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### Pringle: Legal Reasoning, Text, Purpose and Teleology

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## GUEST EDITORIAL

# *PRINGLE*: LEGAL REASONING, TEXT, PURPOSE AND TELEOLOGY

PAUL CRAIG\*

### §1. INTRODUCTION

Not all cases are equally important; they are not equally interesting intellectually and they are not of equal significance in terms of political relevance. Nor indeed is there any guarantee that these features will coalesce in a single case. They did however come together in the *Pringle* case.<sup>1</sup> The challenge to the European Stability Mechanism (ESM)<sup>2</sup> ticked all these boxes, especially because its judicial invalidation could well have sent nervous financial markets into a further downward spiral. A course in EU law could without difficulty be taught from the ensuing judgment. So too could a course in legal reasoning. The judgment unfolds like a story, and even though the reader knows or can hazard a pretty good guess at the ending – that the Court of Justice of the European Union (CJEU) will find that the ESM is lawful – the story is compelling nonetheless, since the last part of the judgment is also the denouement in which the CJEU saves the ESM from the most potent challenge to its legality. In doing so, the judgment reveals much that is of interest about the nature of legal reasoning, in particular the blend of text, background purpose, and teleology that constitutes the very essence of legal discourse.

### §2. THE EUROPEAN STABILITY MECHANISM

The euro crisis generated two responses from the EU: assistance, and heightened supervision over national economic policy. The ESM was the successor to earlier measures to provide assistance to Member States and entered into force on 8 October 2012.

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<sup>1</sup> Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, Judgment of 27 November 2012, not yet reported.

<sup>2</sup> See the European Stability Mechanism, [www.esm.europa.eu/](http://www.esm.europa.eu/) (last visited 6 February 2013).

Article 136 TFEU had been amended by the simplified revision procedure, the result being a new paragraph 3, which stated that ‘the Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole’,<sup>3</sup> the assistance being subject to conditionality. However, this amendment was not in force in October 2012 and the ESM thus took effect as an intergovernmental organization based on an international treaty between the euro area Member States.

The ESM was devised as a permanent rather than temporary mechanism for giving financial assistance to those in the euro area. Its purpose is set out in Article 3.

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 ESM can raise funds by issuing financial instruments or by entering into financial or other agreements with ESM members, financial institutions or other third parties. It has a total subscribed capital of €700 billion, €80 billion of which is in the form of paid-in capital provided by the euro area Member States in five instalments of €16 billion. The ESM can also dispose of up to €620 billion of committed ‘callable capital’ from euro area Member States. From 1 March 2013, assistance under the ESM is conditional on ratification by the applicant state of the Treaty on Stability, Governance and Coordination.

The ESM may provide stability support by: giving loans to countries in financial difficulties; providing precautionary financial assistance in the form of a credit line; financing recapitalizations of financial institutions through loans to governments including in non-programme countries; and purchasing bonds of an ESM Member State in primary and secondary debt markets.<sup>4</sup> The ESM aims to cover its costs and include an appropriate margin.<sup>5</sup> It can borrow on the capital markets from banks, financial institutions, and so on, for the performance of its purpose.<sup>6</sup>

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<sup>3</sup> European Council Decision 2011/199 of 25 March 2011 amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro, [2011] OJ L 91/1.

<sup>4</sup> Articles 14–20 ESM.

<sup>5</sup> Article 20(1) ESM.

<sup>6</sup> Article 21(1) ESM.

### §3. PRINGLE, COMPETENCE AND EU INSTITUTIONS

The claimant in *Pringle* made a number of arguments against the legality of the ESM.<sup>7</sup> This editorial focuses on the most important, those relating to competence and bailouts.

#### A. ESM AND CATEGORIES OF EU COMPETENCE

The claimant argued that the ESM was in substance designed to ensure price stability and save the euro; this was monetary policy, which fell within the EU's exclusive competence,<sup>8</sup> and the Member States therefore had no competence to adopt legally binding acts in the form of an international treaty, the ESM.<sup>9</sup> There was force in the contention that the ESM was in reality directed towards monetary policy given the wording of Articles 3 and 12 ESM, which predicate assistance on the fact that it is indispensable to the financial stability of the euro area as a whole.

