

## **Pringle: A Paradigm Shift in the European Union's Monetary Constitution**

By Pieter-Augustijn Van Malleghem\*

### **A. Introduction**

The reference from the Irish Supreme Court seeking a preliminary ruling in the *Pringle* case concerns the compatibility of the Treaty establishing the European Stability Mechanism (hereinafter ESM Treaty or ESMT) with European Union (EU) law.<sup>1</sup> The Irish Supreme Court was concerned with the legal significance of Council Decision 2011/199,<sup>2</sup> which amended the Treaty on the Functioning of the European Union (TFEU)<sup>3</sup> by inserting a third paragraph in Art 136 TFEU. The new Art 136(3) provides that the Member States whose currency is the euro, may establish a mechanism such as the European Stability Mechanism (ESM) so long as that mechanism is only activated when indispensable to safeguarding the stability of the euro area as a whole, and only if the financial assistance is made subject to strict conditionality. But, because Decision 2011/199 has not yet been ratified by all Member States,<sup>4</sup> the TFEU has not yet been amended. The ESMT nevertheless entered into force at the end of September 2012,<sup>5</sup> and the ESMT commenced its operations in December 2012.<sup>6</sup>

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<sup>1</sup> See Reference for a Preliminary Ruling from Supreme Court (Ireland) Made on 3 August 2012—Thomas Pringle v. Government of Ireland, Ireland and the Attorney General, 2012 O.J. (C 303) 18.

<sup>2</sup> European Council Decision 2011/199/EU, 2011 (L 91) 1 (“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”).

<sup>3</sup> Consolidated Version of the Treaty on the Functioning of the European Union, art. 136, Dec. 13, 2007, 2012 O.J. (C 326) 47 [hereinafter TFEU].

<sup>4</sup> See Peter Laca, *Czech President Klaus Refuses to Sign EU Rescue Fund, CTK Says*, BLOOMBERG (Dec. 7, 2012), <http://www.bloomberg.com/news/2012-12-07/czech-president-klaus-refuses-to-sign-eu-rescue-fund-ctk-says.html> (noting Czech President Vaclav Klaus has refused to sign the amendment to the Lisbon Treaty).

<sup>5</sup> See Treaty Establishing the European Stability Mechanism (ESM), Feb. 2, 2012, 2011 O.J. (L 91) 1 [hereinafter ESM Treaty]; see also Ratification Details, Treaty Establishing the European Stability Mechanism, COUNCIL OF THE EUROPEAN UNION, available at <http://www.consilium.europa.eu/policies/agreements/search-the-agreements-database?command=details&lang=en&aid=2012002&doclang=EN> (last visited 1/8/2013).

Furthermore, the Irish Supreme Court sought to ascertain whether the promulgation and ratification of the ESMT was compatible with numerous provisions of European law, including the “no bailout” clause contained in Art 125 TFEU.<sup>7</sup> The European Court of Justice (ECJ) held that the treaty amendment merely confirmed the competence of the Member States to conclude a treaty such as the ESMT, though it sought to ensure the compatibility of that Treaty with EU law through the imposition of strict conditionality.<sup>8</sup> The ECJ also held that the Member States had not otherwise conferred any powers to the Union to establish a mechanism such as the ESM, and hence retained the power to do so themselves.<sup>9</sup> The ECJ further ruled that the ESMT was compatible with EU law, interpreting the “no bailout” clause as allowing grants of financial assistance to Member States in need when the stability of the euro area as a whole is at risk and so long as a grant of financial assistance does not diminish the incentive of the beneficiary state to conduct sound budgetary policies.<sup>10</sup>

The ECJ’s ruling comes amidst the EU’s deepest existential crisis. At the impulse of the financial markets, several members of the euro area faced growing borrowing costs, sometimes nearing unsustainable levels.<sup>11</sup> The threat of a Member State leaving the euro area became greater as currency devaluation appeared to be the only way to give imperiled economies some breathing room. The effects of the eurozone crisis have been reinforced by the still-lingering 2007–2008 financial crisis. The EU’s existential crisis is also, in part, a growing social crisis.<sup>12</sup> The symptoms of this include unemployment figures at record heights (especially for the young), growing social inequality, and real wage cuts. Resentment for austerity measures is tangible in economically troubled eurozone countries. In this context, the significance of the ECJ’s judgment is ambiguous. Has the ECJ endorsed what could be described as the triumph of rational European economic governance over the irrationality of democratic budgetary policies? Or does the *Pringle*

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<sup>6</sup> See *ESM Issues Bonds for the Recap of the Spanish Banking Sector*, EUROPEAN STABILITY MECHANISM, <http://www.esm.europa.eu/press/releases/ESM%20issues%20bonds%20for%20recap%20of%20Spanish%20banking%20sector.htm>.

<sup>7</sup> See TFEU, *supra* note 3, at art. 125(1).

<sup>8</sup> See Case C-370/12, *Pringle v. Ir.*, 2012 E.C.R. I-\_\_\_\_, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=130381&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=274536> [hereinafter *Pringle*] (challenging the legality of the ESM).

<sup>9</sup> See *id.* at para. 168.

<sup>10</sup> See *id.* at paras. 135–36.

<sup>11</sup> See *Timeline: The Unfolding Eurozone Crisis*, BBC NEWS (June 13, 2012), <http://www.bbc.co.uk/news/business-13856580>.

<sup>12</sup> See EUROPEAN COMMISSION, EMPLOYMENT AND SOCIAL DEVELOPMENTS IN EUROPE 2012, available at <http://ec.europa.eu/social/BlobServlet?docId=9604&langId=en>.

judgment mark the moment when European citizens are presented with the bill for the bailout of the financial sector during the 2007–2008 financial crisis?

I begin this note with a description of the facts leading up to the ECJ's judgment (B). Then, I analyze the ECJ's ruling in further detail (C). Next, I consider the relevance of the ECJ's judgment for the constitutional law of the European Union in a narrow (D.I) and in a wide (D.II) sense. The note ends with brief concluding remarks (E).

## B. Facts

The *Pringle* case is a challenge to the institutional framework governing the response—in the form of the ESMT—to the eurozone economic and financial crisis.<sup>13</sup> That institutional framework cannot be understood without reference to previous policy measures. The sovereign debt crisis erupted in April 2010, when it appeared Greece was in dire need of a bailout. In May 2010, alongside the IMF,<sup>14</sup> the eurozone countries agreed to grant Greece a number of bilateral loans. Greece was granted financial assistance equaling €110 billion, conditioned on its adoption of an austerity package.<sup>15</sup> Fears of contamination of the sovereign debt crisis across the eurozone forced European leaders to adopt a European framework to deal with the issue.<sup>16</sup>

As a result, the summit of eurozone countries of the 7th and 8th of May and the ECOFIN Council of the 8th and 9th of May presented a temporary European framework to deal with the eurozone crisis. These temporary measures were based partly on EU law and partly on an intergovernmental agreement; they included a lending capacity of €440 billion.<sup>17</sup> On the one hand, the European Council adopted Regulation No. 407/2010

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<sup>13</sup> See ESM Treaty, *supra* note 5; *Pringle*, *supra* note 8.

<sup>14</sup> See IMF Approves €30 Bln Loan for Greece on Fast Track, INTERNATIONAL MONETARY FUND (May 9, 2010), <http://www.imf.org/external/pubs/ft/survey/so/2010/new050910a.htm> (reporting an approval of a three year loan to Greece as part of a joint effort with the European Union to assist Greece).

<sup>15</sup> See Letter of Intent, Memorandum of Economic and Financial Policies, Technical Memorandum of Understanding, and Memorandum of Understanding on Specific Economic Policy Conditionality from Greece to the Int'l Monetary Fund, European Comm'n, and European Central Bank (Aug. 6, 2010), *available at* <http://www.imf.org/external/np/loi/2010/grc/080610.pdf> (detailing the financial policies Greece plans to implement with the borrowed funds).

<sup>16</sup> See Jean-Victor Louis, *The No-Bailout Clause and Rescue Packages*, 47 COMMON MKT. L. REV. 971, 973 (2010) (discussing the impact of Greece's debt crisis on the Eurozone).

<sup>17</sup> See Press Release, Council of the European Union, Decision of the Representatives of the Governments of the Euro Area Member States Meeting Within the Council of the European Union (May 10, 2010), *available at* <http://register.consilium.europa.eu/pdf/en/10/st09/st09614.en10.pdf>.

establishing a European Financial Stabilization Mechanism (EFSM)<sup>18</sup> with a lending capacity of €60 billion. On the other hand, the eurozone members set up the European Financial Stability Facility (EFSF), a private company under Luxembourg law, with a lending capacity of €440 billion.<sup>19</sup>

The legal framework for these measures has proven to be controversial. Some argued that the “no bailout” clause of Art 125 TFEU prohibited financial aid among eurozone member states.<sup>20</sup> The EFSM was based upon Art 122(2) TFEU, which provided that the Council could grant financial assistance to the Member States in case of a threat of “severe difficulties caused by . . . exceptional circumstances beyond its control.”<sup>21</sup> Doubts were raised about whether Greece’s high public debt should count as an “exceptional circumstance beyond its control.”<sup>22</sup>

The EFSM and EFSF were part of a wider package of regulatory reforms.<sup>23</sup> The Treaty on Stability, Coordination and Governance (Fiscal Compact),<sup>24</sup> which was designed to reinforce the fiscal discipline of the member states, is the most significant for the ESM. Ratification of the Fiscal Compact is a political pre-condition for receiving financial assistance from the ESM.<sup>25</sup> In addition, the European Central Bank (ECB) took several decisions, the legality of which is controversial, in an attempt to reinforce the economic health of the eurozone members. For example, the ECB has repeatedly intervened in the bond markets in an attempt to decrease unsustainably high financing costs for some

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<sup>18</sup> See Council Regulation 407/2010, (2010) O.J. (L 118) 1 (establishing a European financial stabilisation mechanism).

