Neutral Citation Number: [2012] IEHC 296

THE HIGH COURT

[2012 No. 3772P]

BETWEEN

THOMAS PRINGLE

PLAINTIFF

AND

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on 17th day of July, 2012.

Section I – The plaintiff's claims in the proceedings

The proceedings

1. These proceedings were initiated by a plenary summons which issued on 13th April, 2012. While the plaintiff is a member of Dáil Éireann, on his case as pleaded, the capacity in which he brings these proceedings is as a natural person, a citizen of Ireland and a citizen of the European Union (the Union). In essence, in the proceedings the plaintiff challenges the validity under Union law and Bunreacht na hÉireann (the Constitution) of –

(a) a decision of the European Council proposing a Treaty amendment; and

(b) a Treaty entered into by the seventeen euro area Member States of the Union.

The plaintiff also initially challenged the validity of a Treaty which, since the proceedings were commenced, has been approved of by the people in a referendum held on 31st May, 2012.

2. Because of the importance of the issues raised in the proceedings, the hearing of the proceedings was expedited. It commenced on 19th June, 2012 and concluded on 29th June, 2012. While the proceedings have been pending, various events have occurred which are of relevance to the proceedings, for instance, the referendum referred to above and the enactment of three Acts of the Oireachtas. This judgment is based on the state of affairs as existed on 9th July, 2012, when I gave the decisions on which this judgment elaborates, and was inevitably going to exist when the hearing concluded.

3. Understandably, because of what has been happening in the background since the proceedings were initiated, and the expedition with which the procedural aspects of the matter have had to be completed, the position of the parties, and in particular that of the plaintiff, has changed during the proceedings. I propose initially identifying in chronological order the acts and instruments the validity of which the plaintiff impugns, either as to validity or as to incompatibility with Union law or the Constitution or both, and outlining the current bases of the plaintiff's challenge, as well as the specific reliefs currently being sought in the proceedings. In so doing, I will explain how the plaintiff's case has evolved.

Decision 2011/199/EU

4. Article 48 of the Treaty on European Union (TEU) deals with the manner in which the TEU and the Treaty on the Functioning of the European Union (TFEU) may be amended. Article 48(1) provides that the Treaties may be amended in accordance with one or other of two procedures: an ordinary revision procedure, the requirements of which are outlined in Article 48(2) to (5); and simplified revision procedures. The limited application and the procedural requirements of the simplified revision procedures are outlined in Article 48(6), which provides as follows:

> "The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the [TFEU] relating to the internal policies and action of the Union.
>
> The European Council may adopt a decision amending all or part of the provisions of Part Three of the [TFEU]. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.
>
> The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties."

5. Prior to the decision referred to in the next paragraph, Article 136 of the TFEU, which provision is contained in Chapter 4 of Title VIII of Part Three, provided as follows:

> "1. In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:
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> (a) to strengthen the coordination and surveillance of their budgetary discipline;
>
> (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a)."

6. The European Council by a decision of 25th March, 2011 (Decision 2011/199/EU), which was published in the Official Journal of the European Union on 6th April, 2011, adopted a decision to amend Article 136 TFEU in accordance with the simplified revision procedures provided for in Article 48(6) TEU. Decision 2011/199/EU, having recited that –

(a) the European Council had consulted the European Parliament, the Commission and the European Central Bank on the proposal in accordance with the second subparagraph of Article 48(6) and that each of those institutions respectively adopted opinions on the proposal, and

(b) the proposed amendment concerns a provision contained in Part Three of the TFEU and it does not increase the competences conferred on the Union in the Treaties,

set out the decision adopted by the European Council. In Article 1 it proposed the addition of a paragraph in the following terms to Article 136:

"3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

It was further provided in Article 2 as follows:

"This Decision shall enter into force on 1 January 2013, provided that all the notifications referred to in the first paragraph have been received, or, failing that, on the first day of the month following receipt of the last of the notifications referred to in the first paragraph."

The notifications referred to are notifications by Member States "of the completion of the procedures for the approval of this Decision in accordance with their respective constitutional requirements".

7. The European Communities (Amendment) Act, 2012 (hereinafter referred to as the Amendment Act of 2012) was enacted after the hearing was concluded, but before this judgment was due to be given. These proceedings were initiated prior to the introduction of the Bill, which was so enacted. Section 1 of the Act amends s. 1 of the European Communities Act 1972 by substituting the following definition for the definition of "treaties governing the European Union":

" 'treaties governing the European Union' means –

(a) the [TEU],

(b) the [TFEU],

(c) the Lisbon Treaty, and

(d) the treaties governing the European Communities,

(other than the provisions to which the first paragraph of Article 275 of the treaty referred to in paragraph (b) applies), as amended by –

(i) . . .

(ii) [Decision 2011/199/EU] of 25 March 2011 amending Article 136 of the [TFEU] with regard to a stability mechanism for Member States whose currency is the euro,

(iii) . . .

(iv) . . ."

The Protocols referred to in sub-paragraphs (i) and (iv) and the Treaty referred to in subparagraph (iii) are not of relevance to the issues before the Court. Section 2(3) thereof provides that the Amendment Act of 2012 shall come into operation on such day or days as the Minister for Foreign Affairs and Trade may appoint by order.

8. The initial reliefs sought in the statement of claim by the plaintiff based on the alleged invalidly of Decision 2011/199/EU with EU law and the Constitution are:

(a) a declaration that the proposed amendment of Article 136 TFEU constitutes an impermissible and unlawful amendment of the TFEU by reason of such amendment fundamentally altering the constitutionally entrenched basic law and principles of the Union without utilising the ordinary revision procedure of the Treaties as provided in Article 48(1) to (5) TEU, which is part of Irish law;

(b) an injunction restraining the first defendant, the Government of Ireland, from making provision by legislation or otherwise to give effect to the proposed amendment save by amendment of the Constitution by referendum pursuant to Article 46 of the Constitution.

In a notice of motion returnable in the course of the proceedings on 26th June, 2012, the plaintiff sought an order amending the general endorsement of claim on the plenary summons and the reliefs sought in the statement of claim by the addition of, *inter alia*, a claim for a declaration that the Amendment Act of 2012 is unconstitutional.

9. A written summary of the plaintiff's claim was put before the Court on 27th June, 2012, in which counsel for the plaintiff helpfully outlined the plaintiff's claims in their final form. I propose using the written summary as the basis for identifying the elements of the

plaintiff's claim, and the grounds therefor, which the Court has now to determine. The grounds set out in the written statement on which the plaintiff challenges the constitutionality of the Amendment Act of 2012 and the validity of Decision 2011/199/EU are summarised as follows:

> (a) As regards the Amendment Act of 2012, it is unconstitutional in that it purports to transpose into Irish law Decision 2011/199/EU, which is unlawful as it is contrary to the terms of the Union Treaties and, therefore, contrary to the terms of Article 29.4 of the Constitution.
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> (b) As will appear later, in summarising the grounds for his challenge to the constitutionality of the ESM Treaty, the plaintiff asserts that he has standing to institute the present proceedings to challenge the constitutionality of the approval of Decision 2011/199/EU and to raise questions of Union law in relation to such approval.
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> (c) As regards Decision 2011/199/EU vis-à-vis Union law and the Constitution:
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> > (i) The proposed amendment of Article 136 TFEU ought to have been carried out by means of the ordinary revision procedure. The use of the simplified revision procedure constitutes a breach of Article 48 TEU.
> >
> > (ii) It is contrary to the Union Treaties and "to the General Principles of Union law, in particular the Principle of Legal Certainty (which is a constituent element of the Rule of Law, upon which the Union is founded pursuant to Article 2 TEU)".
> >
> > (iii) Given that it is incompatible with Union law, it is also a breach of the Constitution, pursuant to Article 29.4 thereof. That is a reiteration of what is stated at (a) above.
> >
> > (iv) It constitutes a proposal to amend the TFEU that is subject to approval by the Member States in accordance with their respective constitutional requirements. The proposed amendment contained therein, prior to its approval, falls outside the scope of the Article 29.4.6 immunity provision.
> >
> > (v) Even if it is held to be valid, the provisions of the ESM Treaty extend beyond what could properly have been contemplated by the proposed amendment. That is more properly a challenge to the ESM Treaty.
> >
> > (vi) Its incompatibility with the EU Treaties ought to be referred to the Court of Justice of the European Union (CJEU) pursuant to Article 267 TFEU.
> >
> > (vii) The plaintiff is entitled to challenge the validity thereof in the context of a preliminary reference procedure under Article 267 TFEU. The time limits and standing requirements relating to annulment procedure under Article 263 TFEU do not apply to the Article 267 TFEU procedure. The Court is entitled to make a preliminary reference on validity to the CJEU. As will appear later, this ground is an intended response to a procedural issue raised by the defendants.

European Stability Mechanism Treaty

10. On 2nd February, 2012 the seventeen Member States of the European Union which are euro area Member States entered into an intergovernmental agreement known as the Treaty establishing the European Stability Mechanism (the ESM Treaty), Article 1.1 whereof provides:

> "By this Treaty, the Contracting Parties establish among themselves an international financial institution, to be named the "European Stability Mechanism" ("ESM")."

11. After these proceedings were initiated, a Bill was initiated, which was enacted after the hearing concluded, but before this judgment was due to be given and is now the European Stability Mechanism Act 2012 (hereinafter referred to as the ESM Act of 2012). Its purpose is set out in the long title as follows:

> "(A) to make permanent provision to provide for matters relating to the participation by the State in the [ESM] pursuant to the [ESM Treaty] done at Brussels on 2 February 2012 between the euro area Member States,
>
> (B) to provide for matters relating to the State's subscription to the authorised capital stock of the [ESM] in accordance with that Treaty,
>
> (C) to provide for payments to be made out of the Central Fund or the growing produce of that Fund so as to enable the State to give effect to that Treaty,
>
> (D) to provide for all dividends or other moneys received by the State under that Treaty to be paid into the Exchequer, and
>
> (E) to provide for related matters."

In implementing those purposes, the provisions which follow primarily regulate the interaction of the State with the ESM which, by s. 5, is given legal status and privileges and immunities within the State. For instance, s. 2 of the ESM Act of 2012 empowers the Minister for Finance on behalf of the State, from time to time, to make payments in respect of the contribution of the State to the authorised capital stock of the ESM in accordance with the ESM Treaty. However, s. 3 puts a limit on payments out of the Central Fund "or the growing produce of that Fund" of €11.1454 billion to enable the State to make payments in respect of its contribution.

12. The text of the ESM Treaty (including annexes) is set out in the schedule to the ESM Act of 2012.

13. At the hearing the Court was informed that the first defendant, the Government of Ireland, proposes to ratify the ESM Treaty on 9th July, 2012. The process of ratification thereof is governed by Article 47(1), which provides:

> "This Treaty shall be subject to ratification, approval or acceptance by the signatories. Instruments of ratification, approval or acceptance shall be deposited with the Depositary."

The Depositary is the General Secretariat of the Council of the European Union.

14. The reliefs initially sought in the statement of claim by the plaintiff based on his allegation of incompatibility of the ESM Treaty with the Constitution and the EU Treaties are:

> (a) a declaration that it violates the constitutionally entrenched principles of the TFEU and that any purported ratification thereof is (or perhaps more correctly, would be) invalid, void and of no effect or, in the alternative, a declaration that any process of ratification thereof requires the approval of the people in a referendum pursuant to Article 46 of the Constitution;
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> (b) a declaration that its terms and provisions, if ratified and made part of Irish law, would violate the provisions of the Constitution; and
>
> (c) if necessary, an injunction restraining the ratification by the first defendant, the Government of Ireland, and the State of the ESM Treaty, absent approval by the people in a referendum pursuant to Article 46 of the Constitution.

In the notice of motion returnable before the Court on 26th June, 2012, the plaintiff has sought an amendment of the plenary summons and the prayer in the statement of claim to seek a declaration that the ESM Act of 2012 is unconstitutional.

15. In outlining in the written summary the grounds on which the plaintiff asserts the incompatibility of the ESM Treaty with Union law and the Constitution and the unconstitutionality of the ESM Act of 2012, the plaintiff has categorised his submissions under the following headings:

> (a) the ESM Treaty and the Constitution;
>
> (b) the ESM Act of 2012 and the Constitution; and
>
> (c) the ESM Treaty and Union law.

16. The grounds on which the plaintiff contends that the validity of the ESM Treaty is incompatible with the Constitution have been summarised as follows:

> (a) Given the nature and extent of Ireland's financial obligations under the ESM Treaty, the open-ended and imprecise powers and functions conferred on the ESM institution, and its degree of autonomy, the proposed Treaty constitutes a degree of delegation of sovereignty that is incompatible with the Constitution and is required to be the subject of a referendum. The ESM Treaty is incompatible with Articles 5, 6, 15.2.1, 15.4, 17, 28.2 and 28.4 of the Constitution.
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> (b) Given the scale and extent of Ireland's financial obligations under the ESM Treaty, and the permanent nature of that Treaty combined with the absence of any mechanism for withdrawal, the ESM Treaty entails the transfer by the Oireachtas of an impermissible degree of monetary and budgetary power to the executive branch of the State and, in particular, to the Minister of Finance. Such a transfer would be contrary to Articles 5, 6 and 17 of the Constitution.
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> (c) The ESM Treaty is incompatible with Union law and, consequently, constitutes a breach of Article 29.4 of the Constitution, given the status of Union law in the national legal order as provided for in the European Communities Acts 1972 to 2009 (and affirmed in the judgment of the Supreme Court in *Crotty v. An Taoiseach* [1987] I.R. 713).
>
> (d) The ESM Treaty is in fundamental contradiction to the Union Treaties, and, in particular, to "the provisions of Economic and Monetary Union, inserted by the Treaty on European Union, 1992" which was put to and approved by the people of Ireland in a referendum. The plaintiff contends that any fundamental alteration of the substance of that vote and referendum equally requires the approval of the people.
>
> (e) The determination of the constitutional law issues raised at (b) and (c) above entail a prior interpretation of the Union Treaties and of Union law more generally. The issues of Union law arising ought first to be referred to the CJEU, before this Court is in a position to consider the constitutionality of the ESM Treaty.
>
> (f) The plaintiff has standing to institute the present proceedings concerning the constitutionality of the ESM Treaty and Decision 2011/199/EU and to raise questions of Union law arising in relation to the evaluation of constitutionality, the ratification of the ESM Treaty and the approval of Decision 2011/199/EU.

17. The grounds for the challenge to the validity of the ESM Act of 2012 having regard to the provisions of the Constitution are summarised as follows:

> (a) Section 2 of the ESM Act of 2012 is incompatible with the Constitution, in that it confers an impermissible degree of monetary and budgetary power on the Minister for Finance contrary to Articles 5, 6 and 17 of the Constitution, insofar as it provides for a permanent and unfettered power in the Minister for Finance (in the absence of any control, supervision or veto over the decisions of the Minister by Dáil Éireann) to commit the State to make payments in respect of the contribution of the State and to the authorised capital stock of the ESM, where such commitment or payments –
>
> > (i) may extend beyond what is contemplated in s. 3 of the ESM Act of 2012, to include payments provided for in Articles 8(2), 10(1), 25(1) and 25(2) of the ESM Treaty, and
> >
> > (ii) relate to sums of the order contemplated in the extent of authorised shares in Annex II.
> >
> > Further, this takes place in the context of the ESM Treaty which constitutes an unlawful instrument in Union law and under the Constitution.
>
> (b) The ESM Act of 2012 is unlawful in that it seeks to ratify a treaty that is in breach of the Constitution and of the Union Treaties on the basis of the grounds set out at (a) to (e) in para. 16 above.

18. In summarising the grounds of the alleged incompatibility of the ESM Treaty with Union law, the plaintiff advances the following

arguments:

(a) It is incompatible with the Union Treaties.

(b) The fact that the European Council considered that the creation of the ESM "required" a Treaty change, underscores the European Council's view that there is an incompatibility between it and the existing provisions of the Union Treaties. This I understand to be a reference to Recital (2) in Decision 2011/199/EU, wherein it is stated as follows:

> "At the meeting of the European Council of 28 and 29 October 2010, the Heads of State or Government agreed on the need for Member States to establish a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole and invited the President of the European Council to undertake consultations with the members of the European Council on a limited treaty change required to that effect."

(c) It is incompatible with the Union Treaties and, in particular, with the provisions of Part Three, Title VIII, TFEU, and, in particular, Articles 122, 123, 125 and 126 TFEU, including the object and spirit underlying such provisions as a whole. Without prejudice to the validity of the amendment proposed to be introduced by Decision 2011/199/EU, such amendment does not in any event form part of the relevant Union legal framework, given that it is only envisaged to enter into force, at the earliest, on 1st January, 2013.

(d) It entails a conferral of competences that alters and violates the competences conferred on the Union in the field of economic and monetary policy and breaches the rules governing the allocation of competences set out in Articles 2(1) and (2) TFEU and elaborated on in the case law of the CJEU.

(e) It entails the participation of the institutions of the Union (European Commission, European Central Bank, Court of Justice), conferring new competences on such institutions and requiring them to carry out tasks that are incompatible with their functions as defined in the Union Treaties.

(f) It is incompatible with the respect for effective judicial protection enshrined in the Charter of Fundamental Rights of the European Union (the Charter) and the European Convention on Human Rights and recognised as "a General Principle" of Union law.

(g) The combined and cumulative effect of the breaches of Union law that it entails (as particularised at (c) to (f) above), would constitute a fundamental alteration of the Union Treaties, and, in particular, of the provisions of Economic and Monetary Union as agreed by the Member States in the Treaty on European Union signed in Maastricht in 1992. As such, it would constitute an unlawful interference with and subversion of the Union framework and the Union legal order.

(h) Article 4(3) TEU and the principle of sincere cooperation, prohibits Member States from entering into international agreements that are incompatible with the Union Treaties. Ireland is prohibited from acceding to the ESM Treaty under Union law.

(i) The question as to whether Union law permits Ireland to accede to the ESM Treaty is a matter of Union law and ought to be the subject of a reference made to the CJEU pursuant to Article 267 TFEU.

Fiscal Stability Treaty

19. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Stability Treaty) was signed in Brussels on 2nd March, 2012 by twenty five Member States of the European Union, including Ireland and all other countries whose currency is the euro. Article 14(2) of the Fiscal Stability Treaty provides that it shall enter into force on 1 January, 2013 provided that twelve Contracting Parties whose currency is the euro have deposited their instruments of ratification, or on the first day of the month following the deposit of the twelfth instrument of ratification by a Contracting Party whose currency is the euro, whichever is the earlier.

20. The people approved of the ratification by the State of the Fiscal Stability Treaty in the referendum held on 31st May, 2012. The Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) Act 2012 (hereinafter referred to as "the Thirtieth Amendment of the Constitution Act") was enacted on 27th June, 2012. Section 1 thereof provides that Article 29 of the Constitution is amended by the insertion after subsection 9° of section 4 of the following provision:

> "10° The State may ratify the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union done at Brussels on the 2nd day of March 2012. No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State that are necessitated by the obligations of the State under that Treaty or prevents laws enacted, acts done or measures adopted by bodies competent under that Treaty from having the force of law in the State."

21. In the prayer for relief in the statement of claim (at paragraph 6) the plaintiff initially sought a declaration that the Fiscal Stability Treaty and, in particular, Article 10 thereof violates the constitutionally entrenched principles of the TFEU, by reason of the meaning and effect of the said Article 10 and its intended use being dependent on the validity and effect of the ESM Treaty and the proposed amendment of Article 136 TFEU, both of which measures are void and of no effect in law. As was pointed out by counsel for the defendants in their written submissions, the claim for that relief was not substantiated by any claims made in the statement of claim. It was merely based on the assertion that the Fiscal Stability Treaty is "dependent" on the validity of the ESM Treaty and of the proposed amendment to Article 136. Further, it was not supported by any arguments in the plaintiff's written or oral submissions.

22. The Court was informed on 28th June, 2012 by counsel for the plaintiff that the plaintiff is not pursuing the relief claimed in paragraph 6 of the prayer in the statement of claim (Transcript, Day 6, page 86).

23. Nonetheless, the Fiscal Stability Treaty was drawn into the arguments in support of the plaintiff's case, the plaintiff contending that the considerations which led the defendants to conclude that a referendum was necessary in relation to its ratification, apply a fortiori with respect to the ESM Treaty, submitting that the ESM Treaty also falls outside the Union legal framework and affects the sovereignty of the State, and therefore, the defendants have adopted an inconsistent approach to the two treaties. The defendants'

response was that no inconsistency exists. Further, while the Treaties are complementary, as Recital (5) in the preamble to the ESM Treaty recognises, the scope, objectives and provisions of the ESM Treaty do not involve any transfer of sovereign powers. The provisions of the Fiscal Stability Treaty were not explored and there the plaintiff's submission rests. In the circumstances, the Court cannot express any view on those submissions.

Reference to CJEU
24. In the written summary of the plaintiff's claim put before the Court on 27th June, 2012, the plaintiff "formally" requested that this Court make a reference to the CJEU pursuant to Article 267 TFEU for a preliminary ruling and the basis on which the reference was sought was summarised as follows:

> (a) The plaintiff challenges the compatibility of the ESM Treaty both with the Constitution and with Union law.
>
> (b) The determination of certain of the constitutional aspects of the case is dependent on the interpretation of the Union Treaties and "General Principles of Union law", as developed in the case law of the CJEU.
>
> (c) Questions of law ought to be referred to the CJEU for preliminary ruling pursuant to Article 267 TFEU.

The written summary was accompanied by a list of proposed questions to be referred, to which I will refer later.

Interlocutory injunctive relief
25. In the notice of motion returnable for 26th June, 2012, the plaintiff sought the following interlocutory injunctive relief pending the final determination of these proceedings:

> (a) an order restraining the defendants from ratifying, approving or accepting the ESM Treaty; and
>
> (b) an order restraining the defendants from completing the procedures for the approval of Decision 2011/199/EU.

The application for interlocutory relief was grounded on the affidavit of the plaintiff sworn on 26th June, 2012 and the exhibits referred to therein. The factual response to the application for interlocutory relief is an affidavit sworn on 27th June, 2012 by Jim O'Brien, Second Secretary General of the Department of Finance with responsibility for EU and International Affairs Division of the Department and the exhibits referred to therein.

