



The Court of Justice approves the European stability mechanism (ESM)

EU law does not preclude the conclusion and ratification of the Treaty establishing the ESM by the Member States whose currency is the euro

On 25 March 2011 the European Council adopted Decision 2011/199¹ providing for the addition to the Treaty on the Functioning of the European Union (TFEU), of a new provision² whereby 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. That new provision states, further, that the granting of any required financial assistance under the mechanism will be made subject to strict conditionality. That amendment of the treaty was to take effect on 1 January 2013, subject to having been approved by the Member States in accordance with their constitutional requirements.

On 2 February 2012 the euro area Member States³ concluded the Treaty establishing the European stability mechanism (ESM), which is to have full legal personality. The purpose of the ESM is 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. That support may be granted only if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For that purpose, the ESM is to 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. The maximum lending capacity is set initially at €500 billion. The strict conditionality to which any support must be subject may take the form, notably, of a macro-economic adjustment programme or the obligation continuously to respect pre-established eligibility conditions.

Mr Pringle, a member of the Irish Parliament, claims before the Irish courts that the amendment of the TFEU by a European Council decision – therefore using the simplified revision procedure – is unlawful. He claims that the amendment entails an alteration of the competences of the EU and is inconsistent with provisions of the Treaties on which the EU is founded⁴ concerning economic and monetary union and with general principles of EU law. Further, Mr Pringle claims that, by ratifying, approving or accepting the ESM Treaty, Ireland would undertake obligations incompatible with those Treaties.

Accordingly, the Supreme Court (Ireland) decided to refer questions to the Court of Justice on the validity of European Council Decision 2011/199 and on the compatibility of the ESM with EU law. In order to remove as soon as possible the uncertainty revealed by those questions, the President of the Court decided to grant the Supreme Court's request that the accelerated procedure be

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

² The new paragraph 3 of Article 136 TFEU.

³ Belgium, Germany, Estonia, Ireland, Greece, Spain, France, Italy, Cyprus, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Slovakia and Finland.

⁴ The Treaty on European Union (TEU) and the TFEU.

applied to this case, lodged at the Court on 3 August 2012⁵. Further, the Court considered this case to be of exceptional importance and decided to refer the case to the full Court, consisting of all 27 judges. The View of Advocate General Juliane Kokott was delivered on 26 October 2012.

By its judgment to-day, **the Court holds that its examination has disclosed nothing capable of affecting the validity of Decision 2011/199.**

Further, the Court holds that **the provisions of the TEU and the TFEU and the general principle of effective judicial protection do not preclude the conclusion and ratification of the ESM Treaty.**

In addition, the right of a Member State to conclude and ratify that Treaty is not subject to the entry into force of Decision 2011/199.

Decision 2011/199

By Decision 2011/199, the European Council used **the possibility of amending the TFEU by a simplified procedure** (that is, without convening a convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission). That procedure **applies only to the internal policies and actions of the EU (Part Three of the TFEU), and may not increase the competences conferred on the EU** in the Treaties.

The Court holds that **the challenged amendment relates** – both in form and content – **to the internal policies and actions of the EU, and consequently the first of those conditions is satisfied.**

First, the challenged amendment does not encroach on **the exclusive competence held by the EU (Part One of the TFEU) in the area of monetary policy** for the Member States whose currency is the euro.

While the primary objective of the EU's monetary policy is maintaining price stability, the ESM pursues an objective which is clearly distinct, namely to safeguard the stability of the euro area as a whole. That 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. Further, the instruments envisaged in order to attain the objective pursued by the ESM, to provide financial assistance to a Member State, clearly do not fall within monetary policy.

The ESM serves instead to complement the new regulatory framework for strengthened economic governance of the EU. That framework establishes closer coordination and surveillance of the economic and budgetary policies conducted by the Member States and is intended to consolidate macroeconomic stability and the sustainability of public finances. While that framework is essentially preventive, in that its objective is to reduce so far as possible the risk of public debt crises, the objective of establishing the ESM is the management of financial crises which, notwithstanding such preventive action as might have been taken, might nonetheless arise. **The ESM falls, consequently, within the area of economic policy.**

Secondly, nor does the challenged amendment affect the **competence held by the EU (Part One of the TFEU) in the area of the coordination of the economic policies** of the Member States.

Since the provisions of the TEU and TFEU do not confer any specific power on the EU to establish a stability mechanism of the kind envisaged by Decision 2011/199, the Member States whose currency is the euro are entitled to conclude an agreement between themselves for the establishment of a stability mechanism. Further, the strict conditionality to which the granting of financial assistance is to be made subject, in accordance with the challenged amendment of the TFEU, is intended to ensure that that mechanism will operate in a way that will comply with EU

⁵ Order of the President of the Court of 4 October 2012.

law, including the measures adopted by the EU in the context of the coordination of the Member States' economic policies.

The second condition governing use of the simplified revision procedure, namely that the amendment of the TFEU does not increase the competences conferred on the EU in the Treaties, **is also satisfied**.

The challenged amendment creates no legal basis for the EU to be able to undertake any action which was not previously possible. Even though the ESM makes use of the EU's institutions, in particular the Commission and the ECB, that fact is not, in any event, capable of affecting the validity of Decision 2011/199, which in itself provides only for the establishment of a stability mechanism by the Member States and is silent on any possible role for the EU's institutions in that connection.

The ESM Treaty

In response to the question of whether certain provisions of the TEU and TFEU and the general principle of effective judicial protection preclude the conclusion between the Member States whose currency is the euro of an agreement such as the ESM Treaty, **the Court's answer is in the negative**. More specifically, the provisions concerned are provisions of the TFEU relating to the EU's exclusive competence for monetary policy⁶ and concluding an international agreement⁷, provisions of the TFEU relating to the EU's economic policy⁸, and provisions of the TEU under which Member States have a duty of sincere cooperation⁹ and which provide that each institution of the EU is to act within the limits of the powers conferred on it in the Treaties¹⁰.