<sup>19</sup> See European Financial Stability Facility, EFSF Framework Agreement, *available at* <http://www.efsf.europa.eu/about/legal-documents/index.htm>; *Approved by All Members*, EUROPEAN FINANCIAL STABILITY FACILITY (Oct. 13, 2011), <http://www.efsf.europa.eu/mediacentre/news/2011/2011-011-efsf-amendments-approved-by-all-member-states.htm> (noting that the lending capacity had been increased to €440 billion).

<sup>20</sup> See Lothar Knopp, *Griechenland-Nothilfe auf dem verfassungsrechtlichen Prüfstand*, 63 NEUE JURISTISCHE WOCHENSCHRIFT 1778, 1779–80 (2010).

<sup>21</sup> See TFEU, *supra* note 3, at art. 122(2).

<sup>22</sup> Knopp, *supra* note 19, at 1779–80.

<sup>23</sup> See *EU Economic Governance*, EUROPEAN COMMISSION [http://ec.europa.eu/economy\\_finance/economic\\_governance/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/index_en.htm) (explaining the EU’s recent economic decisions and the impact of those new policies).

<sup>24</sup> See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Mar. 2, 2012, [http://european-council.europa.eu/media/639235/st00tscg26\\_en12.pdf](http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf) [hereinafter Fiscal Compact].

<sup>25</sup> See ESM Treaty, *supra* note 5, at 4.

eurozone members, most recently through the Outright Monetary Transactions (OMT) programme.<sup>26</sup>

Because of the legal uncertainty surrounding the ESFM and EFSF, the European Council made the political decision in December 2010, to amend the TFEU. It was hoped that this move would lay to rest any controversies surrounding the legality of the ESM.<sup>27</sup> On 25 March 2011, the European Council formally adopted Decision 2011/199, amending Art 136 TFEU.<sup>28</sup> The new third paragraph to Art 136 that would be added by the amendment provides that “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.”<sup>29</sup> It was the first time that the Simplified Revision Procedure (SRP), introduced by the Lisbon Treaty into Art 48(6) of the Treaty on the European Union<sup>30</sup> (TEU), was used.<sup>31</sup> The entry into force of Decision 2011/199, and with it the amendment of the TFEU, is subject to the approval by the Member States in accordance with their constitutional requirements.<sup>32</sup> Currently, the Czech Republic has not yet ratified the Decision due to political objections by President Václav Klaus.<sup>33</sup> This has delayed the Decision’s entry into force, which had originally been planned for 1 of January 2013.

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<sup>26</sup> See Press Release, European Central Bank, Technical Feature of Outright Monetary Transactions (Sept. 6, 2012), [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) (detailing the bank’s program).

<sup>27</sup> See Press Release, European Council, Conclusions of the European Council Meeting Dec. 16–17, 2010, 1 (Jan. 25, 2011), [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/118578.pdf#page=6](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/118578.pdf#page=6).

<sup>28</sup> See *supra* note 2 and accompanying text.

<sup>29</sup> *Id.*

<sup>30</sup> See Consolidated Version of the Treaty on European Union, arts. 48(6), Feb. 7, 1992, 2012 O.J. (C 326) 13, 42 [hereinafter TEU].

<sup>31</sup> The Simplified Revision Procedures allows Member States to amend the Treaty without having to comply with all the requirements of the Ordinary Revision Procedure, such as convening an intergovernmental conference.

<sup>32</sup> See TEU, *supra* note 30, at art. 48(6), para. 2.

<sup>33</sup> See Agreement and Ratification Details, Treaty Establishing the European Stability Mechanism, COUNCIL OF THE EUROPEAN UNION, <http://www.consilium.europa.eu/policies/agreements/search-the-agreements-database?command=details&lang=en&aid=2011030&doclang=EN> (last visited 8 Jan. 2013) (detailing the ratification of the original treaty).

The ESMT was originally concluded on 11 July 2011.<sup>34</sup> The ESMT was later re-negotiated in order to provide more flexibility and the new version was concluded on 2 February 2012.<sup>35</sup> The ESM has a lending capacity of €500 billion, backed up by an authorized capital of €700 billion.<sup>36</sup> The ESMT entered into force on 27 September 2012, two months prior to the ECJ's ruling in *Pringle*.<sup>37</sup>

The ESMT provides for a number of mechanisms of financial assistance to eurozone members with financial difficulties, subject to an overarching policy of strict conditionality<sup>38</sup> to which the Treaty amendment makes reference. These conditions are implemented through a Memorandum of Understanding (MoU) reflecting a macro-economic adjustment programme concluded with the ESM Member concerned.<sup>39</sup> The ESM can grant loans, to eurozone members who have lost access to financial markets either through excessive lending costs or lack of lenders.<sup>40</sup> The Primary Market Support Facility (PMSF) allows the ESM to buy bonds in the primary bond market of the eurozone member either to facilitate that state's return to the financial markets or to increase the efficiency of other ESM financial aid,<sup>41</sup> whereas intervention in the secondary bond markets is designed to help reduce interest rates in the secondary market and to help eurozone members struggling with the refinancing of their banking systems.<sup>42</sup> The ESMT also provides for financial assistance to be used in order to recapitalize the financial institutions of a specific member state.<sup>43</sup> Finally, 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>44</sup> The IMF with which the ESM will work in close cooperation inspired the ESM.<sup>45</sup>

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<sup>34</sup> See *id.*

<sup>35</sup> See ESM Treaty, *supra* note 5 and accompanying text.

<sup>36</sup> See ESM Treaty, *supra* note 5, at art. 41(2) and Annex II.

<sup>37</sup> See Ratification Details, *supra* note 5 and accompanying text.

<sup>38</sup> See ESM Treaty, *supra* note 5, at art. 12.

<sup>39</sup> See *id.* at art. 13(3).

<sup>40</sup> See *id.* at art. 16.

<sup>41</sup> See *id.* at art. 17.

<sup>42</sup> See *id.* at art. 18.

<sup>43</sup> See *id.* at art. 15.

<sup>44</sup> See *id.* at art. 14.

<sup>45</sup> See *id.* at art. 5.

The ESM entrusts existing EU institutions with crucial tasks in the process of granting and supervising financial assistance. The European Commission and the ECB assess the financing needed.<sup>46</sup> They also assess the sustainability of the member state's public debt as well as the corresponding risk of financial stability to the eurozone as a whole.<sup>47</sup> Both of these reviews are undertaken prior to the decision of the Board of Governors leading to a grant of financial aid from the ESM.<sup>48</sup> Subsequent to a decision to grant aid and in liaison with the ECB, the Commission negotiates the MoU with the Member State concerned.<sup>49</sup> Thereafter, the Commission signs the MoU on behalf of the ESM.<sup>50</sup> Furthermore, the ESM and the ECB monitor compliance with the conditionality laid down in the MoU.<sup>51</sup> 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>52</sup>

The ESMT has been the subject of constitutional review in several of the Member States. In Estonia, a constitutional complaint was rejected.<sup>53</sup> The German Constitutional Court subjected the ratification of the treaty to several conditions.<sup>54</sup> A constitutional challenge to the ESMT is still pending in Austria.<sup>55</sup> In Ireland, Thomas Pringle, an independent member of Parliament, introduced a challenge against the ratification of the ESMT on the grounds that it was incompatible with the Irish Constitution and the EU Treaties.<sup>56</sup> Pringle requested a preliminary reference to the European Court of Justice.<sup>57</sup> On 17 July 2012, the Irish High Court ruled that the Treaty was compatible with the Irish Constitution and that the Irish Constitution did not require a referendum prior to the Irish government's

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<sup>46</sup> See *id.* at art. 13(1).

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at art. 13(3).

<sup>50</sup> See *id.* at art. 13(4).

<sup>51</sup> See *id.* at art. 13(7).

<sup>52</sup> See *id.* at art. 37(3).

<sup>53</sup> See Riigikohus [Supreme Court Republic of Estonia], Case No. 3-4-1-6-12, July 12, 2012, available at <http://www.nc.ee/?id=1347>.

<sup>54</sup> See Bundesverfassungsgericht [BverfG - Federal Constitutional Court], Case No. 2 BvR 1390/12, Sept. 12, 2012, 2012 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3145 (Ger.).

