eu/about/assistance/spain/index.htm>

<sup>15</sup> Relevant information on the very recent Cypriot financial assistance programme can be found at <http://www.esm.europa.eu/about/assistance/cyprus/index.htm>

<sup>16</sup> *Ibidem*, Article 13.

<sup>17</sup> *Id.*.

<sup>18</sup> *Ibidem*, Article 13.3.

<sup>19</sup> *Ibidem*, Article 13.4.

<sup>20</sup> *Ibidem*, Article 13.7.

<sup>21</sup> *Ibidem*, Article 37.3.

<sup>22</sup> See *Pringle v. Ireland*, [2012] IESC 47, para.5 (S. C.) (Ir.) available at [http://www.courts.ie/80256F2B00356A6B.nsf/0/E7504392B159245080257A4C00517D6A?Open&Highlight=0,Pringle,-language\\_en](http://www.courts.ie/80256F2B00356A6B.nsf/0/E7504392B159245080257A4C00517D6A?Open&Highlight=0,Pringle,-language_en)

<sup>23</sup> A. G. Kokott View on *Pringle* delivered on 26 October 2012.

<sup>24</sup> *Pringle* judgment, paras 30-44.



attributed on the Union in the Treaties. The ECJ reaches the conclusion that the ESM pursues the objective of maintaining the stability of the euro area as a whole whereas the Eurosystem pursues the objective of price stability. The Court observes that it is clear that the establishment of the ESM does not encroach on the monetary policy as the ESM's objective "to safeguard the stability of the euro area as a whole, that 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>25</sup> Further, it specifies that the ESM has the primary objective of managing financial crises which might arise and does complement the new regulatory framework for strengthened economic governance of the Union as envisaged in a number of new measures.<sup>26</sup> It follows that the establishment of that mechanism does not encroach upon the exclusive competence of monetary policy held by the Union and does not affect the restricted role of the Union in the area of economic policy.<sup>27</sup> The Court concludes that Decision 199/2011 satisfies the conditions established under article 48 paragraph 6 TEU by means of a simplified revision procedure. Subsequently, the Court concludes that Decision 199/2011 does not establish any new competence on the Union as the Treaty amendment does not create any legal basis for the Union and is silent as to any possible role for the Union's institutions in the field.<sup>28</sup>

### 3.2 *The second question: the right to conclude and ratify the ESMT and EU law*

The Court subsequently focuses on the question whether the power to conclude and ratify an agreement such as the ESMT is compatible with some European Treaty articles.

On substance, the Court analyses the provisions relating to the exclusive competence of the Union in the monetary policy and the power to conclude international agreements. With regard to the monetary policy competence, the ECJ denies that the role and the tasks of the ESM would fall within the monetary policy under the TFEU. According to articles 3 and 12(1) of the ESMT, the ESM is not entitled to set the key interest rates for the euro area or to issue euro currency, but it seeks to provide financial assistance entirely granted by the ESM from paid-in capital or by the issue of financial instruments.<sup>29</sup> Furthermore, the Court recalls that even if the activities of the ESM might have an influence on the rate of inflation, such influence would constitute "only indirect consequence of the economic policy measures adopted".<sup>30</sup>

As to article 3 paragraph 2 TFEU on the exclusive power to conclude international agreements, the Court states that the ESM does not affect common rules or alter their scope.<sup>31</sup>

Further, the Court conducts an extensive analysis on the interpretation of the ESM with the economic coordination provisions under articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU.

The judgment states that "the ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism".<sup>32</sup> Even though the Court distinguishes between the ESM's conditionality and economic policy coordination, it emphasises that the ESM comes

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<sup>25</sup> *Ibidem*, para. 56 (emphasis added).

<sup>26</sup> *Ibidem*, paras 58 and 59.

<sup>27</sup> *Ibidem*, paras 63 and 64.

<sup>28</sup> *Ibidem*, paras 73-75.

<sup>29</sup> *Ibidem*, para. 96.

<sup>30</sup> *Ibidem*, para. 97.

<sup>31</sup> *Ibidem*, para. 107.

<sup>32</sup> *Ibidem*, para. 110.

within the economic policy element of the EMU as the conditionality attached to the ESM stability support shall be compatible with the TFEU-based coordination of economic policies.<sup>33</sup> Similarly, the Court excludes that the ESM affects the excessive deficit procedure under article 126 as the ESMT, provides “that the conditions imposed on ESM Members who receive financial assistance must be consistent with any recommendation which the Council might issue under [the excessive deficit procedure]”.<sup>34</sup> . It holds that the nature of the ESM is “to mobilise funding and to provide financial stability support to ESM Members who are experienced, or threatened by severe financial problems”.<sup>35</sup>

Then, the Court interprets the ESM in light of articles 123 and 125 TFEU. First, the Court specifies that article 123 TFEU is addressed specifically to the ECB and to the central banks of the Member States and not to Member States as a whole which are entitled to create mechanisms of financial stability and are not covered by that provision.<sup>36</sup> Second, the Court examines more in details the spirit of the provision of art.125 TFEU. Even if not in such a detailed way as the Advocate General did,<sup>37</sup> the Court stresses that “the ESM will not act as guarantor of the debts of the recipient Member State by referring to the spirit of the article inserted by the Treaty of Maastricht. In fact, the latter will remain responsible to its creditors for its financial commitments”.<sup>38</sup> The nature of that rule, as it can be seen in the preparatory work relating to the Treaty of Maastricht, lies in the aim of the Article itself which is to ensure that the Member States follow a sound budgetary policy by assuring that they are subject to the logics of the market when they enter into debt. Hence, the ECJ concludes that the no bail out clause is not infringed by

“the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy”.<sup>39</sup>

Further, the judgment is devoted to the interpretation of article 13 TEU which provides that each institution shall act within the limits of the powers conferred on it by the Treaty. First, the Court examines the role allocated to the Commission and to the ECB. It recalls that, in cases of non-exclusive competences of the Union, Member States can confer powers to the Union institutions, on condition that the Member States do not alter the essential character of the powers conferred on those institutions by the Treaties. Moreover, the provisions of the Treaty do not establish a specific competence to establish a permanent stability mechanism. Article 20 TEU on enhanced cooperation does not preclude a role for the Commission and the ECB in the ESM.<sup>40</sup>

As to the role allocated to the Court, the judgment confirms that article 273 TFEU does not preclude the possibility to confer a judicial role to the Court in cases of international agreement outside the Union framework. On the contrary, the conditions laid out in the ESMT under article 37 appear consistent with the provision under article 273 TFEU.<sup>41</sup>

### *3.3 The third question: whether the Member States may conclude and ratify the ESM Treaty before the entry into force of Decision 2011/199*

Finally, the Court assesses whether the Member States can conclude and ratify the ESM Treaty before the entry into force of Decision 199/2011. Very briefly, the Court

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<sup>33</sup> *Ibidem*, paras 111-112.