Overview of defence
26. In the defence and in both their written and oral submissions, the starting point of the rejection by the defendants of all of the plaintiff's claims in these proceedings was an "overview" in which the position of the defendants as regards the claims is summarised as follows:

> (a) As regards the plaintiff's claim that the ESM Treaty is incompatible with Union law and the Constitution, the defendants' position is as follows:
>
> > (i) Its proposed ratification by the Government on 9th July, 2012 is permissible. Applying the principles established by the Supreme Court in the *Crotty* decision, there is no incompatibility between the ESM Treaty and the provisions of the Constitution.
> >
> > (ii) The plaintiff is incorrect as a matter of law in his assertion that the alleged incompatibility between the ESM Treaty and existing Union Treaty provisions renders the ESM Treaty incompatible with the Constitution.
> >
> > (iii) There is, in any event, no incompatibility between the ESM Treaties and the existing Union Treaties.
> >
> > (iv) Decision 2011/199/EU is not required for Member States to ratify the ESM Treaty, but one of the consequences of its coming into force on 1st January, 2013 will be to put beyond doubt the compatibility of the ESM Treaty with Union Treaty provisions.
>
> (b) As regards the challenge to the validity of Decision 2011/199/EU, the position of the defendants is as follows:
>
> > (i) Its approval by Ireland does not require a referendum. This is so because the power conferred on the European Council to adopt amendments to Part Three of the TFEU by way of decision pursuant to Article 48(6) of the TEU was inserted by the Treaty of Lisbon, the ratification of which was approved by the people in the Twenty-Eighth Amendment of the Constitution Act 2009.
> >
> > (ii) The plaintiff is precluded from challenging its validity by an absence of standing and/or by reason of delay.
> >
> > (iii) It was, in any event, validly adopted on the basis of Article 48(6) of the TEU.
>
> (c) As regards the plaintiff's request that the Court refer certain questions to the CJEU, the position of the defendants is that, of the matters listed at (a) and (b) above, only the matters referred to at (a)(iii) and (b)(iii) could conceivably warrant a reference to the CJEU. It is contended that any reference in respect of point (b)(iii) will be overtaken by the coming into force of Decision 2011/199/EU and, in any event, none is required. No reference is required in relation to point (a)(iii), not least because of the lack of standing and delay.
>
> (d) In reality, the defendants did not resist the plaintiff's application to amend the pleadings to include a claim that both the ESM Act of 2012 and the Amendment Act of 2012 are unconstitutional. Therefore, the plaintiff is given leave to amend the pleadings as sought. The defendants did, however, in their oral submissions deny that either Act is unconstitutional.

27. The defence contains a detailed traversal of the pleas in the statement of claim, as particularised in the replies to the defendants' request for particulars. In the interests of clarity, I think it appropriate to record that at the hearing counsel for the defendants informed the Court that the pleas to be found in paragraphs 2, 5 and 6 of the "overview" segment of the defence, to the effect that

the challenge to the constitutionality of the legislation in relation to Decision 2011/199/EU and the ESM Treaty was premature, were not being pursued on the basis of the assumption that the relevant Bills would have been enacted into law by the time the Court came to determine the issues, which has happened (Transcript, Day 3, at pp. 34, 37, 40 and 41).

28. In broad terms, the defendants' response to the plaintiff's claim for interlocutory injunctive relief was that there are no circumstances in which the Court should grant the restraining orders sought against the defendants. It was submitted that the Court should determine the issues arising out of the challenge to the constitutionality of the Amendment Act of 2012 and the ESM Treaty Act of 2012. If the Court determines those issues in favour of the plaintiff, then it was submitted that the proper course is for the Court to grant the plaintiff permanent injunctions. However, if the Court dismisses the plaintiff's claims, that is the end of the matter. It was further submitted on behalf of the defendants that, even if the Court concludes that a reference should be made to the CJEU, for the reasons which I will outline later, this is not an appropriate case in which to grant interlocutory injunctive relief of the type sought by the plaintiff.

Evidence

29. The only oral evidence adduced at the hearing of these proceedings was the evidence of the plaintiff. In his evidence, the plaintiff outlined his concerns, which he testified date back to April 2011, in relation to the State's involvement in the ESM Treaty. As I understand his evidence, his primary concern relates to the commitment given by the State to contributing to the authorised capital stock of the ESM. He pointed out that the State's aggregate liability (€11.1454 billion) amounts to one third of the revenue generated by the State in 2011, so that it is "a hugely significant sum" and it is not actually clear where it is going to come from. He outlined his beliefs, which I have no doubt are sincere, as to the alleged frailties in the process by which it is intended that the State shall be bound by the proposed amendment of Article 136 TFEU and the ESM Treaty, which are the foundation of the plaintiff's claim for relief in these proceedings. As regards inroads into the sovereignty of the State the plaintiff's position is that "we should retain our sovereignty in as much as possible within the State". He qualified that by stating that "if we go through a process that respects the rule of law and respects the democratic processes that we have within the State, then we have to accept the consequences and the outcomes of that".

30. I think it is important to emphasise that the Court is determining the issues in these proceedings without the benefit of any expert testimony as to the practical implications of what is proposed in the ESM Treaty for a participating Member State or, conversely, the practical implications of non-participation. The consequence is that it has to be inappropriate for the Court to accept some of the assertions made by counsel on behalf of the parties, even *cum grano salis.* Two examples will illustrate the point. Having emphasised the importance of price stability in the Union Treaties, counsel for the plaintiff asserted that the "putting of money into the system of States which are insolvent inevitably affects price stability. . . . You create inflation". The context in which that argument was advanced was that the ESM Treaty is at odds with the principle of price stability (Transcript, Day 3, at pp. 75/76). The second example arose out of the defendants' reply to the plaintiff's contention that the ESM Treaty infringes Article 3(1) of the TFEU which provides that the Union shall have exclusive competence in, *inter alia*, the area of "monetary policy for Member States whose currency is the euro" (para (c)). The defendants' reply was to embark on an exposition of what is meant by "monetary policy", stating that it is part of a broader economic policy and deals with the setting and management of interest rates and money supply by policy-makers usually at a central bank. Counsel for the defendants properly recognised that the Court might take the view that what constitutes monetary policy in a particular context should be a matter for evidence (Transcript, Day 5, p. 82). I mention those two examples to illustrate that the Court could be inhibited by the lack of expert evidence, if its role is different to what I consider to be its role, as outlined later. Finally, on this point, it is worth observing that the basis of the decision of the Supreme Court in the *Crotty* case, that Title III of the Single European Act could oblige the Government in relation to foreign policy to make the national interests subservient to the interests of other Member States, obviously required no evidential elucidation.

Structure of the remainder of the judgment

31. I propose addressing the issues which arise in the proceedings in the following order:

- In Section II, I will give an overview of the provisions of the ESM Treaty which it is alleged are incompatible with the Union Treaties and with the Constitution and the arguments advanced by the plaintiff and the defendants' response.

- In Section III, I will deal with the issues arising out of the plaintiff's claims that the ESM Treaty is incompatible with Union law.

- In Section IV, I will deal with the issues arising out of the plaintiff's claims that the ESM Treaty is incompatible with the Constitution and that the ESM Act of 2012 is unconstitutional.

- In Section V, I will deal with the issues arising out of the plaintiff's claims that Decision 2011/199/EU is invalid and that the Amendment Act of 2012 is unconstitutional.

- In Section VI, I will deal with the plaintiff's request that questions be referred to the CJEU.

- In Section VII, I will deal with the plaintiff's application for interlocutory injunctive relief.

- In Section VIII, the summary of the decisions of the Court given on 9th July, 2012, on which this judgment elaborates, will be set out.

General observations

32. It is a central element of the plaintiff's case that the ESM Treaty is incompatible with Union law and, consequently, is contrary to Article 29.4 of the Constitution, and that it is incompatible with the Constitution. The defendants deny those claims. The plaintiff further contends that, before the Court can properly address the issue as to compatibility with the Constitution, the Court should refer questions in relation to whether the ESM Treaty is compatible with Union law to the CJEU pursuant to Article 267 TFEU.

33. The grounds on which the plaintiff alleges incompatibility of the ESM Treaty with Union law have been summarised above by reference to the plaintiff's written summary. In fact, the plaintiff's oral submissions went beyond that summary. Further, as I have stated, with the plaintiff's written summary, counsel for the plaintiff furnished the Court with a draft of "proposed questions" to be referred to CJEU. Obviously, if the Court were to decide if there should be a reference, the form of the reference would be a matter for further submissions. However, purely for the purpose of fully understanding the plaintiff's case, I think it is instructive to record the questions which the plaintiff envisages the Court referring to the CJEU in relation to both the ESM Treaty and Decision 2011/199/EU.

First, by reference to specific Articles of the Treaties (Article 3(4) TEU, the provisions of Part Three, Title VIII TFEU, Article 3(1)(c) TFEU, Article 2(3) TFEU, Article 4(3) TEU and Article 47 of the Charter, the question posed by the plaintiff is whether –

> "a Member State whose currency is the euro [is] entitled to enter into an international agreement with other Member States whose currency is the euro, such as the ESM Treaty establishing the ESM, which agreement confers on an autonomous international institution, established and/or acting outside the framework of the Union legal order, the power to provide financial assistance, with borrowed money, in potentially unlimited sums of euro currency to Member States whose currency is the euro, where such financial assistance may be in the form of: –
>
> - direct financial assistance;
>
> - recapitalisation of the financial institutions of a Member State whose currency is the euro;
>
> - a loan to a Member State whose currency is the euro;
>
> - an arrangement for the purchase of bonds of a Member State whose currency is the euro on the primary or secondary market,
>
> and where that financial assistance may be provided on the basis of strict conditionality, and where the actions of the institution are subject only to limited judicial control and review, which judicial control and review operates outside the Union legal order."

35. The second question posed, which is premised on the first question being answered in the negative, is whether –

> ". . . the adoption of . . . Decision 2011/199/EU amending Article 136 TFEU, but which has not, at the relevant time, entered into force [is] capable of altering the entitlement of a Member State to enter into an international agreement such as that referred to in the first question? In particular does Union law entitle an interpretation of Decision [2011/199/EU] proposing to amend primary law, in accordance with a Simplified Revision Procedure pursuant to Article 48(6) TEU, according to which such a measure would be capable of conferring a legal basis for an action by Member States that otherwise, without that provision, would be prohibited on grounds of incompatibility with the Treaties and General Principles of Union law?"

The reference in that question to Decision 2011/199/EU not having "at the relevant time, entered into force" resonates the position which the defendants have adopted in relation to the entry into force of Decision 2011/199/EU amending Article 136 TFEU on 1st January, 2013 outlined at (a)(iv) in paragraph 26 above and signposts the issue on which I have found it most difficult to reach a conclusion. Put in plain language, the issue is whether the ESM Treaty may enter into force in accordance with its provisions before the entry into force of Decision 2011/199/EU in accordance with its provisions, assuming, of course, that Decision 2011/199/EU is a valid decision adopted in accordance with Article 48(6) TEU. The significance of this issue is that a decision was made on 9th December, 2011 to accelerate the entry into force of the ESM Treaty and, as is recorded in a statement of the Eurogroup of 30th March, 2012, agreement has been reached to accelerate payment of capital to the ESM to the extent that the first tranche of capital is intended to be paid in July 2012, whereas Decision 2011/199/EU is not intended to enter into force until 1st January, 2013 at the earliest. This issue will be addressed in Section VI.

Section II: Overview of provisions of ESM Treaty alleged to be incompatible with Union law and the Constitution

General observations

36. Broadly speaking, my understanding of the plaintiff's case is that the provisions of the ESM Treaty which are alleged to breach the provisions of the Union Treaties and to be incompatible with the Constitution are the Articles dealing with the purpose of the Treaty, governance, financing the ESM, the operations of the ESM, financial management, conferral of power and interpretation and dispute resolution.

Establishment and purpose

37. As recorded in Section I, by Article 1(1) of the ESM Treaty, an international financial institution to be known as the ESM is established. Its purpose is set out in Article 3, which provides:

> "The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties."

The plaintiff disagrees with the submission on behalf of the defendants that the ESM is a funding mechanism, and contends that it is far more. The plaintiff contends that the limits to which the ESM may go in pursuit of its purposes are unclear, and, indeed, counsel went so far as to say that its capacity is "limitless". The defendants, on the other hand, submit that there are limitations on the lending and borrowing capacity of the ESM, which are strict and clear, the specifics of which will be outlined later.

Governance

38. The Articles on governance are to be found in Chapter 2 (Articles 4 to 7 inclusive). These provisions are at the core of the plaintiff's allegation that the ESM Treaty is inconsistent with the provisions of the Constitution. It is provided in Article 4 that the ESM will have a Board of Governors and a Board of Directors. The Board of Governors will comprise the Finance Ministers of each Member, with provision for an alternate. Each Governor shall appoint a director and an alternate.

39. The voting rules, while quite complex, are very precise. Article 4 provides that the decisions of the Board of Governors shall, as specified in the Treaty be taken by –

> (a) mutual agreement, that is to say, unanimity of the Members participating in the vote (Article 4(3)), or
>
> (b) qualified majority, that is to say, eighty per cent of the votes cast (Article 4(5)), or
>
> (c) simple majority, that is to say, a majority of the votes cast (Article 4(6)).

The decisions of the Board of Governors which require mutual agreement are listed in Article 5(6). The defendants' position is that this list contains most, if not all, decisions which are of significance. The decisions which may be taken by qualified majority are listed in Article 5(7). The defendants submit that the decisions listed in Article 5(7) concern, in essence, issues of administration of the ESM on the detailed technical terms and the implementation of decisions made in accordance with requirement in Article 5(6). On a comparison of the two lists, the defendants' position is broadly speaking correct.

40. However, the voting rules are complicated by the fact that Article 4(4) permits a derogation from the mutual agreement requirement "where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance . . . would threaten the economic and financial sustainability of the euro area". In such an emergency situation, the crucial decision in relation to the granting of financial assistance as provided for in Articles 13 to 18 may be made by the Board of Governors by a qualified majority of eighty five per cent of the votes cast.

41. The voting rights of each Member are equated with the number of shares allocated to it in the authorised capital stock of the ESM, as set out in Annex II. Ireland's voting rights represent 1.5922% of the total voting rights. Counsel for the plaintiff produced an interesting analysis in tabular form of the number of States capable of forming a blocking majority on a qualified majority vote and the minimum number of States capable of passing resolutions by qualified majority vote. The analysis, with which the defendants do not disagree, illustrates that the five Members with the largest voting rights (Germany, France, Italy, Spain and the Netherlands) together are capable of passing resolutions by qualified majority and, those States coupled with Belgium, together would be capable of passing a resolution by the eighty five per cent qualified majority provided for in Article 4(4).

42. Finally, one of the provisions relied on by the plaintiff in support of his constitutional article is Article 4(8) which provides as follows:

> "If any ESM Member fails to pay any part of the amount due in respect of its obligations in relation to paid-in shares or calls of capital under Articles 8, 9 and 10, or in relation to the reimbursement of the financial assistance under Article 16 or 17, such ESM Member shall be unable, for so long as such failure continues, to exercise any of its voting rights. The voting thresholds shall be recalculated accordingly."

The plaintiff contends that the deprivation of voting rights in the event of default represents a fundamental transfer of sovereignty. The defendants reject the argument that Ireland's participation in the ESM entails loss of sovereignty.

Financing
43. The sources of financing the ESM are borrowing, which is dealt with in Article 21, and subscription to capital. The Articles on the capital of the ESM are to be found in Chapter 3 (Articles 8 to 11 inclusive).

44. Article 8 makes provision for authorised capital stock in the amount of €700 billion, both paid in and callable, of which, by virtue of Annex II, Ireland's total subscription to authorised capital stock (both paid in and callable) is set at €11.1454 billion. It is provided that the initial total paid-in capital is €80 billion. The plaintiff raises a number of issues in relation to Article 8, which are pertinent to the issue of the compatibility of the ESM Treaty with the Constitution, the most significant of which are outlined here. First, under Article 8(4) ESM Members irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock in accordance with Annex I. The plaintiff submits that a change in the circumstances of a Member does not permit it to abdicate that duty. The response of the defendants, which will be recorded in greater detail later, is that under international law, as codified in Article 56 of the Vienna Convention on the Law of Treaties (the Vienna Convention), a Member (for example, Ireland) would be permitted to denounce the ESM Treaty and negotiate its withdrawal therefrom. Secondly, the plaintiff points to Article 8(5), under which the obligation to contribute to the authorised capital stock is not affected if the Member becomes eligible for, or is receiving, financial assistance from the ESM, in other words, if the Member is in dire financial straits. The answer of the defendants is that Members may voluntarily make the choice as to whether or not to seek financial assistance.

45. Article 10(1) provides:

> "The Board of Governors shall review regularly and at least every five years the maximum lending volume and the adequacy of the authorised capital stock of the ESM. It may decide to change the authorised capital stock and amend Article 8 and Annex II accordingly. Such decision shall enter into force after the ESM Members have notified the Depositary of the completion of their applicable national procedures."

This is another example of a provision which is invoked by the plaintiff in support of the incompatibility with the Constitution argument. An important feature concerning that provision from the defendants' perspective, is that, by virtue of Article 5(6)(d), the Board of Governors must make a decision thereunder by mutual agreement, that is to say, there must be unanimity. Moreover, the position of the defendants is that not only would an amendment of the authorised capital stock and of Article 8 and Annex II require mutual agreement, but the completion of Ireland's "applicable national procedures" would also require the approval of the Dáil, pursuant to Article 29.5.2° of the Constitution and an amendment by the Oireachtas to the ESM Act of 2012 would also be necessary.

46. In relation to other provisions in relation to capital to which the plaintiff adverts and invokes in support of the alleged incompatibility with the Constitution argument, for example, the right of the Board of Governors to call in authorised unpaid capital (Article 9(1)) and the right of the Board of Governors to adjust the contribution liability of a Member State based on relevant percentage voting rights as stipulated in Annex I (referred to as the "Contribution Key") in certain circumstances, such as the accession of a new Member to the ESM (Article 11), it is the case that decisions by mutual agreement are also required under Article 5(6).

Operations
47. The operations of the ESM, meaning, in essence, the provision of stability support, are regulated by Chapter 4 (Articles 12 to 21 inclusive). Article 12 sets out the principles on which the ESM is to operate and it echoes Article 3. Article 12(1) provides:

> "If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions."

It is the contention of the plaintiff that Article 12(1) is incompatible with the Constitution. The basis of this contention is that it is discretionary, that it authorises "unlimited conditionality", and that it trenches on fundamental freedoms of a Member in various

matters of policy, namely: to select and pursue a policy of austerity or a policy of growth; to determine taxation policy; to determine the level of public spending; to determine the level of borrowing; to decide on policy in relation to regulation and/or deregulation and competition, as well as privatisation of public services. As is the case in relation to most of the provisions of Chapter 4, the plaintiff invokes Article 12 in support of his claim that the ESM Treaty is incompatible with Union law. In broad terms, for example, it is the plaintiff's contention that Article 12 conflicts with guidelines established by the European Council under Article 121 TFEU. Further, it is contended that Article 12 conflicts with Articles 125 and 126 TFEU.

48. In answering the plaintiff's arguments in relation to Article 12, the defendants put forward the following general propositions, which they have particularised in their submissions:

> (a) conditionality in Article 12 simply refers to the conditions of the loan granted by the ESM to a Member;
>
> (b) conditionality must comply with policy already established by the Union, as is expressly stipulated in Article 13(3), which is quoted below, and on which the defendants, in my view, properly lay particular emphasis;
>
> (c) setting conditionality in accordance with Article 13(3) is not policy making or policy co-ordination or policy determination or policy implementation;
>
> (d) conditionality does not interfere with national sovereignty, emphasising the voluntary nature of participation in the ESM, which does not involve a transfer of sovereignty;
>
> (e) conditionality does not interfere with Union powers;
>
> (f) conditionality does not interfere with Union economic policy; and
>
> (g) conditionality does not interfere with Union monetary policy, which will be considered below in the context of the plaintiff's contention that the authorisation of the giving of stability support through the instruments provided for in Articles 14 to 18 constitutes a violation of Article 127 TFEU.

49. It is Article 12(2) which provides that ESM stability support may be granted through the instruments provided in Articles 14 to 18 which are outlined below.

50. Article 12(3) provides that collective action clauses (CACs) shall be included, as of 1 January, 2013, –

> ". . . in all new euro area government securities, with maturity above one year, in a way which ensures that their legal impact is identical".

The plaintiff characterises the introduction of this requirement as "problematic", in that it is suggested that it probably represents a fairly significant change in sovereign debt structural arrangements. Specifically, in support of his constitutional challenge, the plaintiff characterises this change as an example of the erosion of Ireland's economic sovereignty, in that it encroaches on Ireland's power to determine the terms on which it issues bonds and suggests that a change is likely to affect the value of such bonds. The response of the defendants is that collective action clauses are technical clauses in bonds and Ireland's decision, by ratifying the ESM Treaty, to include them in its securities involves the full and free exercise of sovereignty and does not amount to an impermissible transfer of Ireland's sovereignty. I feel constrained to comment that the submissions on the significance of the imperative of including CACs in government bonds is probably the most egregious example of the evidential deficit underlying this action. Having said that, from the explanation furnished in the defendants' written submissions, I have gained a superficial understanding of the purpose of CACs in bonds, whether corporate or government, and also of the purpose of having identical CACs in government bonds issued by governments in the euro area. Such understanding, however, is not sufficient to enable me to determine whether the change is good or bad for Ireland. In any event, I do not understand it to be the Court's function to make such a determination in these proceedings.

51. Article 13 deals with the procedure to be followed by a Member of the ESM in seeking stability support and the steps to be followed by the ESM in considering whether to accede to the request.

52. Article 13(3), reliance on which is at the core of the defendants' defence of the plaintiff's claim as to incompatibility of the ESM with Union law, provides:

> "If a decision pursuant to paragraph 2 is adopted, the Board of Governors shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. In parallel, the Managing Director of the ESM shall prepare a proposal for a financial assistance facility agreement, including the financial terms and conditions and the choice of instruments, to be adopted by the Board of Governors.
>
> The MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned."

A decision pursuant to Article 13(2) is a decision of the Board of Governors to decide "to grant, in principle, stability support to the ESM Member concerned in the form of a financial assistance facility". By virtue of Article 5(6)(f), mutual agreement, that is to say, unanimity is required for decisions to provide stability support, including economic policy conditionality as stated in the MoU, and to establish the choice of instruments and the financial terms and conditions, in accordance with Articles 12 to 18. Article 5(6)(g) provides that to give a mandate to the European Commission under Article 13(3) also requires the mutual agreement of the Board of Governors. The defendants emphasise that the second paragraph in Article 13(3) highlights the fact that economic policies are not made within the framework of the ESM Treaty; rather, the policies made within the TFEU framework constrain how activities within the ESM Treaty framework may be conducted.