The Member States nonetheless predictably contended that the ESM was concerned with economic policy, which is not within the EU's exclusive competence. The CJEU, equally predictably, reached the same conclusion, although the reasoning was strained. It held that the primary objective of monetary policy was price stability,<sup>10</sup> but that this was distinct from the stability of the euro area as a whole, which was the objective of Article 136(3) TFEU and the ESM. The CJEU justified this conclusion on the ground that even 'though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro'.<sup>11</sup> This is, with respect, legal formalism, which may explain why the CJEU moved rapidly on in its judgment without further reasoning on the point. In economic terms, the stability of the euro area as a whole is surely a condition precedent to price stability within that area. To put the same point conversely, it is not clear how there could be price stability in relation to the euro, given the serious instability of the euro area as a whole.

The claimant further contended that if the subject matter of the amended Article 136(3) TFEU was regarded as falling within economic policy, Member State competence to act was nonetheless pre-empted because the EU had occupied the relevant area. The CJEU rejected this contention.<sup>12</sup> It held that since Articles 2(3) and 5(1) TFEU restricted the EU's role in economic policy to the adoption of coordinating measures, the TEU and TFEU did not therefore confer any specific power on the EU to establish

<sup>7</sup> Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*.

<sup>8</sup> Article 3(1)(c) TFEU.

<sup>9</sup> Article 2(1) TFEU.

<sup>10</sup> Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, para. 54, 94.

<sup>11</sup> *Ibid.*, para. 56, 96.

<sup>12</sup> *Ibid.*, para. 102–107.

a stability mechanism of the kind envisaged by Decision 2011/199 that brought about the amendment in Article 136(3) TFEU.<sup>13</sup> It followed, said the CJEU, from Article 4(1) and Article 5(2) TEU that competence in this regard remained with the Member States, who could therefore lawfully conclude the ESM.<sup>14</sup> It also followed that Article 136(3) was regarded as merely ‘confirming’<sup>15</sup> the Member States’ power to establish a stability mechanism, and created no new Union competence.<sup>16</sup>

## B. ESM AND EU INSTITUTIONS

The CJEU’s preceding conclusion still left open the legality of the EU institutions participating in such an agreement. The Commission and European Central Bank (ECB) are integral to the ESM regime.<sup>17</sup> The issues of principle raised by such involvement are complex.<sup>18</sup>

The CJEU’s response was brief and Delphic. It held that even though the ESM made use of the Commission and ECB, that fact could not affect ‘the validity of Decision 2011/199, which in itself provides only for the establishment of a stability mechanism by the Member States and is silent on any possible role for the Union’s institutions in that connection’.<sup>19</sup>

A partial explanation to this response is that the CJEU was dealing with the question of whether Article 136(3) TFEU could be introduced pursuant to the simplified revision procedure. The legal reality was, as we have seen, that the ESM took effect as an international agreement because Article 136(3) had not yet come into effect. The legal reality was, however, also that the EU institutions were central to the ESM, and the CJEU provides scant if any guidance as to the legitimacy of such involvement.

This reticence was doubtless due in part to the legal difficulties that might be raised by such involvement. It was also doubtless due to the fact that when Article 136(3) comes into effect it will provide a more secure foundation for EU institutional involvement with the kind of assistance dealt with via the ESM. It is true that Article 136(3) does not explicitly address EU institutional involvement, but it is a good deal easier to infer EU institutional capacity to participate in such a schema when it is grounded in the primary treaty itself.<sup>20</sup>

<sup>13</sup> Ibid., para. 64.

<sup>14</sup> Ibid., para. 68, 109.

<sup>15</sup> Ibid., para. 72.

<sup>16</sup> Ibid., para. 73.

<sup>17</sup> Articles 13(1), 13(3), 13(4) ESM.

<sup>18</sup> P. Craig, ‘The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism’, 37 *European Law Review* 3 (2012), p. 231.

