ANNEX I.1: COLLINS V MINISTER FOR FINANCE AND OTHERS [2013] IEHC 530, 26 NOVEMBER 2013

(http://vlex.com/vid/collins-v-minister-for-finance-ors-478021246)

1. NAME OF THE COURT

   Irish High Court (Divisional Court – Kelly, Finlay Geoghan and Hogan JJ)

2. PARTIES

   Joan Collins (independent Member of Parliament) vs Minister for Finance, Ireland and the Attorney General.

3. TYPE OF ACTION/PROCEDURE

   Constitutional challenge (Plenary Summons)

4. ADMISSIBILITY ISSUES

   The defence raised two issues of admissibility. Firstly, whether the fact the plaintiff was elected after the date impugned legislation was adopted affected her standing to bring the case. Secondly, whether the delay in bringing the case compromised the action. The defendants expressly dropped the matter in relation to standing. It was unclear whether the defence maintained the objection based on delay. In any event the point was moot in light of the conclusions of the Court.

5. LEGALLY RELEVANT FACTUAL SITUATION

   In late September 2008 the Irish government issued a blanket guarantee covering all the liabilities and obligations of the Irish banks in an effort to stabilise the banking sector in Ireland. On 2 October 2008 the Credit Institutions (Financial Support) Act 2008 was passed by the Oireachtas (Irish Parliament) in order to provide for financial support to credit institutions covered by the guarantee. Under section 6 of the 2008 Act the Minister was authorised to extend financial support to credit institutions if he was of the opinion that it was necessary to safeguard the financial stability of the institution, that there was a threat to the stability of the financial system and finally that there was a threat to the stability of the economy as a whole. The Minister was to make such support available with regard to the resources available to him for that purpose. That support was to be funded from the Central Fund.

   Under s 6 of the 2008 Act a number of banks were recapitalised. Three particularly problematic institutions, Anglo-Irish Bank, Irish Nationwide Building Society (INBS) and the Educational Building Society (EBS) were issued with promissory notes to be paid at yearly intervals. These promissory notes totalled approximately €30 billion out of a total €64 billion provided to recapitalise the Irish banking sector. They were considered assets and were deposited with the

Irish Central Bank in exchange for emergency liquidity funding.

Anglo-Irish Bank and INBS were later merged to form the Irish Bank Resolution Corporation (IBRC) and EBS was merged with another, largely nationalised Irish bank, Allied Irish Banks (AIB). After securing the agreement of the ECB and European partners, the IBRC was liquidated in 2013. Pursuant to a Special Master Repurchase Agreement the ownership of the notes would then vest in the Central Bank. However, under the Irish Bank Resolution Corporation Act 2013 (the 2013 Act) they were exchanged for a set of government bonds with low interest rates and a long maturity. The promissory notes issued to Anglo-Irish Bank and INBS were therefore transformed into government bonds with more favourable conditions attached, thereby reducing the real financial burden on the State. The promissory note of €250 million issued to EBS remained.

A member of the public, David Hall, challenged the issuance of the promissory notes before the High Court in 2012 claiming that issuing the notes by the Minister without any further authorisation circumvented the legislative and budgetary powers of the Parliament.[1] His claim was rejected for want of standing with both the High and Supreme Courts finding only a Member of Parliament (Teachta Dála (TD)) would have standing. Joan Collins, a member of the Dáil (lower house), then challenged the issuance of the promissory notes before the High Court. She claimed that in issuing the notes the Minister had gone beyond the powers delegated to him under the legislation (had acted *ultra vires*) and secondly that the 2008 Act itself was an unconstitutional delegation of legislative authority and a circumvention of the powers of the parliament in budgetary matters.

6. LEGAL QUESTIONS

- Whether, in issuing the promissory notes without further Dáil authorisation, the Minister had acted outside his powers (*ultra vires*) under the 2008 Act and the 2013 Act.
- Whether the 2008 Act breached provisions of Bunreacht na hÉireann (the Irish Constitution) relating to the legislative and budgetary prerogatives of the Parliament.