53. Article 13(4) provides that the European Commission shall sign the MoU on behalf of the ESM. Counsel for the plaintiff pointed to the fact that it is the Commission, an institution of the Union, which signs the MoU on behalf of the ESM, as being noteworthy. The defendants' position is that the Commission has competence to perform the role provided for in Article 13 pursuant to the mandate given to it in Article 17 TEU, which mandates it to "promote the general interest of the Union and take appropriate initiatives to that

end". Further, it is suggested that the Commission's tasks pursuant to the ESM Treaty must be viewed in the light of the fact that the Commission is already integral to the Union system of economic and fiscal surveillance, reference being made to the five Regulations and one Directive proposed by the Commission in October 2011 and approved by all twenty seven Member States and by the European Parliament (the so-called "Six Pack": Regulation (EU) 1173/2011; Regulation (EU) 1174/2011; Regulation (EU) 1175/2011; Regulation (EU) 1176/2011; Regulation (EU) 1177/2011; and Directive 2011/85/EU). The defendants point to the multiple functions performed by the Commission pursuant to those legislative measures, which the defendants suggest, are regarded as falling within the scope of Article 17 TEU, the emphasis being on the fact that no Treaty amendment was required to permit the Commission to carry out those functions.

54. The plaintiff's claims as to the incompatibility of the power conferred on the ESM to grant stability support by means of the various financial assistance instruments provided for in Articles 14 to 18 is primarily a claim that such power is incompatible with identified provisions of the Union Treaties. It is convenient to consider the detail of those Articles and the submissions of the parties in relation thereto together with the Articles of the Union Treaties which it is contended they infringe, as will be done in Section III below.

55. Article 21 of the ESM Treaty deals with borrowing operations and provides that the ESM shall be empowered to borrow on the capital markets from banks, financial institutions or other persons or institutions for the performance of its purpose. The plaintiff's position on this Article is probably more relevant to the constitutional argument than to the contention of incompatibility with the Union Treaties. The plaintiff's contention is that there is no limitation on the power to borrow. The defendants dispute this and contend that there are clear and strict limitations on the borrowing powers of the ESM and that, by application of Article 3, which I have quoted earlier, its power to borrow is limited to the purpose stipulated in Article 3.

Financial management
56. The provisions in relation to financial management are contained in Chapter 5 (Articles 22 to 30 inclusive).

57. The plaintiff's invocation of Article 25 of the ESM Treaty, which deals with coverage of losses, is related to the alleged incompatibility of the ESM Treaty with the Constitution. Article 25 provides for the manner in which losses arising in the ESM operations shall be charged: firstly against the reserve fund; secondly, against the paid-in capital; and lastly, against an appropriate amount of the authorised unpaid capital, which shall be called in in accordance with Article 9(3). As I understand the plaintiff's position, he does not make any complaint about the schema for the distribution of liability for losses. His complaint is that it is not clear that there any limitations on the losses, that there is no statement that losses are limited to authorised share capital. Further, he asserts that ESM borrowing powers are not restricted in amount to the authorised or paid-in capital. In relation to Article 25(2), which the plaintiff also invokes and which addresses the situation where there is default by an ESM Member in relation to a capital call, by mandating the making of a revised increase capital call to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed, subject, however, to remediation as provided in Article 25(3), if the defaulter settles its debt, the position of the defendants is that there is no basis whatsoever for asserting that the losses could be unlimited. It is reiterated that Ireland's total authorised capital contribution to the ESM, both paid in and callable, is capped at €11.1454 billion, that any increase would require the approval of Dáil Éireann, and would require amendment by the Oireachtas to the ESM Act of 2012.

Other relevant provisions
58. Article 32 provides, *inter alia*, that the legal status and the privileges and immunities set out in that Article "shall be accorded to the ESM in the territory of each ESM Member". It further provides that the ESM "shall have full legal personality" and shall have full legal capacity to, *inter alia*, contract and to be party to legal proceedings. Article 31 provides that the seat of the ESM will be in Luxembourg. Article 37, which provides for dispute resolution, will be considered in detail later in the context of the provisions of the Treaties which it is alleged by the plaintiff it infringes. Finally, Article 48 provides that the ESM Treaty shall enter into force –

> ". . . on the date when instruments of ratification, approval or acceptance have been deposited by signatories whose initial subscriptions represent no less than 90% of the total subscriptions set out in Annex II."

Section III: Alleged incompatibility of ESM Treaty with Union law

General approach
59. I propose addressing the plaintiff's allegation of incompatibility between the provisions of Articles 14 to 18 and Article 19 of the ESM Treaty first. Notwithstanding some inevitable degree of repetition, I will then address the Articles of the TFEU and the Articles of the TEU with which the plaintiff contends the ESM Treaty is incompatible and I will then set out my conclusions, which will be informed by the matters set out in addressing the specific complaints made by the plaintiff in relation to the powers conferred on the ESM by Articles 14 to 18 and Article 19 of the ESM Treaty.

Articles 14 to 18 and Article 19 of the ESM Treaty
60. As regards the various financial assistance instruments through which ESM stability support may be granted in accordance with Article 12(1) (that is to say, subject to strict conditionality), the plaintiff alleges violation of Part Three Title VIII TFEU as follows:

> (a) as regards the power conferred by Article 14 to "grant precautionary financial assistance in the form of a precautionary conditioned credit line or in the form of an enhanced conditions credit line", that it violates Articles 123, 125 and 127;
>
> (b) as regards the power conferred by Article 15 to "grant financial assistance through loans to an ESM Member for the specific purpose of recapitalising the financial institutions of that ESM Member", that it violates Articles 123, 125 and 127;
>
> (c) as regards the power conferred by Article 16 to "grant financial assistance in the form of a loan to an ESM Member", that it violates Articles 123, 125 and 127;
>
> (d) as regards the power conferred by Article 17 to "arrange for the purchase of bonds of an ESM Member on the primary market", that it is expressly prohibited by Article 123 and constitutes the assumption of commitments prohibited by Article 125; and
>
> (e) as regards the power conferred by Article 18, to "arrange for operations on the secondary market in relation to the bonds of an ESM Member", that it is prohibited by Articles 123, 125 and 127.

61. The defendants forcibly reject each of the foregoing allegations of violation of the provisions of Title VIII TFEU on a number of

bases.

62. First, they state that each type of stability support authorised by Articles 14 to 18 inclusive is authorised to be granted by the ESM, not by the European Central Bank or central banks of the Member States. That distinction is unquestionably correct and it is of crucial significance. For example, Article 123 TFEU expressly prohibits overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of Member States in favour of, *inter alia*, central governments, but not with the ESM.

63. Secondly, while Article 125 TFEU provides that –

> (a) the Union shall not be liable for or assume the commitments of, inter alia, central governments, and
>
> (b) a Member State shall not be liable for or assume the commitments of, inter alia, public undertakings of another Member State,

apart from the first point made above, it is the defendants' answer to the alleged infringement of that Article that the various financial assistance instruments provided for in Articles 14 to 18 inclusive do not involve liability for or assumption of commitments. From this Court's perspective, in the absence of evidence explaining how the various financial assistance instruments referred to are intended to operate, an assessment of that proposition is easier in the case of some instruments than others. For instance, it is easy to understand that a loan granted by the ESM to a Member, for repayment of which the Member would be liable, does not involve liability for, or the assumption of, the commitments of the borrower Member by the ESM. The defendants assert that none of the instruments is in the nature of a guarantee which would involve liability for or the assumption of commitments.

64. Thirdly, the defendants submit that the granting of stability support in any of the forms provided for does not interfere with monetary policy. The explanation of that proposition by counsel for the defendants harks back to the observations in relation to the paucity of evidence adduced by the parties in Section I above. In any event, as the defendants assert, monetary policy for the euro area is managed by the European Central Bank and the European system of central banks. Under Article 127(1) TFEU, the primary objective of the European system of central banks is to maintain price stability, but it is also required to support the general economic policies in the Union and is required to act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources. It is the defendants' position that the activities of the ESM do not interfere with Union monetary policy, nor do they affect or interfere with the performance by the European system of central banks of the basic tasks which it is required to carry out in accordance with Article 127(2), which include defining and implementing the monetary policy of the Union. The rationale underlying that assertion is that the funding provided by the ESM seeks to fulfil the funding needs of ESM Members that can no longer access international capital markets at reasonable and sustainable interest rates. The funding is raised by the ESM on international funding markets and lent to the relevant ESM Member subject to strict conditionality. The defendants' position is that the ESM will not alter the overall money supply in the euro area; rather, it will redistribute it within the euro area.

65. Fourthly, the defendants reject the plaintiff's contention prompted by the references to Articles 107 and 108 TFEU in Article 15 of the ESM Treaty, that the granting of financial assistance to recapitalise financial institutions is a "radical departure from the normal rules" in relation to State aid, as set out in those Articles. The position of the defendants is that the MoU must have conditions which require compliance with competition law and that it will be the role of the Commission in preparing the MoU to ensure that this is achieved.

66. The plaintiff submits that the power conferred by Article 19 to review the list of financial assistance instruments provided for in Articles 14 to 18 inclusive and to decide to make changes to it violates Article 125 TFEU. The defendants reiterate that none of the financial instruments currently envisaged by the ESM Treaty involve liability or the assumption of commitments prohibited by Article 125. Further, the defendants submit that the plaintiff's assertion that the exercise of the power contained in Article 19 may alter that situation is premature, hypothetical and unfounded. It is also pertinent to record that, by virtue of Article 5(6)(i) of the ESM Treaty, the exercise of the power contained in Article 19 requires mutual agreement.

Article 2(3) TFEU

67. It is alleged by the plaintiff that the ESM Treaty violates the role of the Council in coordinating economic policy under Article 2(3), which provides:

> "The Member States shall coordinate their economic and employment policies within arrangements as determined by [the TFEU], which the Union shall have competence to provide."

The defendants' reply is that there is no coordination of economic policy pursuant to the ESM Treaty. Further, the ESM is constrained by economic policy made by the Union pursuant to Article 2(3) and cannot encroach on that power. In this connection, the defendants rely on Article 13(3), which has been quoted in full in Section II above, which expressly provides that the MoU detailing the conditionality attached to a financial assistance facility shall be fully consistent with the measures of economic policy coordination provided for in the TFEU. I am satisfied that the plaintiff has not demonstrated that the ESM Treaty is incompatible with Article 2(3) on the basis alleged. The ESM is a funding mechanism. It has no role in the coordination of economic policy. Apart from that, by virtue of Article 13(3) its operations are required to be conducted in a manner which is fully consistent with the measures of economic coordination provided for in the TFEU.

Article 3(1)(c) TFEU

68. Article 3(1) provides that the Union shall have "exclusive competence" in five designated areas, including "monetary policy for the Member States whose currency is the euro" (paragraph (c)). The plaintiff asserts that the ESM Treaty confers on an institution "satellite" to the Union, meaning the ESM, power to provide financial assistance subject to conditionality, which power would not otherwise be exercisable by the Union. In the defendants' reply to this allegation, one encounters once again the evidential lacuna as to what monetary policy means, in that the defendants' position is that there is no determination or implementation of monetary policy pursuant to the ESM Treaty and, in line with the defendants' position as outlined later, the activities of the ESM do not interfere with Union monetary policy or encroach on the performance by the European system of central banks of the basic tasks which are conferred on it in relation to monetary policy in Article 127 TFEU. Further, the defendants rely on Article 13(3) of the ESM Treaty. I am satisfied that the plaintiff has not demonstrated that the ESM Treaty is incompatible with Article 3(1)(c). Once again, it is necessary to recall that it is a funding mechanism and its purpose as such is clearly stated in Article 3 of the ESM Treaty, which has been quoted earlier. The ESM Treaty does not give the ESM institution any role in defining or implementing the monetary policy of the Union or of any part of the Union.

Part Three, Title VIII TFEU

69. By way of introduction, Title VIII (entitled "Economic and Monetary Policy") of Part Three TFEU contains, *inter alia*,:

(a) Chapter 1 (entitled "Economic Policy"), being Articles 120 to 126 inclusive;

(b) Chapter 2 (entitled "Monetary Policy"), being Articles 127 to 133 inclusive; and

(c) Chapter 4 (entitled "Provisions specific to Member States whose currency is the euro"), which includes Article 136, the amendment of which is the subject of Decision 2011/199/EU.

Article 121
70. Article 121(1) provides:

> "Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120."

Article 120 mandates that the Member States shall conduct their economic policies, *inter alia*, "in the context of the broad guidelines referred to in Article 121(2)". The plaintiff invokes Article 121(2), which provides:

> "The Council shall, on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Union . . .."

The plaintiff's allegation of a potential conflict between the ESM Treaty and Article 121(2) is that the conditions imposed by the ESM institution could conflict with the broad guidelines. The defendants, in reply to that allegation, refer once again to Article 13(3), which ensures that there can be no conflict between the conditions attached to ESM financial assistance and the measures of economic policy coordination provided for in TFEU. I am satisfied that the defendants are correct in stating that there is no scope within the ESM Treaty for conflict with Article 121.

Article 122
71. Article 122(2) provides:

> "Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken."

The plaintiff's interpretation of Article 122(2) is that, if the conditions outlined therein are satisfied, "Union financial assistance" and only "Union financial assistance" can be provided. The defendants take serious issue with that proposition, asserting that the provision does not say that. The defendants' position is that Article 122(2) relates to Union competence, *via* the Council, to grant financial assistance to Member States in exceptional circumstances, not to the competence of an international organisation, such as the ESM, to grant funding pursuant to an international agreement, such as the ESM Treaty. In any event, the defendants contend that the Union cannot be the only entity that is permitted to provide financial assistance to Member States, characterising such proposition as far-reaching and unsustainable. I am satisfied that Article 122(2) does not have the meaning or effect advocated on behalf of the plaintiff and that the ESM Treaty is not incompatible with it. It is interesting to note that both the European Parliament and the Commission, in their respective opinions given to the European Council in the context of the proposal which led to Decision 2011/199/EU, considered whether a stability mechanism as envisaged in the proposed amendment of Article 136 TFEU would involve a reduction of the competences of the Union and were satisfied that it would not, as will be outlined later in Section V.

Article 123
72. Counsel for the plaintiff lays particular emphasis on Article 123, referring to it as a key provision from the plaintiff's perspective, which outlaws the grant of overdraft facilities and any other type of credit facility with the European Central Bank or the national central banks in favour of Union institutions, central governments and the like. I have already outlined the distinction drawn by the defendants between the prohibition in Article 123 and the empowerment of the ESM to grant financial assistance in the ESM Treaty. The prohibition on the provision of credit in Article 123 binds the European Central Bank and the central banks of Member States. It does not bind the ESM institution which is a distinct entity, which is funded by capital contributions from its Members and borrowing on international capital markets. I am satisfied that the fact that, for instance, Ireland has irrevocably and unconditionally undertaken to subscribe a maximum of €11.1454 billion to the authorised capital stock of the ESM institution in accordance with Article 8 of the ESM Treaty does not mean that Ireland is providing overdraft facilities or any other type of credit facility as envisaged in Article 123. Accordingly, I am satisfied that the ESM Treaty is not incompatible with Article 123.

Article 125
73. Article 125 provides:

> "The Union shall not be liable for or assume the commitments of central governments . . .. A Member State shall not be liable for or assume the commitments of central governments . . . of another Member State . . .."

In pursuing the incompatibility challenge, as I understand it, the plaintiff's focus is primarily on the second prohibition, that is to say, the prohibition on a Member State, in Article 125. However, both prohibitions are expressed to be "without prejudice to mutual financial guarantees for the joint execution of a specific project". The plaintiff's allegation of incompatibility between the ESM Treaty and Article 125 has already been addressed in the context of Articles 14 to 18 of the ESM Treaty. In summary, the defendants' reply to the plaintiff's contentions in relation to what is permitted by those Articles is that none of the forms of financial assistance envisaged in those Articles involves liability for or assumption of commitments of another Member State, as prohibited by the so-called non-bail out provision of Article 125. The defendants emphasise that Article 125 is addressed to the Union and to Member States and the prohibition therein applies to the Union and to Member States, but not to an international organisation, such as the ESM. The defendants make the case that, on the plaintiff's interpretation of Article 125, Ireland could not participate in any funding mechanism, including the IMF, if there could be a possibility of another Member State benefiting, suggesting that such an extreme consequence could not have been intended by the Treaty of Maastricht, which is the provenance of Article 125. Notwithstanding that there is no evidence before the Court of the nature and effect of, for instance, "a precautionary conditioned credit line" or "an enhanced conditions credit line", as permitted by Article 14 of the ESM Treaty, other than the statement of its effect by counsel for the defendants, which affords only a superficial understanding of the instruments, I am satisfied that the plaintiff has not demonstrated that the ESM Treaty is incompatible with Article 125. That conclusion has been influenced by the view expressed by the European Central Bank in the opinion it gave to the European Council on the proposal which led to Decision 2011/199/EU (at paragraph 5),

which is quoted in Section VI below.

Article 126
74. The defendants' reply to the plaintiff's contention of incompatibility of the ESM Treaty with Article 126, which provides that Member States shall "avoid excessive government deficits" and, in broad terms, provides for the enforcement of budgetary discipline by the institutions of the Union on all Member States, is once again reliance on Article 13(3) of the ESM Treaty. As is the case in relation to the other Articles of Chapter I of Title VIII, I am satisfied that the defendants' submission that Article 13(3) of the ESM Treaty leaves no scope for conflict between the provisions of the ESM Treaty and the TFEU is correct, because not only must an MoU on the basis of which financial assistance is afforded to a Member of the ESM be fully consistent with the measures of economic policy coordination provided for in TFEU but, in particular, it must be fully consistent with any monitoring or disciplinary act of the Union addressed to the Member involved.

Article 127
75. Article 127, as has been referred to earlier, deals with monetary policy. The plaintiff's position is that the utilization of the various instruments of financial assistance permitted under Articles 14 to 18 of the ESM Treaty would be in breach of Article 127. In the context of Article 127, counsel for the plaintiff referred to the "direct linkage" of Article 127 with Article 119(2). Article 119 is the introductory Article in Title VIII, dealing with economic and monetary policy. Article 119(1) provides:

> "For the purposes set out in Article 3 of the [TEU], the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition."

Article 3(4) TEU provides that the Union shall establish an economic and monetary union whose currency is the euro. Article 119(2), on which counsel for the plaintiff lays particular emphasis in the context of Article 127, provides:

> "Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition."

The basic tasks involved in implementation of that objective are specified in Article 127(2).

76. The defendants' primary response to the plaintiff's allegation of incompatibility of the ESM Treaty with Article 127 is the same as their response to the allegation of incompatibility with Article 3(1)(c): that there is no determination or implementation of monetary policy pursuant to the ESM. In my view, an analysis of the purpose of the ESM and the contents of the provisions of the ESM Treaty, the objective of which is to achieve that purpose, supports the conclusion that the ESM has no competence in the area of monetary policy as regulated by the Treaties, which was the defendants' primary answer to the plaintiff's contention of incompatibility of the ESM Treaty with Article 3(1)(c), as outlined earlier. Additionally, the defendants contend that, by reason of the provisions of Article 13(3) of the ESM Treaty, there is no scope for conflict with Article 127. However, counsel for the plaintiff pointed to the fact that there is no reference to monetary policy in Article 13(3). Counsel for the defendants agreed that that is so, pointing out that monetary policy is not referred to, because funding, that is to say, provision of stability support, which is what the ESM Treaty is concerned with, is not part of monetary policy. Presumably, on the basis of that submission, the Court is not being invited to treat reliance on Article 13(3) as part of the defendants' answer to the allegation of incompatibility of the ESM Treaty with either Article 3(1)(c) or Article 127. In any event, I am satisfied that the ESM Treaty is not concerned with the definition or implementation of monetary policy and does not encroach on the policy area governed by Article 3(1)(c), Article 119(2) or Article 127 of the TFEU. Therefore, I am satisfied that the provisions of the ESM Treaty are not incompatible with Article 127.

Other submissions
77. In addressing the submissions made by the parties in relation to the allegation of incompatibility between the ESM Treaty and the provisions of the TFEU which the plaintiff makes, I have focused primarily on the oral submissions made by counsel and on the first question formulated by counsel for the plaintiff for referral to the CJEU, which I set out in Section I above. In adopting that approach, I have endeavoured to identify and give determinations on the real issues between the parties. That is not to say that I have ignored the submissions made by each side in the written submissions furnished to the Court. However, there are a number of matters raised in the written submissions which I consider that it is appropriate to comment on.

78. In the context of their submissions in relation to Articles 122(2), 123 and 126, counsel for the plaintiff cite the decision of the Court of Justice in *Commission v. Ireland* [2006] ECR I – 4635. The premise on which they rely on that decision as authority for the proposition that the provisions of the ESM Treaty are incompatible with the provisions of the TFEU is that the power to give financial assistance is a Union competence conferred on the Council under the TFEU and that the ESM Treaty interferes with that Union competence in conferring an equivalent, overlapping and conflicting power to a autonomous international institution that operates outside the framework of the Union legal order. The issue in *Commission v. Ireland* was whether Ireland was permitted to initiate dispute-settlement proceedings against the United Kingdom under the United Nations Convention on the Law of the Sea concerning the MOX plant located at Sellafield. In its judgment, the Court stated (at para. 123):

> "The Court has already pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. That exclusive jurisdiction of the Court is confirmed by Article 292 EC, by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein . . .".

The invocation by the plaintiff of that authority is misplaced, because it is based on a false premise. The Union does not have exclusive competence to grant financial assistance to Member States embroiled in financial difficulties, and the ESM Treaty does not purport to affect the allocation of responsibilities defined in the Union Treaties.

79. While, in their written submissions, as in their oral submissions, counsel for the defendants' refutation of the plaintiff's allegation that the ESM Treaty encroaches on Union competence, particularly by reference to Articles 2(3) and 3(1)(c) TFEU, was the submission I have outlined earlier, namely, that the ESM Treaty is a funding agreement, which has nothing to do with coordinating economic policy or defining or implementing monetary policy, an alternative position adopted in their written submissions was that the plaintiff had overlooked that Article 2(1) TFEU, or more correctly the principles to be found therein, as interpreted by the Court of

Justice in Case 22/70 *Commission v. Council (AETR)* [1971] ECR 263, would permit Member States to enter into the ESM Treaty. Article 2(1) TFEU provides:

> "When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."

The defendants then explored academic commentary on the meaning of "empowered" in Article 2(1). As the core element of the defendants' defence to the plaintiff's allegation of incompatibility with Union law is that the ESM Treaty does not purport to confer on the ESM or the Members of the ESM a competence which is exclusive to the Union, which I understand to be the defendants' final position, the defendants do not have to fall back on Article 2(1) or on the *AETR* decision. In my view, neither is of relevance to the issues in this case.