<sup>34</sup> *Ibidem*, para. 113.

<sup>35</sup> *Ibidem*, para. 110.

<sup>36</sup> *Ibidem*, para. 125.

<sup>37</sup> A.G. Kokott View, paras 100-166.

<sup>38</sup> Pringle judgment, para. 138.

<sup>39</sup> *Ibidem*, para. 137.

<sup>40</sup> *Ibidem*, paras 168-169.

<sup>41</sup> *Ibidem*, paras 171-177.



states that that decision does not confer any new power to the Member States and, thus, concludes that the ESM Treaty is not subject to the entry into force of Decision 2011/199.<sup>42</sup>

#### **4. Commentary**

The ruling in the *Pringle* case is a seminal ECJ judgment.<sup>43</sup> The Court endorses the amendment of article 136 TFEU and concludes that the ESMT is compatible with the rules of the Treaty. It was a rather awaited judgment, especially because of the incumbent entry into operation of the ESMT and the need to provide rapidly a safety net for Member States in distress. The full Court constitutes the ECJ “bail out” of the ESM. This is for two reasons.

First, by clarifying the extent of powers to exercise the Treaty amendment powers under article 48 TEU, the Court allows the revision of article 136 TFEU.

Second, the judgment, for the first time since the adoption of the Maastricht Treaty, analyses core provisions in the economic and monetary policy title (in particular articles 122-126 TFEU) and it clarifies the extent of power to provide financial assistance between Member States. The judgment legitimizes the possibility to use an international instrument between Member States to reinforce financial assistance in the Eurozone. Such solution appears feasible and the judgment itself stands out as a significant precedent with a view to take further action to reduce the impact of the financial crisis.

After having briefly mentioned some aspects on admissibility and jurisdiction, the commentary will address the extent of powers to conclude an international agreement as it happened for the ESM. Then, it will concentrate on the extent of revision powers in the Treaties in the context of economic and monetary policy. Finally, it will assess the judicial interpretation of the Treaty rules on economic and monetary policy with particular emphasis on the no bail out clause under article 125 TFEU.

#### **4.1 Admissibility and Jurisdiction**

##### **4.1.1 Jurisdiction**

The new Lisbon framework did not pose particular problems to the Court to exercise its jurisdiction on the case. The Court affirms that it has jurisdiction under the Treaty to establish the feasibility on the use of the simplified revision procedure under article 48 paragraph 6 TEU.

Competences and powers of the EU have been substantially increased and it is no surprise that Decision 199/2011 can be subject to the Court jurisdiction. This is because the European Council has become a stand-alone EU institution with the power to adopt decisions which can, in principle, be subject to the Court jurisdiction.<sup>44</sup> This is the first time that the Court pronounces itself on the new simplified revision procedure introduced by the Lisbon Treaty. The position of the Court is quite clear in affirming its jurisdiction as article 48 paragraph 6 TEU does not specify which institution has jurisdiction on the revision procedure. It was already held that the Court would be involved on disputes about the scope of article 48 6 TEU.<sup>45</sup> This has been precisely the case.

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<sup>42</sup> *Ibidem*, paras 184-185.

<sup>43</sup> At the time of writing some commentaries on *Pringle* have been published: V. Borger, “The ESM and the European Court’s Predicament in *Pringle*” and P. Van Malleghem, “*Pringle*: A Paradigm Shift in the European Union’s Monetary Constitution”, *German Law Journal* 1/2013; P. Craig, “Guest Editorial Article”, *Maastricht Journal on Comparative and European Law*, 1/2013; Bruno de Witte and Thomas Beukers, “The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*”, in 50 *CMLRev.*, 805-848.

<sup>44</sup> Article 13 TEU and article 267 TFEU.

<sup>45</sup> Bruno De Witte, “The reform of the revision rules by the Lisbon Treaty”, in Eeckhout, Biondi and Ripley, *EU law after Lisbon*, Oxford, OUP, 124.

#### 4.1.2 Admissibility

As to the first question, the Court reaffirms the *TWD* doctrine and excludes that Mr. *Pringle* had standing before the Court for a direct challenge to the European Council decision.

Under article 263 paragraph 4 TFEU “[a]ny natural or legal person may (...) institute proceedings against an act addressed to that person or which is of direct and individual concern to them (...)”. In other words, any natural or legal person shall demonstrate that the Union act is addressed to him or that it is of direct and individual concern to him in order to have standing before the ECJ.<sup>46</sup> Differently, an indirect challenge to a Union act – *in casu* the decision of the European Council - can be made through the preliminary ruling procedure under article 267 TFEU without any specific condition on the standing.

As it is well established in the Court case law, the *TWD* doctrine maintains that if an individual has *locus standi* for bringing an annulment action before the European judicature – *id est* the Union act is of direct and individual concern to it - and such action is not exercised in due time, a preliminary ruling on the same matter is inadmissible.<sup>47</sup> Mr. *Pringle* had not, beyond any doubt, direct and individual concern to bring action against Decision 2011/199. This is because the challenged decision is an act of general application and does not directly and individually concern Mr Pringle. It flows from the content of the Decision itself that it did not apply as such to a limited category of individuals among which Mr. *Pringle*.<sup>48</sup> On the contrary, the decision is of general application. This was uncontested and the Court has correctly declared the action as admissible.

As to the second question, it is well established that preliminary rulings are an instrument of judicial cooperation that allow the Court of Justice to provide “national courts with the criteria for the interpretation of European Union law which they need to decode the dispute before them”.<sup>49</sup> However, a number of conditions need to be respected for the preliminary ruling order. As to the one contested in the *Pringle* case, the order of reference should give sufficient information on the Treaty rules invoked. Accordingly, both the Court and the Advocate General contended that some provisions indicated in the order of reference did not come into question for the outcome of the dispute. In particular, the Court stresses that articles 2 and 3 TEU do not come within the scope of the second question. This position reinforces the duty on the part of the referring court to specify the EU provisions they ask for reference to the benefit of the national proceedings.