<sup>55</sup> See *Constitutional Court: ESM Examination Takes up to 6 Months*, FRIEDL NEWS (July 25, 2012), <http://www.friedlnews.com/article/constitutional-court-esm-examination-takes-up-to-6-months>;

<sup>56</sup> See Pringle, *supra* note 8, at para. 2.

<sup>57</sup> See *id.* at para. 1.

ratification of the ESMT.<sup>58</sup> On appeal of the High Court's decision, the Irish Supreme Court requested a preliminary ruling from the ECJ on 31 July 2012.<sup>59</sup> Given the urgent nature of the subject, the Supreme Court asked the ECJ to apply its accelerated procedure when dealing with the matter. On 19 October 2012, the Supreme Court confirmed the High Court's decision with respect to Irish constitutional law.<sup>60</sup>

Due to the exceptional nature of the financial crisis the ECJ, by order on 4 October 2012, decided to apply the accelerated procedure.<sup>61</sup> The ECJ relied on Art 23(a) of the ECJ Statute<sup>62</sup> and Art 104(a) of the ECJ's (old) Rules of Procedure for this decision.<sup>63,64</sup> In accordance with the ECJ's practice, Advocate General Kokott offered her "views" to the ECJ,<sup>65</sup> rather than issuing an opinion. The exceptional importance of the case also led the ECJ to assign the case to the full Court<sup>66</sup> in accordance with Art. 16 of the ECJ Statute<sup>67</sup> and Art. 60(2) of the (new) ECJ Rules of Procedure.<sup>68</sup> The full court rendered its judgment on 27 November 2012.<sup>69</sup>

<sup>58</sup> See *Pringle v. Ir.*, [2012] IEHC 296, paras. 208–09 (H. Ct.) (Ir.), available at [http://www.courts.ie/\\_80256F2B00356A6B.nsf/0/OCA92DB7C606F3C680257A4B003AA637?Open&Highlight=0,pringle,~language\\_en~](http://www.courts.ie/_80256F2B00356A6B.nsf/0/OCA92DB7C606F3C680257A4B003AA637?Open&Highlight=0,pringle,~language_en~).

<sup>59</sup> See *Pringle v. Ir.*, [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~) (noting the appeal has been sent to the ECJ on July 31, 2012).

<sup>60</sup> See *id.* at paras. 208–09 (affirming the High Court's decision).

<sup>61</sup> See Case C-370/12, Order of the President of the Court in *Pringle v. Ir.*, para. 8 (Oct. 4, 2012), available at [http://curia.europa.eu/juris/document/document\\_print.jsf;jsessionid=9ea7d2dc30db57774ff134e343399983e127354ae11d.e34KaxiLc3qMb40Rch0SaxuKxb0?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=128422&occ=first&dir=&cid=581740](http://curia.europa.eu/juris/document/document_print.jsf;jsessionid=9ea7d2dc30db57774ff134e343399983e127354ae11d.e34KaxiLc3qMb40Rch0SaxuKxb0?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=128422&occ=first&dir=&cid=581740) [hereinafter Order of the President of the Court].

<sup>62</sup> See Protocol (No. 3) on the Statute of the Court of Justice of the European Union, art. 23(a), 2012 O.J. (C 326) 210, 217 [hereinafter Protocol No. 3] (noting that accelerated procedures may be used for a preliminary ruling).

<sup>63</sup> See Rules of Procedure of the Court of Justice, art. 104(a), 2010 O.J. (C 177) 1, 28 (noting the President has the power to decide to apply accelerated procedures).

<sup>64</sup> Interestingly, the ECJ made reference to Art 105(1) of its new Rules of Procedure, which had entered into force during the interval.

<sup>65</sup> See Opinion of Advocate Gen. Kokott, Case C-370/12, *Pringle v. Ir.*, 2012 E.C.R. I-\_\_\_\_.

<sup>66</sup> See Order of the President of the Court, *supra* note 61 and accompanying text.

<sup>67</sup> See Protocol No. 3, *supra* note 62, at art. 16. ("[W]here it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.").

<sup>68</sup> See Rules of Procedure of the Court of Justice, art 60(2), 2012 O.J. (L 265) 20 (detailing when the Court may sit in full court).

<sup>69</sup> See *Pringle*, *supra* note 8, at para. 2.

### C. Reasoning of the Court

#### *I. The Treaty Amendment: Questions 1 and 3*

The amendment of Art 136 TFEU contained in Decision 2011/199 was originally designed to avoid any legal uncertainty as to the compatibility of the ESMT with EU law. Paradoxically, the anticipated entry into force of the ESMT raised the question whether that amendment was the legal basis for the ESM. If so, then the ratification of the ESMT prior to the entry into force of the Decision would have been incompatible with EU law. With its first reference to the ECJ the Irish Supreme Court inquired whether Council Decision 2011/199 was valid, having regard to the procedural requirements of the new SRP as well as its content. With its third reference to the ECJ, the Supreme Court wished to know whether the ESM Treaty could validly be ratified prior to the entry into force of the Decision amending the TFEU.

#### *1. Jurisdiction and Admissibility of the First Question*

The European Council, the European Commission and no fewer than 10 member states argued that the ECJ had no jurisdiction to answer the first question as it concerned an amendment to the Treaty and, hence, the validity of a provision of primary law. The ECJ held that, under Art 267 TFEU, it had jurisdiction “to give preliminary rulings concerning . . . the validity . . . of acts of the institutions.”<sup>70</sup> With this reasoning the ECJ distinguished Decision 2011/199—which would amend the Treaty—from the future Art 136(3) that would result from this amendment and would have the status of primary law. Furthermore, the ECJ held that its task of ensuring that, in the interpretation and application of the Treaties, the law is upheld required it to ensure compliance with the conditions of the SRP laid down in Art 48(6) TEU.<sup>71</sup> The ECJ explained that decisions to amend the TFEU under the SRP must comply with the stipulated procedural requirements, could amend only the provisions of Part Three of the TFEU and may not affect any other provisions of the Treaties, and may not increase the powers conferred on the Union.<sup>72</sup>

Ireland’s challenge to the admissibility of the first question, on the grounds that it ought to have been brought by way of direct action, was dismissed. The ECJ reiterated its settled case-law<sup>73</sup>, which holds that a preliminary reference concerning the validity of an act is only barred when the party challenging that validity had the right to bring a direct action

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<sup>70</sup> See *id.* at para. 31.

<sup>71</sup> See *id.* at para. 35.

<sup>72</sup> See *id.* at para. 36.

<sup>73</sup> Case C-188/92 *TWD Textilwerke Deggendorf*, 1994 E.C.R. 833, paras. 18 and 23, Case C-550/09 *E and F*, 2010 E.C.R. 6213, paras. 46 and 48, Case C-494/09 *Bolton Alimentari*, 2011 E.C.R. 647, paras. 22 and 23.

under Art 263 TFEU.<sup>74</sup> Because it was doubtful whether the applicant had standing under that provision, the first question was deemed admissible.<sup>75</sup>

## 2. *Validity of the Decision*

The ECJ first analyzed whether the amendment only concerned Part Three of the TFEU. In its analysis, the ECJ went beyond a formal assessment of the articles amended by the Decision in its effort to determine whether other provisions of the Treaty were substantively affected, thereby encroaching upon the Union's competences concerning monetary and economic policy.<sup>76</sup>

First, the ECJ held that Decision 2011/199 did not affect the Union's exclusive competence in matters of monetary policy, which is laid down in Art 3(1)(c) TFEU.<sup>77</sup> Given that the Treaty does not define monetary policy, the Court's reasoning was based upon the objective of the Union's monetary competences, namely price stability.<sup>78</sup> In the ECJ's view, the ESM's objective of safeguarding the stability of the euro area must be distinguished from the objective of maintaining price stability.<sup>79</sup> Financial assistance also does not fall within the scope of monetary policy.<sup>80</sup> The ECJ further stressed the relationship between the Six Pack and the ESMT, which was as envisaged in the Decision.<sup>81</sup> The Court concluded, on the basis of these factors, that the establishment of the ESM falls within the scope of economic rather than monetary policy.<sup>82</sup> The fact that the European Council voluntarily requested the ECB to issue an opinion on the Decision, which is a procedural requirement for institutional change in the monetary area, could not alter that conclusion.<sup>83</sup>

Second, the ECJ held that the Decision did not encroach upon the Union's competences in matters concerning economic policy.<sup>84</sup> Neither Art 122(2) nor Art 143(2) TFEU constituted

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<sup>74</sup> See *id.* at para. 41.

<sup>75</sup> See *id.* at para. 42.

<sup>76</sup> See *id.* at paras. 46–47.

<sup>77</sup> See *id.* at para. 63.

<sup>78</sup> See *id.* at paras. 53–54.

<sup>79</sup> See *id.* at para. 56.

<sup>80</sup> See *id.* at para. 57.

<sup>81</sup> See *id.* at para. 58.

<sup>82</sup> See *id.* at para. 60.

<sup>83</sup> See *id.* at para. 61.