80. Reliance by the defendants in their written submissions on the decision in the *AETR* case led to considerable significance being attached by counsel for the plaintiff in his replying submissions to one aspect of the judgment. The issue before the Court in that case arose out of a dispute between the Commission and the Council as to whether, at the relevant time, the negotiation and conclusion of the *AETR*, which was an international agreement in the sphere of transport policy between Member States and other European countries, could only be carried on by the Community, and not by the Member States, as had occurred. Counsel for the plaintiff referred the Court to, *inter alia*, paragraphs 13 to 21 of the judgment. Reference was made by the Court of Justice to the Article of the Treaty then in force, which provided that the adoption of a common policy in the sphere of transport was specially mentioned amongst the objectives of the Community, and also to the Article, which counsel for the plaintiff referred to as the predecessor of the present sincere cooperation provision (Article 4 TEU) and then stated (at para. 22):

> "If these two provisions are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope."

81. As the analysis of, and the conclusions on, the plaintiff's allegations of incompatibility between the ESM Treaty and the provisions of the TFEU illustrate, the ESM Treaty is not an agreement under which the Member States purport to assume obligations which might affect Union rules or alter their scope. In my view, in stating what I understand to be the final position of the defendants on the AETR case, the defendants were ultimately correct in suggesting that the decision of the Court of Justice does not advance the plaintiff's case.

Article 4(3) TEU

82. Article 4 TEU has been referred to in the next preceding paragraph in the context of the AETR case. Article 4(3) provides:

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

The plaintiff alleges that Member States are breaching their duty of sincere cooperation by ratifying the ESM Treaty, insofar as it violates the Union Treaties. The defendants' primary position is that there is no breach of the Union Treaties and accordingly no breach of Article 4(3). On the contrary, the defendants contend that the euro area Member States are fulfilling their duty under Article 4(3) by ratifying the ESM Treaty. As evidence of that, the defendants cite the following matters: the reference in Recital (2) to Decision 2011/199/EU and Recitals (5), (6), (9) and (10) of the ESM Treaty; the role of the Commission and the European Central Bank in the ESM framework; and the constraints imposed on ESM activities by Article 13(3) of the ESM Treaty. In my view, all of the matters adverted to by the defendants demonstrate that it is the opinion of the principal institutions of the Union that the actions which have been taken in the establishment of the ESM and in entering into the agreement which is the Fiscal Stability Treaty involve adherence to the principles of sincere cooperation contained in Article 4(3). I see no basis for disagreeing with that view.

Conferral of new functions: The Commission/Article 17 TEU

83. It is part of the plaintiff's case that the ESM Treaty confers "new functions" on, *inter alia*, the Commission in connection with the performance of tasks provided for under the ESM Treaty, which functions are not contemplated by the Union Treaties. The defendants refute that allegation by reference to Article 17 TEU which deals with the competence of the Union and provides that the Commission shall promote the general interest of the Union and take appropriate initiatives to that end. As has been noted earlier in Section II in giving an overview of Article 13 of the ESM Treaty, it is the defendants' position that the Commission is already performing similar tasks to those envisaged for it in the ESM Treaty in accordance with the regulation introduced in the so-called "Six Pack", for which there is a clear legal basis in the TFEU. The principal institutions of the Union in adopting, and in giving favourable opinions to the adoption of, Decision 2011/199/EU, as will be outlined later in Section V, clearly did not share the plaintiff's view that the establishment of a permanent stability mechanism would confer functions on the Commission at variance with what is permitted under Article 17. In my view, the plaintiff's allegation of an infringement of Article 17 is unfounded.

Conferral of new functions: The European Central Bank

84. Similarly, the plaintiff alleges that the ESM Treaty confers powers on the European Central Bank which are not contemplated by the Union Treaties. This is denied by the defendants who assert that the European Central Bank has competence to perform its ESM Treaty functions pursuant to the Union Treaties, referring to Article 282 TFEU. The defendants assert that the European Central Bank already performs a consultative/liaison role pursuant to, *inter alia*, Articles 126 and 127 TFEU and a similar role is envisaged for it in the "Six Pack". The understanding of the European Central Bank as stated in its opinion on the draft European Council decision which led to Decision 2011/199/EU as to the functions it might exercise in connection with a permanent stability mechanism is instructive. It states in paragraph 9 that the European Central Bank "may act as fiscal agent for the ESM" in the same way as under the EFSM and the EFSF. However, it does note that the monetary financing prohibition in Article 123 TFEU would not allow the ESM to become a counterparty of the euro system. I am not satisfied that the plaintiff has established that the ESM Treaty confers any function on the European Central Bank which infringes Union law.

Conferral of new functions: CJEU/Article 273

85. Finally, on the issue of competence conferral, the plaintiff alleges that the ESM Treaty confers powers on the CJEU which are not contemplated in the Union Treaties. Specifically, the plaintiff's allegation relates to the jurisdiction conferred on the CJEU by Article 37 of the ESM Treaty, which contains a mechanism for resolving questions of interpretation or application of its provisions between a Member and the ESM or between the Members *inter se*. The process is a three stage process, the first stage involving the decision of the Board of Directors, the second stage involving the decision of the Board of Governors, with provision at the third stage for referral to the CJEU under Article 37(3), if an ESM Member contests the decision of the Board of Governors. That seems to me to be a logical process. The defendants' position is that the CJEU has competence to perform the function thus conferred on it pursuant to Article 273 TFEU which provides:

> "The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties."

In relation to the three elements in Article 273 which must be present to confer jurisdiction on the Court of Justice, the defendants make the following submissions:

> (a) A referral pursuant to Article 37(3) would involve a dispute between Member States, all ESM Members being Union Member States, either directly, or indirectly, in the case of a dispute between a Member and the ESM, being between a Member and a collective of the other Members.
>
> (b) Such a dispute would be a dispute "which relates to the subject matter of the Treaties", given that the purpose of the ESM (as set out in Article 3) is to mobilise funding and provide stability support if indispensable to safeguard the financial stability of the euro area as a whole. Therefore, such dispute would relate to the subject matter of the Treaties.
>
> (c) Article 37 of the ESM Treaty constitutes a "special agreement" within the meaning of Article 273, on the basis that there is no impediment in that Article to establishing in advance of a dispute resolution mechanism that can be used in predetermined conditions, if and when a dispute arises.

Having regard to the defendants' submissions with which I agree, I am not satisfied that the plaintiff has established that Article 37 confers jurisdiction on the CJEU which infringes Union law.

Article 47 of the Charter

86. The plaintiff alleges that the ESM Treaty breaches the principle of effective judicial protection and Article 47 of the Charter. In replying to a request by the defendants to particularise the "constitutionally entrenched principles" of the TFEU which the plaintiff alleges would be violated by "ratification" of the ESM Treaty, the plaintiff enumerated the general principle of effective judicial protection and the right to an effective remedy as provided in Article 47 of the Charter. Accordingly, it is not correct, as was suggested by the defendants in their written submissions, that this point has not been pleaded. As to the manner in which this point has been developed in the written submissions of the plaintiff, first, the plaintiff asserts that any review by the CJEU pursuant to Article 37(3) of the ESM Treaty will be necessarily limited. Secondly, the plaintiff asserts that the CJEU will not have jurisdiction to review the compatibility of decisions of the ESM with Union law, including the Union Treaties, the Charter or general principles of Union law. Thirdly, the plaintiff asserts that a dispute may only be referred under Article 37(3) by a Member of the ESM and asserts that the consequence of that is that "any other interested parties, such as financial institution, or the shareholders of such institutions" shall have no access to the CJEU. In that context, the plaintiff refers to the judgment of the Grand Chamber in joined cases C 402/05 P and C 415/05P *Kadi v. Council* [2008] ECR I – 6351 at paragraphs 281 to 286. He also refers to the judgment of the European Court of Human Rights in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* (2006) 42 EHRR1. Finally, he also invokes the decision of the Court of Justice in *NS* and *ME* (Case – 493/10 *NS* and *ME*, 21st December, 2011), on the basis that there the CJEU adopted an analogous approach to that which had been adopted by the European Court of Human Rights in the *Bosphorus* case. The factual basis of all of those cases is very far removed from the realities of the financial crises being experienced by euro area Member States which are being addressed in the ESM Treaty and the measures adopted to safeguard the euro.

87. Article 47, which is entitled "Right to an effective remedy and to a fair trial" provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a Tribunal in compliance with the conditions laid down in Article 47. It further elaborates on how an effective remedy is to be afforded, namely: by a fair and public hearing within a reasonable time; by an independent, impartial tribunal previously established by law; and by affording everyone the possibility of being advised, defended and represented, and of having recourse to legal aid if he or she lacks sufficient resources insofar as such aid is necessary to ensure effective access to justice.

88. The defendants argue that the plaintiff does not have any standing to pursue the ground of challenge based on Article 47, as distinct from what is referred to as *"Crotty"* type standing, that is to say, standing to challenge the consistency of the ESM Treaty with the Constitution, to which I will refer later in Section IV. The defendants' reasoning is that, in effect, in the terminology of Henchy J. in *Cahill v. Sutton* [1980] I.R. 269, he is relying on the putative rights of a hypothetical third party. Notwithstanding that stance, the defendants address the substantive issue and argue forcibly that there is no lacuna in the judicial protection created in the ESM, nonetheless, observing, in my view justifiably, that it is difficult to envisage circumstances in which the activities of the ESM, given their nature, could give rise to a violation of the fundamental rights and freedoms which are protected by Article 47. In particular, it seems to me inconceivable that financial institutions, or the shareholders of such institutions, with which the ESM may enter into financial arrangements would be relying on the ESM Treaty as the basis of a legal relationship with the ESM. Apart from that, the defendants argue that the role of the CJEU pursuant to Article 37 of the ESM Treaty in connection with "the interpretation and application" of the Treaty is sufficiently broadly worded to incorporate a review which takes cognisance of rights and freedoms protected by Article 47. They demonstrate that historically, and in the absence of reference to human rights in the EC Treaty, the CJEU nonetheless fashioned a sophisticated human rights jurisprudence, suggesting that it is simply not tenable that the CJEU would ignore that well developed jurisprudence on a referral to it of a dispute as to the "interpretation and application" of the ESM Treaty, simply because there is no express reference therein to human rights.

89. Whether or not the plaintiff does have *locus standi* to pursue the allegation that the ESM Treaty infringes Article 47 of the Charter, on which I do not consider it necessary to express a view, the assertion that the ESM Treaty does infringe Article 47 is, in my view, unsustainable. On the basis of the various arguments put forward by the defendants, I am satisfied that the plaintiff has not established that there is incompatibility between the ESM Treaty and Article 47.

Summary of conclusions

90. For the reasons set out both in Section II and in the foregoing paragraphs of Section III, I am satisfied that the plaintiff's claim that the ESM Treaty is incompatible with Union law has not been established. The declaration sought by the plaintiff is that the ESM Treaty violates the constitutionally entrenched principles of the TFEU. To that extent the declaration is refused. However, the

declaration sought is also to the effect that "any purported ratification of the [ESM Treaty] is invalid, void and of no effect". That aspect of the claim will be adjourned pending the resolution of the issue dealt with in Section VI. However, as will be outlined later, I have come to the conclusion that an issue does arise as to whether the ESM Treaty may enter into force and operate in advance of the entry into force of Decision 2011/199/EU.

Section IV: The ESM Treaty and the Constitution

General observations

91. Before addressing the areas of contention between the parties on the alleged incompatibility of the ESM Treaty with the Constitution, it is appropriate to note some areas of consensus which emerged from the submissions of the parties.

92. First, the defendants, properly in my view, do not contest the plaintiff's submission that the ESM Treaty is not "necessitated" by the obligations of membership of the Union and do not rely on Article 29.4.6° of the Constitution as affording the ESM Treaty the force of law in the State. The defendants' position is that the ESM Treaty is an international agreement and the State's participation in it is voluntary.

93. Secondly, the defendants do not contest the plaintiff's assertion, in reliance on the decision of the Supreme Court in *Crotty*, that he has *locus standi* to request the Court to consider whether ratification by the State of the ESM Treaty without the approval of the people in a referendum in accordance with Article 46 of the Constitution would be consistent with his constitutional rights, although that acknowledgement is made without prejudice to the defendants' arguments on the plaintiff's alleged lack of standing to challenge the incompatibility of the ESM Treaty with Article 47 of the Charter, which was addressed in Section III earlier. As will appear in Section IV, the defendants also dispute that the plaintiff has standing to challenge the validity of Decision 2011/199/EU in these proceedings, which will be considered in Section V below. It may also be observed that, in acknowledging the plaintiff's *locus standi*, the defendants refer to the rights he enjoys "as citizen and Teachta Dála" under the Constitution. I did not understand the plaintiff to assert that his standing to challenge the constitutionality of the ESM Treaty or the ESM Act of 2012 was related to his membership of Dáil Éireann. I consider that his standing is based on the fact that he is a citizen of Ireland.

94. Thirdly, while the defendants do not dispute the plaintiff's contention, also in reliance on the judgment of the Supreme Court in the *Crotty* case, "that in the conduct of the State's external relations, as in the exercise of executive power in other respects, the Government is not immune from judicial control if it acts in a manner or for a purpose which is inconsistent with the Constitution" (*per* Henchy J. at p. 786), the defendants remind the Court of what, following an analysis of the *Crotty* decision, has been described by the High Court as "the wide discretion so accorded to [the Government] in foreign policy and conduct in international relations (per Kearns J., as he then was, in *Horgan v. An Taoiseach* [2003] 2 I.R. 468 at p. 512).

95. As the summary of the plaintiff's grounds for contending that the ESM Treaty is incompatible with the Constitution as outlined in Section I above indicates, in essence, there are three limbs to the plaintiff's constitutional argument. The first limb is that the ESM Treaty constitutes such a degree of delegation of sovereignty that it is incompatible with the Constitution and, as a consequence, that a referendum to amend the Constitution is necessary pursuant to Article 46 of the Constitution to permit ratification of, and Ireland's participation in, the ESM Treaty. This argument is based primarily on the decision of the Supreme Court in the *Crotty* case. The second limb is that the ESM Treaty, or more properly I would suggest, its implementation, entails the transfer from the Oireachtas of an impermissible degree of monetary and budgetary power to the executive, and, in particular, to the Minister for Finance, contrary to the Constitution. While the defendants pointed to the fact that this ground was not pleaded, nonetheless they addressed it and I propose to consider it. As the ESM Act of 2012 has been enacted, the second limb has to be considered in the context of the plaintiff's challenge to the constitutionality of that legislation on the grounds summarised in Section I above. The third limb, which the defendants also contend was not pleaded, but which they addressed and which I propose considering, is that the ESM Treaty is incompatible with Union law and that it is in fundamental contradiction to the Union Treaties and, consequently, the Constitution is breached and the approval of the people in a referendum is necessary to give effect to the necessary amendment of the Constitution.

96. In addressing the first limb of the constitutional argument, I propose outlining the provisions of the Constitution which were under scrutiny in the *Crotty* case, before consideration of that decision.

Articles of the Constitution under scrutiny in the *Crotty* decision

97. Article 5 of the Constitution provides that Ireland is a sovereign, independent, democratic State. Article 6 provides that all powers of government, legislative, executive and judicial, derive from the people, and that the powers of government are exercisable only by and on the authority of the organs of the State established by the Constitution. Article 28.2 provides that the executive power of the State shall, subject to the provisions of the Constitution, be exercised by or on the authority of the Government.

98. Article 29.4.1° provides:

> "The executive power of the State in or in connection with its external relations shall in accordance with Article 28 be exercised by or on the authority of the Government."

Article 29.4.2° provides:

> "For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern."

99. Article 29.5.1°, which deals with international agreements, other than agreements and conventions of a technical or administrative character, requires that every international agreement to which the State becomes a party shall be laid before Dáil Éireann. Article 29.5.2° provides:

> "The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann."

The *Crotty* decision

100. The aspect of the *Crotty* decision which is of relevance to the first limb of the plaintiff's argument on the inconsistency of the

ESM Treaty with the Constitution is the majority decision (in the judgments of Walsh J., Henchy J. and Hederman J.) of the Supreme Court declaring that the ratification of Title III of the Single European Act (SEA) would be unconstitutional. As the headnote in the report succinctly records, Title III of the SEA embodied a separate Treaty whereby each of the High Contracting Parties agreed to adopt its foreign policy positions to those of the others and refrain from impeding a consensus and joint action within a structured framework known as European Political Cooperation. The provisions of Title III of the SEA were not inserted into the European Communities Act 1972 by virtue of the European Communities (Amendment) Act 1986, the constitutionality of which was upheld by the separate decision of the Supreme Court in the *Crotty* case. As is pointed out in the judgment of Walsh J., Title III was, in reality, a separate Treaty, although not so in form. The SEA provided that it would be ratified "by the High Contracting Parties in accordance with their respective constitutional requirements". As Walsh J. pointed out in his judgment (at p. 777), in essence, the issue before the Supreme Court was whether or not, as a matter of Irish law, the method of ratification proposed by the Government was in accordance with the Constitution, namely, whether it could be ratified on the basis that its terms had been approved in their entirety by Dáil Éireann in accordance with Article 29, s. 5, sub-s. (2) of the Constitution.

101. In his judgment Walsh J. (at p. 780) summarised the effect of the Treaty in issue before the Supreme Court as follows:

> "What the Treaty does is to commit the State to pursuing a policy which has, *inter alia*, as one of its objectives the transformation of the relations of Ireland with the other Member States of the European Communities into a European Union. If this were simply a unilateral statement of policy on the part of the Government or part of a multilateral declaration of policy to the like end it could not be called into question in this Court. As was pointed out by Budd J. in *Boland v. An Taoiseach* [1974] I.R. 338 at p. 366 it would, as such, be outside 'the purview of the Courts in that it makes the Government responsible to the Dáil which can support or oppose those policies and review them'. The present Treaty provisions go much further than that and, notwithstanding that, they have been approved by Dáil Éireann. As was pointed out in the decision of the Court in the first part of this case the essential nature of sovereignty is the right to say yes or to say no. In the present Treaty provisions that right is to be materially qualified."

102. Having outlined the relevant provisions of the Treaty in issue, Walsh J. stated (at p. 782) that the matters outlined impinged upon the freedom of action of the State not only in certain areas of foreign policy but even within international organisations such as the United Nations or the Council of Europe. He stated that certain of its provisions impinged "upon the State's economic, industrial and defence policies".

103. Having considered Article 29.4.2°, Walsh J. stated that the framers of the Constitution in that provision had refrained from granting to the Government the power to bind the State by agreement with groups of nations "as to the manner or under what conditions" the executive function of the State conferred by that provision would be exercised. He identified where the line is drawn between what the Government can and cannot do in the following passage (at p. 783):

> "In enacting the Constitution the people conferred full freedom of action upon the Government to decide matters of foreign policy and to act as it thinks fit on any particular issue so far as policy is concerned and as, in the opinion of the Government, the occasion requires. In my view, this freedom does not carry with it the power to abdicate that freedom or to enter into binding agreements with other States to exercise that power in a particular way or to refrain from exercising it save by particular procedures, and so to bind the State in its freedom of action in its foreign policy. The freedom to formulate foreign policy is just as much a mark of sovereignty as the freedom to form economic policy and the freedom to legislate."

Walsh J. held that a referendum was necessary if it was desired "to qualify, curtail or inhibit the existing sovereign power to formulate and to pursue such foreign policies as from time to time to the Government may seem proper . . .".

104. In his judgment, Henchy J., in considering the scope and objective of Title III, observed that it set the Member States on a course leading to an eventual European Union in the sphere of foreign policy. He continued (at p. 785) as follows:

> "The essence of this fundamental transformation in the relations between the Member States of the European Communities is that they are no longer to have separate foreign policies but are, as far as possible, to merge their national foreign policies in a European (i.e. Community) foreign policy and to work together in the manner indicated, so as to implement what is called European Political Cooperation, with a view to achieving eventual European union."

105. In setting out his conclusions as to the consequences of the effect of Title III, Hency J. stated (at p. 787) as follows:

> "A perusal of Title III of the SEA satisfies me that each ratifying Member State will be bound to surrender part of its sovereignty in the conduct of foreign relations. That is to happen as part of a process designed to formulate and implement a European foreign policy. The freedom of action of each state is to be curtailed in the interests of the common good of the Member States as a whole. Thus, for example, in regard to Ireland, while under the Constitution the point of reference for the determination of a final position on any issue of foreign relations is the common good of the Irish people, under Title III the point of reference is required to be the common position determined by Member States. It is to be said that such a common position cannot be reached without Ireland's consent, but Title III is not framed in a manner which would allow Ireland to refuse to reach a common position on the ground of its obligations under the Irish Constitution. There is no provision in the Treaty for a derogation by Ireland where its constitutional obligations so require."

106. Later, Henchy J. concluded (at p. 788) that, if Ireland were to ratify the Treaty in issue it would be bound in international law to engage actively in a programme which would trench progressively on Ireland's independence and sovereignty in the conduct of foreign relations and that Ireland would therefore become bound to act in a way that would be inconsistent with the Constitution. Without the appropriate constitutional amendment, the ratification of Title III would be impermissible under the Constitution.

107. Counsel for the defendants referred the Court to the following passage from the judgment of Walsh J. in the *Crotty* case (at p. 777):

> "The Constitution confers upon the Government the whole executive power of the State, subject to certain qualifications which I will deal with later, and the Government is bound to take care that the laws of the State are faithfully executed. In its external relations it has the power to make treaties, to maintain diplomatic relations with other sovereign States. The Government alone has the power to speak or to listen as a representative of the State in its external relations. It is the Government alone which negotiates and makes treaties and it is the sole organ of the State in the field of international affairs. For these functions it does not require as a basis for their exercise an Act of the Oireachtas.

> Nevertheless the powers must be exercised in subordination to the applicable provisions of the Constitution. It is not within the competence of the Government, or indeed of the Oireachtas, to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered so to do by the Constitution. They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution. To the judicial organ of government alone is given the power conclusively to decide if there has been a breach of constitutional restraints."

The defendants lay particular emphasis on two aspects of that passage. The first is the nature and scope of the Government's power in the field of external relations, which was also adverted to in the judgment of Kearns J. in the *Horgan* case, where he stated (at p. 511) that Walsh J. "emphasises repeatedly that the executive cannot be told, either externally or internally, how to conduct its relations with other states". The second is the reference to transfer of power, which the defendants assert is a reference to policy making power.