7. ARGUMENTS OF THE PARTIES

In relation to the first claim, the Plaintiff argued that the actions of the Minister in issuing the notes went beyond the powers (*ultra vires*) delegated to him under the 2008 Act and the 2013 Act under three headings. Firstly, she claimed that the notes were issued in contravention of time limits contained in s 6(3) of the 2008

[1] *Hall v Minister for Finance and others* [2013] IEHC 39 (before the High Court) and *Hall v Minister for Finance and others* [2013] IESC 10 (before the Supreme Court).

Act providing that support could not be provided after a date specified in the act. Secondly, she argued that by providing that the Minister shall have regard to the 'resources available to him or her for that purpose' under s 6(1)(c) of the 2008 act the legislator intended that a further act of appropriation was required for the purpose of providing specific financial support. Thirdly, she argued that the promissory notes were not 'obligations or liabilities' owed by the Government to the Central Bank under s 17 of the 2013 Act. In particular she contended that the promissory notes only constituted obligations of the Government to Anglo Irish Bank and not the Central Bank. Accordingly the Minister was not authorised to issue bonds in exchange for the notes under the 2013 Act.

She also claimed that the section 6 of 2013 Act was unconstitutional. The plaintiff contended that the concept of appropriation contained in Article 11 read in combination with Article 15.2.1 of Bunreacht na hÉireann implied that 'neither the Dáil may vote supply nor the Oireachtas pass a law appropriating public moneys unless the sums to be so disbursed are pre-determined in advance'.

The defendants arguments were not mentioned specifically by the Court.

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

The Court dealt first with the arguments based on the powers of the Minister under the legislation before dealing with the constitutionality of the 2008 Act.

a) Whether the Minister acted within his powers under the legislation.

Firstly, the Court found that the time limits contained in s 6(3) prohibited both the issuance of support measures and their continued payment after the dates specified. However, the notes were issued within the relevant period. The notes issued to Anglo-Irish Bank and INBS were also paid within the relevant period by means of a government bond. However, payments would continue beyond the specified date in the case of the EBS promissory note. Accordingly, in order for the continued payments on the EBS note to be lawful that period will have to be extended. Following amendment of the legislation the Minister is now empowered to extend the period by ministerial order.

Secondly, the Court found that, given the context in which the 2008 Act was passed and the reference to the Central Fund in that act, it was clear that by referring to 'the resources available to him or her for that purpose' in s 6(1)(c) the Oireachtas did not intended that a further vote was required to authorise specific funds for the purposes of the act.

Finally, the Court found that under the Special Master Repurchase Agreement ownership of the promissory notes had vested in the Central Bank. The Government therefore had incurred an obligation or liability under the promissory notes vis-à-vis the Central Bank and was empowered to issue bonds in exchange

for the notes under the 2013 Act.

b) Whether section 6 of the 2008 Act was unconstitutional.

The Court considered the constitutional question in two stages. It firstly considered whether by failing to provide for a predetermined limit on the financial support to be advanced by the Minister, the 2008 Act constituted an unauthorised delegation of legislative power under Article 15.2.1 Bunreacht na hÉireann (the Irish Constitution). It then considered whether the term 'appropriation' contained in Article 11 Bunreacht na Éireann, read in light of the broader budgetary process contained in the constitution, implied a need for the amount of any appropriation to be determined by the authorising legislation.

The Court found that the power to provide financial support under s 6 did not constitute an unconstitutional delegation of legislative power from the Oireachtas to the Minister. After considering the relevant test developed in the case law, the Court concluded that the general principles and policies were contained in the 2008 Act. Section 6 outlined detailed conditions under which the Minister was authorised to provide financial support. Furthermore, any such decision by the Minister would be reviewable before the Courts in light of these conditions. It did not provide the Minister with an unfettered discretion but rather was tailored to meet a specific need and pursue a particular policy outlined in the legislation.