<sup>84</sup> See *id.* at para. 68.

an appropriate legal basis for the establishment of the ESM.<sup>85</sup> The ECJ did not exclude the possibility of doing so on the basis of Art 352 TFEU, but the Union was not under an obligation to do so.<sup>86</sup>

The ECJ concluded that, because the Decision did not affect the Union's competences, the Member States were free in principle to conclude the ESMT but could not disregard their duties under Union law when doing so. The Court observed that compliance with Union law was ensured because Art 136(3) made the grant of financial assistance through the ESM dependent upon the observance of strict conditionality.<sup>87</sup>

Then, the ECJ examined whether the Decision to amend the TFEU could increase the competences conferred upon the Union. The Court held that that was not the case because Art 136(3) was not the legal basis for the establishment of the ESM.<sup>88</sup> (Given that no specific competence had been conferred upon the Union, the Member States had retained their competence to establish the ESM.<sup>89</sup>) Thus, the amendment was merely designed to confirm that the Member States were entitled to conclude the ESMT and to ensure compliance with Union law when doing so.<sup>90</sup> The ECJ, therefore, found that the conditions for the validity of the Decision had been fulfilled.

With its third reference the Irish Supreme Court wished to be informed whether the ESMT could validly be concluded and ratified prior to the entry into force of the amendment to the TFEU. In its reply, the ECJ reiterated that the amendment merely confirmed the power of the Member States to conclude the ESMT and that the conclusion and ratification of the ESMT did not depend on the entry into force of the amendment.<sup>91</sup>

## *II. Compatibility of the ESMT with the EU Treaties*

With its second reference the Irish Supreme Court asked the ECJ to interpret a number of provisions of the EU Treaties in order to ensure that they allowed for the conclusion and ratification of the ESMT. The Court had jurisdiction to answer that question because it concerned the interpretation of the EU Treaties and not, as Spain argued, the

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<sup>85</sup> See *id.* at paras. 65–66.

<sup>86</sup> See *id.* at para. 67.

<sup>87</sup> See *id.* at paras. 68–69.

<sup>88</sup> See *id.* at para. 73.

<sup>89</sup> See *id.* at para. 168.

<sup>90</sup> See *id.* at para. 72.

<sup>91</sup> See *id.* at paras. 184–85.

interpretation of the ESMT.<sup>92</sup> But the ECJ deemed the second question inadmissible in so far as it concerned the interpretation of Arts 2 and 3 TEU and the principle of legal certainty. The Court observed that the Irish Supreme Court had provided insufficient information to allow the Member States and other interested parties to provide their observations to the ECJ.<sup>93</sup>

### 1. *Exclusive Competence*

The ECJ's analysis as to the exclusive competences of the Union concerned both monetary policy (Art 3(1)(c) TFEU and Art 127 TFEU) and the conclusion of international agreements that may affect common rules or alter their scope (Art 3(2) TFEU). As regards the former, the Court reiterated that the ESM did not concern monetary policy, as its purpose of safeguarding the financial stability of the eurozone had to be distinguished from the objective of safeguarding price stability.<sup>94</sup>

The ECJ further held that the ESMT did not affect common rules of the Treaty nor did it alter their scope. As the EFSF was not established within the Union framework, the ESM's relation with the EFSF could not affect or alter such rules.<sup>95</sup> The ESM did not alter the Union's power to establish a mechanism for *ad hoc* financial assistance such as the EFSM, as that provision did not confer a power to establish a permanent rescue mechanism.<sup>96</sup>

### 2. *Economic Policy*

In the first place, the Irish Court was seeking to ascertain whether the ESM Treaty encroached upon the competences of the Union concerning the coordination of economic policy.<sup>97</sup> The ECJ held that the strict conditionality imposed on beneficiary states are not instruments for the coordination of economic policy, although consistency with such coordination measures is ensured.<sup>98</sup> Next, the Irish Court wanted to know whether the ESMT encroached upon the competence conferred to the Union in Art 122 TFEU. That was not the case, as Art 122(1) TFEU is not concerned with the possibility of severe financing

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<sup>92</sup> See *id.* at para. 79.

<sup>93</sup> See *id.* at paras. 85–87.

<sup>94</sup> See *id.* at paras. 95–96.

<sup>95</sup> See *id.* at para. 102.

<sup>96</sup> See *id.* at para. 105.

<sup>97</sup> The CoJ did not rule on the doctrinal debate whether economic policy is a shared competence or not. Advocate General Kokott took the view that was not necessary in order to reply to the first question (View, para. 93).

<sup>98</sup> See *Pringle*, *supra* note 8, at paras. 110–12.

problems and Art 122(2) is limited to granting financial aid by the Union itself, rather than its member states.

The Irish Supreme Court also asked whether the ESM was intended to circumvent the prohibition on monetary financing of the Member States that is laid down in Art 123 TFEU. The ECJ held that that was not the case because that prohibition is addressed to the ECB and the central banks of the member states, rather than the member states themselves or the ESM.<sup>99</sup> The Court also noted that there was “no basis for the view that the funds provided by the ESM . . . might be derived from financial instruments prohibited by Article 123(1) TFEU.”<sup>100</sup>

The compatibility of the ESMT with the so-called “no bailout” clause of Art 125 TFEU seemed the most daunting obstacle for the ESMT. The ECJ held that the scope of the “no bailout” clause was limited to the liability for, or assumption of, the commitments of other Member States. The Court concluded that the clause did not prohibit other forms of financial assistance. That view was supported by a systematic interpretation of the Treaty, as the wording used in Art 123 TFEU was stricter than that in Art 125 TFEU and as it was not apparent from Art 122 that that article constituted an exception to a general prohibition on bailouts.<sup>101</sup> A teleological reading of Art 125 TFEU then allowed the ECJ to determine which forms of financial assistance were compatible with the Treaty.<sup>102</sup> Drawing upon preparatory works to the Maastricht Treaty, the ECJ concluded that the Treaty merely prohibited financial aid that reduces the incentive of a Member State to conduct sound budgetary policy.<sup>103</sup> The financial assistance provided by the ESM was deemed not to reduce that incentive and was, therefore, declared compatible with the Treaty because all stability support provided by the ESM is subject to strict conditionality and because such support will only be granted when indispensable to safeguard the stability of the euro area as a whole.<sup>104</sup> Granting a loan to or buying bonds of a beneficiary state on the primary markets does not mean that the ESM assumes the debt of a Member State. The Court justified this conclusion with the reasoning that these actions, although resolving debt problems for the beneficiary state, have the effect of creating new debt for that state.<sup>105</sup> Similarly, the Court concluded that buying a Member State’s bonds on the secondary bond market would not make the ESM responsible for the debt of a Member

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<sup>99</sup> *See id.* at para. 125–26.

<sup>100</sup> *Id.* at para. 127.

<sup>101</sup> *See id.* at paras. 131–32.

<sup>102</sup> *See id.* at para. 133.

<sup>103</sup> *See id.* at paras. 136–37.

<sup>104</sup> *See id.* at paras. 142–43.

<sup>105</sup> *See id.* at para. 139–40.

State with respect to a specific creditor.<sup>106</sup> Finally, the Court explained that, when ESM Members are called upon to pay additional capital as a result of the failure of an ESM Member to meet its obligation, these increased responsibilities do not constitute the assumption of the debt of another Member State because the defaulting Member State remains responsible to pay its own capital.<sup>107</sup> On the basis of this reasoning, the ECJ ruled that the provisions of the ESMT were not in breach of EU law.

### 3. Principle of Sincere Co-operation

The ECJ held that the ESMT also did not run afoul of the principle of sincere co-operation laid down in Art 4(3) TEU and that such concerns did not preclude the conclusion or ratification of the ESMT. The Court noted that the ESMT ensured compliance with Union law.<sup>108</sup>

### 4. Conferral of Tasks upon Union Institutions

The Irish Supreme Court also inquired whether the role the ESMT conferred upon the ECB, the European Commission, and the Court of Justice of the European Union was compatible with the Treaties. First, the ECJ analyzed the tasks allocated to the ECB and the Commission. It held that the Member States were entitled, in areas not falling within the exclusive competence of the Union, to confer tasks on the institutions, provided that the new competences did not alter the essential character of their powers under the EU Treaties. In reaching this conclusion the Court relied on settled case-law going back to *Bangladesh*.<sup>109</sup> The Court found that the powers conferred upon the ECB and the Commission by the ESMT were in line with the authority already conferred upon them by the EU Treaties.<sup>110</sup> The fact that the *Bangladesh* case-law predated the rules on enhanced co-operation introduced by the Treaty of Amsterdam, the Court explained, did not imply that the Member States had to resort to that mechanism if they wanted to make use of Union institutions in the framework of the ESMT. The rules on enhanced co-operation could only apply where the Union would have the powers to act in that domain, which is not the case for the establishment of a permanent stability mechanism such as the ESM.<sup>111</sup>

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<sup>106</sup> See *id.* at para. 141.

<sup>107</sup> See *id.* at para. 145.

<sup>108</sup> See *id.* at para. 151.