108. In the sentence which succeeds the passage from the judgment of Walsh J. in the *Crotty* case which I have quoted in para. 103 above, Walsh J. stated, referring to freedom to form economic policy and freedom to legislate, that those freedoms had prior to 1987 been curtailed by the consent of the people to the amendment of the Constitution which is contained in Article 29.4.3°, which was the result of the third amendment of the Constitution approved of in 1972 to allow the State to become a member of the European Communities. It cannot be gainsaid that, as the defendants submit, such residual freedom in the field of monetary and economic policy as remained in the State in 1987 has been significantly curtailed by the Treaty on European Union (the Treaty of Maastricht) and the Treaties of Amsterdam, Nice and Lisbon, all of which were approved by the people in 1992, 1998, 2002 and 2009 respectively.

109. Against that background, I will consider the submissions of the parties on the first limb of the constitutional challenge to the ESM Treaty, insofar as they have not been already outlined and considered in the overview of the provisions of the ESM Treaty.

Submissions on first limb of constitutional argument

110. There is one aspect of the submissions on which it is not possible for the Court to express a view. The plaintiff makes what I consider can justifiably be characterised as a sweeping assertion that the provisions and obligations contained in the ESM Treaty are more extensive, open-ended and onerous than existing agreements with other financial institutions, which I assume is an oblique reference to the International Monetary Fund (IMF). The defendants, on the other hand, refer to the many international financial agreements, which have been entered into and ratified by the State since the coming into force of the Constitution, and the legislation enacted in relation thereto, including the Bretton Woods Agreements Act 1957 and the various amendments of it in relation to the participation of Ireland in the IMF. In fact, counsel for the defendants furnished the Court with a lever arch file of domestic legislation covering such agreements, coupled with a resumé of the contents of the file and an overview of Ireland's membership of the various international financial institutions. Although it has been furnished in a very accessible fashion, because of the time constraints in relation to deciding the issues in these proceedings, it has not been possible to consider that material. In any event, I am sceptical as to whether it has any relevance at all to the issues to be determined in relation to the ESM Treaty.

111. The nub of the plaintiff's arguments based on the decision in the *Crotty* case is that participation in the ESM Treaty involves a transfer of sovereignty to the ESM, because such participation impinges on and diminishes Ireland's budgetary, economic and fiscal sovereignty, in that it entails an open-ended and irreversible transfer of powers to an autonomous institution that exposes Ireland to a permanent commitment to provide funding and assume liability, without limit, for the debts of other Members, on the basis of decisions that may be made regardless of, and in opposition to, Ireland's views, in circumstances where there is no option or procedure for withdrawal from the mechanism. The plaintiff's case is that this transfer of sovereignty is compounded by:

> (a) the voting structure and, in particular, the provision which deprives a Member of its vote if it is in default;
>
> (b) the contended for power of the ESM to create and construct its structural and operational parameters in the course of its activities, as and when required, so that the financial commitment of a Member is unforeseeable, referring to the powers under Articles 8(2), 10, 11, 25, 4(4), 19, 20 and 44, the exercise of all of which, with the exception of those under Article 25 and the first paragraph of Article 4(4), it should be observed expressly requires mutual agreement, by virtue of Article 5(6);
>
> (c) that it entails the transfer of powers to an autonomous institution that operates outside the Irish constitutional and Union legal orders and is not subject to minimum requirements of scrutiny, review or due process, which contention has been addressed in consideration of Article 37 of the ESM Treaty in Section III above; and
>
> (d) that it constitutes a permanent transfer of powers to the ESM, without any procedure for withdrawal from the mechanism.

112. In response to the plaintiff's general proposition, in reliance on the decision in the *Crotty* case, that the State's participation in the ESM Treaty will involve a transfer of sovereignty to the ESM, the defendants submit that what participation by the State in the ESM Treaty at this time entails contrasts markedly with what participation in Title III of the SEA entailed in 1987 and, on that basis, that the circumstances in this case are distinguishable from the circumstances in the *Crotty* case. In this connection, the defendants refer to the decision of the Supreme Court in *McGimpsey v. Ireland* [1990] 1 I.R. 110, in which the basis of the decision of the Supreme Court in the *Crotty* case was explained as follows in the judgment of Finlay C.J. (at p. 122):

> "The basis of the decision of this Court in *Crotty* . . . was that the terms of the Single European Act could oblige the Government in carrying out the foreign policy of the State to make the national interests of the State, to a greater or lesser extent, subservient to the national interests of other member states."

113. The defendants submit that, while the ESM Treaty as an international agreement is a formal exercise in international relations, it has little to do with the conduct of the State's foreign policy. I have already alluded to the defendants' argument based on the distinction made by Walsh J. in the *Crotty* case between freedom to formulate foreign policy, on the one hand, and freedom to formulate economic policy and to legislate, on the other hand, and the defendants' submission, which is clearly correct, that the distinction has become more pronounced in the intervening years since *Crotty*. The defendants emphasise that the context in which the Member States of the euro area entered into the ESM Treaty is the global financial crisis which commenced in September 2008, which has given rise to considerable financial instability in the euro area. Viewed in that context, and having regard to the purpose of the ESM, it is the defendants' position that its participation in the ESM does not involve the State in "the transformation" of its relations with other Member States of the European Union, nor does it involve any fettering or disposal of sovereign foreign policy powers, as envisaged in the *Crotty* decision as being constitutionally impermissible.

114. The defendants in their response stray into the theoretical and factual spheres, in that it is stated in the defendants' written submission that participation in the ESM will permit the Government and future Governments to seek financial assistance, if required in future, from the ESM, whether because it cannot be obtained domestically or on the international financial markets, or because, having regard to the terms and conditions on offer, those on offer from the ESM are more attractive than those on the markets. That proposition is elaborated on in a footnote to the following effect:

> "For these reasons, it is the considered view of the Government that it is essential for Ireland, and indeed in its vital national interest that the ESM Treaty enters into force as soon as possible. The Government considers it to [be] very important, in terms of Ireland's future return to the international financial markets, that the ESM should be in place as a safety net, or insurance policy, to provide reassurance to financial markets of the availability of a funding source, were a situation to evolve in which we required further assistance."

While no evidence was adduced that that is the considered view of the Government, obviously the instructions of counsel for the defendants' are to that effect. In any event, it is reasonable to infer, on the basis of the defendants' submissions that, if Ireland ratifies the ESM Treaty, it will remain free to raise finance on the financial markets insofar as that is possible, and ratification will give it the additional option of requesting financial assistance from the ESM. As counsel for the defendants put it, the State will remain free to say yes or no to the market, but will have the additional choice of saying yes or no to the ESM.

115. In relation to the specific arguments which the plaintiff makes to illustrate that the participation of Ireland in it involves a transfer of sovereignty to the ESM, the defendants disagree with the plaintiff's analysis of the provisions of the ESM Treaty and, in particular, as I have endeavoured to demonstrate in giving the overview of its provisions, the specific features which the plaintiff identifies as giving rise to a curtailment of the State's sovereignty. As regards decision making within the ESM, the defendants' position is that all decisions of significance must be made by the Board of Governors unanimously. The State's current liability to subscribe to capital stock is fixed and has been approved by the Oireachtas in the ESM Act of 2012. A decision to change authorised stock would require not merely a unanimous decision of the Board of Governors, but also approval of Dáil Éireann and an amendment of the ESM Act of 2012. A decision to provide financial assistance and the nature of the assistance to be provided must be made by the Board of Governors unanimously. The strict conditionality to which the provision of financial assistance must be subject must, by virtue of Article 13(3), be consistent with the measures of economic policy coordination provided for in the TFEU. That means, the defendants submit, that the ESM in determining the conditionality to which financial assistance is to be subject, cannot set new policies inconsistent with Union law or with the Constitution.

116. The defendants dispute the plaintiff's contention that Ireland's participation in the ESM involves a permanent commitment, in the sense that there is no means of exiting or withdrawing from the ESM. As was acknowledged by the defendants, there is, in fact, no provision in the ESM which deals with the withdrawal of a Member. Notwithstanding that, counsel for the defendants submitted that a Member may withdraw from the ESM under international law via the following exit route. First, Article 15 TEU provides that any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. Secondly, Article 56 of the Vienna Convention provides:

> "A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
>
> (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
>
> (b) a right of denunciation or withdrawal may be implied by the nature of the treaty."

The defendants submit that, as a Member State can withdraw from the Union, and as the Members of the ESM are Member States of the Union, it must be assumed that they intended to admit the possibility of withdrawal from the ESM. A right of withdrawal may be implied by the nature of the ESM Treaty. Counsel for the defendants further rely on the provisions of the Vienna Convention on interpretation of the Treaties and, in particular, Article 32 which provides:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 . . ."

Thirdly, that provision, in turn, leads the defendants back to the ESM Treaty and Recital (5) thereof, which refers to the Fiscal Stability Treaty and recites that the ESM Treaty and the Fiscal Stability Treaty "are complementary in fostering fiscal responsibility and solidarity with the economic and monetary union". The defendants submit that the ESM is so close to the Union framework that it is inconceivable that a Member, which had withdrawn as a Member State of the Union, could not withdraw from the ESM. In this context, counsel for the defendants adopted the description of the ESM as being "hybrid in nature" by reference to the judgment of the German Constitutional Court of 19th June, 2012, on the application of Fraktion Bündis 90/Die Grünen.

Conclusions on first limb of constitutional argument

117. The first question which must be addressed on the plaintiff's claim that the ESM Treaty is incompatible with the Constitution is what is the Court's function in determining a claim of that nature brought by a citizen? The answer is to be found in the last sentence of the last passage from the judgment of Walsh J. in the *Crotty* case, which is quoted in para. 107 above. It is to decide if there has been a breach of constitutional restraints imposed on the Government in the exercise of its executive power and it is merely that. The next question is what restraints does the Constitution impose on the Government in entering into an international agreement such as the ESM Treaty. That question necessitates identifying what power the Constitution confers on the Government in relation to entering into such an agreement. The executive power of the State is exercisable by or on the authority of the Government (Article 28.2) and the executive power of the State in or in connection with external relations is exercisable by or on the authority of the Government (Article 29.4. 1°) but such exercise is subject to the provisions of the Constitution. Article 29.4.2°, which has been quoted earlier, expressly empowers the State to enter into international agreements. There are express requirements in Article 29 in relation to the exercise of that power, in that every international agreement must be laid before Dáil Éireann (Article 29.5.1°) and the State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement have been approved by Dáil Éireann (Article 29.5.2°). That last requirement, in my view, is of particular significance to the issue the Court has to determine here. It is clearly implicit in that provision that the Government has power, subject to approval of Dáil Éireann, to enter into an international agreement which gives rise to financial liability on the part of the State.

118. Subject to the foregoing, there are no other express restraints on the exercise of the power of the Government in relation to entering into international agreements in the Constitution. However, on the authority of the Supreme Court in the *Crotty* case, there are implicit restraints in the Constitution in relation to the manner in which the Government may exercise its power in relation to external relations and, in particular, in relation to entering into treaties with other nations. It cannot enter into an international

agreement with other nations which, in the words of Walsh J., will qualify, curtail or inhibit the existing sovereign power of the State. What was at issue in the *Crotty* case was sovereignty in the conduct of external relations. In principle, and on the authority of the decision in the *Crotty* case, there is similar constitutional restraint in relation to other areas, such as economic and monetary policy, save, however, to the extent that the Constitution has been amended to permit curtailment in that area, for example, by the amendments which permitted participation in the Union Treaties, and that the curtailment of freedom in that area is in accordance with those amendments.

119. In my view, the defendants were correct in submitting that it is the power to formulate and implement policy which the Constitution restrains the Government from abdicating or relinquishing in part. That is to be deduced not only from the judgment of Walsh J. in the *Crotty* case, but also from the judgment of Henchy J. Accordingly, it seems to me that the core question on this aspect of the plaintiff's claim, is whether the consequence of the ratification of the ESM Treaty will be that the State's residual freedom to formulate and implement policy in relation to economic and monetary matters will be diminished. I consider that the answer to that question is to be found in the basic features of the ESM Treaty and the basic functions of the ESM, rather than in the detail.

120. In the ESM Treaty the seventeen Member States in the euro area joined together to establish a body, the ESM, with a separate and distinct legal personality. The ESM, in essence, has two inter-related and, indeed, inter-dependent functions:

> (a) to mobilise funding, that is to say, to raise funds through capital contributions and borrowing; and
>
> (b) to provide stability support to a Member who is in severe financial difficulty, in other words, to bail out the Member, but that function is wholly conditional on the exercise of the function being indispensable to safeguard the financial stability of the euro area as a whole and its Member States.

121. It is instructive to consider how being a Member of the ESM impacts on Ireland having regard to those basic functions. Arising out of the first function, Ireland is obliged to subscribe to the authorised capital stock (Article 8), meet capital calls (Article 9) and assume liability for coverage of losses (Article 25) in the amounts and percentages stipulated in Annex II and Annex I respectively. By virtue of the ESM Act of 2012, in effect, Dáil Éireann has given approval to the charge upon public funds which necessarily ensues from the ESM Treaty, as required by Article 29.5.2°. It is undoubtedly the case that the State's financial liability under the ESM Treaty is not finite and there is potential for such liability being increased. However, that state of affairs cannot come about without the consent of, or, in other words, against the wishes of the State, because a decision to change the authorised capital stock requires a unanimous decision of the Board of Governors under Article 5(6)(d). Further, Article 10 requires that, before such decision shall enter into force, the Members have to complete their applicable national procedures. In the case of Ireland, if it happens, this will involve the approval of Dáil Éireann and, indeed, as the defendants accept, the amendment of the ESM Act of 2012.

122. In relation to the second basic function, the provision of financial assistance, Ireland's participation in the ESM will render it eligible to request financial assistance in accordance with Article 13. However, there is no compulsion on the State to avail of that option. If the State were to decide voluntarily to avail of the option, and if the terms of conditionality to be imposed in the MoU would involve a diminution of the State's existing residual sovereignty in the area of economic and monetary policy, the State would be free, and the Government, as a matter of complying with its constitutional obligations, would be required, to forgo availing of such financial assistance on those terms.

123. Accordingly, when one considers the substance of the ESM Treaty, Ireland's participation in it neither impinges on nor diminishes its budgetary, economic or fiscal sovereignty as contended by the plaintiff. While it undoubtedly commits Ireland to financial liability, the constitutional requirement of approval of Dáil Éireann has been obtained as to its current liability and any increase in financial liability to the ESM to which the Government consents in the future cannot bind the State without the approval of Dáil Éireann and, indeed, of the Oireachtas in amending the ESM Act of 2012. It may be that discharging that financial liability will have budgetary implications which will require an adjustment of budgetary policy. However, those possible implications have advance approval of the Oireachtas under the ESM Act of 2012.

124. I consider that the provisions of the ESM Treaty are not open-ended. The agreement which the seventeen Member States of the euro area signed up to on 2nd February, 2012 sets out the rights and obligations of each signatory with clarity and precision. Neither Ireland nor any other Member State assumes limitless financial liability thereunder. The risk inherent in conducting a detailed analysis of the provisions of the ESM Treaty, which the plaintiff has done and the defendants have answered, is that one could easily lose sight of what the Court's function is. It is the very limited function outlined earlier. The Court has absolutely no role in commenting as to whether participation is a good or bad strategy for Ireland. For that reason, the Court must attach no weight to the views of the Government as expressed in the quotation from the defendants' written submissions set out earlier. Subject to what I will say below on the question of capacity to withdraw from the ESM Treaty, in general, I have found the defendants' responses to the plaintiff's specific grounds of alleged incompatibility with the Constitution to be wholly persuasive. However, for completeness I make the following comments.

125. On my reading of the ESM Treaty, the only circumstance in which mutual agreement is not required for a significant decision is the emergency situation provided for in Article 4(4). Where the emergency voting procedure is invoked, there is no doubt that a decision affecting Ireland could be made without the consent of Ireland. However, the decision relates to the granting of financial assistance in circumstances where both the Commission and the ECB conclude that a failure to urgently adopt a decision would threaten the economic and financial sustainability of the euro area. Obviously, there is need for flexibility in addressing financial crises. I cannot see how agreeing to the provisions of Article 4(4) on the part of the Government could on any common sense basis be regarded as a diminution of sovereignty, when the objective is to safeguard the euro area.

126. As regards the exclusion of a Member who is in default from exercising voting rights for so long as it is in default as provided for in Article 4(8), even allowing for the fact that the default may be attributable to inability, rather than unwillingness, to meet its obligations, I cannot see how, as a matter of commonsense, such a pre-determined sanction for default, which in participating in the ESM Treaty Ireland has agreed to, could be regarded as a fundamental transfer of sovereignty in the sense envisaged in the judgment in the *Crotty* case. Looking at the situation from the perspective of a non-defaulting Member, it is true that Article 25(2) has consequences, in that a revised increased capital call will be made with a view to ensuring that the ESM receives the total amount of paid-in capital needed. However, in my view, the defendants' submission to the effect that the power conferred by Article 25(2) is subject to the cap on Ireland's obligation to subscribe to the authorised capital stock, which is €11.1454 billion, is correct. Any increase in that liability would require unanimity (Article 10(1) and Article 5(6)(d)) and also the approval of Dáil Éireann and the amendment of the ESM Act of 2012.

127. Because of the provisions of Article 13(3) and, in particular, the requirement that the MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, there cannot be an incompatibility between the conditionality

imposed on the grant of financial assistance to a Member and the TFEU. As Ireland is bound under both Union law and national law to the provisions of the TFEU in consequence of amendment of the Constitution, there can be no incompatibility with the Constitution.

128. The question of the entitlement of a Member to withdraw from the ESM, in the absence of an express provision in the ESM Treaty permitting withdrawal and, insofar as it might arise, the resolution of a dispute between the Member seeking to withdraw and the other participating Members, would be a matter for the final decision of the CJEU in accordance with Article 37 to be determined in accordance with Union law. That being the case, I do not think it is appropriate for this Court to express a view on the submission made on behalf of the defendants as to how withdrawal could be achieved. Having said that, I am of the view that, even in the absence of an express mechanism for withdrawal, the participation of the State in the ESM Treaty, given that its consent is necessary in all cases (with the exception of the application of Article 4(4)) where significant decisions must be made, cannot be regarded as a diminution of sovereignty.

Second limb of the plaintiff's constitutional argument/challenge to the constitutionality of the ESM Act of 2012
129. The second limb of the plaintiff's argument that the ESM Treaty is incompatible with the Constitution, as originally formulated, was that a consequence of the ESM Treaty is that particularly far-reaching decisions may be made by the Minister for Finance in his capacity as a Governor of the ESM without the involvement of the Oireachtas. In identifying such decisions, the plaintiff pointed to, for example, the decision to make capital calls to finance operations or to cover losses and to change the authorised capital stock. As such decisions relate to matters which involve "a charge upon public funds", the plaintiff contended, clearly correctly, that they would require approval of Dáil Éireann. During the hearing, it became apparent that that submission was being overtaken by events and that the ESM Act of 2012 would be enacted before the Court gave its judgment. Against that background, the plaintiff sought to amend his pleadings to claim a declaration that the Act is unconstitutional. The grounds on which the plaintiff supported such claim, as set out in the plaintiff's written summary, have been set out in Section I above.

130. In relation to the plaintiff's claim as originally formulated, the position of the defendants is that it was misconceived, in that the Minister for Finance will remain accountable to Dáil Éireann in respect of decisions taken within the ESM in respect of financial assistance provided using, in part, public funds that Dáil Éireann has approved for contribution to the ESM and, further, that no additional funding can be committed without further approval of Dáil Éireann by virtue of Article 29.5.2° of the Constitution. The defendants recognise that legislation approving an agreement to commit capital to the ESM could be subject to constitutional challenge. That is what has happened. Therefore, the second limb of the plaintiff's constitutional argument falls to be considered by reference to the plaintiff's claim that the ESM Act of 2012 is unconstitutional.

131. Apart from the plaintiff's contention that the ESM Act of 2012 in its entirety is unlawful by reason of the fact that it seeks to ratify the ESM Treaty, which it is alleged is in breach of the Constitution and of the Union Treaties, the plaintiff's challenge focuses entirely on s. 2, which, it is contended will confer an impermissible degree of financial and budgetary power on the Minister for Finance contrary to Articles 5, 6 and 17 of the Constitution. As is disclosed in the outline of its provisions in Section I above, the text of the ESM Treaty is set out in the schedule to the Act.

132. Section 2 of the ESM Act of 2012 provides as follows:

> "The Minister [for Finance] may on behalf of the State, from time to time, make payments in respect of the contribution of the State to the authorised capital stock of the ESM in accordance with the Treaty."

However, s. 2 is not a stand-alone provision, as is implicit in the plaintiff's arguments. As the defendants submit, it must be read in conjunction with the remainder of the Act and, in particular, with s. 3 which provides:

> "There may be paid out of the Central Fund or the growing produce of that Fund sums, aggregating to a sum not exceeding [€11.1454 billion] to enable the State to make payments in respect of its contribution to the authorised capital stock of the ESM in accordance with the Treaty."

By virtue of Article 29.5.2° of the Constitution the approval of Dáil Éireann was necessary to render the State liable in Irish law for the financial contributions committed to in the ESM Treaty. However, the combined effect of ss. 2 and 3 of the Act is that the Oireachtas has approved of that commitment, subject to the limitation expressly provided for in s. 3, that is to say, that the aggregate contributions shall not exceed €11.1454 billion. The Oireachtas has also empowered the Minister for Finance to make the payments "from time to time" but he must exercise that power in accordance with the provisions of the Treaty. In my view, the empowerment of the Minister to make payments to the ESM by s. 2, which, on a plain reading, is subject to the limitation contained in s. 3, does not involve any transfer of power to the executive or to the Minister in contravention of any provision of the Constitution.

133. Moreover, it is unequivocally acknowledged by the defendants that the limit on payments by the State to the ESM stipulated in s. 3 cannot be exceeded without the approval of Dáil Éireann, and without a legislative amendment.

134. It was submitted by the defendants that, before voting in his capacity as a Governor of the ESM on a decision which would involve an increase in the State's commitment to make payments to the ESM, the Minister should have the approval of the Dáil, because such approval is necessary to make the State liable for the extra charge on public funds and exceeding the limit stipulated in s. 3 would necessarily involve a legislative change. That would certainly be the prudent course for the Minister to adopt. However, in any event, by virtue of Article 10(1) of the ESM Treaty, a decision of the Board of Governors to change authorised capital stock will only enter into force after the ESM Members have notified the Depositary of "the completion of their applicable national procedures". Accordingly, there is no possibility that the State could be bound to pay more than €11.1454 billion into the ESM without the approval of the Dáil Éireann and the sanction of the Oireachtas by an amendment to s. 3.