## 4.2 Substance

### 4.2.1 Judicial endorsement of international agreements outside the EU legal framework?

The *Pringle* judgment raises three questions on the extent of powers to conclude and ratify the ESMT under EU external relations law. First, the judgment questions the conclusion of an international agreement outside the EU legal framework. Second, it

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<sup>46</sup> Note, however, that the Lisbon Treaty added a new indent to article 263 paragraph 4 TFEU according to which “any natural or legal person (...) may institute proceedings (...) against a *regulatory act* which is of direct concern to them and *does not entail implementing measures*” (emphasis added).

<sup>47</sup> Case C-188/92, *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland*, ECR [1994] I-00833, paras 23-24. The *TWD Textilwerke Deggendorf* case concerned the reimbursement of an unlawfully granted aid. The German Government informed the company, and told it also to the Commission’s decision could be challenged under art.263 TFEU. The company did not challenge the Commission’s decision, but instead sought to raise the legality of the Commission’s decision via the national courts. See also case C-550/09, *E and F*, [2010] ECR I-6213, paras 45-46. On the *TWD* doctrine see more extensively Roland Schwensfeier, “The *TWD* principle post-Lisbon”, (2012) 37 E. L. Rev., 156–175.

<sup>48</sup> *Pringle* judgment, para. 42.

<sup>49</sup> *Ibidem*, para. 83.

affirms the use of the Commission and the ECB institutions in cases outside the Union legal framework. Third, it assesses article 273 TFEU and the role of the Court itself in the framework of the ESM.

First, it is clear that the EST Treaty was concluded as an *inter se* international agreement, thus between some Member States and outside the Union framework. This is because the Treaty does not contain rules to provide permanent financial assistance to Member States in distress. At the same time, the Lisbon Treaty contains rules, codified from case law, that give exclusive competences to the Union for the conclusion of international agreements with international organizations and third countries. In particular, article 3 paragraph 2 TFEU affirms that the Union has exclusive competence to conclude an international agreement in so far as its conclusion would “affect common rules or alter their scope”. Correctly, the Court excludes that the ESMT refers to those situations. However, it makes two mistakes. First, article 3 paragraph 2 TFEU refers to international agreements with third countries and not between Member States. It appears that reference to such article is wrong as the ESMT is an international agreement between Member States and not with third states or international organizations. Second, the Court holds that the ESMT neither affects *common* rules nor alters their scope.<sup>50</sup> The ESMT shall not be seen as an initiative impinging on exclusive or shared competences of the Union, *in casu* monetary policy. The Court clearly states that the ESMT shall be considered within economic policy, even if this area is not - strictly speaking - a common policy within the meaning of article 3 paragraph 2 TFEU. This argument serves the Court to conclude that the ESM does not affect common rules because economic policy is not an area of *common* rules. This assumption, however, does not exclude any duty on the part of Member States. In fact, the Court reaffirms the *Gottardo* case law according to which, even when concluding international agreements outside EU competences, Member States need to comply with EU law when exercising their competence in their reserved competence area.<sup>51</sup>

Second, the judgment gives some interesting indications on the use of Union institutions in international agreements.<sup>52</sup> *Pringle* gives ground to the Court to assess the use of the Commission, the ECB and the Court itself in situations where EU institutions are given competences outside the Union framework. Some case law already existed and is mentioned by the Court. The Court refers to the *Bangladesh* case<sup>53</sup> and to the *Lomé* case.<sup>54</sup> The *Bangladesh* case concerned the constitution of a fund of aid to Bangladesh as an extra-EU instrument. The European Parliament challenged the validity of a collective decision by all Member States to grant such aid and to confer power to the Commission to manage that aid to be given. In the *Lomé* case the European Parliament contested a decision of the Council to establish a system outside the EU budgetary procedure to administer Member States’ assistance to some third countries within the framework of the *Lomé* Convention. This reference to the previous case law allows the Court to affirm in *Pringle* that additional tasks can be conferred to Union institutions so long as they “do not alter

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<sup>50</sup> See also paras 102-104. Emphasis added by the author.

<sup>51</sup> Case C-55/00, *Elide Gottardo v. Istituto nazionale della previdenza sociale (INPS)*, [2002] ECR I-00413, para. 32. This case concerned Mrs Gottardo, an Italian citizen who worked as a teacher in Italy, Switzerland and France, and wished to obtain an old-age pension in Italy. She would be entitled to an Italian old-age pension if account were also taken of her Swiss contributions in the overall calculation of her contributions pursuant to the 1962 Italo-Swiss convention on social security.

<sup>52</sup> See, more extensively, S. Peers, “Towards a new form of EU law? The use of EU institutions outside the legal framework”, EConstLR 1/2013, 37-72, in particular at 46-55 and 61-65 and P. Craig, “Pringle and Use of EU Institutions outside the EU Legal Framework”, EConstLR 2/2013, 263-284.

<sup>53</sup> Cases C-181 and 248/91, *Parliament v. Council and Commission (Bangladesh aid)*, [1993] ECR I-3865, para. 20.

<sup>54</sup> Case C-316/91, *Parliament v. Council* [1994] ECR I-625.

the *essential character* of the powers conferred on those institutions by the EU and FEU Treaties.”<sup>55</sup>

Paragraph 158 confirms that the *Bangladesh* and *Lomé* case law is still good law and that Member States can confer additional tasks to the Union institutions also when they use the intergovernmental means or they act outside the Union framework. However, one may argue whether the doctrine according to which it is possible by international agreements to confer additional functions to EU institutions, so long as the basic competences of the EU are not affected has not been stretched too much. In other words, to what extent may EU institutions be “borrowed” for international arrangements between Member States? Some conditions need to be respected: the Union shall not have exclusive competence; the tasks conferred to EU institutions shall not entail any power to make decision of their own; and the additional tasks shall not alter the essential character of the powers conferred to them by the Treaties. Unfortunately, the Court does not go more on the details of each condition and bases its reasoning on previous case law rather than proposing some grounds to assess them.

More clarifications were needed if one looks precisely at the EU institutions’ powers under the ESMT. It is true that the Board of Governors plays a central role in the ESM. It acts as the main body to take decisions to grant financial assistance to Member States in difficulty. The Commission and the ECB should only play a role of assistance. However, the ESMT suggests that both the Commission and the ECB can exert some quasi-decisional powers. A strict reading of the ESMT would suggest that these powers would run counter to the second condition mentioned by the Court. Furthermore, the relationship between the use of Union institutions and the enhanced cooperation under article 20 TEU needed further clarifications. According to this article Member States may make use of enhanced cooperation between themselves within the framework of the Union’s non-exclusive competences by making use of Union institutions. The applicant argued that Article 20 TEU on enhanced cooperation should be used. This argument is correctly rejected by the Court as article 20 TEU refers only to cases where the Union has competences to establish a permanent mechanism and this was not the case.<sup>56</sup> Regrettably, the Court fails to give more indications on how to use the procedure under article 20 TEU. Would the enhanced cooperation procedure under article 20 TEU be used in areas covered by Union policies?