<sup>109</sup> See *id.* at para. 158 (referring to Joined Cases C-181/91 and C-248/91, *Parliament v. Council & Comm'n*, 1993 E.C.R. 3685; Case C-316/91, *Parliament v. Council*, 1994 E.C.R. 0625; Opinion 1/92, 1992 E.C.R. 2821; Opinion 1/00, 2002 E.C.R. 3493; Opinion 1/09, 2011 E.C.R. \_\_\_\_).

<sup>110</sup> See *Pringle*, *supra* note 8, at para. 159.

<sup>111</sup> See *id.* at para. 168.

Finally, the ECJ held that its authority under Art 37(3) ESMT to resolve disputes between the ESM and Member States (as well as between Member States) in matters concerning the interpretation or application of the ESMT was compatible with Art 273 TFEU. The Court carefully scrutinized Art 37(3) ESMT to determine whether the conditions Art 273 TFEU established for its jurisdiction had been satisfied, including: that disputes be submitted pursuant to a special agreement; that disputes be related to the subject-matter of the Treaties; and that the dispute be between the Member States. First, the ECJ found there to be no objection to the fact that agreement to refer the dispute to the CoJ is concluded prior to the emergence of a dispute.<sup>112</sup> Second, the ECJ held that such a dispute would relate to the subject-matter of the Treaties even though Art 37 ESMT only refers to disputes arising under the ESMT. This was so, explained the Court, because such a dispute would also be “likely” to concern the interpretation of EU law.<sup>113</sup> Finally, the ECJ found that such a dispute would be a dispute between the Member States. Art 37 ESMT refers to disputes between the ESM and an ESM Member, or between ESM Members, but the Court found that the condition of Art 273 TFEU was nevertheless fulfilled given that all ESM Members are Member States of the EU. Therefore, the tasks conferred by the ESMT to Union institutions were deemed compatible with Union law.

##### 5. *Effective Judicial Protection*

Finally, the Irish Court sought the ECJ’s opinion on whether the ESMT constituted a violation of the right to effective judicial protection under the Charter of Fundamental Rights (CFR). This was a concern because the establishment of the ESM outside the EU legal order might be seen as placing the ESM beyond the duties imposed by the CFR. As the Union did not have a specific competence to establish the ESM, the ECJ held the ESM Members were not implementing Union law when they established the ESM and that they were, therefore, acting outside of the scope of the CFR.<sup>114</sup> Hence, the principle of effective judicial protection could not preclude the Member States from concluding and ratifying the ESMT. As a result, none of the grounds examined by the ECJ could prevent the Member States from establishing a mechanism such as the ESM.

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<sup>112</sup> *See id.* at para. 172.

<sup>113</sup> *See id.* at para. 174.

<sup>114</sup> *See id.* at paras. 179–80.

## D. Comments

The *Pringle* case raises a number of issues of EU constitutional law. First, a number of issues regarding constitutional law in the strict sense of the term are analyzed. Then, the implications of the judgment on the constitution of the Union in a wider sense will be examined.

### I. Constitutional Implications in the Strict Sense

#### 1. The Role of the Court of Justice in the Simplified Revision Procedure

In *Pringle* the ECJ laid down the criteria according to which Treaty amendments under the SRP are to be reviewed. It was the first time the Court heard arguments as to the validity of a Decision taken by the European Council and, *a fortiori*, a Decision to amend the Treaties pursuant to the SRP authority granted the Council by the Treaty of Lisbon. The criteria are both procedural and substantive. The procedural requirements of Art 48(6) require: (1) that a proposal for revision must be submitted to the European Council by the Government of a Member State, the European Commission, or the European Parliament; (2) that the Decision of the European Council be adopted unanimously; (3) that the Decision does not enter into force prior to approval by the Member States in accordance with their constitutional requirements; and (4) that consultation with the European Parliament and the European Commission is always mandatory, but consultation with the ECB is only required when the amendments concerns changes in the monetary area.

The Court noted two substantive requirements for implementation of the SRP. First, the amendments may not increase the powers conferred on the Union. Second, the amendments may implicate only the provisions of Part Three of the TFEU. The ECJ's test under the second of these criteria goes beyond a formal assessment but extends to an assessment of whether the amendment affects the substance of provisions outside Part Three of the TFEU.<sup>115</sup> The Court explained that, in the case of Decision 2011/199, its broader assessment under the second of these criteria would not be cut short merely because the European Council voluntarily consulted with the ECB. This courtesy was all the more pronounced by the fact that the Council did not believe that the amendment concerned changes in the monetary area. Still, the Court resolved to pursue its broader assessment of the substantive effects of the amendment beyond Part Three of the TFEU.<sup>116</sup>

This was the first time the ECJ had reviewed the validity of Treaty amendments. Prior to the introduction of the SRP, it was settled case-law that the Court did not have the power

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<sup>115</sup> See *id.* at paras. 47–67.

<sup>116</sup> See *id.* at para. 61.

to review revision Treaties.<sup>117</sup> That reasoning was based upon the ECJ's lack of competence to review Treaties under Art 267 TFEU. The Court's *ratio decidendi* on this point appears sound given that, under the SRP, an amendment results from an act of an institution of the Union (which the ECJ has the power to review under Art 267 TFEU) and not from an amending treaty. Furthermore, the Court's ruling appears to be in line with its consistent policing of (what is now) Art 48 TEU since *Defrenne*. Those efforts sought to ensure that the Member States do not circumvent their obligation under EU law to use the amendment procedure laid down in that article.<sup>118</sup>

## 2. Side-stepping the EU Legal Framework through International Agreements

The ESMT raises the question of the relationship between EU law and international agreements concluded outside of the EU law legal framework. The ECJ made it clear that no power was conferred upon the Union to establish a mechanism such as the ESM.<sup>119</sup> The Court confirmed its settled case-law holding that, although the Member States had retained the residuary competence to conclude the ESMT, "those Member States may not disregard their duty to comply with European Union law when exercising their competences in that area."<sup>120</sup> In Hohfeldian terms, the Member States' duties to comply with Union law do not depend on the existence of a correlative power conferred upon the Union.<sup>121</sup> When exercising such competences, the Member States remain bound by their duty of sincere co-operation and by existing primary and secondary law.<sup>122</sup> The Court thereby confirms existing case law concerning residual competences on matters such as taxation,<sup>123</sup> national legislation governing a person's name,<sup>124</sup> as well as the conclusion of international treaties.<sup>125</sup> Whether EU law will also offer individuals protection appears far

<sup>117</sup> See Case C-253/94, *Roujansky v. Council*, 1995 E.C.R. 0007, para. 11; see also Bruno de Witte, *International Law as a Tool*, 5 EUR. CONST. L. REV. 265, 270 (2009).

<sup>118</sup> See Case 43/75, *Defrenne v. Société anonyme bege de vaigation aérienne Sabena*, 1976 E.C.R. 455, para. 58, Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1996 E.C.R. 1759, para. 35.

<sup>119</sup> See *Pringle*, *supra* note 8, at para. 168.

<sup>120</sup> *Id.* at para. 69; see also *id.* at paras. 72, 151.

<sup>121</sup> Alan Dashwood, *The Limits of European Community Powers*, 21 EUR. L. REV. 113, 114 (1996).

<sup>122</sup> See de Witte, *supra* note 117, at 275; see also KOEN LENAERTS & PIET VAN NUFFEL, *EUROPEAN UNION LAW* 929 (Robert Bray & Nathen Cambien eds., 3rd ed. 2011) (noting that to the extent such agreements are concluded, they "undoubtedly give shape to the Union legal order in a broader sense").

<sup>123</sup> See Case C-513/04, *Kerckhaert v. Belg.*, 2006 E.C.R. 967, para. 15.

<sup>124</sup> See Case C-148/02, *Avello v. Belg.*, 2003 E.C.R. 11613, para. 25.

<sup>125</sup> See Case C-55/00, *Gottardo v. INPS*, 2002 E.C.R. 413, para. 32; Case C-307/97, *Compagnie de Saint Gobain v. Finanzamt Aachen-Innenstadt*, 1999 E.C.R. 6161, para. 57–58.

less clear. It is questionable whether an individual's right to effective judicial protection will be safeguarded, given the Court's holding that the act of establishing the ESM falls outside the scope of the Charter.<sup>126</sup> The status of decisions taken by the ESM, such as the MoUs which could affect individuals' rights under the Charter, is thereby rendered uncertain.