<sup>19</sup> Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, para. 74.

<sup>20</sup> The TSCG, by way of contrast, was created after the veto by the UK prevented the desired ends from being undertaken within the framework of the Lisbon Treaty, and there is nothing analogous to Article 136(3) TFEU.

## §4. PRINGLE AND BAILOUTS

There is no doubt that the claimant's principal argument in *Pringle* concerned bailouts. The assiduous reader has to wait until the end of the judgment to see how the Court tackled this argument, the essence of which was the alleged incompatibility between the ESM and the no-bailout clause in Article 125 TFEU. This argument had some prima facie plausibility. The informed observer might well conclude that the ESM was doing just that, bailing out those Member States such as Greece, Ireland and Portugal that were in serious financial difficulty. The very language of bailout was deployed repeatedly in the press and media coverage to capture the assistance provided to such Member States. It was therefore interesting to see how the CJEU would deal with this aspect of the claim.

### A. PURPOSE, TEXT AND CONSEQUENCE

It is axiomatic that recourse to the underlying purpose or objective of a legal provision is often crucial to its interpretation, since the words do not just 'self-define'. The revealed purpose is then used to help determine the scope of the particular provision. The CJEU in *Pringle* is to be commended for doing just this when interpreting Article 125 TFEU.

The CJEU, drawing inspiration from the Advocate General, held that Article 125 was not intended to prohibit either the EU or the Member States from granting any form of financial assistance whatsoever to another Member State, since the EU could grant assistance pursuant to Article 122(2) TFEU.<sup>21</sup> The CJEU reinforced this conclusion by arguing that the wording of Article 123 TFEU, which prohibits the ECB and national central banks from granting 'overdraft facilities or any other type of credit facility', was stricter than that in Article 125 TFEU, which thereby lent support to the view that the no-bailout clause was not intended to prohibit all kinds of financial assistance to a Member State.<sup>22</sup>

It was therefore necessary, said the CJEU, to consider the objective underlying Article 125 to decide what forms of financial assistance were prohibited.<sup>23</sup> The CJEU adverted to preparatory work on the Maastricht Treaty and correctly concluded that the aim of Article 125 TFEU was to ensure that Member States remained subject to the logic of the market, which would prompt them to maintain budgetary discipline.<sup>24</sup>

It followed that Article 125 TFEU must be held to 'prohibit the EU and Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished'.<sup>25</sup>

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<sup>21</sup> Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, para. 130–131.

<sup>22</sup> *Ibid.*, para. 132.

<sup>23</sup> *Ibid.*, para. 133.

<sup>24</sup> *Ibid.*, para. 135.

<sup>25</sup> *Ibid.*, para. 136.

This reasoning is surely correct. The purpose of Article 125 was to engender sound national budgetary policy. It was to ensure that states remained subject to the logic of the market when they became indebted, and hence any assistance that would, in the words of the Court, 'diminish' the incentive of the Member State to conduct sound budgetary policy should fall within the prohibition of Article 125 TFEU.

It is the conclusions drawn from this premise that are more contestable. The Court held that, provided that the state remains ultimately responsible to its creditors, and provided that conditions are attached to assistance designed to foster sound budgetary policy, then it is not prohibited by Article 125 TFEU.<sup>26</sup> The ESM was therefore compatible with Article 125 TFEU because the participating Member States were not 'liable for the commitments of a Member State which receives stability support and nor do they assume those commitments, within the meaning of Article 125 TFEU'.<sup>27</sup> ESM assistance did not render Member States the guarantor of debts of the recipient state, nor did they assume the debts of that state.<sup>28</sup> The recipient state remained liable to repay the sums lent, which included also an appropriate margin. This was said to be true also for assistance through bond purchases on the primary and secondary markets, which were regarded as comparable to loans from the recipient state, and which retained ultimate responsibility in terms of repayment.<sup>29</sup>

Economic reality renders this neat juncture between the purpose/objective of Article 125 and its interpretation a good deal more tenuous. The judgment is expressly predicated on the assumption that a Member State should remain subject to the logic of the market in relation to its debts, that this will instil budgetary discipline, and that any assistance that 'diminishes' the incentive to maintain sound budgetary policy is prohibited. This premise is used by the Court to yield the conclusion that any assistance is allowed, provided only that it is conditional and that ultimate responsibility for repayment resides with the recipient state. The very idea that conditional assistance given by the ESM does not diminish incentives for sound budgetary policy is nonetheless difficult to accept for three reasons.

