Mr Pringle goes to Luxembourg…

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Following the series of challenges against the European Stability Mechanism (ESM) in domestic courts of the EU Member States, Thomas Pringle's action to prevent Irish ratification of the ESM Treaty brought before the Irish Supreme Court finally brought the ESM to Luxembourg by way of a reference for a preliminary ruling.

…and everybody's in!

Even without the press, guests and the interested general public being there, the courtroom was crowded: All 27 judges of the Court of Justice and German Advocate General Juliane Kokott had gathered to hear the parties' submissions in favour and against the ESM's compatibility with EU law. The respondent Irish government was supported by a dozen interveners: 9 Member States, the European Council, the European Parliament and the European Commission presented their cases in favour of the ESM.

Irish resistance

Mr Pringle, represented by attorney John Rogers, submitted at the outset that the European Council wrongly enacted Art. 136(3) TFEU, the ESM's legal basis in EU law, using the simplified revision procedure laid down in Art. 48(6) TEU. He argued that the simplified procedure could not be employed, because the ESM affected the allocation of competences within the EU. Even if the ESM was an entity under international law, its activities affected European monetary policy, an area falling within the exclusive competences of the EU. The simplified revision procedure could neither be used to expand nor to restrict the competences of the EU. Furthermore, Mr Pringle argued, the introduction of a new legal basis to EU primary law was futile, since Art. 122(2) TFEU already provided for mechanisms to address crises and situations of emergency.

The discussion centered on the so-called prohibition of bail-outs under Art. 125 TFEU. Mr Pringle argued that, even if Art. 125 TFEU did not prescribe financial assistance, Member States could not hide behind the ESM and that rescuing measures had to be consistent with EU law. He reasoned that Member States could not escape their obligations under EU law by setting up a mechanism under international law. When creating an international legal entity, Member States could not interpret EU law provisions like "Humpty Dumpty" and give meaning to their wording as they seem fit. Financial guarantees to rescue a State violated the prohibition of bail-outs.

Eventually, MP Pringle accused the Member States of disregarding the rules they had given themselves: According to the decision of the European Council the new Art. 136 par. 3 takes effect only on 1 January of 2013 – the ESM, however, came into existence already on 8 October this year – a clear inconsistency.

(Almost) European unity

Of course, the Member States and the EU institutions had a different say on this and displayed astounding agreement on the issues of the case. Most lines of argument were like peas in the same pod. In that vein, the pleadings were full of respective affirmative references , which was rather fatiguing for the audience to track.

All interveners agreed on the declaratory nature of Art. 136(3) TFEU – a rare chance to witness unfettered unity of the United Kingdom and continental Europe in matters of European law: The ESM does not really need a legal basis since it builds on competences of the Member States. The German representative, Thomas Henze, sketched out the dramatic scenario of a "fragile market situation" in which the ESM was decided on. Hence, the Member States did not want to leave open any doubt about the legality of the rescue

fund in order to prevent speculators from taking advantage of an uncertain legal situation. Member States representatives ruled out the alternative to take recourse to Art. 122(2) TFEU, which is the basis for exceptional financial assistance, because it only allows for ad hoc measures. Hubert Legal, legal advisor to the European Council, demonstrated that the ESM sum corresponds to the total of the EU's budget from 2007 to 2012. Therefore, also simple arithmetic calls for a permanent mechanism of the Member States.

Not surprisingly, the proponents of the ESM rejected any interpretation of Art 125 TFEU that does not allow for rescue measures facilitated by the ESM. According to that provision, said to prohibit bail out, the Member States are not to be held liable for debts of other Member States. Unanimously, the Member States pointed out that Art. 125 TFEU does not exclude a mechanism that grants loans under market conditions. This position does not entail "conceptual gymnastics", the Slovakian representative stressed. Thomas Henze was not willing to accept the German government to be equated with Alice in Wonderland, either: she did not twist words; instead, she just does not rely solely on them. The purpose of Art 125 TFEU – to safeguard stability in the Eurozone and to achieve budget discipline through market conditionality – is more decisive. In this respect, Thomas Henze engaged in a dangerous line of argument: the ESM loan conditions to financially suffering States would ensure the kind of budget discipline which, under normal circumstances, market forces would provide for.

A rather hypothetical debate was sparked between the United Kingdom and the rest of the pleading Member States on the conditions of the loan of organs to other institutions of the Member States. They all agreed that this is in principle possible, even if the organs were to be conferred tasks not envisaged by the founding treaties. However, the position of the United Kingdom requires an unanimous decision while all other Member States held the view that the consent of the "loaning" States would suffice. Alas, this little tempest in a teacup will probably not bear consequences for the judgment of the CJEU since all Member States have consented in the role of the Commission and the ECB under the ESM.

A full Court with an inconvenient Judge-Rapporteur

After the lunch break the Counsels had to undergo uncomfortable questioning by Judge-Rapporteur Koen Lenaerts. To the European Council Representative, Lenaerts pointed out that there might be a contradiction in the Member States' reasoning: On the one hand Art. 136(3) TFEU is supposed to be merely declaratory – which would render it dispensable –; on the other hand, though, it shall secure that the rescue measures be in accordance with the object and purpose of Art. 125 TFEU – but then the ESM could take up its work only with entry into force of the ESM provision. In response to the pointed question whether Art. 136(3) had really been necessary for the ESM, the Council Representative answered with a plain "Yes!". But Mr Pringle's attorney, too, was struggling to defend his position. He was asked if he could not imagine any kind of aid in accordance with EU law, for instance if the Member States acted outside the EU framework relying on their genuine competences. Judge Lenaerts emphasized in this regard: "What is not referred, that remains with the Member States".

After a long day of hearing, the full Court of 27 judges retired for deliberations. It is expected that a judgment will be delivered by year's end. It became clear that the Judges will not just uncritically follow the arguments of the responding parties and wave through the ESM and its would-be legal basis in Art. 136(3) TFEU. Then again, the Judge-Rapporteur suggested that the Member States could not be deterred from taking some rescue actions outside the European legal framework. In any case, it will be interesting to learn how the CJEU is evaluating the relationship between EU law and Member States' treaties of general international law like the ESM.

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