Conclusion on the constitutionality of the ESM Act of 2012
135. The only provision of the Constitution which the plaintiff invokes to ground his constitutional challenge to s. 2, apart from Articles 5 and 6, is Article 17 which, broadly speaking, guarantees the supremacy of Dáil Éireann in financial matters. In my view, neither s. 2 nor the Act as a whole is contrary to Article 17. In fact, s. 8 of the Act requires the Minister, as soon as practicable after the end of each reporting period, as defined, to cause a report to be laid before Dáil Éireann, which includes information in relation to various matters specified, including the aggregate value of contributions made by the State to the authorised capital stock of the ESM during the reporting period, and up to the end of the reporting period and also the aggregate amount of monies (including dividends) received by the State from the ESM (which, by virtue of s. 4, form part of the Central Fund) during the reporting period, and up to the end of the reporting period. Broadly speaking, the reporting period covers a half year, so the reporting is on a half-yearly basis.

136. For the reasons outlined in the preceding paragraphs, I have come to the conclusion that the ESM Act of 2012 is not invalid

having regard to the provisions of the Constitution.

Third limb of the plaintiff's constitutional argument
137. This limb of the plaintiff's constitutional argument is premised on the ESM Treaty being in fundamental contradiction to the Union Treaties and, in particular, to the provisions on economic and monetary union introduced in the Maastricht Treaty, which were put to, and approved by, the people in a referendum. It is the plaintiff's contention that any fundamental alteration of the substance of the matters on which the people voted in that referendum requires the approval of the people in a further referendum. The provision of the Constitution which the plaintiff invokes to ground that proposition is Article 29.4.4° which provides:

> "Ireland affirms its commitment to the European Union within which the member states of that Union work together to promote peace, shared values and the well-being of their peoples."

138. The defendants vigorously reject the underlying proposition that, as a matter of Irish constitutional law, a breach of Union law by the State would automatically constitute a simultaneous breach of the Constitution, advancing, among other submissions, a submission that, if it were otherwise, there would arguably be no need for the doctrine of supremacy of Union law, which by its nature, is based on the presumption that there could be differences between Union law and national law.

139. Having regard to the conclusion I have reached that the ESM Treaty is not incompatible with the various provisions of the TEU and the TFEU which have been considered earlier, that debate is for another case and another day. The participation by Ireland in the ESM Treaty does not render it in conflict with its obligations under the Union Treaties and under Union law. Therefore, I conclude that Article 29.4.4° does not preclude Ireland from participating in the ESM Treaty.

Summary of conclusions
140. I conclude that the ESM Treaty is not incompatible with the Constitution and that an amendment of the Constitution approved of by the people in a referendum is not necessary before it can be ratified. I also conclude that the ESM Act of 2012 is not invalid having regard to the provisions of the Constitution. The plaintiff's claims for –

> (a) a declaration that the ESM Treaty violates the provisions of the Constitution,
>
> (b) a declaration that any process of ratification of the ESM Treaty requires the approval of the people in a referendum,
>
> (c) a permanent injunction restraining the ratification of the ESM Treaty absent a referendum, and
>
> (d) a declaration that the ESM Act of 2012 is unconstitutional, are all refused.

Section V: Alleged invalidity of Decision 2011/199/EU and unconstitutionality of Amendment Act of 2012

The function of the Court and the issues
141. The adoption by the European Council of Decision 2011/199/EU on 25th March, 2011 was the first occasion on which the simplified revision procedure provided for in Article 48(6) TEU, which was introduced in the Lisbon Treaty, was utilised to amend the Treaties in accordance with Article 48(1). At this point in time there is no jurisprudence of the CJEU on the application of Article 48(6) to guide this Court. However, an issue in relation to the "ratification" by Ireland of the proposed amendment of Article 136 TFEU arose in an application for judicial review, which came before the High Court (Hogan J.) on 29th May, 2012, that is to say, two days before the referendum on the Fiscal Stability Treaty. The judgment of Hogan J. in *Doherty v. The Referendum Commission* [2012] IEHC 211 was given on 6th June, 2012. The context was an allegation by the applicant that the Referendum Commission had acted *ultra vires* its powers in making two statements, one being a statement by the Chairman of the Referendum Commission made at a press conference on 3rd May, 2012, and the other being a statement placed on the website of the Referendum Commission on 18th May, 2012, which was entitled "Proposed amendment of Article 136 of the [TFEU]".

142. As the written summary of the plaintiff's claims outlined in Section I above discloses, the plaintiff's attack on the State's reliance on the amendment of Article 136 TFEU is two-pronged. First, the plaintiff challenges the validity of the decision adopted on 25th March, 2011 under Union law. Secondly, solely on the basis of its alleged invalidity under Union law, he alleges that it also infringes the Constitution and he also challenges the constitutionality of the Amendment Act of 2012 and also its efficacy to give Decision 2011/199/EU force of law in Irish law, contending that the Act, being contrary to the terms of the Union Treaties is, consequently, contrary to the terms of Article 29.4 of the Constitution, echoing the arguments made in relation to the ESM Act of 2012 dealt with in Section IV above. Whether that contention is correct or not, is a matter of Irish law.

143. Before considering the features of Decision 2011/199/EU, it is appropriate to consider what function a national court has in reviewing a decision adopted by an institution of the European Union. That question was determined by the CJEU in Case 314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199. There the CJEU was considering a question referred by a German court as to whether the German court itself was competent to declare invalid a Commission decision made pursuant to Article 6 of Commission Regulation EEC No. 1573/80 that post-clearance recovery of import duty could not be waived, on foot of which the Hauptzollamt (the principal Customs Office) issued a notice to Fofo-Frost (the importer) for post-clearance of duty, which was contested by Foto-Frost in the main proceedings. The matter was before the Court of Justice on a reference by the German court under Article 177 of the EEC Treaty, being the jurisdiction now conferred by Article 267 TFEU. The Court of Justice answered the question in paragraphs 12 to 15 of its judgment as follows:

> "Article 177 confers on the Court jurisdiction to give preliminary rulings on the interpretation of the Treaty and of acts of the Community institutions and on the validity of such acts. The second paragraph of that article provides that national courts may refer such questions to the Court and the third paragraph of that article puts them under an obligation to do so where there is no judicial remedy under national law against their decisions.
>
> In enabling national courts, against those decisions where there is a judicial remedy under national law, to refer to the Court for a preliminary ruling questions on interpretation or validity, Article 177 did not settle the question whether those courts themselves may declare that acts of Community institutions are invalid.
>
> Those courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling into question the existence of the Community measure.

> On the other hand, those courts do not have the power to declare acts of the Community institutions invalid. As the Court emphasized in the judgment of 13 May 1981 in Case 68/80 . . ., the main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. . . ."

In summary, therefore, this Court may determine that Decision 2011/199/EU is "completely valid", but it does not have jurisdiction to declare that it is invalid.

144. As the summary of the defendants' defence of the plaintiff's challenge to Decision 2011/199/EU outlined in Section I above discloses, it is the defendants' case that the plaintiff is precluded from challenging the validity of that decision by reason of lack of standing and/or by reason of delay. However, if the challenge is admissible, it is the defendants' case that it must fail because the decision was validly adopted on the basis of Article 48(6) TEU. The assertion that the plaintiff lacks standing is based entirely on Union law, whereas the assertion that the plaintiff is precluded by delay is based on both Union law and Irish law. Finally, the defendants submit that approval of the decision by Ireland does not require a referendum.

145. On the basis of the foregoing, in particular, the decision in the *Foto-Frost* case, in my view, the issues (and the order in which they should be considered) which arise on the plaintiff's challenge to the validity of Decision 2011/199/EU and the measures necessary for its application in Irish law and the constitutionality of the Amendment Act of 2012 are as follows:

> (a) Whether the grounds put forward by the plaintiff in support of invalidity of Decision 2011/199/EU are unfounded, so that the Court can conclude that the decision is completely valid?
>
> (b) If the answer to question (a) is negative, whether is it open to the plaintiff to request the Court to refer the matter to the CJEU for a preliminary ruling in accordance with Article 267 TFEU, or, alternatively, whether the plaintiff is precluded from so requesting by reason of –
>
> (i) lack of standing, or
>
> (ii) delay.
>
> (c) Given that, if the answer to (a) is positive, the sole basis of the constitutional challenge falls away, what measures are necessary under Irish law for the approval of Decision 2011/199/EU by Ireland and its implementation into Irish law and, in particular, whether a referendum is necessary under Article 46 of the Constitution?
>
> (d) Whether the plaintiff has established that the Amendment Act of 2012 is unconstitutional or ineffective to give Decision 2011/199/EU force of law in Irish law.

The issue identified at (a) concerns the validity of the decision. It does not address when it enters into force, nor the possible implications of it not entering into force before the ESM Treaty enters into force or, indeed, at all. The issues at (c) and (d) concern approval and giving force in Irish law to the decision, on the assumption that it is valid. The issue which is identified in the question set out in Section I above in relation to Decision 2011/199/EU which the plaintiff requests the Court to refer to the CJEU is dealt with in Section VI below.

146. The first step in addressing issue (a) is to analyse the adoption and content of Decision 2011/199/EU against the requirements of Article 48(6) TEU.

Issue (a): Analysis of Decision 2011/199/EU in the context of Article 48(6) TFEU

147. The valid utilisation of the simplified revision procedure provided for in Article 48(6) necessitates full compliance with the following requirements stipulated therein:

> (a) There must be a proposal from the Government of any Member State, or the European Parliament or the Commission before the European Council. As Decision 2011/199/EU records in the second paragraph thereof, the relevant proposal was submitted by the Belgian Government on 16th December, 2012.
>
> (b) The proposal must be for revising all or part of the provisions of Part Three of the TFEU. The proposal of the Belgian Government was for the revision of Article 136, which comes within Part Three.
>
> (c) The adoption of a decision amending all or part of the provisions of Part Three must be a decision of the European Council, which must act by unanimity. The decision at issue here is a decision of the European Council and it was adopted by unanimity on 25th March, 2011 by the Heads of State or Government of all the Member States, including Ireland.
>
> (d) Prior to adopting the decision, the European Council must consult with the European Parliament and the Commission, and, in the case of institutional changes in the monetary area, with the European Central Bank. As is recited in Decision 2011/199/EU, on 16th December, 2010 the European Council decided, in compliance with the requirement of Article 48(6), to consult with the European Parliament and the Commission, and it also decided to consult with the European Central Bank. Each of those institutions "adopted opinions on the proposal".
>
> (e) It is mandated that the decision adopted by the European Council "shall not increase the competences conferred on the Union in the Treaties". It was clearly the view of the European Council that the decision to amend does not increase the competences conferred on the Union in the Treaties, because this proposition is recited in Recital (6) in the decision.

148. The foregoing are the requirements in relation to the steps preliminary to the making, and the components, of the decision. Article 48(6) also mandates when the decision shall "enter into force", in providing that it shall not enter into force until it is "approved" by the Member States "in accordance with their respective constitutional requirements".

149. In line with the requirements stipulated in Article 48(6), Decision 2011/199/EU provides as follows:

> (a) There shall be added to Article 136 TFEU the paragraph (paragraph (3)) quoted in Section I above (Article 1).

(b) Member States shall notify the Secretary-General of the Council without delay of the completion of the procedures for the approval of the decision "in accordance with their respective constitutional requirements" (Article 2).

(c) The decision shall enter into force on 1 January, 2013 or on the first day of the month following receipt of the last of the notifications referred to at (b) (Article 2).

150. After Decision 2011/199/EU was adopted by the European Council on 25th March, 2011, what remained to be done to give the decision force in Union law was that all of the Member States should approve of it "in accordance with their respective constitutional requirements" and that they should notify the Secretary-General of the completion of the relevant procedures. By the express terms of Article 2 the entry into force of the decision was conditional on each Member State approving of the decision in accordance with its constitutional requirements and notifying the Secretary-General of the completion of that procedure.

151. The amendment of TFEU consequent on the entering into force of Decision 2011/199/EU will only apply to the Member States whose currency is the euro. The amendment will provide that those Member States "may" establish a stability mechanism subject to two conditions:

(a) that it is only to be activated "if indispensable to safeguard the stability of the euro area as a whole", and

(b) that the granting of any required financial assistance thereunder will be made subject to strict conditionality.

No issue was raised by the plaintiff in relation to the first condition, namely, the indispensability of such stability mechanism. The second condition, that financial assistance will only be made subject to strict conditionality, was characterised by counsel for the plaintiff as conferring new powers on the Union not at present contained in the Treaties. The similar argument in relation to the provision of the ESM Treaty is addressed in Section IV above.

Grounds of the plaintiff's challenge to the validity of Decision 2011/199/EU
152. Having regard to the plaintiff's written summary as to the basis of his challenge to the validity of Decision 2011/199/EU, in broad outline, the primary grounds of the challenge are:

(a) that the effect of the decision is to increase the competences conferred on the Union in the Treaties, so that the utilization of the simplified revision procedure to amend Article 136 was impermissible; and

(b) the amendment which will enter into force in consequence of the decision is "vague and open-ended" and breaches the Treaties, in particular, by enabling the granting of financial assistance without limitations or restrictions, such as are provided for in the Union Treaties.

153. Before considering the response of the defendants to those grounds, I propose recording the relevant observations of the institutions of the Union which adopted opinions on the proposal to amend Article 136.

Opinion of European Parliament
154. The opinion of the European Parliament is in the form of a resolution of 23rd March, 2011. In the resolution, the European Parliament emphasised that monetary policy for the Member States whose currency is the euro is an exclusive competence of the Union and has been a Community policy since the Maastricht Treaty. While it recorded certain caveats in relation to the intention to establish a permanent stability mechanism outside the EU institutional framework, it endorsed the draft European Council decision, notwithstanding its reservation that it would have been preferable to draft it as proposed by the European Parliament in Annex 1 to the resolution. More significantly for present purposes, in paragraph 19 it was stated that the European Parliament resolution:

"Underlines that the draft European Council decision as amended would not increase the competences of the Union and would therefore remain within the scope of the simplified Treaty revision procedure; notes, conversely, that the decision cannot reduce the competences of the Union institutions in the fields of economic and monetary policy and of monetary policy for Member States whose currency is the euro, and cannot in any event prejudice the correct application of Union law, in particular Articles 122 and 143 TFEU and of the Union *acquis*."

Opinion of the Commission
155. On 15th February, 2011 the Commission delivered a "favourable opinion" addressed to the European Council on the draft European Council Decision amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro. The view of the Commission as to the impact of the proposed amendment by the addition of paragraph (3) to Article 136 TFEU is set out in Recital (6) in the following terms:

"The new paragraph, which will be one of the Treaty provisions specific to Member States whose currency is the euro, confirms that the legal framework of the Union does not prevent those Member States from establishing a permanent stability mechanism enabling them to obtain any necessary financial assistance."

Counsel for the defendants pointed to the word "confirms" in that Recital, suggesting that the meaning it is intended to convey is that the amendment is not an "enabling" provision.

156. In considering the draft decision in the light of the conditions on the use of the simplified revision procedure, in particular, the prohibition on a decision thereunder increasing the competences of the Union, the Commission stated, *inter alia*, in Recitals (11) and (12):

"Furthermore the amendment does not affect the competences conferred on the Union and its institutions in the Treaties. It does not involve creating a new legal base which would allow the Union to take action that was not possible before this Treaty amendment. Under the draft decision, the permanent stability mechanism will be established directly by Member States whose currency is the euro.

Nor does the draft decision reduce the competences conferred on the Union. In particular, it does not affect either the specific solidarity mechanisms provided for in Articles 122 and 143 of the TFEU in the event that a Member State is in difficulties or is seriously threatened with difficulties or the Union's competences in terms of coordination and surveillance of the economic and financial policies of the Member States in general and of Member States whose currency is the euro in particular."

157. In setting out its position on the substance of the amendment to the Treaty, the Commission pointed to the then evolving situation, which ultimately led to the adoption of the Fiscal Stability Treaty. It set out its position in Recital (14) as follows:

> "The Union's economic governance in the euro area will thus constitute the basis which the future stability mechanism will necessarily build upon. The strict conditions to which granting any assistance under the mechanism is to be made subject must be based on the guidelines adopted at Union level to support the proper functioning of the EMU. The Commission will take every initiative, whether legislative or of any other kind, to ensure consistency between the future mechanism and the Union's economic governance in the euro area in particular, while respecting the competences conferred on the Union and its institutions by the Treaty."

In the final Recital, having noted that it had proved possible to find swift interim solutions to the problems which arose in 2010, by setting up the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Fund (EFSF), it was stated that the Commission fully supported the principle of a permanent mechanism.

Opinion of European Central Bank
158. The opinion of the European Central Bank was dated 17th March, 2011 and it had been adopted by its Governing Council. Having outlined the recent background, including the establishment of the EFSF and the EFSM, and having reiterated its call for further strengthening of fiscal macro-economic surveillance, the opinion stated (in paragraph 4):

> ". . . the ECB welcomes the draft decision. Following approval by all Member States of the draft decision a new Article 136(3) will feature in the [TFEU]. In accordance with it, Members States whose currency is the euro are expected to establish a permanent mechanism, known as European Stability Mechanism (ESM). The ESM is to be activated if it is indispensable to safeguard the stability of the euro area as a whole and temporary financial assistance may be granted under it only subject to strict conditions. The ESM will replace the current temporary arrangements of the EFSM and the EFSF . . .".

159. The view of the European Central Bank on the effect of the new Article 136(3) is set out (in paragraph 5) as follows:

> "In addition, and even before its entry into force, the text of the new Article 136(3) TFEU helps to explain, and thereby confirms, the scope of Article 125 TFEU with respect to safeguarding the financial stability of the euro area as a whole, i.e. the activation of temporary financial systems is in principle compatible with Article 125 TFEU provided that it is indispensable for such safeguarding and subject to strict conditions. Also, the new Article 136(3) TFEU does not increase the competences of the Union."

Later, having noted that the necessary preparations were underway in relation to the exact design of the ESM and having set out its features, it was stated (in paragraph 8) that a key element of the draft decision was that it provided for "an intergovernmental mechanism instead of a Union mechanism". With respect to the role of the European Central Bank and the Euro system, it was pointed out, as I have already recorded, that, while the European Central Bank may act as fiscal agent for the ESM, Article 123 TFEU would not allow the ESM to become a counterparty of the Euro system.

Response of the defendants to the plaintiff's challenge to the validity of Decision 2011/199/EU
160. The position of the defendants is that Decision 2011/199/EU has been correctly and validly adopted as a decision in accordance with Article 48(6) TEU. In analysing the nature of the decision, counsel for the defendants referred to Article 288 TFEU, which deals with legal acts of the Union and provides that, to exercise the Union's competences, the institutions (defined in Article 13 TEU as being the European Parliament, the European Council, the Council, the Commission, the CJEU, the European Central Bank and the Court of Auditors) shall adopt regulations, directives, decisions, recommendations and opinions, and, in the fourth paragraph, goes on to provide:

> "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them."

It is the defendants' position that, as Decision 2011/199/EU does not expressly specify those to whom it is addressed, it is binding in its entirety. However, I would observe that when it enters into force is a separate issue.

161. The defendants refute the plaintiff's contention that the amendment of Article 136 involves an increase in the competences of the Union or that, in the context of Irish constitutional law, it could be construed as altering the essential scope or objectives of the Union. The defendants characterise the amendment as a technical amendment designed to confirm that Member States who have adopted the euro as their currency may establish between themselves an intergovernmental mechanism for the purpose of facilitating the safeguarding of the stability of the euro area. Leaving aside the possible ambiguity as to what the defendants mean by "confirm" in that context, that is to say, that it is not enabling, that position reflects the view of the institution of the Union which has jurisdiction to implement (the European Council), and of the institutions which must be consulted in relation to the exercise of such jurisdiction (the European Parliament, the Commission and the European Central Bank), the simplified revision procedure provided for in Article 48(6). The defendants' position is that the amendment, in fact, has nothing to do with the Union or its competences; rather, it merely serves to confirm a competence that the Member States retain.

162. There is an element of crossover between the grounds advanced on behalf of the plaintiff for his contention that Decision 2011/199/EU is invalid and the arguments advanced to support the contention that the provisions of the ESM Treaty are incompatible with the Union Treaties, which has already been addressed. It is sufficient at this stage to note that, in answering the plaintiff's assertions in relation to the amendment of Article 136, counsel for the defendants repeatedly emphasised the defendants' stance that the provisions of the ESM Treaty are not incompatible with the Union Treaties. As to the contention of the plaintiff that the amendment envisaged in Decision 2011/199/EU is "vague and open-ended" and will permit financial assistance to be provided by Member States to other Member States without the limitations or restrictions such as are provided for in the Union Treaties, counsel for the defendants reiterated that the objective of the amendment is clear and that it does expressly restrict the granting of any required financial assistance under the ESM by stipulating that such financial assistance will only be made "subject to strict conditionality". Having rejected the plaintiff's claim that the ESM Treaty is incompatible with the Union Treaties, it follows that I consider that the defendants' submissions recorded in this paragraph to be correct.

Issue (a): Conclusion on challenge to validity of Decision 2011/199/EU
163. The effect of the addition of paragraph (3) to Article 136, as the opinions of the institutions of the European Union, the relevant portions of which are outlined above, demonstrate, is that a provision is inserted in the TFEU which recognises that Member States whose currency is the euro may establish a stability mechanism the purpose of which is to safeguard the stability of the euro area as

a whole. However, the stability mechanism, which is obviously intended to be permanent, may only be activated if it is indispensable to achieve that purpose. The stability mechanism envisaged is an intergovernmental mechanism, in which the participants are the Member States whose currency is the euro. As is explicitly stated in the opinion of the European Central Bank, what is envisaged is not a Union mechanism. Further, having regard to the actual wording of paragraph (3) which is to be added to Article 136, and the views of the four institutions of the Union on its effect, it is clear that its effect will not be to increase the competences conferred on the Union in the Treaties. On the foregoing basis, I am satisfied that the defendants are correct in submitting that the deployment of the simplified revision procedure provided for in Article 48(6) TEU was appropriate to amend Article 136 in the manner provided in Decision 2011/199/EU. Having considered all of the arguments advanced on behalf of the plaintiff, I am satisfied that the grounds put forward by him in support of his claim as to the invalidity of Decision 2011/199/EU are unfounded and that it is appropriate to reject them. The conclusion I have come to is that the decision is "completely valid" in accordance with Union law. On the authority of the decision of the Court of Justice in the *Foto-Frost* case, this Court is entitled to make a declaration to that effect.