Secondly, the Court did not consider that the concept of appropriation contained in Articles 11 and 17 Bunreacht na hÉireann implied that the Oireachtas was required to provide a pre-determined limit when it authorised the Government to appropriate moneys. An assessment of the text of the provisions and a comparison of the linguistic versions (Irish and English) did not lead to the conclusion that the concept 'appropriation' contained in Articles 11 and 17 implied an upper limit. The Court pointed out that a variety of policies required an open-ended financial commitment including health, social welfare and educational policies. A requirement that upper limits be placed on moneys that could be spent by Government on such matters would either lead to a continuous raising of the limit or the creation of absurdly high ceilings. The result would be either manifest inconvenience or a legislative charade. Furthermore, the existence of an upper limit would have a negative impact on the State's ability to borrow money on the international markets. Finally, the Court noted that the equivalent provision in the US constitution was described by Alexander Hamilton and confirmed in US practice as meaning that 'no money can be expended, but for an object, to an extent and out of a fund, which the laws have prescribed'. This interpretation was applied to Article 11 Bunreacht na hÉireann. It concluded that the 2008 Act properly described the object, extent and fund out of which the money shall be paid. While the Oireachtas did not know the precise sums that were at stake under the 2008 Act, the conditions on the issuance of financial support contained in the act did circumscribe the extent of the appropriation by

reference to the objects of the legislation.

9. LEGAL EFFECTS OF THE JUDGMENT

The promissory notes provided to Anglo-Irish Bank and INBS were found to have been legally issued and paid. The promissory notes provided to EBS were found to be legally issued. However, the relevant date in the legislation would have to be amended in order to ensure that the Government could continue to make payments on the outstanding promissory note.

Section 6 of the 2008 Act was held to be in conformity with the constitution. More generally, the court found that authority to appropriate and spend funds flowed from the Oireachtas by means of legislation. When authorising expenditure the Oireachtas should specify the 'object, extent and the fund' out of which the money can be spent. However this did not extend to including a precise amount or pre-determined limit on the amount the Government was authorised to spend under the legislation.

10. MAIN OUTCOME OF THE JUDGMENT AND ITS BROADER POLITICAL IMPLICATIONS

The promissory notes were politically symbolic. The payments under the promissory notes were being made to what was effectively a dead bank, no longer in operation and one that had cost the taxpayer a considerable sum of money. They were perceived as a particularly absurd consequence of the banking guarantee and attracted considerable political opposition and also constituted a lightening rod for criticism of the ECB's supposed role in forcing Ireland to fully support all its banks. To some extent the challenge was moot in light of the liquidation of IBRC and the exchange of the promissory notes for bonds issued on more favourable terms. However, the case did discuss important issues relating to the constitutional roles of the Oireachtas and the Government in the budgetary process. A useful discussion of the constitutional provisions relating to the budgetary process and its underlying democratic philosophy is contained in paragraphs 82 to 97. While emphasising the democratic nature of the budgetary process and the key role played by the Oireachtas in the appropriation and control of moneys raised, the judgment nonetheless reserved the possibility of granting considerable and effectively unlimited discretion to the Government regarding the amount of money to be spent in pursuing a particular goal. It therefore contained a balance between parliamentary and democratic control and Governmental discretion and effectiveness. This was based on both textual but also policy based arguments. While claiming to eschew an analysis of the merits or demerits of a particular economic policy, the Court was clearly cognisant of the financial and economic context under which the guarantee was extended and the notes issued and mentions it at a number of points in the judgment. In a tone that is repeated in other cases dealing with the effects of the financial crisis the Court describes a state of national economic emergency.

Ms Collins has appealed the judgment to the Supreme Court that is currently pending.