Third, *Pringle* sheds some light on the interpretation of article 273 TFEU. This provision affirms that the Court “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 serves to avoid a divergent interpretation of EU law by other jurisdictions and to assure unity in the interpretation of EU law.<sup>57</sup> Accordingly, the ESMT states that if decisions of the Board of Governors are contested, the dispute is submitted to the Court of Justice.

The Court’s reasoning of Article 273 TFEU is quite open on the reading of this article. First, the Court recognizes that article 273 TFEU may be invoked also *ex ante causa*. It means that it is not necessary that the actual dispute has arisen.<sup>58</sup> Second, the subject matter of the dispute concerns the Treaties, and *a fortiori* EU law, as the ESMT requires that the stability support be fully consistent with EU law.<sup>59</sup> However, one may question the fact that the Court affirms that the dispute will be *likely* to concern the interpretation or application of EU law. Does this mean that in some cases the Court’s jurisdiction will not be in place as regards EMS Treaty disputes?

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<sup>55</sup> Pringle judgment, para. 158 (emphasis added).

<sup>56</sup> *Ibidem*, paras 168-169.

<sup>57</sup> See more extensively Koen Lenaerts, Dirk Arts and Ignace Maselis, *Procedural law of the European Union*, Sweet and Maxwell, 2006, 502 et seq.

<sup>58</sup> Pringle judgment, para. 172.

<sup>59</sup> *Ibidem*, para. 174.

The Court does not give hints on this. Finally, the Court considers that disputes where international organisations are party may be submitted to it.<sup>60</sup> This reaffirms the extensive interpretation of the Court on article 273 TFEU.

Overall, the Court's reading on article 273 TFEU is a welcome development. It is submitted that the Court adopts an extensive and open interpretation on the possibility to conclude international agreements outside the Union framework and to make use of EU institutions to that effect. This might reinforce Member States to rely on international agreements concluded between each other in order to tackle the debt crisis in future. The role of the Commission and the ECB would be useful to these purposes.

#### *4.2.2 The extent of simplified revision powers and the ESM: between policies and competences*

Preliminarily, it must be stated that the revision of article 136 paragraph 3 was not necessary to the entry into force of the ESMT. The third question before the ECJ explicitly affirms that "Decision 2011/199 confirms the existence of a power possessed by the Member States".<sup>61</sup> It is clear that the entry into force of the Treaty amendment did not affect the power to adopt the ESMT alone. This conclusion questions whether the Treaty amendment is necessary to adopt international agreements between Member States to establish permanent financial assistance facilities. Does article 136 paragraph 3 TFEU really add a new legal dimension to international agreements between Member States or is the amendment only the result of a political compromise between Member States and the EU institutions?

Having said that, it is important to appraise the simplified revision procedure as *Pringle* gives significant indications on the relationship between the simplified revision procedure under article 48 TEU and the nature of the EMU.

Revision procedures are contained in article 48 TEU. The Treaty provides for an ordinary and a simplified revision procedure. As underlined above,<sup>62</sup> the first question concerned the possibility to amend the Treaty through the simplified revision procedure of article 48 TEU paragraph 6 by inserting a third indent to article 136 TFEU.

The functionality of the simplified revision procedure is to avoid recourse to the ordinary revision procedure where a Convention composed of the members of the Member States' governments is necessary. According to the simplified revision procedure, the proposed amendment will be adopted directly by the European Council acting by unanimity of its members without a Convention. However, two essential conditions are necessary to make use of article 48 TEU: first, the amendment shall concern solely the provisions of Part Three of the TFEU on Union internal policies and actions (articles 26-197 TFEU); second, the revision shall not increase competences conferred on the Union by the Treaties.<sup>63</sup> The Court assesses them in turn and comes to the conclusion that the amendment is compatible with the procedure under article 48 TEU. It is the first time that the Court interprets article 48 TEU and the conditions therein. This allows us to make some comments on this contentious part of the judgment.

First, it is important to note that the content of the article amendment refers to the possibility to allow the conclusion of an international treaty, such as the ESM and not a Union arrangement. This shows that the simplified amendment procedure can also be used to insert provisions that do not necessarily concern EU law. Member States are still distinct entities from the EU.

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<sup>60</sup> *Ibidem*, para. 175.

<sup>61</sup> *Ibidem*, para. 184 (emphasis added).

<sup>62</sup> See *supra* 3.1.

<sup>63</sup> More generally on the simplified revision procedure see Steve Peers, "The future of EU Treaty Amendments", in Takis Tridimas and Piet Eeckhout, (2012) *Yearbook on European law*, 31-42.

Second, and more interestingly, the essential question that the Court addresses is whether the new amendment impinges on monetary and economic policy. It is well known that the EMU is composed of two “pillars”: monetary policy and economic policy.<sup>64</sup> The former is an exclusive competence; the latter is a “peculiar” competence reserved to Member States through a system of coordination of economic policies.<sup>65</sup> The Court has the opportunity to interpret the concept of “economic” and “monetary” policies as contained in the Treaty. However, the Court appears to limit its interpretation by stating that the EU’s economic policy competence has a merely coordinating nature. In such way, the Court does not recognize that the Union competence in this field can go beyond the simple coordination, but can include also financial assistance as shown by article 122 paragraph 1 TFEU.<sup>66</sup>

The Court’s conclusion on the Treaty amendment is clear: the amendment of article 136 TFEU concern solely economic policy and not monetary policy which therefore is not altered by the new provision.<sup>67</sup> This reasoning is remarkable as it allows for future use of the simplified revision procedure in the EMU Title whenever the envisaged revision does not impinge on monetary policy *stricto sensu*. Even if financial assistance measures “may have *indirect* effects on the stability of the euro” (emphasis added), it can be argued that paragraph 56 gives ground to reform economic policy measures through the simplified revision procedure. In other words, the simplified revision procedure can be used even if the amendment has effects on the stability of the euro, but only indirectly on price stability, thus on monetary policy.