Issue (b): Whether the plaintiff has standing to seek a reference for a preliminary ruling

164. Notwithstanding that I have found that Decision 2011/199/EU is valid in accordance with Union law, so that the issue of the admissibility of the plaintiff's claim as to its invalidity and whether the plaintiff would be entitled to request the Court to make a reference to the CJEU for a preliminary ruling as to its validity, strictly speaking, does not arise, I propose considering the defendants' contention that the plaintiff lacks standing under Union law and is out of time both under Union law and Irish law to challenge the validity of Decision 2011/199/EU in these proceedings. In so doing, I am not only conscious that a different view may be taken on issue (a) elsewhere, but I am also conscious that the issue of standing may arise in relation to the matter dealt with later in Section VI.

165. The starting point of the defendants' argument on issue (b) is Article 263 TFEU, which deals with the jurisdiction of the CJEU to review the legality of acts of institutions of the Union. The first paragraph of Article 263 provides:

> "The [CJEU] shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties."

The fourth paragraph of Article 263 provides as follows:

> "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

The conditions laid down in the second paragraph are that the jurisdiction applies in actions brought "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application, or misuse of powers".

166. There is a time limit provided for in the last paragraph of Article 263 for the institution of such proceedings. They are required to be instituted –

> ". . . within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

167. The defendants contend that it has been well established in the jurisprudence of the CJEU since the decision in Case C – 188/92 *TWD Textilwerke Deggendorf GmbH v. Germany* [1994] ECR 1 – 833 that a plaintiff who could have brought a challenge pursuant to Article 263 TFEU, but who fails to do so within the two-month time limit, becomes precluded from questioning the validity of the relevant legal act before a national court. Before considering how it is contended the principle applies to the plaintiff, it is necessary to consider the *TWD* case in some detail.

168. The chronology in the *TWD* case was that TWD, a manufacturer of polyamide and polyester yarn, in the years from 1981 to 1983 received aid, including a subsidy, from the Federal Republic of Germany. In 1986, the Commission adopted Decision 86/509, which was addressed to the Federal Republic of Germany, wherein the Commission declared that the aid granted to a producer of polyamide and polyester yarn situated at Deggendorf, which was in fact TWD, had been granted in contravention of Article 93 of the EEC Treaty and was consequently unlawful. The Commission requested the Federal Republic of Germany to recover the aid. On 1st September, 1986 a copy of Decision 86/509 was forwarded to TWD for information by the Federal Minister for Economic Affairs and, significantly, it was pointed out that TWD could bring an action against that decision under Article 173. Neither the Federal Republic of Germany nor TWD challenged the decision before the Court of Justice. In March 1987 the Federal Minister for Economic Affairs made a decision which initiated the process for recovery of the aid. In April 1987 TWD appealed against that decision to the Court of First Instance in Cologne, which dismissed the application in December 1989. TWD appealed against that judgment to an appeal court, which sought a preliminary ruling from the Court of Justice. The question referred which is of relevance for present purposes was:

> "Is a national court bound by a decision of the EEC Commission adopted under Article 93(2) . . . when hearing an appeal regarding the implementation of that decision by the national authorities brought by the recipient of the aid and addressee of the implementation measures on the ground that the decision of the EEC Commission is unlawful in circumstances where the recipient of the aid did not institute proceedings under the second paragraph of Article 173 of the EEC Treaty, or did not do so in good time, even though it was informed of the Commission's decision in writing by the Member State?."

Article 173 subsequently became Article 230 and the corresponding provision is now Article 263 TFEU.

169. Having recorded that it was settled law that a decision which had not been challenged by the addressee within the time limit laid down in Article 173 of the Treaty became definitive as against him, and that it was settled law that a Member State might no longer call in question the validity of a decision addressed to it on the basis of Article 93(2) of the Treaty once the time limit laid down in Article 173 had expired, and having cited the relevant authorities, the Court of Justice stated as follows (at paras. 16 and 17):

> "That case-law, according to which it is impossible for a Member State which is the addressee of a decision taken under the first paragraph of Article 93(2) of the Treaty to call in question the validity of the decision in the proceedings for non-compliance provided for in the second paragraph of that provision, is based in particular on the consideration that the periods within which applications must be lodged are intended to safeguard legal certainty by preventing Community

measures which involve legal effects from being called in question indefinitely.

It follows from the same requirements of legal certainty that it is not possible for a recipient of aid, forming the subject-matter of a Commission decision adopted on the basis of Article 93 of the Treaty, who could have challenged that decision and who allowed the mandatory time-limit laid down in this regard by the third paragraph of Article 173 of the Treaty to expire, to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision."

170. The first paragraph of Article 263 quoted above confers jurisdiction on the CJEU to review the legality of, *inter alia*, acts of the European Council intended to produce legal effects vis-à-vis third parties. The defendants did not expressly demonstrate that Decision 2011/199/EU is intended to produce legal effects "vis-à-vis third parties", although they did contend that it was intended to produce such legal effects, relying on the position adopted by the plaintiff in pleading. The fourth paragraph of Article 263 as quoted above, empowers a natural or legal person to whom the act is not addressed, but to whom the act is "of direct and individual concern", to institute annulment proceedings under Article 263. Counsel for the defendants did set out to demonstrate that the plaintiff had a "a direct and individual concern" in respect of Decision 2011/199/EU.

171. I do not propose to consider in detail the case law to which the defendants resorted in order to show that the plaintiff had a "direct and individual concern". I propose merely to outline the defendants' submissions.

172. As regards "direct" concern, on the basis of the contention that Member States have no discretion as regards their Union law obligation to approve Decision 2011/199/EU, it was contended that, once it comes into effect, it can be regarded as being of "direct" concern to the plaintiff in accordance with the jurisprudence of the CJEU. That reasoning creates obvious difficulty, because the underlying proposition is that the plaintiff should have initiated a direct challenge to Decision 2011/199/EU before the entry into force of that decision, which will not happen until 1st January, 2013 at the earliest.

173. As regards "individual" concern, counsel for the defendants outlined the various bases on which individual concern has been identified in the case law of the CJEU (the differentiating attributes factor identified in Case 25/62 *Plaumann v. Commission* [1963] ECR 95; the closed category factor applied in Cases 106 and 107/63 *Toepfer v. Commission* [1965] ECR 405; and the special protection factor applied, *inter alia*, in Case 11/82 *Piraiki – Patraiki v. Commission* [1985] ECR 207). The factual basis on which it was contended by the defendants that the plaintiff's situation meets each of those tests, in my view, is extremely contrived, far fetched, and unreal and is wholly unsustainable.

174. It is true that the primary basis on which the plaintiff challenges the validity of Decision 2011/199/EU is that the ordinary provision procedure provided for in Article 48(2) – (5) should have been utilised and not the simplified provision procedure under Article 48(6). If the ordinary revision procedure had been adopted there would have been a requirement to notify, *inter alia*, the national Parliaments of the Member States of the proposals for the amendment of the Treaties. A Convention composed of, *inter alia*, representatives of the national Parliaments might have been convened to examine the proposals and to make a recommendation to a conference of representatives of the governments of the Member States. The utilisation of the simple revision procedure did not require any involvement of the national Parliaments and, therefore, it deprived the plaintiff, who is a member of Dáil Éireann, of having the opportunity to participate in legislative debate in the Oireachtas on the proposed amendment and possibly to attend the Convention envisaged by the ordinary revision procedure as a representative of the national Parliament.

175. Moreover, the reliance by the defendants on the principle established in Case T – 135/96 *UEAPME v. Council* [1998] ECR II – 2335, which they have referred to as the "principle of protecting democracy" seems to me to be contrived and unreal. The type of legal act being challenged there, a directive, is fundamentally different to the type of legal act being challenged by the plaintiff in this case, a decision of the European Council to amend the TFEU, which is a decision which has general application across the Union. In short, Decision 2011/199/EU, being the first decision made under Article 48(6), at this point in time, is not only novel, it is unique. I am not satisfied that it is a decision in respect of which the plaintiff could have standing to seek an annulment pursuant to Article 263 TFEU. If I had reached a different conclusion in relation to the plaintiff's challenge to the validity of Decision 2011/199/EU to that outlined when dealing with issue (a) above, I would not have been in a position to determine that the plaintiff's claim of his entitlement to seek a reference to the CJEU in these proceedings is precluded for failure to bring a direct challenge under Article 263 within the time limited in that Article.

176. In the interests of clarity, I consider it prudent to recapitulate on my understanding of the defendants' defence on the basis of the plaintiff's lack of standing and delay. It is that the plaintiff did have standing under the fourth paragraph of Article 263 to directly challenge the validity of Decision 2011/199/EU, in other words, to institute proceedings against the European Council in the CJEU, on the basis that it was "of direct and individual concern" to him for the reasons outlined earlier, but that he failed to seek a review under Article 263 within the time limited in that Article. Therefore, on the authority of the decision in the *TWD* case, he does not have standing to challenge the validity of that decision in this Court, in which his proceedings were initiated more than a year after the making of the decision and its publication in the Official Journal. Furthermore, the evidence establishes, the defendants assert, that he was aware of the decision from the date of its adoption, 25th March, 2011. The defence is premised on the plaintiff having standing to seek a review under Article 263, as to which, as I have already indicated, I find the defendants' submissions far from convincing.

177. In the context of issue (b), both sides rely on the judgment of the Court of Justice, on an appeal from the Court of First Instance, in Case C – 50/00P *Unión de Pequeños Agricultores v. Council* [2002] ECR 1 – 6677, but for different purposes. There the Court stated at paragraphs 40, 41 and 42:

"By Article 173 and Article 184 . . ., on the one hand, and by Article 177, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts . . .. Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid . . ., to make a reference to the Court of Justice for a preliminary ruling on validity.

Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.

In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national

courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act."

By way of explanation, Article 177 subsequently became Article 234 and the corresponding provision is now Article 267 TFEU. Article 184 subsequently became Article 241 and the corresponding provision is now Article 277 TFEU.

178. The defendants rely on paragraph 40 of the judgment of the Court in support of the proposition that the purpose of permitting individuals to seek review of a Union measure before national courts, rather than by direct annulment action, is to ensure an effective system of remedies, in other words, to ensure that there is no lacuna in the system for challenging such measures. The plaintiff, on the other hand, relies on para. 42 to demonstrate where the law stands at this point in time. While there is nothing fundamentally wrong in either proposition, the crux of the admissibility issue is whether the plaintiff would have been able to demonstrate "individual concern" so as to establish that he had standing to bring a direct challenge to Decision 2011/199/EU pursuant to Article 263 TFEU. I am not satisfied that he had, for the reasons outlined earlier, but if a definitive determination on issue (b) was necessary, I would have considered referring it to the CJEU for a preliminary ruling.

179. I do not consider that it is necessary to address the defendants' submissions in support of their contention that the plaintiff cannot, under Irish law, pursue his claim as to the validity of Decision 2011/199/EU, and, possibly, as to the incompatibility of the ESM Treaty with the Union Treaties on the grounds of delay and waiver in depth. Decision 2011/199/EU awaits compliance with Article 2 thereof before entry into force under Union law and a Ministerial order commencing the relevant provision of the Amendment Act of 2012 remains to be made under Irish law. The ESM Treaty only acquired force of law in this jurisdiction after these proceedings were commenced.

Issue (c) – Measures necessary for approval by Ireland of Decision 2011/199/EU in accordance with Irish law

180. The people, having given their approval to the ratification of the Lisbon Treaty, have given their approval to the amendment of the Union Treaties in accordance with Article 48 TEU, including, where applicable, amendment in accordance with the simplified revision procedures provided for in Article 48(6). Having concluded that Decision 2011/199/EU was adopted by the European Council in compliance with Article 48(6) and is "completely valid", it follows that it is compatible with the Constitution. Accordingly, the approval by the people of that decision by referendum is not necessary for its ratification or its implementation into Irish law. While Article 48(6) provides that a decision shall not enter into force until it is "approved", rather that "ratified", by Member States in accordance with their respective constitutional requirements, as Hogan J. pointed out in *Doherty v. The Referendum Commission* (at para. 59), nothing really turns on the use of the term "approval" rather than "ratification", since "approval" in the context is really only another term for a simplified form of ratification, *per* Hogan J. quoting Shaw, *International Law* (5th Ed.) (London, 2003). In fact, in these proceedings, no argument is made that there is a distinction between "approval" and "ratification".

181. As outlined in Section I earlier, by virtue of the Amendment Act of 2012, the giving of force of law to Decision 2011/199/EU was effected, in that the European Communities Act 1972 was amended, in consequence of which the Union law amending effect of that decision comes within the meaning of the expression "Treaties governing the European Union" in that Act. When the Amendment Act of 2012 comes into operation, as regards the decision, it will have that effect. In short, all that is necessary to give force of law in the State to Decision 2011/199/EU is an Act of the Oireachtas, which has been enacted in the Amendment Act of 2012. All that is required to bring the relevant provision of that Act into operation is a Ministerial order.

182. Accordingly, in my view, apart from the Ministerial order, all the measures have been adopted which are necessary to give Decision 2011/199/EU force of law in Irish law.

Issue (d): Alleged unconstitutionality of the Amendment Act of 2012

183. It follows from the conclusions set out in the preceding paragraphs that, Decision 2011/199/EU having validly amended Article 136 TFEU in accordance with Article 48(6) TEU, it was constitutionally permissible for the Oireachtas to enact legislation to give it force of law in Irish law. Accordingly, the plaintiff has not established that the Amendment Act of 2012 is invalid having regard to the provisions of the Constitution.

184. As the Amendment Act of 2012 has been enacted since these proceedings were initiated, an issue which arose in the course of the proceedings as to whether, once the European Council acting by unanimity adopted Decision 2011/199/EU, the decision became binding on the Member States as a matter of Union law, so that, as the defendants submit, Ireland became obligated, as a matter of Union law, to engage in completion of the procedures for its approval in accordance with the constitutional requirements of Ireland and had no discretion in relation to such completion, is moot.

Summary of conclusions/orders

185. Having found that Decision 2011/199/EU validly amended Article 136 TFEU, the declaratory relief to the contrary sought by the plaintiff is refused. The injunctive relief, including the interlocutory injunctive relief, sought by the plaintiff restraining the giving effect to the decision and the amendment of Article 136 TFEU thereby effected is also refused. The Amendment Act of 2012 is not invalid having regard to the provisions of the Constitution and the declaratory relief to the contrary sought by the plaintiff is refused.

Section VI: Reference to CJEU for preliminary ruling

186. Having regard to the decisions I have made in Sections III, IV and V above, the only issue raised by the plaintiff which could give rise to the necessity to refer a question for a preliminary ruling to the CJEU is the question identified in Section I above at para. 35.

187. I propose tracing the provenance of the issue in the pleadings and the arguments advanced by the parties in their respective written legal submissions. It evolved in the pleadings as follows:

(a) In paragraph 57 of the statement of claim the plaintiff alleged that the making of the ESM Treaty was "purportedly made possible" by Decision 2011/199/EU.

(b) With reference to paragraph 57, the defendants requested the plaintiff to particularise the plea in the following terms:

> "How it is alleged:(i) that the [ESM Treaty], which was signed on 2 February 2012, '*was purportedly made possible'* (emphasis in original) by . . . Decision 2011/199/EU . . . , which will not enter into force until 1 January 2013 at the earliest; and (ii) that this claim can be determined prior to the entry into force of the said proposed amendment on or after 1st January 2013."

(c) In the plaintiff's reply in relation to item (i) it was stated that it is alleged that the European Council considered that the ESM Treaty became permissible through Decision 2011/199/EU, referring to, inter alia, Recital (2) in Decision 2011/199/EU, which has been quoted earlier in Section I. The plaintiff asserted that, given that the European Council considered a change to be "required" for the establishment of a permanent crisis mechanism, the ESM must be regarded as being "purportedly made possible" by such Treaty change. In relation to item (ii) it was stated that the plaintiff alleges that the European Council considers that the ESM Treaty is made possible by Decision 2011/199/EU and, accordingly, the plaintiff's claim must be determined before 1 January 2013, because the European Council and the contracting parties to the ESM Treaty propose to rely on Decision 2011/199/EU.

(d) In the defence, at paragraph 39, the defendants specifically denied the claims made in paragraph 57 and 59 of the statement of claim and continued:

> "It is specifically denied that the ESM Treaty . . . was '*made possible'* (emphasis in original) by Decision 2011/199/EU . . ., which will not enter into force until 1 January 2013 at the earliest".

188. In their written legal submissions delivered before the hearing, (at paras. 1.18 and 1.19) the plaintiff quoted Recital (2) of Decision 2011/199/EU and continued:

> "The Plaintiff observes that this amendment could only come into force, at the earliest, in January 2013. Consequently, the Treaty refers to a provision of the TFEU that is not in force at the time the ESM Treaty is due to become operational in July 2012."

189. In their written legal submissions delivered before the hearing, the defendants responded to that assertion and denied that the Recital quoted by the plaintiff raises a constitutional issue with ratifying the ESM Treaty before the entry into force of Decision 2011/199/EU and continued (at para. 27):

> "If anything, the anticipated entry into force of the ESM Treaty and the establishment of the ESM prior to entry into force of Decision 2011/199/EU demonstrates that the Decision is not, as the plaintiff claims, a legal basis for the said Treaty. . . . It suffices to say at this juncture that the purpose of the decision was [to] confirm and remove any doubt as to whether the Member States whose currency is the euro could establish a stability mechanism and, if they saw the need and wished, permit such a mechanism to have available to it, for the purpose of safeguarding the stability of the euro area, the range of instruments and structures that might otherwise not be compatible with Title VIII of Part Three of the TFEU. It is manifest that, since the euro area Member States have decided to bring the ESM Treaty in force before Decision 2011/199/EU enters into force (which is not before 1 January 2013), the financial-assistance instruments available to the ESM will have to comply with Union law . . . ."

The first sentence in that passage begs the question. The second sentence reflects the observation of counsel for the defendants in relation to the use of the word "confirms" in Recital (6) in the opinion of the Commission of 15th February, 2011, namely, that the decision is not "enabling". The third sentence appears to be inconsistent with the defendants' argument that the provisions of the ESM Treaty are compatible with Union law.

190. Later, in their written legal submissions, the defendants dealt with the obligation imposed on Member States by Article 2 of Decision 2011/199/EU, namely, that Member States shall notify the Secretary-General without delay of the completion of the procedures for approval in accordance with their respective constitutional requirements, stating (at para. 171):

> "This obligation refers back to Article 1 of the Decision, which provides the text of the new third paragraph which is added to Article 136 of the TFEU. It follows, the defendants submit, that Member States are obliged, ***as a matter of Union law*** (emphasis in original), to engage in the completion of the procedures for approval 'in accordance with their respective constitutional requirements' of the said amendment to Article 136 of the TFEU. The fact that the domestic approval procedures for Decision 2011/199/EU are to be completed in accordance with 'respective constitutional requirements' of the Member States, including Ireland, does not render the obligation under Union law conditional, but, instead, qualifies how that obligation is to be approved, or given effect to, by the Member States."

What the defendants consider "approval" entails in this jurisdiction was then addressed. Having taken issue with the plaintiff's assertion that the approval by Ireland required a prior constitutional referendum, the defendants' submission continued:

> "That is not of course to say that Ireland's domestic constitutional requirements regarding approval of the Decision are a mere formality. A formal decision of the Government to authorise the notification of the approval of the decision is still required."

Whether the assertion in the final sentence is correct or not, as I have already indicated, is moot, because the Amendment Act of 2012 has been enacted.

191. The defendants went on to deal with the issue which I consider remains, which they referred to as "a temporal dimension", that is to say, that Decision 2011/199/EU, in accordance with its provisions, shall enter into force at the earliest on 1st January, 2013, stating that it is "a binding legal act for the purpose of Union law". I find the submissions to be confusing and, possibly, ambiguous. It was not made clear (at para. 176), whether the defendants' position is that it has been a binding legal act for the purpose of Union law since it was adopted on 25th March, 2011. Later, in the written legal submissions, in the context of addressing the constitutional requirements under Irish law for approving Decision 2011/199/EU, it seems to be the defendants' case (in para. 180) that it is upon the entry into force of Decision 2011/199/EU, on or after 1st January, 2013 pursuant to Article 2 thereof, that the decision shall be binding. However, in the preceding paragraph (para. 179) the defendants submitted unequivocally that the Member States were "obliged" to approve the decision in accordance with their respective constitutional requirements.

192. In addressing the defendants' submissions, counsel for the plaintiff opened the decision of Hogan J. in the *Doherty* case extensively. The reason the legal status of Decision 2011/199/EU at the time of the application in the *Doherty* case was in issue was because the statements in issue there, which had been made by the Referendum Commission and which were the subject of the application for judicial review on the basis of an allegation by the applicant that they were outside the subject matter of the referendum on the Fiscal Stability Treaty, concerned the proposed amendment of Article 136 TFEU. For instance, in the second statement, the Referendum Commission, *inter alia*, stated:

> "In order for the amendment of Article 136 of the TFEU to come into effect, however, all 27 member states of the EU

must ratify it. It would be possible for Ireland to decide not to ratify the change (despite agreeing to make the change). However, the Irish Government has announced its intention to have the amendment to the TFEU ratified by the Oireachtas."

It appears from paragraph 60 of the judgment that the position adopted by the Attorney General in the *Doherty* case was that the Government had exercised the executive power of the State in Article 29.4.1° of the Constitution in agreeing to the decision and that, such agreement being already in place, no further steps were necessary. Further, as recorded by Hogan J. (at paragraph 61) it was submitted on behalf of the Attorney General that the proposed legislative change (in what is now the Amendment Act of 2012) was not an essential constitutional requirement within the meaning of Article 2 of Decision 2011/199/EU. Hogan J. then recorded (at paragraph 62) that the position of the Referendum Commission was "somewhat different".

193. Having thus outlined the respective positions of the respondents, Hogan J. stated as follows (at paragraph 63):

> "The critical point, it seems to me, however is this: in view of these competing arguments, it would be just impossible for this court at this juncture to express a definitive view on any of the three arguments that have been advanced. For this court to advance a definitive view, it would be absolutely necessary to make a reference pursuant to Article 267 TFEU to the Court of Justice concerning the interpretation, *inter alia*, of Article 4(3) TEU, Article 288 . . . TFEU and the import of Article 2 and Article 3 of [Decision 2011/199/EU]. Perhaps other questions would have to be referred as well, not least the question of whether the . . . decision is a 'decision' for the purposes of Article 288 TFEU and, if it is, how is the reference to 'respective constitutional requirements' consistent with the suggestion that the decision is already binding on all Member States in its entirety? Does this mean, for example, that where the Parliament of a Member State rejected a proposal to amend Article 136 that the Member State in question would already be in breach of Union law? If that argument were, moreover, correct it might be asked how this interpretation would be consistent with the *effet utile* of the requirement that each Member State must approve the decision in accordance with its own constitutional requirements?"