As regards **the EU's exclusive competence in the area of monetary policy** for the Member States whose currency is the euro¹¹, the Court reiterates that the objective of that policy is to maintain price stability. The activities of the ESM do not fall within that policy.

It is not the purpose of the ESM to maintain price stability, but rather to meet the financing requirements of ESM Members. To that end, the ESM is not entitled either to set the key interest rates for the euro area or to issue euro currency; the financial assistance which the ESM grants must be entirely funded from paid-in capital or by the issue of financial instruments. Even if the activities of the ESM might influence the rate of inflation, such an influence would constitute only the indirect consequence of the economic policy measures adopted.

As regards **the EU's exclusive competence to conclude an international agreement** which might affect common rules or alter their scope¹², the Court holds that no argument put forward on that point has demonstrated that an agreement such as the ESM would have such effects.

As regards **the EU's competence for the coordination of economic policy**¹³, the Court reiterates that the Member States have the power to conclude between themselves an agreement for the establishment of a stability mechanism such as the ESM Treaty provided that the commitments undertaken by the Member States who are parties to such an agreement are consistent with EU law. The ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism. Further, the strict conditionality to which all support is subject and which can take the form of a macro-economic adjustment programme does not constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with, inter alia, the 'no bail-out' clause of the TFEU¹⁴ and the coordination measures

⁶ Articles 3(1)(c) TFEU and 127 TFEU.

⁷ Article 3(2) TFEU.

⁸ Articles 2(3) TFEU, 119 TFEU to 123 TFEU, 125 TFEU and 126 TFEU.

⁹ Article 4(3) TEU.

¹⁰ Article 13 TEU.

¹¹ Articles 3(1)(c) TFEU and 127 TFEU.

¹² Article 3(2) TFEU.

¹³ Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU.

¹⁴ Article 125 TFEU.

taken by the EU. In addition, the ESM Treaty does not affect the competence of the Council of the EU to issue recommendations¹⁵ to a Member State in which an excessive deficit exists.

In particular, **the competence of the Council to grant EU financial assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control**¹⁶ does not preclude the Member States establishing a stability mechanism such as the ESM, provided however that, in its operation, that mechanism complies with EU law and, in particular, with measures adopted by the EU in the area of coordination of the Member States' economic policies. The ESM Treaty contains provisions¹⁷ which are intended precisely to ensure that any financial assistance granted by the ESM will be consistent with such coordinating measures.

The prohibition on the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the EU and of Member States and from purchasing directly from them their debt instruments¹⁸ is not circumvented by the ESM. That prohibition is addressed specifically to the ECB and the central banks of the Member States. The grant of financial assistance by one Member State or a group of Member States to another Member State, directly or through the ESM, is therefore not subject to that prohibition.

The 'no bail-out' clause¹⁹, which provides that neither the EU nor a Member State are to be liable for the commitments of another Member State or assume those commitments, is not intended to prohibit either the EU or the Member States from granting any form of financial assistance to another Member State. The aim of that provision is to ensure that the Member States follow a sound budgetary policy by ensuring that they remain subject to the logic of the market when they enter into debt. Accordingly, it does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains liable 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. The ESM and the Member States who participate in it are not liable for the commitments of a Member State which receives stability support and do not assume liability within the meaning of the 'no bail-out' clause.

Since the ESM is not in breach of the provisions of the TFEU relating to economic and monetary policy and since it provides guarantees that, in carrying out its tasks, the ESM will comply with EU law, it is also not in breach of the **principle of sincere cooperation**²⁰ pursuant to which the Member States are to refrain from any measure which could jeopardise the attainment of the EU's objectives.

Further, the Court holds that the allocation, by the ESM Treaty, of new tasks to the **Commission**, the **ECB** and the **Court** is compatible with their **powers** as defined in the Treaties²¹. The Court states, inter alia, that the duties conferred on the Commission and ECB within the ESM Treaty do not entail any power to make decisions of their own and that the activities pursued by those two institutions within the ESM Treaty solely commit the ESM. As regards the Court itself, the Court observes that it has jurisdiction in any dispute between Member States which relates to the subject-matter of the Treaties, if that dispute is submitted to it under a special agreement²², and there is no reason why such agreement should not be given in advance with reference to a class of pre-defined disputes.

The Court further holds that **the general principle of effective judicial protection** also does not preclude the ESM. When the Member States establish a stability mechanism such as the ESM,

¹⁵ On the basis of Article 126(7) and (8) TFEU.

¹⁶ Article 122(2) TFEU.

¹⁷ Article 13(3), second subparagraph, and (4) of the ESM Treaty.

¹⁸ Article 123 TFEU.

¹⁹ Article 125 TFEU

²⁰ Article 4(3) TEU.

²¹ See in that regard Article 13 TEU.

²² Article 273 TFEU.

where the TEU and TFEU do not confer any specific competence on the EU to establish such a mechanism, the Member States are not implementing EU law, and accordingly the Charter of Fundamental Rights of the EU, which guarantees that everyone has the right to effective judicial protection²³, is not applicable.

The conclusion and ratification of the ESM before the entry into force of Decision 2011/199

The amendment of the TFEU by Decision 2011/199 merely confirms the existence of a power possessed by the Member States. Since that decision does not confer any new power on the Member States, the right of a Member State to conclude and ratify the ESM Treaty is not subject to the entry into force of Decision 2011/199.

NOTE: A reference for a preliminary ruling allows the Courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national Court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national Courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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²³ Article 47.