The ambiguity of the relationship between the ESMT and EU law also came to the fore in the ECJ's analysis of the amendment to Art 136 TFEU. On the one hand, the Court repeatedly affirmed that the future Art 136(3) TFEU is not the legal basis for the Member States' authority to conclude the ESMT but merely confirms that concluding the treaty fell in their residual competence.<sup>127</sup> On these terms Art 136 appears superfluous. That is surprising given that the Treaty was amended partly out of fear that, if left unchanged, it precluded the Member States from concluding an agreement such as the ESM.<sup>128</sup> On the other hand, the Court implied that the amendment is significant to the extent that it "ensure[s] that that mechanism will operate in a way that will comply with European Union law."<sup>129</sup>

The position of the ESMT with regard to Union law is left ambivalent. Although Member States are required to comply with Union law when establishing a mechanism such as the ESM, individuals might not be able to invoke Union law against measures designed by EU institutions and adopted by the Member States in their capacity as ESM Members. On the one hand, the implementation of MoUs by states that are recipients of ESM stability support seems to fall outside the scope of Union law as the MoU itself is negotiated by the ESM, which is not an institution of the Union. This reasoning is problematic given the central involvement of the ECB and the Commission in the drafting of these documents. On the other hand, the Court assimilated the ESM with the Member States of the Union for the purpose of the interpretation of Art 273 TFEU.<sup>130</sup> In addition, MoU's have to be consistent with measures of economic policy coordination,<sup>131</sup> which do fall within the scope of Union law. A pending request for a preliminary ruling on Portuguese national law implementing the MoU concluded with Portugal, as a condition on Portugal's receipt of

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<sup>126</sup> See *Pringle*, *supra* note 8, at para. 180.

<sup>127</sup> See *id.* at paras. 68, 72, 109, 184.

<sup>128</sup> See Bruno de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, SIEPS—SWEDISH INSTITUTE FOR EUROPEAN POLICY STUDIES 6 (2011), available at [http://www.sieps.se/sites/default/files/2011\\_6epa.pdf](http://www.sieps.se/sites/default/files/2011_6epa.pdf).

<sup>129</sup> *Pringle*, *supra* note 8, at para. 69; see also *id.* at paras. 72, 111, 143.

<sup>130</sup> See *id.* at para. 175.

<sup>131</sup> See ESM Treaty, *supra* note 5, at art. 13(3).

financial assistance from the EFSM and EFSF, will hopefully settle that question.<sup>132</sup> If the Court were to refuse to assess the compatibility of these measures with the Charter, that would appear problematic in the light of the Court's commitment to the rule of law.<sup>133</sup>

### 3. Implications for Monetary Policy

The *Pringle* judgment also interprets the exact meaning of monetary policy and the prohibition of debt monetization contained in Art 123 TFEU. In its answer to the first question, the ECJ refrained from defining monetary policy and based its reasoning on the objectives set forth in the Treaty.<sup>134</sup> The ECJ unambiguously confirmed the "supremacy of price stability" as the predominant objective of the Union's monetary policy.<sup>135</sup>

The Court's judgment in *Pringle* will be closely scrutinized for its implications on measures to counter the sovereign debt crisis involving the ECB. The ECJ was not asked to rule on any of these measures, leaving the legal community to speculate on their legality. Nevertheless, the Court's interpretation of Art 123 TFEU might give some clues. The Court's interpretation does not give any decisive answer concerning the legality of the ECB's OMT programme, as its reasoning does not consider the distinction between primary and secondary bond markets. A complaint concerning the legality of that practice is currently pending before the German Constitutional Court.<sup>136</sup> The ECJ's interpretation of Art 123 TFEU also leaves the legality of a possible future issuance of a banking license to the ESM uncertain. A banking license would allow the ESM to obtain funds directly from the ECB. On the one hand, the Court suggested that the ESMT merely concerns financing by one or more ESM Members to another Member,<sup>137</sup> even though the ESM was designed to be able to borrow on financial markets.<sup>138</sup> That line of reasoning could indicate that there is no legal objection to the grant of a banking license to the ESM. On the other hand, the ECJ stressed that there is currently no reason to believe that the funds provided to the

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<sup>132</sup> See Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins v. Fidelidade Mundial*, 2012 E.C.R. I-\_\_\_\_\_, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:209:0005:03:EN:HTML>.

<sup>133</sup> See Case 294/83, *Les Verts v. Eur. Parliament*, 1986 E.C.R. 1339, para. 23; Case C-402/05 P & C-415/05 P, *Kadi & Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 E.C.R. 6351, para. 281.

<sup>134</sup> See *Pringle*, *supra* note 8, at para. 53–54.

<sup>135</sup> See Matthias J. Herdegen, *Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom*, 35 COMMON MKT. L. REV. 9, 15 (1998).

<sup>136</sup> See Press Release, *Bundesverfassungsgericht* (German Federal Constitutional Court), Date for Sentencing in Terms of "ESM/ Fiscal Pact" 12 September 2012 Remains (Sept. 11, 2012), available at <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-065a.html>.

<sup>137</sup> See *Pringle*, *supra* note 8, at paras. 125–26.

<sup>138</sup> See ESM Treaty, *supra* note 5, at art. 21.

ESM are obtained in circumvention of Art 123 TFEU.<sup>139</sup> The latter observation suggests a more pragmatic test, pursuant to which the Court would look at the source of the funds obtained by the ESM. On the whole, the Court's *obiter dicta* do not allow inferring a conclusion on the legality of the issuance of a banking license to the ESM under Art 123 TFEU either.<sup>140</sup>

#### 4. No Bailout: What's in a Name?

The ruling in the *Pringle* judgment is decisive in resolving the ambiguities surrounding the "no bailout" clause contained in Art 125 TFEU. Multiple interpretations of that clause were possible. An expansive interpretation of that clause might look at the outcome of the grant of financial aid, that is, in the absence of the financial aid, the recipient country would not have been able to repay its outstanding debt. A narrower reading of that provision could look at incentives instead, namely, does the receipt of financial aid decrease the recipient country's incentive to pursue sound monetary policy? In *Pringle*, the Court opted for the latter interpretation. That decision indicates a shift in Europe's economic and monetary constitution.

The origins of the "no bailout" clause can be traced back to the *Delors Report on Economic and Monetary Union* of 1989.<sup>141</sup> That report identified the need for macro-economic policy coordination in order to ensure that monetary union would be viable. If the ECB was to be able to conduct monetary policy at a European level, then that presupposed the conduct of sound fiscal policies by the member states of the monetary union. The budgetary constraints imposed by the financial markets were considered to be either "too slow and weak or too sudden and disruptive."<sup>142</sup> Hence, the monetary union would have to legally require sound fiscal policy from the member states. Furthermore, the interdependence between members of a monetary union implied that one member's sovereign debt crisis would have spill-over effects on the economies of other members of the union that, in turn, would create a perverse incentive for the members of the monetary union to take the risk of conducting unsustainable fiscal policies. This is what is known as the moral hazard problem.

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<sup>139</sup> See *Pringle*, *supra* note 8, at para. 127.

<sup>140</sup> In its Opinion on Decision 2011/199, the ECB indicated it did not believe such a bank license to be compatible with Art 123 TFEU or Art 18 of the ECB Statute. See Opinion of the European Central Bank on a Draft European Council Decision Amending Article 136 of the Treaty on the Functioning of the European Union with Regard to a Stability Mechanism for Member States Whose Currency is the Euro, 2011 O.J. (C 140) 8, recital 9.

<sup>141</sup> See COMM. FOR THE STUDY OF ECONOMIC AND MONETARY UNION, REPORT ON ECONOMIC AND MONETARY UNION IN THE EUROPEAN COMMUNITY 20 (1989), available at [http://aei.pitt.edu/1007/1/monetary\\_delors.pdf](http://aei.pitt.edu/1007/1/monetary_delors.pdf).

<sup>142</sup> *Id.*

The monetary constitution concluded by the Member States at the time of the Maastricht Treaty focused unilaterally on the prevention of such a crisis. Through the “no bailout” clause the Member States were thought to have irrevocably committed themselves to not helping other members of the monetary union, thereby reinforcing the fiscal discipline of all of its members. That prohibition was at the core of the design of the monetary constitution implemented in the Maastricht Treaty.<sup>143</sup> It was further complemented by the supervision of the fiscal policies of the member states of the monetary union through the excessive deficit procedure and<sup>144</sup> later, the Stability and Growth Pact.<sup>145</sup>

But the supposed rigidity of the fiscal constraints imposed by the EU Treaties progressively eroded. By 2003 Germany and France had exceeded the imposed 3% deficit limit.<sup>146</sup> On an initiative of the Commission, the Council issued recommendations calling on both states to lower their deficits.<sup>147</sup> When that objective was not met, the Council merely adopted a decision to “hold the Excessive Deficit Procedure in abeyance for the time being.”<sup>148</sup> This meant the “(near) death” of the Stability and Growth Pact.<sup>149</sup> With the sovereign debt crisis of 2010, it was the “no bailout” clause itself that came under threat. The European monetary constitution has gone through an existential crisis. Should the “no bailout” rule be strictly observed leading to the likely implosion of the euro and the resulting dire economic consequences - *dura lex, sed lex*? Or, in light of the exceptional circumstances, should the bailout prohibition of Art 125 TFEU be disregarded in order to save the EU’s most prestigious symbol, the euro - a Schmittian *Ausnahmezustand*? Economists had long predicted this dilemma, arguing that a strict prohibition of bailouts was not credible and would in all likelihood be set aside in times of crisis.<sup>150</sup>

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<sup>143</sup> Kenneth Dyson, *Maastricht Plus: Managing the Logic of Inherent Imperfections*, 34 J. EUR. INTEGRATION 791, 803 (2012).

<sup>144</sup> See TFEU, *supra* note 3, at art. 126.