ANNEX I.2: DOHERTY V REFERENDUM COMMISSION [2012] IEHC 211, 6 JUNE 2012

(http://www.courts.ie/judgments.nsf/09859e7a3f34669680256ef3004a27de/952cc19f6a9da7f380257a150048e845?OpenDocument)

1. NAME OF COURT

High Court of Ireland (Hogan J)

2. PARTIES

Pearse Doherty TD (Plaintiff) v The Referendum Commission (Defendant), Attorney General (Intervener)

3. TYPE OF ACTION/PROCEDURE

Judicial Review of a statement by the Referendum Commission.

4. ADMISSIBILITY ISSUES

Three questions of admissibility were raised.

Firstly whether the Referendum Commission (the Commission) was a body corporate and hence a judicial person that could be sued. The Chairperson of the Commission, Feenly J, was listed as a defendant in his personal capacity in the event that the Commission was found not to be a body corporate. Nonetheless, despite the fact that the Act establishing the Referendum Commission did not explicitly specify its status, it did in fact have juridical capacity. Feenly J was therefore struck from the list of defendants.

Secondly it was questioned whether the statements of the Commission were in fact amenable to judicial review. While the orthodox position, based on a desire not to interfere with political matters, may have been that such statements were not amenable to legal standards of review, Hogan J found that given the legislative and constitutional framework of referenda and the role played therein by the Commission, its statements could be subject to review. Nonetheless, given the sensitive nature and discretion enjoyed by the Commission, a high threshold was established. Its statements, in order to be successfully challenged in judicial review proceedings would have to be 'plainly wrong'.

Finally it was claimed that Mr Doherty had exercised undue delay, introducing the proceedings on the eve of the referendum on the Treaty on Stability, Coordination and Growth (TSCG). Given the importance of the issues Hogan J agreed to accept the proceedings despite reservations.

5. LEGALLY RELEVANT FACTUAL SITUATION

Following a series of challenges to the use of public funds by the Government to promote

a particular outcome in a referendum[2] a Referendum Commission was established in order to make impartial information and analysis publically available during the course of a referendum.[3]

During the referendum on the TSCG the Chairman of the Commission, Mr Justice Feenly, made an oral statement and the Commission issued a written statement to the effect that while Ireland had had a veto when the Decision was adopted by the European Council, once that Decision had been adopted it was now under an effective obligation to 'approve' the amendment contained in that Decision.[4] Mr Doherty contested this assessment claiming that the Government in fact retained a discretion to approve or not approve the Decision.

6. LEGAL QUESTIONS

Aside from the admissibility questions referred to above there were two substantive legal questions, namely whether the Commission in making its statement was acting *ultra vires* (outside its powers) and whether the Commission's statements were 'plainly wrong'.

7. ARGUMENTS OF THE PARTIES

The arguments of the parties in relation to the first question are not detailed in the judgment.

The arguments of the parties in relation to the second question turned on the appropriate interpretation to be given to the meaning of 'approved by Member States in accordance with their respective constitutional requirements' contained in Article 48(6) TEU and in particular whether this implied that Member States retained a discretion to refuse to approve a European Council Decision validly adopted under Article 48(6) TEU.

Mr Doherty argued that the Decision was to be treated as a normal international agreement under Article 29 of the Irish Constitution. Accordingly it was entirely within the Government's executive power to ratify or not ratify the agreement.

The Attorney General argued that Ireland no longer had any discretion to approve the Decision. This was based on a joint reading of Article 228(4) TFEU stating that decisions are binding and Article 4(3) TEU establishing a duty of sincere cooperation. In fact she maintained that the references to the constitutional requirements of the Member States was a pure formality. She argued that the Decision was already 'approved' by Ireland within the meaning of Article 48(6) TEU and that the Bill then before the Parliament was

---

2 *McKenna v An Taoiseach (N*o. 2) 2 IR 10.

3 The Referedum Act 2001.

4 Counsel for the plaintiff did make the claim that there was some discrepancy between the two statements. However in light of the Commission's role to provide general information to the public Hogan J found that broadly speaking the Commission's communications were to the effect that Ireland had had a veto but, now that the Decision was validly adopted, it was under an obligation to approve it.

simply necessary to introduce the decision into Irish law.