First, it is easy, given the complexity of this area, to lose sight of the fundamental thread that underpins the ESM: the assistance is provided on terms or in circumstances that would not be provided by the ordinary markets. That is the very *raison d'être* of the ESM. There is in that sense a real tension between the purpose underlying Article 125 and its interpretive realization by the Court. Thus to take but one example, ESM intervention to buy bonds of the ailing state on the primary market may well, as the CJEU stated, be in effect a loan that has to be repaid. This however ignores the fact that such assistance is required because the market was either unwilling to provide the assistance, or was only willing to do so at interest rates that the state could not afford. The existence of

<sup>26</sup> Ibid., para. 137, 143, 146.

<sup>27</sup> Ibid., para. 146.

<sup>28</sup> Ibid., para. 138–139.

<sup>29</sup> Ibid., para. 140–141.

ESM stability support thus diminishes the incentive for budgetary probity by holding out the possibility of assistance in circumstances, or on terms, that the market would not provide. This is not altered by the fact that the recipient state must pay an 'appropriate margin' for the financial assistance granted,<sup>30</sup> since this will still be considerably less than the cost of such assistance from the ordinary market.

Second, the preceding argument is not met merely because the assistance is given subject to strict conditionality. It is tempting to suggest that any diminution in national budgetary responsibility is offset by the strict conditions imposed, which have to be met before successive tranches of funding are released. It is true that the conditions imposed have been stringent, and that the impact on national workers has been severe. The key issue is nonetheless whether the ESM regime diminishes the incentive for national financial probity and hence falls within the prohibition in Article 125. The operative inquiry must therefore be the impact on that incentive flowing from a bailout subject to strict conditions, as compared to that of an incentive if there was no bailout, and the market failed to provide the funds needed by the state or did so only at a prohibitive cost. If a state knows that there is a strong chance that it will be bailed-out if it is financially irresponsible, on terms that the market would not supply, this will, other things being equal, diminish its sense of budgetary responsibility when compared to the state for which no bailout is available. This conclusion is not altered by the strict conditions imposed on the former, because the disruptive effect on national economic life would be even greater in the latter circumstance where no bailout is available. If the markets fail to provide the funds, or do so at a cost that is not sustainable for the state, then this would rapidly lead to an inability to pay wages, debt and the like, with dramatic results for employment and economic stability. There would moreover be no orderly recovery plan.

Third, the CJEU's conclusion that the ESM regime does not diminish the Member State's incentive for financial probity is predicated on the assumption that the recipient state will repay its debt, but it may well default on repayment, or so extend the repayment period that the obligation to reimburse becomes more theoretical than real. The larger the assistance, and the smaller the economy, the less likely that repayment will be an economic reality. This is why the ESM has provisions to deal with non-repayment, which are based on the assumption that other ESM members will pick up the unpaid tab.<sup>31</sup>

## B. TELEOLOGY, TEXT AND CONSEQUENCE

It is common for textual argumentation as to the scope of a particular treaty article to be shaped by background teleological assumptions or objectives. These may be apparent on the face of the judgment. They may be implicit in the Court's reasoning. The degree of work done by such argumentation will depend in part on how far the Court believes that

<sup>30</sup> Article 20 ESM.

<sup>31</sup> Article 25 ESM.



it can go towards its desired conclusion through purely textual analysis, and how far it is willing to give voice to the *telos* underlying a particular scheme of treaty provisions. In this context, given the limits of what can be achieved by textual interpretation addressed in the previous section, it may well be that greater teleological input was required to save the ESM.