<sup>145</sup> The Stability and Growth Pact consists of Resolution of the European Council on the Stability and Growth Pact, 1997 O.J. (C 236) 1 and Council Regulation No. 1466/97, 1997 O.J. (L 209) 1 (as amended by Council Regulation No. 1055/2005, 2005 O.J. (L 174) 1) and Council Regulation (EC) No. 1467/97, 1997 O.J. (L 209) 6 (as amended by Council Regulation No. 1056/2005, 2005 O.J. (L 174) 5).

<sup>146</sup> See Council Decision 2003/89/EC, 2003 O.J. (L 34) 16; Council Decision 2003/487/EC, 2003 O.J. (L 165) 29.

<sup>147</sup> See Case C-27/04, *Comm’n v. Council*, 2004 E.C.R. 6649, paras. 7–8.

<sup>148</sup> Press Release, European Council, Minutes of the November 25th 2003 Meeting, available at [http://europa.eu/rapid/press-release\\_PRES-03-320\\_en.pdf](http://europa.eu/rapid/press-release_PRES-03-320_en.pdf).

<sup>149</sup> Alberto Alesina & Roberto Perotti, *The European Union: A Politically Incorrect View*, 18 J. ECON. PERSP. 27, 43 (2004).

<sup>150</sup> See Timothy Lane, *Market Discipline* 3, 19 (IMF Working Paper 92/42), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=884774](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=884774).

The conclusion of the ESMT entails the shift from a monetary constitution focusing solely on the prevention of fiscal crises to a monetary constitution that provides for both crisis prevention and crisis management. Economic reality forced political leaders to complement the Maastricht Treaty's one-sided focus on crisis prevention (secured through the "no bailout" rule and the excessive deficit procedure) with a permanent mechanism for crisis management. A political solution was found in the balance between the granting of financial assistance to member states on the verge of bankruptcy and the reinforcement of control over the fiscal policies of the member states.<sup>151</sup> Whereas the former became possible with the ESMT, the latter was assured through the Fiscal Compact, which further specifies the limits within which national budgetary policy will be possible and which is to be implemented in (preferably constitutional rules of) national law.<sup>152</sup>

The ECJ was able to accommodate this shift in the monetary constitution through the semantic ambiguity of the "no bailout" clause. Though the clause is universally known under that name, its literal wording merely prohibits the Union or Member States from becoming "liable for" or to "assuming" the commitments of other Member States. Based upon a teleological reading of that article the Court concluded that the provision only prohibits bailouts that diminish "the incentive of the recipient Member State to conduct a sound budgetary policy."<sup>153</sup> Hence, the "no bailout" clause—do not let the name fool you—allows bailouts when implemented in conjunction with strict conditionality. The Court made numerous references<sup>154</sup> to that concept, considering it the condition for the compatibility of the ESMT with Union law.<sup>155</sup> In *Pringle* the Court elegantly interpreted the "no bailout" clause to allow a shift from crisis prevention to crisis management in the EU monetary constitution. In doing so, it constitutionalized the requirement that bailouts be accompanied by strict conditionality.

##### 5. Use of Union Institutions

The *Pringle* ruling also lays down the criteria under which Member States may entrust tasks to the Union institutions when operating outside the Union framework. The issues concerned the status of the *Bangladesh* case law after the introduction of Enhanced Cooperation in the Treaty of Amsterdam and the interpretation of Art 273 TFEU.

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<sup>151</sup> See Dyson, *supra* note 143, at 797; see also ESM Treaty, *supra* note 5, at recital 5.

<sup>152</sup> See Fiscal Compact, *supra* note 24, at art. 3.

<sup>153</sup> Case *Pringle*, *supra* note 8, at para. 136.

<sup>154</sup> See *id.* at paras. 69, 72, 111, 142.

<sup>155</sup> See *id.* at para. 69.

The Court based its reasoning on *Bangladesh* and subsequent cases, confirming that they remain good law post-Amsterdam. The Member States were, therefore, entitled to entrust tasks to the Commission and the ECB on the condition that these tasks “do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties.”<sup>156</sup> But the possibility of relying on *Bangladesh* in an area where the Union itself would be competent to act appears uncertain. Indeed, the ECJ rejected the argument that the conferral of powers on the institutions in the ESMT is unlawful because the Member States had to make use of the enhanced cooperation procedure laid down in Art 20 TEU on the ground that the Member States could not have done so, as the Union did not have the power to establish a mechanism such as the ESM.<sup>157</sup> The Court did not give any guidance as to whether Art 20 TEU precluded the Member States from conferring powers on the institutions outside the framework of enhanced cooperation where the Union itself did have the power to act.

For the first time, the Court interpreted its powers to adjudicate disputes relating to the subject matter of the Treaties on the basis of a special agreement between the Member States under Art 273 TFEU. The ECJ gave that power an expansive interpretation. The special agreement between the Member States, the Court explained, can be concluded prior to the emergence of an actual dispute.<sup>158</sup> The fact that the dispute arising between the Member States was “likely” to be related to the interpretation of EU law because all measures taken under the ESMT have to be consistent with Union law satisfied the requirement that the subject matter of the dispute be related to the Treaties.<sup>159</sup> The link between a possible future dispute and the subject matter of the Treaties can, therefore, be examined *ex ante* and in general. Finally, the ECJ ruled that the requirement that the dispute be “between Member States” does not preclude an international organization—whose members are solely Member States, such as the ESM—from appearing as a party. The fact that membership of the ESM is open solely to European Union Member States was significant in that regard.<sup>160</sup>

## II. Constitutional Implications in the Wider Sense

The *Pringle* judgment endorses a shift in the EU’s monetary constitution from crisis prevention to crisis management, when bailout funds are only granted in conjunction with the imposition of strict conditionality on beneficiary states. By making the imposition of

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<sup>156</sup> See *id.* at para. 158.

<sup>157</sup> See *id.* at paras. 158, 167–69.

<sup>158</sup> See *id.* at para. 172.

<sup>159</sup> See *id.* at para. 174.

<sup>160</sup> See ESM Treaty, *supra* note 5, at art. 2(1).

strict conditionality a constitutional requirement, the Court has imported a concept with controversial reputation into EU law.<sup>161</sup> This constitutional shift in the narrow sense also has constitutional implications in a broader sense; the imposition of strict conditionality is sure to change the constraints within which the political bargaining of the beneficiary states take place. EU law unambiguously endorses these implications of the ESMT, which can be considered to “undoubtedly give shape to the Union legal order in a broader sense.”<sup>162</sup> The involvement of the ESM in the symbolic project of saving the euro might thereby call into question the legitimacy of the European project itself. Below, I argue these changed political constraints might aggravate the EU’s democratic and social deficit. In addition, it might give rise to a political deficit for the Member States of the eurozone as well as the EU itself.

### 1. *Democratic Deficit*

The shift of Europe’s monetary constitution is likely to have an impact on the democratic deficit, which has long plagued the European project.<sup>163</sup> The establishment of the ESM outside the framework of EU law places the decision-making processes of that institution beyond the influence of the European Parliament.<sup>164</sup> Worse still, the ESMT implies a loss of fiscal sovereignty of all ESM Members. The mere contribution of funds to the ESM makes the budget constraint within which political bargaining can take place considerably more stringent. This was stressed by the German Constitutional Court’s ruling on the preliminary injunction against the ratification of the ESM.<sup>165</sup> Germany’s total liability to the ESM’s authorized capital stock represents some €190 billion, more than 12% of its annual budget. These commitments can be called-in by the ESM at any time. The German Constitutional Court found that the budgetary responsibility of the *Bundestag* required that that liability could not be expanded without the consent of the German Parliament.

Arguably, the loss of fiscal sovereignty—and the accompanying democratic deficit—is even more dramatic for the beneficiary states. Beyond their contribution to the ESM, those states are required to meet stringent budgetary goals as a result of negotiations of doubtful democratic legitimacy with the troika. Their budgetary autonomy is thereby reduced to an attempt to achieve externally imposed goals. In addition, the specific conditions attached to financial assistance often specify which means are to be used to

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<sup>161</sup> See JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

<sup>162</sup> See Lenaerts, *supra* note 122, at 929 (concluding conventions among Member States post-Lisbon).

<sup>163</sup> See Joseph Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2430 (1991) (discussing the changes in Europe based on integration).

<sup>164</sup> See European Parliament Resolution (2012/C 247 E/08), 2012 O.J. (C 247) E/22, para. 8.

<sup>165</sup> See Bundesverfassungsgericht [BverfG - Federal Constitutional Court], Case No. 2 BvR 1390/12, Sept. 12, 2012, 2012 *NEUE JURISTISCHE WOCHENSCHRIFT* (NJW) 3145 (Ger.).

achieve those goals.<sup>166</sup> Finally, the General Court jurisdiction of the ECJ has not granted requests for access to documents containing the economic expertise upon which these policy prescriptions are based.<sup>167</sup> Public debate on the wisdom of specific policy prescriptions is, thereby, further hampered. These factors contribute to the impression that the representatives of the IMF, the ECB, and the Commission (gathered in the troika) and not the democratically elected representatives of the people have the decisive say on the crucial policy decisions of the beneficiary states. In turn, such an impression can call into question the input legitimacy of economic policy in beneficiary states,<sup>168</sup> largely imposed by EU institutions.