The Commission adopted a slightly different position. It argued, similarly to the Attorney General, that Ireland no longer retained any discretion in approving the decision. Nonetheless it maintained that the constitution required approval through an Act of Parliament in line with Article 29.4 of the Irish Constitution on the exercise of executive powers in foreign affairs.

8. CONCLUSION AND REASONING OF COURT

In relation to the first question, that is whether the Commission in making the statements on the ESM and the Decision acted *ultra vires*, the Court found that it had in fact acted within its remit as defined by s. 3 of the Referendum Commission Act 1998 as amended by the s. 1 of the Referendum Commission Act 2001 given that 'the ESM and the TSCG are inextricably interlinked' and that 'certainly, one could not realistically seek to explain the likely impact of the TSCG without reference to the question of the ESM.'[5] In fact, this point was so obvious that the Court refused to admit this claim beyond the initial application.

The second question, and in particular the assessment of the correctness or otherwise of the Commission's statement was more complex. The Court did not decide on the substantive question of whether Ireland retained a discretion under Article 48(6) TEU to approve the Decision. Rather it came to the opinion that all three positions of the parties were valid and worthy interpretations. Any definitive judgment would require a reference to the Court of Justice under Article 267 TFEU. Given the complexity and novelty of the legal question the opinion as stated by the Commission was not "plainly wrong".

9. LEGAL EFFECTS OF THE JUDGMENT

The claim was dismissed.

10. MAIN OUTCOME AND BROADER IMPLICATIONS

The claim was dismissed. There was no conclusive statement by the Court on the substantive claim that Ireland retained a veto on the Decision and indirectly on the establishment of the ESM (see above). The claim was still made in the context of the parliamentary debate on the Act approving the Decision.

On other issues it would appear that the Commission has juridical capacity and can sue and be sued before the Courts. Furthermore, its statements are in fact subject to review. Nonetheless, it would appear that a strict test will not be applied to the Commission's statements. A potential complainant will have to prove that such statements are 'plainly wrong' in order successfully challenge a statement.

In addition to *Doherty v the Referendum Commission* there was a single case directly

[5] *Doherty v The Referendum Commi*ssion [2012] IEHC 211, para 29.

challenging Decision 2011/199/EU. Thomas Pringle, an independent TD, initiated proceedings challenging the decision alongside the Fiscal Compact and the ESM on 13 April 2012. After approval of the Fiscal Compact by referendum on 31 May 2012 that aspect of the challenge was dropped. Justice Laffoy in the High Court rejected most of the claims of the plaintiff while agreeing to refer a single question regarding the relationship between the Decision and the ESM Treaty to the Court of Justice.[6] The decision of the High Court was appealed to the Supreme Court. A hearing was held during the week of the 23 July 2012 and judgement on those issues it deemed urgent, namely the compatibility of the ESM with the Irish constitution, was delivered on 31 July 2012.[7] On the same day the Supreme Court referred those matters relating to EU law to the Court of Justice.[8] The use of the urgent procedure was requested and granted by order of the President of the Court on 4 October 2012, a hearing was held on 23 October 2012. Judgment was delivered on 27 November 2012 upholding the legality of both the Decision and the ESM itself.[9]

6 *Pringle v The Government of Ireland* [2012] IEHC 296.

7 *Pringle v Government of Ireland* [2012] IESC 47.

8 *Pringle v Government of Ireland* [2012] IESC 47 (Reference by the Supreme Court to the Court of Justice of the European Union, 31 July 2012).