An example could be the use of the simplified revision procedure to put forward amendments to create the Banking Union as long as the proposed amendment does not directly impinge on monetary policy. However, it is difficult to believe that the procedure under article 48 paragraph 6 TEU may be used to reform the Treaty on prudential supervision of credit institutions. Article 127 paragraph 5 TFEU, which refers to the role of the ESCB to “contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system”, is a provision contained in the monetary policy chapter. A restrictive reading of the article 48 paragraph 6 TEU conditions would exclude the use of the simplified amendment provision to change the Treaty on the role of the ESCB in banking supervision. However, one might argue whether article 127 paragraph 5 TFEU does really refer to the core of monetary policy or rather to the “indirect” effects of the ESCB’s activities on monetary policy. If we follow the second interpretation, it is submitted that article 48 paragraph 6 TEU could be used to such purposes. However, one might still argue what content the new provision should have. If the amendment increases new competences to the Union, it would still infringe one of the conditions on the simplified amendment procedure. On the contrary, if it relates to institutional issues, which are also mentioned in article 48 paragraph 6 TEU itself – “institutional changes in the monetary area” –, a simplified amendment would be possible.

Arguably, the simplified procedure could be also used to revise some more problematic Treaty provisions such as articles 123 or 125 TFEU by providing exceptions to the prohibition contained thereof.<sup>68</sup> However, the reasoning of the Court appears too cautious and *Pringle* does not explain better what the threshold for “indirect effects” is.

Third, paragraph 56 contains also an interesting “policy” development as compared to former jurisprudence. It is the first time that the Court interprets the concept of “stability of the euro area as a whole” as the main objective of the ESM. This is

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<sup>64</sup> See *supra* section 2.

<sup>65</sup> Palmstorfer, *op. cit.*, 773.

<sup>66</sup> I am grateful to the anonymous reviewer for this point.

<sup>67</sup> *Pringle* judgment, para. 56.

<sup>68</sup> On articles 123 and 125 TFEU see *infra* 4.2.3.1 and 4.2.3.2.

“clearly distinct from the objective of maintaining price stability”,<sup>69</sup> the main objective of the monetary policy. The expression “stability of the euro area as a whole” is contained in the first sentence of article 3 of the ESMT as well as in the new indent of article 136 TFEU. The Court’s interpretation focuses on a new objective pursued by the Eurozone that paves the way to a future refocusing of the economic policy. However, the judgment fails to give more clarifications on it. This lack of reasoning opens a number of questions. Is “the stability of the euro area as a whole” something more or less than price stability? Is it an objective pertaining only and *exclusively* to the economic policy? The Court affirms that the ESM can have some indirect effects for the monetary policy. However, it does not specify what these effects are. Further, what is the relationship between “coordination and economic policy” and “economic policy”? It is submitted that the Court interprets the ESM as an instrument within the “economic policy”,<sup>70</sup> but it does not give enough clues on how the ESM relates to the Union framework. Arguably, *Pringle* does not give answers to these questions. However, the interpretation of the expression “stability of the euro area as a whole” results in a very innovative assertion by the Court that needs to be clarified in future now that it is also contained in a Treaty provision.

Finally, as to whether the revision procedure increases the competences conferred on the Union in the Treaties, the answer of the Court is, arguably, far less reasoned and motivated. Conferring new competences can be made by express Treaty provisions that establish legal basis for the Union to take action or through implied powers. The solution of the Court appears very cautious. The judgment limits to say that the amendment does not confer any new competence on the Union. The amendment does not add any Union legal basis or any possible role for the Union’s institutions.<sup>71</sup> As such, the Court does not take a purposive interpretation, but keeps a prudent, even a *status quo*, interpretation on the potentials of the ESM and on the possibility to incorporate it into the EU Treaty in future. The very careful approach of the Court might be explained by the political pressure put by the case at issue. A more open reading would have been to argue that the Treaty amendment acts as a first step, in emergency situations and under “strict conditionality”, to allow further Treaty amendments without infringing article 48 paragraph 6 TEU.

Overall, the judgment sheds important lights on use of the simplified revision procedure under article 48 paragraph 6 TEU in future. To some extent the Court has opted for an extensive reading of this article that could allow for future revisions in the EMU Title so long as the Treaty revision does not touch the core of monetary policy.

#### 4.2.3 Articles 122, 123 and 125 TFEU: real limits to the establishment of permanent assistance mechanisms between Member States?

As recalled before, the ESM has been established outside the Union legal framework. This is because the Union framework does not contain any specific provision that allowed the establishment of *permanent* financial assistance mechanisms between Eurozone Member States. To that extent, articles 122, 123 and 125 TFEU come into question. These will be analysed in turn.

##### 4.2.3.1 The ESM Treaty and Article 122 paragraph 2 TFEU

Article 122 paragraph 2 TFEU provides that “where a Member State is in difficulties or is seriously threatened with severe difficulties (...), the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. (...)”. The use of this provision is limited to natural disasters or similar occurrences. A strict reading of this provision would run counter its use in other circumstances. However, the crisis has made reference to this

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<sup>69</sup> *Ibidem*, para. 56.

<sup>70</sup> *Ibidem*, para. 60.

<sup>71</sup> *Ibidem*, paras 73-74.



provision in a wider sense to provide *ad hoc* financial assistance to Member States in distress.<sup>72</sup> In particular, it was used to establish the EFSM.<sup>73</sup> Article 122 paragraph 2 allows for the use of special “Union financial assistance” to the benefit of a Member State “in difficulties or is seriously threatened with severe difficulties”. The special nature of the provision cannot act as a *carte blanche* to provide any kind of financial support, given the special conditions set out in that article. As such, it could not be stretched as much as to establish the ESM. This would clearly run counter the scope of the provision mainly because of the permanent nature of the ESM.