It appears that greater output legitimacy will not be able to compensate for this lack of input legitimacy.<sup>169</sup> The crisis-hit countries of the eurozone are still headed for recession, perhaps even depression. At least so far, the conditionality attached to bailout funds have not created the impression of resolving the crisis while at the same time creating perspectives for growth. Nobel-prize winning economist J. Stiglitz has argued that Europe's austerity recipe will lead to "enormous suffering," which he qualified as "criminal."<sup>170</sup> Meanwhile, European leaders have not been able to put in place effective stimulus measures that can encourage growth throughout the eurozone. Although European leaders agreed on a Compact for Growth and Jobs, that agreement has not fundamentally produced the economic outlook for the better.<sup>171</sup>

## 2. Social Deficit

The economic aspects of the euro crisis are indistinguishable from their social aspects. For millions of European citizens, especially in the economically troubled Member States, recession is a synonym for real wage cuts, high unemployment (especially for the young generation just entering the labor market) and rising social inequality. Yet the ESMT

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<sup>166</sup> See Kaarlo Tuori, *The European Financial Crisis: Constitutional Aspects and Implications* 39, 45 (European Univ. Inst., Working Paper Law 2012/28), available at [http://www.eui.eu/Events/download.jsp?FILE\\_ID=3544](http://www.eui.eu/Events/download.jsp?FILE_ID=3544).

<sup>167</sup> See Case T-590/10, *Thesing v. ECB*, 2012 E.C.R. \_\_\_\_; Press Release, General Court of the European Union, Judgment in Case T-590/10 (Nov. 29, 2012), available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-11/cp120156en.pdf>.

<sup>168</sup> See Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Preemption of Democracy* 36–37 (MPIFG Discussion Paper 11/11), available at [http://www.mpifg.de/pu/mpifg\\_dp/dp11-11.pdf](http://www.mpifg.de/pu/mpifg_dp/dp11-11.pdf).

<sup>169</sup> See *id.* at 37.

<sup>170</sup> See Joseph Stiglitz, *After Austerity*, PROJECT SYNDICATE (May 7, 2012), <http://www.project-syndicate.org/commentary/after-austerity> (discussing the impact of the recent European economic policy decisions).

<sup>171</sup> See EUROPEAN COMMISSION, IMPLEMENTATION OF THE COMPACT FOR GROWTH AND JOBS 1 (2012), available at [http://ec.europa.eu/europe2020/pdf/growth\\_report\\_en.pdf](http://ec.europa.eu/europe2020/pdf/growth_report_en.pdf).

appears oblivious to the social aspects of the crisis, relegating them to a secondary status. The rhetoric of the Court's ruling in *Pringle* does not help because it reflects a legal order concerned with its economic and monetary constitution rather than social policy. Worse still, the ECJ might refuse to enforce social rights against measures implementing ESM-based conditionality, on the ground that they fall outside the scope of Union law.<sup>172</sup>

This disjunction between economic and social concerns has its reasons. For years political scientists have observed a separation between economic integration and redistributive policies in the EU.<sup>173</sup> Whereas economic integration was a matter for the EU, redistributive policies were left to the Member States. It was argued that economic integration would bring greater welfare to the EU as a whole. Besides, it was thought that the divergence in preferences on matters of social policy did not allow harmonization at the European level. This separation appeared legitimate as long as the project of economic integration proved to be complementary with implementation of social welfare policies at the national level.

The balance between economic and social policy now appears fundamentally subverted through the imposition of strict conditionality on beneficiary states. These strict conditions attached to financial aid prevent Member States from implementing social policies in accordance with their national preferences. Instead, they are required to progressively dismantle their social welfare systems, a prime target for austerity cuts.<sup>174</sup> Nor is a correlative harmonization of social policies taking place at the European level. Rather, the logic of economic integration now appears to require that beneficiaries of financial assistance dismantle the social welfare state.

The future of "social Europe" in the eurozone's economically fragile states therefore appears precarious. In the past, accession to the euro brought hope of convergence with Europe's most prosperous economies, allowing ample margin for the extension of social welfare policies. Today the European recipe of austerity appears more likely to preclude growth, reducing the likelihood that Europe's existing social model will be viable in the foreseeable future. Simultaneously, Europe has trouble fostering solidarity among its Member States. Instead, the ESM seems to breed resentment due to its intergovernmental nature, as it reallocates the funds of its Member States rather than drawing upon genuinely European money.<sup>175</sup>

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<sup>172</sup> See *supra* Part D.I.2.

<sup>173</sup> See Fritz W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, 40 J. COMMON MKT. STUDS. 645 (2002); see also Floris de Witte & Mark Dawson, *Constitutional Balance in the European Union After the Euro-Crisis*, MOD. L. REV. (forthcoming).

<sup>174</sup> See Tuori, *supra* note 166, at 40, 46.

<sup>175</sup> See MATTIAS KUMM, EUROPEAN PARLIAMENT, DEMOCRATIC CHALLENGES ARISING FROM THE EUROCRISIS: WHAT KIND OF A CONSTITUTIONAL CRISIS IS EUROPE IN AND WHAT SHOULD BE DONE ABOUT IT 6–8 (2010), available at [http://www.eui.eu/Events/download.jsp?FILE\\_ID=3543](http://www.eui.eu/Events/download.jsp?FILE_ID=3543).

### 3. Political Deficit

Europe's response to the eurozone crisis takes place against the wider background of a power struggle between politics and the markets. Should politics regulate markets or should markets regulate politics? The interconnected nature of global financial markets has created regulatory competition between nation states, undermining their ability to regulate markets effectively. This tendency can be counteracted by the ability of Member States to join forces and regulate markets at a European level, creating a source of legitimacy for the EU. The speculative attacks of financial markets against several eurozone Member States has once again brought this tension to the fore.<sup>176</sup>

The eurozone crisis management framework can be thought of as the lopsided European resolution of this tension. Most European states voluntarily subscribed to a policy of stringent austerity, reducing their ability to manage their economies, in the hope of avoiding problems with financial markets altogether. In beneficiary states, the troika is called upon at once to appease the markets and to ensure that—even in their absence—market discipline reigns. Through this “self-disempowerment”<sup>177</sup> of politics in its relation with the markets, Europe is farther than ever from realizing the ideal of politics as collective self-determination.

### E. Conclusion

The ECJ's *Pringle* judgment held that the ESM, the eurozone's crisis management mechanism, was compatible with the requirements of EU law. In its ruling, the Court asserted its power to review the validity of Decisions to amend the TFEU under the SRP. The ECJ held that the Member States had not conferred any powers to the Union to establish a mechanism such as the ESM, and hence retained the power to do so themselves. The Court endorsed the conferral of several crucial tasks by the ESMT to EU institutions, including the Court itself. Crucially, it found no incompatibility between the ESMT and EU law. It concluded that the infamous “no bailout clause” contained in Art 125 TFEU does not preclude the promulgation of the ESMT because the ESM only grants financial assistance subject to strict conditionality and only when assistance is indispensable to the stability of the eurozone as a whole.

The *Pringle* judgment signals that the EU's monetary constitution, originally designed to focus solely on crisis prevention, also allows the establishment of a crisis management framework. The Court accommodated this shift in the EU's monetary constitution by interpreting the “no bailout” clause to allow for bailouts when they do not reduce

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<sup>176</sup> See JÜRGEN HABERMAS, ZUR VERFASSUNG EUROPAS-EIN ESSAY 42 (2011).

<sup>177</sup> See Jürgen Habermas, *Heraus aus dem Teufelskreis*, SÜDDEUTSCHE ZEITUNG, Sept. 22, 2012.

incentives for sound budgetary policy. The ECJ thereby constitutionalized the requirement of strict conditionality. This focus on conditionality as a basis for the ESM's compliance with EU law alters the rules of the game of political bargaining in beneficiary states. With these conditions comes a democratic deficit because outsiders, rather than domestic democratic, effective assume policy-making. It also implicates a social deficit because beneficiary states are forced to progressively dismantle their social welfare systems in order to meet stringent budgetary requirements. Finally, conditionality entails a political deficit because European policy-makers are collectively focusing on appeasing markets, rather than considering whether and how the requirements of the market economy can be made compatible with the ideal of democratic politics. Given the symbolic nature of a common European currency and the project of saving it, these predicaments might jointly endanger the legitimacy of the euro project.

The Court's *Pringle* judgment should be applauded for its flexible yet sound interpretation of the EU's monetary constitution, empowering the Member States to save the euro currency. Simultaneously, the judgment's focus on the constitutionalization of the ESM's required conditionality is in line with European politics' partial focus on austerity and its lack of attention to other dimensions of this crisis. That might endanger the legitimacy of the euro project, especially in economically troubled eurozone countries. While *Pringle* will no doubt be remembered as a landmark judgment of the ECJ, it reflects Europe's deeply troubled attempt at overcoming the eurozone crisis.