9 Case C-3*70/12 Pringle v Government of Ireland and others* (Court of Justice, 27 Novemeber 2012).

ANNEX I.3: PRINGLE V GOVERNMENT OF IRELAND AND OTHERS [2012] IEHC 296 [HIGH COURT], 17 JULY 2012

(http://www.courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/0ca92db7c606f3c680257a4b003aa637?OpenDocument&Highlight=0,pringle)

1. NAME OF COURT

High Court of Ireland

2. PARTIES

Thomas Pringle v Government of Ireland and the Attorney General

3. TYPE OF ACTION

4. ADMISSIBILITY ISSUES

The Defendant raised an issue regarding the standing of the plaintiff to contest the validity of Decision 2011/199/EU. It was claimed that the plaintiff was directly and individually concerned by the decision and should have contested the decision by a direct action under Article 263 TFEU. Given the nature of the Act as one of general application across the Union, Laffoy J was not satisfied that the plaintiff could have been considered 'individually and directly concerned' for the purposes of Article 263 TFEU (paras 164 - 179) and allowed the plaintiff to challenge the validity of Decision 2011/199/EU via a preliminary reference procedure.

5. LEGALLY RELEVANT FACTUAL SITUATION

As part of a broader effort to reform the governance of the Euro zone in late 2011 and early 2012 a number of instruments were adopted. The European Stability Mechanism (ESM) is established by Treaty and is intended to be a permanent rescue fund intended to replace the temporary instruments, the European Financial Stability Fund (EFSF) and the European Financial Stability Mechanism (EFSM). In order to ensure the ESM's compatibility with the European Treaties it was decided to amend the Treaties by inserting a new paragraph into Article 136 TFEU providing for the establishment of a mechanism such as the ESM. Finally the 'Fiscal Compact' was adopted by all but two EU Member states and introduces constitutional or equivalent rules on budgetary discipline. Thomas Pringle, an independent member of the lower house of Parliament (Dáil) challenged three related instruments, namely the ESM Treaty, the Decision amending Article 136 TFEU and finally the Fiscal Compact before the High Court. The challenge to the Fiscal Compact was dropped following a positive result in the Fiscal Compact referendum (see question IX.2).

6. LEGAL QUESTIONS

1. Whether the ESM is compatible with Union law and with the Irish constitution.

2. Whether the decision of the European Council to amend Article 136 TFEU was compatible with Union law and with the Irish constitution.

3. What, if any, impact the delay in the entry into force of the decision to amend Article 136 TFEU would have on the legality of the ESM under Union law.

4. If the plaintiff was entitled to an interlocutory injunction restraining the government from ratifying the ESM Treaty and from giving effect to Decision 2011/199/EU.

7. ARGUMENTS OF THE PARTIES

Before the High Court Mr Pringle claimed that the Council Decision breached both Union law and the Irish constitution. In relation to Union law he maintained that the creation of an ESM-type institution would in fact alter the competences of the Union, in particular those relating to economic and monetary matters. As a consequence, Article 48(6) TEU was an inappropriate means of amending the Treaties. He furthermore argued that by breaching Union law it also breached the Irish constitution by virtue of the special status afforded Union law in the Irish constitution. Finally, he argued that as an act that delegated sovereignty the decision should have been adopted in Ireland by an amendment of the constitution and hence by popular referendum rather than by legislation. The act ratifying the decision (European Communities (Amendment) Act 2012) was therefore unconstitutional.

The Government argued that the Decision merely confirmed a pre-existing power of the Member States. It did not expand the competences of the Union, was merely technical in nature and was therefore correctly adopted on the basis of Article 48(6) TEU. As with the plaintiff's arguments this assessment depended on an analysis of the ESM itself. Similarly as an ESM type institution did not violate Union law by affecting the competences of the Union the Decision itself did not violate Union law. In its submissions the Government relied on the opinions on the amendment issued by Union institutions in particular the European Parliament and the European Central Bank. Furthermore, it contended that an amendment to the TFEU adopted pursuant to that Article did not require a referendum in Ireland. The amendment of the constitution as part of the adoption of the Treaty of Lisbon had made the use of Article 48(6) TEU compatible with the Irish constitution and no further referendum was required in order to give effect to amendments adopted under that Article.