*Pringle* examines whether article 122 paragraph 2 TFEU would run counter the establishment of the ESMT. The Court adopts a strict reading on the limits of article 122 TFEU which follows the strict views of the Heads of State and Government on the future use of article 122 TFEU. The Commission’ position was divergent. This discrepancy can be implicitly seen from the Conclusions of the meeting of 16 and 17 December 2010 where only the Heads of State and Government are mentioned and not the European Council comprising also the President of the Commission.<sup>74</sup> The Court follows the strict line of the Heads of State and Government by excluding that “article 122 (2) TFEU (...) constitute an appropriate legal basis for the establishment of a stability mechanism of the kind envisaged in [Decision 199/2011].”<sup>75</sup> In other words, the judgment does not recognize that that article might be used, more generally, as the legal basis to provide *permanent* - and not temporary - financial assistance to Member States in serious difficulty in the Eurozone. Some authors have expressed the same concern on the use of article 122 paragraph 2 TFEU.<sup>76</sup> Before the judgment they argued that article 122 TFEU has a limited scope and cannot give ground to the establishment of permanent mechanisms of the kind envisaged.<sup>77</sup> The Court’s approach distances the ESM, a permanent financial assistance mechanism, from any possible encroachment with article 122 paragraph 2 TFEU. The reference to article 122 paragraph 2 should be made only when support is provided to a Member State in temporary financial difficulties and not to create a permanent facility to assist Member States in distress. However, one might question whether article 122 paragraph 2 TFEU is really useful to provide a ESM-kind financial assistance. The system of own resources in the EU budget is not sufficient to safeguard government debts of big Member States. The EU budget does not have sufficient funds to provide the required financial assistance to big economies in the Eurozone.<sup>78</sup> Member States needed to establish an international organisation to provide robust assistance going beyond “the margin available under the own resources ceiling for payment appropriations” of the EFSM.<sup>79</sup> This shows that stability mechanisms for robust assistance to Member States require funds that are not currently available under the EU budget and thus would not come within the scope of application of article 122 paragraph 2 TFEU..

Overall, *Pringle* confirms that article 122 paragraph 2 TFEU is a very special provision. To some extent, this is a regrettable step as the Court could have avoided

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<sup>72</sup> See among others Jean-Victor Louis, *Editorial Guest Article*, (2010) CMLR, 984 and Reiner Palmstorfer, *op. cit.*, 779.

<sup>73</sup> Council Regulation 407/2010.

<sup>74</sup> European Council conclusions, 16-17.12.2010, 1: “As [the ESM] is designed to safeguard the financial stability of the euro area as a whole, the European Council agreed that Article 122(2) TFEU will no longer be needed for such purposes. *Heads of State or Government* therefore agreed that it should not be used for such purposes” (emphasis added).

<sup>75</sup> *Pringle* judgment, para. 65.

<sup>76</sup> Jean-Victor Louis, *op. cit.*, 986.

<sup>77</sup> de Gregorio Merino, *op. cit.*, 1632.

<sup>78</sup> According to the latest data, the draft EU budget for 2014 would amount to €142.01 billion in commitment appropriations and to €135.9 billion in payment appropriations. The latter sum is clearly insufficient to cover financial assistance to big Member States such as Spain or Italy. See further [http://ec.europa.eu/budget/index\\_en.cfm](http://ec.europa.eu/budget/index_en.cfm)

<sup>79</sup> Council Regulation 407/2010, Article 2 paragraph 2.

such a firm view on this article. In this way, the Court excludes that article 122 paragraph 2 TFEU would come into play as a legal basis to create other forms of financial assistance under European Union law in future. It is true that the introduction of article 136 paragraph 3 TFEU allows for the use of permanent financial assistance mechanisms between Member States. However, the Court's approach on the use of article 122 paragraph 2 TFEU appears too severe. It is submitted that the Court should not have been so clear-cut to limit the use of article 122 paragraph 2 TFEU.

#### 4.2.3.2 The ESM Treaty and article 123 TFEU

Article 123 TFEU prohibits "[o]verdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (...) in favour of (...) Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments". *Pringle* makes a reference also to article 123 TFEU<sup>80</sup>. However, both the A.G. view and the judgment fail to provide legal certainty on the terms contained in this article. The Court simply excludes that financial assistance between Member States of the ESM is covered by that provision. The choice of the Court is cautious as it prefers to assess only forms of financial assistance between Member States. The judgment neither gives indications on the terms used in article 123 TFEU nor specifies what limits this article entails. Thus, it still cannot be inferred from *Pringle* whether some forms of ECB credit facilities would be compatible with article 123 TFEU. There are at least two options that need some scrutiny.

First, on 2 August 2012 the ECB announced that it would undertake the Outright Monetary Transactions (OMT) programme<sup>81</sup> as a purchase of government-issued bonds maturing in 1 to 3 years in the secondary market. The ECB can exercise OMTs once the Eurozone Member State asks for financial assistance. This announcement followed Draghi's public speech where he declared that "[w]ithin our mandate, the ECB is ready to do whatever it takes to preserve the euro".<sup>82</sup> So far the OMT programme has only been announced and has not yet been exercised. It has been demonstrated that the effects of the announcement has been beneficial to stabilize the markets, but it is still questionable whether the OMT programme is compatible under article 123 TFEU.<sup>83</sup> It is submitted that the OMT programme is feasible as it acts only as a purchase in the secondary market and acts as a crisis-tailored instrument for intervention. In the next months the German Constitutional Court will decide on the compatibility of the OMTs programme with the German Constitution.<sup>84</sup> There may be also the possibility that the German Constitutional Court refers, for the first time, to the ECJ the case as it lacks the powers to assess the legality of the ECB mandate. In such case, the ECJ may be called to rule on the OMT and the ECB mandate. The Karlsruhe decision is expected to provide an essential answer to the feasibility of the OMTs, but it is not excluded that future ECJ case law might provide some interpretation of article 123 TFEU.

Second, the ESMT envisages the possibility of borrowing capital "from banks, financial institutions or other persons or institutions for the performance of its

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<sup>80</sup> *Ibidem*, paras 125-128.

<sup>81</sup> The OMTs are outright transactions in secondary, sovereign bond markets, aimed "at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy." See the ECB press release on OMTs available at [http://www.ecb.int/press/pr/date/2012/html/pr120906\\_1.en.html](http://www.ecb.int/press/pr/date/2012/html/pr120906_1.en.html)

<sup>82</sup> Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012 available at <http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>

<sup>83</sup> On the OMT programme see, further, T. Petch, The compatibility of Outright Monetary Transactions with EU law, 2013 *Law and Financial Markets Review*, pp. 13-21.

<sup>84</sup> *ECB warns against opening debate on its mandate*, Financial Times, 12.06.2013, <http://www.ft.com/cms/s/0/8e6e2600-d366-11e2-b3ff-00144feab7de.html#axzz2dNfDhgW9>

purpose”.<sup>85</sup> The ESMT provision does not set any limits as to the threshold to borrow capital. It is submitted that the ECB comes within the term “banks” and that the ECB could be used as the lending institution for capitals to the ESM. In other words, the ECB could become the lender of capitals to the ESM. However, so far some Member States, most notably Germany, have opposed the power to grant this unlimited banking license to the ESM.<sup>86</sup> In particular, the use of the ECB capital to the ESM would certainly question the compatibility under article 123 TFEU. However, in the longer term this option would grant safety nets for the safeguard of Member States’ public finances. Neither the AG’s view nor the judgment give indications on this ESMT provision and its potential. It is clear that the creation of an unlimited banking license to the ESM by the ECB would require a Treaty change as article 123 TFEU does not allow this operation. However, the potential for giving “real teeth” to the ESM are on the table.