Thus it might be contended that Article 125 was designed with individual cases in mind, preventing bailouts of particular states when national fiscal policy or irresponsibility led to problems confined to that state. Article 125, and the more general schema in Articles 122–126 TFEU, were not on this view structured so as to cope with the circumstance where the very future of the euro was at stake, with the consequence that assistance had to be provided by the Member States, considerations of moral hazard had to be severely compromised, and could only be given expression through strict conditions attached to funding assistance. This sentiment has been captured by Tuori, through the invocation of the idea of a double *telos*. There was the *telos* embodied in Article 125 itself, expressive of the view that fiscal liability remained with the particular Member State. This should nonetheless be read as subject to a ‘second-order *telos*’ where the very survival of the euro was at stake.<sup>32</sup>

[T]he no-bailout provision clearly aims to induce Member States to responsible fiscal policy and to ward off the moral hazard which awareness of other Member States’ coming to the rescue in a sovereign debt crisis could entail. This aim also justifies treating different forms of financial assistance in equal terms under this provision. But a teleological interpretation should heed not only the particular *telos* of the no-bailout clause but also the more general objective of the regulative whole Art 125(1) is part of. And this ‘second-order’ *telos* of the no-bailout clause undoubtedly includes the financial stability of the euro area as a whole. This argument supports the legal impeccability of Member-State assistance, in spite of the no-bailout clause and the inapplicability of the emergency provision in Art 122(2) TFEU. But it also justifies and even presupposes, at least to a certain extent, the ‘strict conditionality’ of assistance. The viewpoint of moral hazard retains its relevance even when retreat from stringent bailout prohibition is considered legally possible.

This rationale coheres with economic reality and is reflected in key provisions of the ESM. Thus Article 3 and Article 12 ESM are both predicated on assistance being necessary to safeguard the financial stability of the euro area as a whole. So too is Article 136(3) TFEU.

Advocate General Kokott adverted to teleological argumentation in support of her textual analysis of the scope of Article 125. She focused on Member State sovereignty to help justify a reading of Article 125 that would uphold the legality of the ESM. It was sovereignty in the form of the capacity of Member States to protect their shared interest that was paramount.<sup>33</sup>

<sup>32</sup> K. Tuori, ‘The European Financial Crisis – Constitutional Aspects and Implications’, *EUI Law Working Papers* No. 28 (2012), p. 24.

<sup>33</sup> Opinion of Advocate General Kokott in Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, para. 139–140.

If a prohibition under European Union law even on indirect assumption of liabilities were recognised, that would hinder the Member States from deploying financial resources in order to attempt to prevent the negative effects of the bankruptcy of another Member State on their own economic and financial situation. Given the mutual interdependence of the Member States' individual economic activities which is encouraged and intended under European Union law, substantial damage could be caused by the bankruptcy of one Member State to other Member States also. That damage might possibly be so extensive that an additional consequence would be to endanger the survival of monetary union, as submitted by a number of parties to the proceedings.

There is no question here of finding that such a danger to the stability of the monetary union exists or of examining how such a danger should best be combated. It must only be emphasized that a broad interpretation of Article 125 TFEU would, also in such circumstances, deprive the Member States of the power to avert the bankruptcy of another Member States and of the ability thereby to attempt to avert damage to themselves. In my opinion, such an extensive restriction on the sovereignty of the Member States to adopt measures for their own protection cannot be founded on a broad teleological interpretation of a legal provision the wording of which does not unambiguously state that restriction.

## §5. CONCLUSION

The legal saving of the ESM will not of course cure the underlying problems with the euro area. That will require longer term measures of the kind that are already sketched in the report by the 'Four Presidents'.<sup>34</sup> There is, however, little doubt that the legal result in *Pringle* was greeted with quiet relief in the corridors of power in Brussels and elsewhere. For lawyers the case will hold a longer term interest, exemplifying the conjunction of text, purpose, and teleology that informs legal reasoning.

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<sup>34</sup> H. Van Rompuy in close collaboration with J.M. Barroso, J.-C. Juncker and M. Draghi, 'Towards a Genuine Economic and Monetary Union', 5 December 2012, [www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/134069.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf) (last visited 6 February 2013).