194. What this Court has been asked to determine is whether the ESM Treaty is compatible with the Union Treaties. I have found that it is. However, prior to the seventeen euro area Member States entering into the ESM Treaty, all of the Member States of the European Union adopted Decision 2011/199/EU for the purpose of amending Article 136 TFEU. As counsel for the plaintiff has emphasised, it seems to be implicit in Recital (2) of the decision that the European Council considered that "a limited Treaty change" was required to enable the establishment of a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole. Decision 2011/199/EU was clearly adopted to achieve that effect. I have rejected the plaintiff's challenge to the validity of the decision. However, there remains an issue as to whether the postponement of the entry into force of the decision affects the effect and operability of the ESM Treaty pending the entry into force of the decision.

195. Apart from the matters alluded to by Hogan J., the determination which this Court has to make on that issue raises a fundamental question. That is whether the entry into force of Decision 2011/199/EU in accordance, not only with its terms, but also in accordance with the provisions of Article 48(6), is an essential pre-condition to the coming into force of the ESM Treaty. It is to be noted that, in contrast to Article 48(6), which provides that the decision "shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements", Article 48(4) TEU provides as follows:

> "The amendments [to the Union Treaties effected by the ordinary revision procedure] shall enter into force after being ratified by all Member States in accordance with their respective constitutional requirements".

That, in reality, there is no distinction between "ratification" and "approval" in this context has already been commented on. That leaves the question whether a distinction can be drawn between "amendments" in Article 48(4) and "decision" in Article 48(6), or between "shall enter into force after" in Article 48(4) and "shall not enter into force until" in Article 48(6). It is interesting to note that the drafting amendment proposed by the European Central Bank, which was not taken up by the European Council, was that Article 2 should read "Article 1 of this decision shall enter into force on 1 January 2013 . . .".

196. If the coming into force of the ESM Treaty is dependent upon the coming into force of Decision 2011/199/EU, that has serious legal and practical implications, given that the decision shall enter into force on 1st January, 2013 at the earliest and then only provided that all of the notifications of completion of the procedures for approval in accordance with their respective constitutional requirements by all of the Member States have been received by the Secretary-General. Obviously, the legal implications would be compounded if one or more of the Member States were not to approve of the decision or were not to give notification of such approval to the Secretary General at any time. That would give rise to a fundamental question as to what was the legal status of Decision 2011/199/EU, which I have already described as unique, on its adoption, having regard to the express provisions therein in relation to entry into force.

197. For the foregoing reasons, I consider that the issue should be referred to the CJEU for a preliminary ruling. As was acknowledged by the parties during the hearing, it will be necessary for the Court to hear further submissions as to formulation of the question or questions to be referred to the CJEU.

Section VII – Plaintiff's application for interlocutory injunctive relief

198. All issues which arise in these proceedings other than the issue which I consider should be referred to the CJEU for a preliminary ruling have been determined. Therefore, the only aspect of the claim for interlocutory injunctive relief which has to be considered is whether the Court should make an order restraining the defendants from ratifying, approving or accepting the ESM Treaty pending the final determination of the proceedings.

199. As outlined in Section I, the application for an interlocutory injunction was grounded on the affidavit of the plaintiff sworn on 26th June, 2012. The defendants' response was by an affidavit sworn by Mr. O'Brien on 27th June, 2012. Mr. O'Brien averred that he was authorised to confirm that it was the intention of the Government to deposit Ireland's instrument of ratification of the ESM Treaty by 9th July, 2012 with the Depositary. The decisions given on 9th July, 2012 and this judgment have been given on the basis that such intention would be fulfilled.

200. In the *Crotty* case, on 24th December, 1986, the day following the enactment of the European Communities (Amendment) Act 1986, which was ultimately found by the Supreme Court not to be invalid having regard to the provisions of the Constitution, the High Court (Barrington J.), on the application of the plaintiff, granted an interlocutory injunction restraining the defendant, who, as he stated, in effect was the Government of Ireland, from depositing with the Government of the Italian Republic any purported instrument of ratification of the SEA. Subsequently, in a judgment of a Divisional Court of the High Court delivered on 12th February, 1987, in which all of the substantive reliefs sought by the plaintiff were refused, the interlocutory injunction was discharged. The

plaintiff then appealed to the Supreme Court and he obtained an interlocutory injunction from the Supreme Court in similar terms to the order of Barrington J. pending the hearing of the appeal.

201. The judgment of the Supreme Court on the issue as to whether the plaintiff was entitled to an interlocutory injunction was delivered by Finlay C.J., with whom the other four Judges agreed, on 18th February, 1987. Finlay C.J. (at p. 763) identified the first issue arising as whether the plaintiff had established a fair issue to be tried as to the effect of ratification within the provisions of Article 29.4.3° of the Constitution and expressed the view that he had, although he expressed no view on the weight of the arguments. He then stated:

> "As to the second question, whether the balance of convenience justifies the granting of an interlocutory injunction, the balance of convenience in the context of the Constitution is exceptional and considerations different to those of the ordinary injunction apply. If the interlocutory injunction sought by the plaintiff were not granted, then the Government's act of ratification would deprive this Court of its jurisdiction or power to grant to the plaintiff the remedies necessary to protect his constitutional rights. If that submission is correct, a fair argument has been made out and it constitutes what, in my view, would justify making an exception, given a reluctance to interfere with the Executive."

Finlay C.J. concluded the short judgment by stating that he was satisfied that, in order to do justice to the parties, the injunction, which had already been granted by the Supreme Court on an interim basis, should continue. Obviously, no question arose or could arise, in the *Crotty* case as to the adequacy of damages as a remedy for the plaintiff nor, it would appear, was there any question of the plaintiff giving an undertaking as to damages, as is the norm on an application for an interlocutory injunction.

202. While counsel for the defendants urged that the Court should not refer any question to the CJEU for a preliminary ruling, it was submitted that, in the event of the Court deciding to refer, the issue as to whether interlocutory relief should be granted should be determined in accordance with the jurisprudence of the CJEU. In that connection, counsel for the defendants referred to two authorities.

203. The earlier authority is a decision of the Court of Justice in cases C – 143/88 & C – 92/89 *Zuckerfabrik Süderdithmarschen* [1991] ECR 1 – 415, a decision dating from 1991. There, the Finanzgericht (Finance Court) Hamburg had referred the validity of a Council Regulation introducing a "special elimination levy" in the sugar sector to the Court of Justice and also raised questions as to the jurisdiction of the national court to grant interim relief by suspending the operation of an administrative measure based on the impugned regulation until a decision would be reached in the main action. In the paragraphs relied on by counsel for the defendants, (paragraphs 23 to 33) the Court of Justice dealt with that issue and it then answered the question as follows in paragraph 33:

> "It follows from the foregoing that the reply to the second part of the first question put to the Court by the Finanzgericht Hamburg must be that suspension of enforcement of a national measure adopted in implementation of a Community regulation may be granted by a national court only:
>
> (i) if that court entertains serious doubts as to the validity of the Community measure and, should the question of the validity of the contested measure not already have been brought before the Court, itself refers that question to the Court;
>
> (ii) if there is urgency and a threat of serious and irreparable damage to the applicant;
>
> (iii) and if the national court takes due account of the Community's interests."

204. The later authority relied on by counsel for the defendants is the decision of the Court of Justice in 1995 in Case C– 465/93 *Atlanta Fruchthandelsgesellschaft mbH v. Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR 1 – 3761. In that case, the Court of Justice restated the principles which had been outlined in the *Zuckerfabrik* decision. At paragraph 51 it summarised the position in relation to the grant of interim relief by a national court stating:

> ". . . interim relief, with respect to a national administrative measure adopted in implementation of a Community regulation, can be granted by a national court only if:
>
> (1) that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;
>
> (2) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
>
> (3) the court takes due account of the Community interest; and
>
> (4) in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Community level."

205. In response, counsel for the plaintiff referred the Court to the 1990 judgment of the Court of Justice in case – 213/89 *R. v. Secretary of State for Transport, ex p Factortame Ltd*. [1990] ECR 1 – 2433. By way of explanation, in that case, the House of Lords held that the granting of interim relief to Factortame and other companies, which sought such relief pending final judgment on a claim that legislation introduced in the United Kingdom in 1988 breached Union law, was precluded both by the common law rule prohibiting the grant of an interim injunction against the Crown and by the presumption that an Act of Parliament is in conformity with EU law until a decision on its compatibility has been given, notwithstanding that it had found that Factortame would suffer irreparable damage if interim relief was not granted and it was successful in the main proceedings. On a reference by the House of Lords to the Court of Justice raising the question as to whether interim relief was required as a matter of Union law, in the paragraphs of the judgment relied on by counsel for the plaintiff (paras. 19 to 21), the Court stated:

> "In accordance with the case-law of the Court, it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law . . ..
>
> The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply

such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law . . ..

It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule."

206. I am in agreement with the submission made on behalf of the defendants that the decision in the *Factortame* case is of no relevance to the issue the Court has to determine. As counsel for the defendants mentioned in passing, as long ago as 1985, the Supreme Court held in *Pesca Valencia Ltd. v. Minister for Fisheries and Forestry* [1985] I.R. 193 that there is no rule of national law in this jurisdiction which might impair the effectiveness of Community law by withholding from the national court jurisdiction to grant interim relief. It was made clear by counsel for the defendants that it is not the defendants' position that the Court does not have jurisdiction to grant interlocutory relief; the defendants' position is that the Court should apply the principles which the Supreme Court laid down in *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 to be applied on the grant of an interlocutory injunction but as regards the Union law issues in the case, the application of those principles should be informed by the decisions in the *Zuckerfabrik* case and in the *Atlanta* case. I am satisfied that that is the correct approach to adopt.

207. However, before attempting to apply those principles, it is necessary to identify clearly what relief could possibly be granted to the plaintiff on the basis of the decisions made.

208. First, the plaintiff is entitled to none of the reliefs he claims in relation to Decision 2011/199/EU, because he has failed to establish that the decision is invalid. The decision has, in effect, been approved by the Oireachtas and, subject to its entry into force in Union law, it will have force in Irish law as soon as the Minister makes a commencement order in respect of the relevant provision of the Amendment Act of 2012. However, on the assumption that entry into force of the ESM Treaty is dependent on entry into force of Decision 2011/199/EU, as the plaintiff contends, as it has not entered into force in Union law in accordance with Article 48(6) TFEU and Article 3 thereof, the implications of that as regards the effect and operability of the ESM Treaty remain to be determined, the Court being of the view that the questions on that issue which arise should be referred to the CJEU.

209. Secondly, as regards the ESM Treaty, the Court has held that it is not incompatible with Union law and, in particular, the provisions of the Union Treaties, and that it is not incompatible with the Constitution. Further, the requirements of the Constitution and, in particular, Article 29.5 have been complied with in the enactment of the ESM Act of 2012. The issue which remains is whether, as a matter of Union law, the ESM Treaty can enter into force or operate prior to the entry into force of Decision 2011/199/EU. On the basis of that analysis, it seems to me that, if the CJEU, on a preliminary ruling, were to determine that entry into force of the ESM Treaty was dependent on prior entry into force of Decision 2011/199/EU, it would be open to this Court to grant a declaration to the plaintiff to that effect. On the other hand, if the CJEU were to determine that the entry into force of the ESM Treaty is not dependent on the prior entry into force of Decision 2011/199/EU, in those circumstances the plaintiff would not be entitled to any relief in respect of the ESM Treaty.

210. Counsel for the defendants submitted that the following factors weigh against granting interlocutory injunction restraining the ratification of the ESM Treaty pending a ruling of the CJEU on a reference by the Court, which factors are based on matters of inference from the various documents put before the Court and the affidavit evidence of Mr. O'Brien:

(a) The ESM Treaty Members, including Ireland, and the Member States of the European Union all have pressing interest in Ireland's timely ratification of the ESM Treaty.

(b) In general, the stability of the euro area would be seriously damaged by delayed ratification.

(c) Timely ratification is imperative from Ireland's perspective in that it is essential that Ireland is involved in the ESM Treaty from the outset, in order that it may participate and vote on early decisions of the ESM taken by mutual agreement. Apart from that, Mr. O'Brien has averred to a range of adverse consequences which may ensue if Ireland does not ratify the ESM Treaty in the short term, for example, detrimental impact on Ireland's proposed re-entry into the financial markets in 2014 and a serious set-back to the substantial progress made to date by Ireland towards completing and exiting the EU-IMF programme by 2013.

(d) Ireland's timely ratification of the ESM Treaty is of the utmost importance for other Members of the ESM, and, in particular, the Members who are in need of financial assistance. Mr. O'Brien has averred that it is essential that the ESM should have the largest possible capital base from the outset, including Ireland's contribution, which is relatively small but nonetheless important in the aggregate.

(e) The favourable opinions adopted by the Commission and the European Central Bank are referred to, but, of course, those opinions relate only to the amendment of Article 136 and do not address the nexus between the entry into force of Decision 2011/199/EU and the entry into force of the ESM Treaty.

(f) If ratification were to proceed on 9th July, 2012, it would not have any detrimental impact either on the plaintiff individually or on the national interest.

(g) On the contrary, it is clearly in the national interest that ratification should proceed.

(h) In any event, as the ESM is due to come into operation on an incremental manner, only two tranches of capital contributions will become due to be paid in within the next six months, which is the timeframe estimated for obtaining a ruling from the CJEU.

(i) Further, Mr. O'Brien has furnished details in his affidavit of the usual timeframe, which he believes is unlikely to differ under the ESM when it is established, between applications by States for financial assistance and the disbursement of funds. He has averred that it follows that the capital contribution instalments that Ireland would be required to make between ratification of the ESM Treaty and the ruling of the CJEU would be unlikely to be fully leveraged by the ESM in raising funding on the financial markets for the purpose of providing financial assistance to ESM Members.

211. Finally, it was submitted on behalf of the defendants that, if the CJEU issued a ruling which was favourable to the plaintiff's case, the consequence would be that all ESM Treaty Members, including Ireland, would be under an immediate obligation pursuant to Article 4(3) TFEU to refrain from proceeding with participating in the ESM. Having regard to the issue which it is proposed to refer to the CJEU, it is probably more correct to say that such state of affairs would exist until entry into force of Decision 2011/199/EU.

212. If the Court were to restrain the ratification of the ESM Treaty by Ireland, the probable consequences for Ireland are of a fundamentally different order to the consequences which actually ensued from the grant of an interlocutory injunction by the Supreme Court in the *Crotty* case. As it transpired in the *Crotty* case, it was within the capacity of the State to take the steps necessary to ensure that Title III of the SEA could be ratified by Ireland. The situation in this case is totally different. It is impossible to predict the fallout from restraining the Government from ratifying the ESM Treaty, save to say that, on the basis of Mr. O'Brien's evidence, the probability is that it would be extremely detrimental to Ireland and to the other Members of the ESM.

213. On the basis of the principles set out in the *Zuckerfabrik* case, as the plaintiff has raised serious doubts as to whether the ESM can enter into force and operate before the entry into force of Decision 2011/199/EU, the Court must weigh in the balance –

> (a) whether there is urgency and a threat of serious and irreparable damage to the plaintiff, if an interlocutory injunction is not granted, which I am satisfied there is not, against
>
> (b) the interests of Ireland and of the other Members of the ESM and of the Union, which I am satisfied do not favour the grant of an interlocutory injunction restraining ratification of the ESM Treaty by Ireland.

By the same token, if one applies *Campus Oil* principles, the balance of convenience favours not granting an interlocutory injunction. The ultimate outcome of a reference, the decision of the CJEU, will bind Ireland and the other Member States of the Union and the ESM and their citizens. In that way, if what remains of the plaintiff's claim is well founded, the rule of law will be applied, which is his stated objective.

214. Accordingly, the application for an interlocutory injunction restraining the ratification of the ESM Treaty is refused.

Section VIII: Summary of decisions of the Court given on 9th July, 2012

A – Decision on issues arising from the European Stability Mechanism Treaty (ESM Treaty) which was signed by the seventeen euro area Members of the European Union on 2nd February, 2012.

(1) The plaintiff claims that the Treaty is incompatible with Union law, primarily with various provisions of the Treaty on the Functioning of the European Union (TFEU), but also with some provisions of the Treaty on European Union (TEU) and Article 47 of the Charter of Fundamental Rights.

Subject to the qualification expressed below, I am satisfied that the plaintiff's claim has not been established. The ESM Treaty is an international Treaty between the contracting parties which is not incompatible with Union law. The qualification relates to its effect and operability arising from the issue on the entry into force of Decision 2011/199/EU, which is addressed at B below.

(2) The plaintiff claims that the Treaty is incompatible with the Constitution and that an amendment of the Constitution approved of by the people in a referendum is necessary before it can be ratified.

The determination of this claim turns on the application of the majority decision of the Supreme Court in *Crotty v. An Taoiseach* [1987] I.R. 713. I am satisfied that, unlike participation in the Treaty at issue in the *Crotty* case (Title III of the Single European Act), participation in the ESM Treaty will not involve any transfer or diminution of sovereignty by Ireland to the European Stability Mechanism (ESM) or other Members of the ESM. Therefore, I am satisfied that the ESM is not incompatible with the Constitution.

(3) The plaintiff claims that the European Stability Mechanism Act 2012 (No. 20/2012), which was signed by the President last week, which, *inter alia*, authorises the Minister for Finance to subscribe to the authorised capital stock of the ESM to a maximum of €11.1454 billion and gives legal status to the ESM within the State is unconstitutional. I am satisfied that the Act is not invalid having regard to the provisions of the Constitution on the grounds alleged by the plaintiff.

B – Decision on issues arising from Decision 2011/199/EU of the European Council of 25th March, 2011 amending Article 136 TFEU pursuant to Article 48(6) TEU

(1) The plaintiff claims that the Decision is invalid under Union law.

The jurisdiction of this Court to review the decision, as a decision adopted by an institution of the European Union, is governed by the decision of the CJEU in *Foto-Frost v. Hauptzollamt Lübeck-Ost* (Case 314/85) [1987] ECR 4199. I am satisfied that the grounds put forward by the plaintiff in support of his claim that the Decision is invalid are unfounded. I have come to the conclusion that the Decision is "completely valid" in accordance with Union law.

(2) The plaintiff originally sought a permanent injunction restraining the Government from giving effect to the proposed amendment of Article 136 TFEU otherwise than by constitutional amendment approved by the people in referendum. During the hearing, the plaintiff sought an interlocutory injunction restraining the defendants from completing the approval procedures pending the determination of these proceedings.

The plaintiff's claim that the approval of the declaration requires an amendment of the Constitution approved by the people in referendum is rejected. The people have approved, in the referendum on the Lisbon Treaty, *inter alia*, the amendment of the TEU by the inclusion of the simplified revision procedures now to be found in Article 48(6) TEU. Having found that the Decision, which was adopted by utilising the simplified revision procedures, is completely valid in Union law, I am satisfied that an amendment of the Constitution is not necessary as a preliminary to giving the Decision force of law in Irish law.

(3) The plaintiff claims that the European Communities (Amendment) Act 2012 (No. 21/2012), which was signed by the President last week and which amends the European Communities Act 1972 by insertion of the Decision into the definition of "Treaties governing the European Union" therein, is unconstitutional.

Having regard to the conclusions set out at (1) and (2) above, I consider that the plaintiff's claim is unsustainable. I conclude that the Act is valid having regard to the provisions of the Constitution.

As, by virtue of the Act, the Decision has been given force of law in the State, the contentious proposition advanced on behalf of the defendants that, once the European Council acting by unanimity adopted the Decision on 25th March, 2011 amending Article 136, which was the substantive provision of the Decision, the Decision became binding on the Member States as a matter of Union law, so that Ireland became obligated, as a matter of Union law, to engage in completion of the procedures for approval of the Decision in accordance with the constitutional requirements of Ireland, is moot. It is moot as regards approval by Ireland of the Decision in accordance with the constitutional requirements of Ireland.

(4) During the hearing, counsel for the plaintiff made a formal request that a question be referred to the CJEU pursuant to Article 267 TFEU as to whether the adoption of the Decision, but which has not been, at the relevant time, entered into force, is capable of altering the entitlement of Member States to enter into an international agreement such as the ESM Treaty.

The primary focus of the question proposed for referral, as formulated by counsel for the plaintiff, was on the utilisation of the simplified revision procedure provided for in Article 48(6) in making the Decision. Having regard to the conclusion I have reached on the validity of the Decision in Union law, it follows that I consider that it is not necessary to refer a question to the CJEU on the validity of the Decision in Union law.

As to the temporal component of the proposed question, which identifies an issue as to the implications of the intention of the Members of the ESM to ratify the ESM Treaty before the Decision shall enter into force, which will not happen until 1st January, 2013 at the earliest, it is the aspect of the proceedings which I have found most difficult to determine. The factual position is that there is no evidence before the Court as to the current position in relation to approval by the Member States of the EU "in accordance with their respective constitutional requirements" of the amendment of Article 136 TFEU either in accordance with the terms of Article 48(6) or of Article 2 of the Decision. On the assumption that all Member States have not yet given notice of approval in accordance with Article 2, issues arise as to the implications of one or more Member States not approving the Decision and not giving notification of such approval in accordance with Article 2 of the Decision. Some of those issues are referred to in the decision of this Court (Hogan J.) in *Doherty v. The Referendum Commission* [2012] IEHC 211.

In the context of these proceedings, the principal issue which arises is what would be the effect of the failure of one or more Member States to comply with Article 2 of the Decision on the effect and operability of the ESM. I have come to the conclusion that a reference to the CJEU is necessary to address that issue. Notwithstanding the submissions made on behalf of the defendants that such a request is time-barred, I am not satisfied that it is. However, consideration may be given to whether the issue of admissibility should also be referred to the CJEU.

C – The plaintiff's claim for an interlocutory injunction restraining the Government from ratifying the ESM Treaty pending the determination of the proceedings

This claim, which was first brought during the hearing, crosses over the claims made by the plaintiff arising from the matters referred to at A and B above. For the reasons which will be more fully outlined in the judgment of the Court, I have come to the conclusion that the Court should not make the order sought. The only determinations which the Court is requested to make in these proceedings which will remain outstanding are the determinations which will require to be made consequent on the outcome of the reference to the CJEU. The outcome to the reference will bind all euro area Member States, not just Ireland.