#### 4.2.3.3 The ESM Treaty and article 125 TFEU

More importantly, the *Pringle* case assesses, for the first time, the no bail out clause under article 125 TFEU. Before commenting on the judgment, we will first recall the provision and the doctrinal debate on it.

Article 125 TFEU contains the ban to the assumption of commitments by Member States between each other. It states that the “Union shall not be liable for or assume the commitments (...) of any Member State, (...). A Member State shall not be liable for or assume the commitments (...) of another Member State, (...)”. This provision was inserted in the Treaty of Maastricht to ensure that the Member States follow a sound budgetary discipline.<sup>87</sup>

So far, article 125 TFEU has proven to be the real “evil” for any possible mutualisation of public debt. Doctrinal positions so far on it have been divergent. Shortly after the entry into force of this provision, Smits argued that the no bail out clause is an essential element of the budgetary code if the Union and, thus, Member States are “on their own” as to their budgetary commitments. He underlined that “the rationale for the prohibition is (...) the application of full market rigour to the activities of Governments”.<sup>88</sup> More recently, in the context of the current financial crisis, different positions have arisen on the recent crisis measures taken in Europe. Rueffert argued that the bilateral loans to Greece in 2010 and the establishment of the ESFS were in breach of EU law because they would run counter article 125 TFEU.<sup>89</sup> More correctly, Smits suggested that the markets have yet not been a reliable instruments to discipline financial assistance to Member States in difficulties and that, given the changed circumstances, a different view on the EMU rules is needed.<sup>90</sup> Some others have tried to give a narrower interpretation of the no bail out provision as “it aims to force Member States to comply with their budgetary discipline following the logics of the markets when incurring public debts”.<sup>91</sup> Louis sustained that in exceptional circumstances the no bail out can be potentially overturned “if the situation (...) degenerates into an asymmetric shock or a shock common to a number of Member States”.<sup>92</sup> Nonetheless, as affirmed by the more cautious position of Palmstorfer, the wording and the systematic reading of the provision “covers and bans all forms of financial assistance given by the European Union or through a

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<sup>85</sup> See the ESMT, article 21.

<sup>86</sup> “Angela Merkel stands firm in resisting ESM bank licence”, The Telegraph, 29 August 2012, available at <http://www.telegraph.co.uk/finance/financialcrisis/9506882/Angela-Merkel-stands-firm-in-resisting-ESM-bank-licence.html>

<sup>87</sup> *Ibidem* para. 135 where the Court mentions the Bulletin of the European Communities, Supplement 2/91, pp.24 and 54 to retrace the origin of the no bail out rule.

<sup>88</sup> Renée Smits, *The European Central Bank*, Kluwer International 1997, 76-77.

<sup>89</sup> Matthias Rueffert, *The European debt crisis and European Union law*, 2011 CMLR, 1777-1805, 1785.

<sup>90</sup> Smits, *Correspondence*, 2012 CMLR, 827-832, 827.

<sup>91</sup> De Gregorio Merino, *op. cit.*, 1625.

<sup>92</sup> Louis, *op. ult. cit.*, 984.

Member State to another". Thus, the Greek loan facility, the ESFS and the ESM would run counter article 125 TFEU.<sup>93</sup> Overall, the doctrinal position appears divergent as to the possible implications of article 125 TFEU on financial assistance mechanisms.

*Pringle* has offered the Court the chance to express itself for the first time on article 125 TFEU and, in particular, to interpret the ESM in light of article 125 TFEU. The Court considers that article 125 TFEU does *not* preclude the adoption and ratification of the ESMT. This conclusion is made through a certain number of arguments that need a careful assessment.

First, the Court conducts a literal interpretation of article 125 TFEU and concludes that Member States are not prohibited from granting any form of financial assistance whatever to another Member State.<sup>94</sup> This result is achieved through a combined reading of article 125 TFEU together with article 122 paragraph 2 TFEU and article 123 TFEU. Correctly, the Court shows that financial assistance between Member States is allowed by some Treaty provisions even if article 125 TFEU provides for the no bail out clause. It is an important point as the Court considers that, notwithstanding the no bail out clause, financial assistance between Member States is possible.

Second, the Court examines the objective of article 125 TFEU. Paragraph 135 affirms that article 125 TFEU serves to ensure that Member States maintain budgetary discipline. This equals to say that article 125 TFEU serves as a provision to guarantee the budgetary discipline of the Member States and *not*, strictly speaking, to ban financial assistance between them. However, this is not an absolute invitation to provide financial assistance instruments. In fact, the Court requires that such intervention is indispensable for the safeguarding of the financial stability of the euro area as a whole and that it is subject to strict conditionality.<sup>95</sup> The arguments of the Court are based on the different provisions contained in the ESMT according to which financial assistance is given only if special conditions are respected. This is not to say that Member States cannot provide assistance between each others. Indeed, one might take two different views on this issue.

On the one hand, it can be argued that the Court has clearly set the maximum limits on the possible exceptions to article 125 TFEU. Member States cannot be liable for debts of other Member States, but they can only provide loans or similar means on condition that the beneficiary rests fully liable with its commitments.

On the other hand, provided that assistance is given to the benefit of the "financial stability of the euro as a whole" and that strict conditionality is respected, Member State can voluntarily make use of financial assistance instruments without infringing article 125 TFEU and to the extent that they prefer.

Correctly, De Witte and Beuckers argue that the interpretation of article 125 TFEU in *Pringle* is based both on the requirement of indispensability and conditionality of intervention.<sup>96</sup> However, I would put more emphasis on the actual limits on Member States' commitments which flow from article 125 TFEU. It is submitted that the Court legitimizes Member States' money transfers to bail out other Member States in distress without infringing EU law.<sup>97</sup>

It is true that the recipient Member State remains fully responsible to its creditors for any financial commitments<sup>98</sup>. Financial assistance amounts to the creation of a new debt to the ESM and not to the establishment of debt liabilities assumed by the assisting Member States. We are still not in a transfer Union with a mutualisation of

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<sup>93</sup> Palmstorfer, op. cit., 784.

<sup>94</sup> *Pringle* judgment, para. 130.

<sup>95</sup> *Ibidem*, para. 136.

<sup>96</sup> De Witte and Beuckers, op. cit., 838-839.

<sup>97</sup> See *Pringle*, op. cit., para.137.

<sup>98</sup> *Ibidem*, paras 139, 145.

public debts.<sup>99</sup> The ESM does not provide neither for the joint nor for the joint and several liability of the assisting Member States. It is not an international organisation which provides for stability bonds.<sup>100</sup> The assisted Member State remains fully responsible for its commitments.

Nonetheless, it can be argued that the Court legitimizes, if not even invites, Member States to bail out each other without necessarily infringing the Treaty. This is because the purpose of article 125 TFEU is essentially to assure that “the incentive of the recipient Member State to conduct sound budgetary policy is [not] diminished”<sup>101</sup> and not to prohibit financial assistance between Member States as such. If the Court’s judgment is welcome as it held that the ESM is compatible with the no bail out clause, regrettably, it does not appear as convincing as the reading of the A.G.’s view. First, the A.G. stated that article 125 TFEU would not prohibit any form of financial support to a Member State.<sup>102</sup> In a more appealing way, she argued that the purpose of article 125 TFEU is to assure that “the disciplinary effect of interest rate spreads on the capital markets according to the individual financial positions of Member States”.<sup>103</sup> Does this mean that the no bail out provision is concerned with market discipline of Member States rather than with budgetary discipline?<sup>104</sup> It appears that article 125 TFEU runs primarily counter Member State’s arrangements which would subvert the credibility of the individual financial position of Member States. Second, the A. G.’s view argued that an extensive reading of the provision would run counter the principles of sovereignty and solidarity of the Member States. Such argument equals to say that an extensive reading of the no bail out clause would *infringe* two principles in the EU that, admittedly, “rank as of at least equal importance to Article 125 TFEU”.<sup>105</sup> The judgment mentions neither of them to counteract an extensive reading of article 125 TFEU. This is regrettable as the Court would have showed more activism in legitimizing a restrictive reading of article 125 TFEU.

If focus on limitations to article 125 TFEU are on the ways in which Member States provide financial assistance, conditionality and even more indispensability of financial intervention have less importance than what one could see at first sight. As to the former, conditions attached to the MoU are essential to granting financial assistance in compliance with EU law, but can go further or can be different from what is required under the economic policy provisions contained in the Treaty. It is true that article 13 ESMT requires strict conditionality of intervention. However, it is argued that conditionality is a flexible concept which depends on the nature of each intervention. As to the latter, indispensability does not seem so much essential. It is true that the ESM was created to guarantee the stability of the euro and that Article 136 paragraph 3 TFEU requires that intervention can be activated “if indispensable to safeguard the stability of the euro area as a whole”. However, the recent Cypriot bail out did not appear to be such a serious threat to the financial stability of the euro as a whole. Even if the Eurogroup stated that “financial assistance to Cyprus is warranted to safeguard financial stability (...) to the euro area as a whole”<sup>106</sup>, it is submitted that indispensability of intervention was not essential to safeguard the currency union as such. As shown by the Cypriot bail out, the ESM funds can be used also to allow a

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<sup>99</sup> See more extensively de Gregorio Merino, op. cit., 1630-1632.

<sup>100</sup> European Commission, *Green Paper on the feasibility of introducing Stability Bonds*, 23.11.2011, COM(2011) 818 final.

<sup>101</sup> *Ibidem*, para.136.

<sup>102</sup> A. G. Views, para. 134.

<sup>103</sup> *Ibidem*, para. 132 and 148.

<sup>104</sup> See on that issue V. Borger, op. cit., pp. 135-137.

<sup>105</sup> Pringle judgment, para.136.

<sup>106</sup> Eurogroup Statement on Cyprus of 25 March 2013 available at <http://eurozone.europa.eu/media/404933/EG%20EG%20Statement%20on%20CY%2025%2003%202013.pdf>

Member State in difficulty not to exit the Eurozone.<sup>107</sup> This questions whether indispensability of intervention is essential to trigger the ESM funds.

Overall, the Court's approach on article 125 TFEU is welcome as it gives some leeway to assure financial assistance between Member States beyond a strict reading of article 125 TFEU. Despite not being as appealing as the A.G.'s view, the Court establishes that Member States can provide financial resources to another Member State without breaching the no bail out prohibition. This is possible so long as such intervention is in line with sound budgetary discipline and with the indispensability to safeguard the stability of the euro as a whole. However, it has been demonstrated that these two conditions can become rather flexible in their application. The real limit of the no bail out clause is the nature of liability of the financial instrument.

## 5. Conclusion

The judicial endorsement of the ESMT by the ECJ was highly expected. This contribution has shown that this judgment is welcome and satisfactory in light of future developments along the financial crisis. Among others, it clarifies three issues in the current debt crisis era.

First, it is the first time that the Court pronounces itself on the rules related to the new crisis-related measure in light of the economic and monetary provisions contained in the Treaty. The Court's approach is satisfactory as it adopts a lenient judicial control over the conclusion and ratification of an international Treaty to provide financial assistance to Eurozone Member States. An opposite solution would have jeopardized the project of monetary union in Europe.

Second, the judgment allows the use of the simplified revision procedure pursuant to article 48 TEU in the context of the economic policy. This is a seminal point as the Court has clarified to what extent the simplified revision procedure might be used to change the Treaty. The judgment is an important precedent to future simplified revisions of the Treaty provisions on the EMU so long as the changes do not affect the core part of the monetary policy competence. It has been argued that new provisions could be inserted to amend the Treaty with a view to establish the Banking Union without necessarily recurring to the ordinary revision procedure.

Third and perhaps most importantly, the *Pringle* case illustrates how stability mechanisms to support Member States in financial distress can be effective tools to provide liquidity in the European markets. By endorsing the ESMT, the ECJ assures that Member States can take financial measures to support each other, notwithstanding the straightjacket of the no bail out clause. The result is that Member States can establish financial arrangements which can be used beyond a strict reading of article 125 TFEU. In essence, the judgment gives flexibility to Member States' arrangements in providing financial support to each other.

To conclude, *Pringle* will be remembered as the first landmark decision in which the Court has endorsed financial assistance between Member States as a "catalyst" to increase further financial, economic and perhaps political interconnection between Member States.

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<sup>107</sup> See in favour V. Borger, op. cit., 138.





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