8. ANSWER BY THE COURT TO THE LEGAL QUESTIONS AND LEGAL REASONING OF THE COURT

Laffoy J, accepted for the most part the arguments of the defence and found that Council Decision 2011/199/EU, enabling as it did the establishment of an extra-Union institution, did not increase the competences of the Union. It was therefore correctly adopted under Article 48(6) TEU. Accordingly Decision 2011/199/EU was 'completely valid' within the meaning of Foto-Frost and the High Court was not under an obligation to make a reference to the Court of Justice. As to the question of the appropriate means to give

effect to the European Council Decision in Irish law the High Court found that subsequent to the adoption of the Treaty of Lisbon no constitutional amendment was required for amendments to the Treaties adopted under the simplified revision procedure.

In considering the question of legal standing for the plaintiff, Laffoy J. rejected the contention of the Government that Mr Pringle was time-barred by the rule in TWD. In particular she found that he could not be considered individually and directly concerned by Decision 2011/199/EU and thus could not have challenged the decision via Article 263 TFEU (para 176).

While accepting the submissions of the Government on almost all issues Laffoy J was troubled by what she termed the 'temporal' aspect of the interaction of the European Council Decision and the ESM, noting that while the Decision was intended to facilitate the creation of the ESM, that Decision did not enter into force until 1 January 2013 at the earliest, ie subsequent to the establishment of the ESM. In particular she was unsure of the binding nature of the Council Decision and what the effect of non-notification by one or more Member states would be on the legality of the ESM. Accordingly she decided to refer the matter to the Court of Justice.

After considering both the domestic (Campus Oil) and Union (Zuckerfabrik and Atlanta) tests for the granting of an interlocutory injunction she found that the balance of convenience favoured refusal and accordingly did not restrain the government from ratifying the ESM Treaty.

9. LEGAL EFFECTS OF JUDGEMENT

The judgment was appealed to the Supreme Court (see below) by the plaintiff. In the appeal the High Court's finding on the standing of the plaintiff was not contested by the defence.

10. MAIN OUTCOME OF JUDGMENT AND POLITICAL IMPLICATION

The judgement was appealed to the Supreme Court (see below Annex I.4).

ANNEX I.4: PRINGLE V GOVERNMENT OF IRELAND AND OTHERS [2012] IESC 47 [SUPREME COURT], 19 OCTOBER 2012

(http://ie.vlex.com/vid/thomas-pringle-ireland-attorney-403117070)

1. NAME OF COURT

Supreme Court of Ireland

2. PARTIES

Thomas Pringle (appellant) v Government of Ireland, Ireland and the Attorney General (defendants)

3. TYPE OF ACTION/PROCEDURE

Appeal

4. ADMISSIBILITY ISSUES

N/A

5. LEGALLY RELEVANT FACTUAL SITUATION

See above summary of High Court decision.

6. LEGAL QUESTIONS

The Appellant raised various questions that were grouped by the Court under the following headings:

1. That the ESM Treaty (the Treaty) represented a delegation of sovereignty to an international institution that was prohibited under the Irish constitution as interpreted in *Crotty* (the "sovereignty claim").
2. That the ESM Act, implementing the ESM Treaty in Irish law, represented an unconstitutional delegation of legislative authority to the Government (the "transfer of powers claim").
3. That the ESM Treaty breached Union law (the "ESM claim").
4. European Council Decision amending Article 136 TFEU breached Union law (the "Council Decision claim")
5. The appellant argued that the breach by the ESM of Union law implied a parallel breach of the Irish constitution due to the special status that Union law enjoys under Article 29 of the Irish Constitution.
6. That an injunction should be granted restraining the Irish government from ratifying the ESM Treaty.

7. ARGUMENTS OF THE PARTIES

The appellant argued that the Treaty breached Union law. It was pointed out that in the recital to Decision 2011/119/EU that the European Council considered a treaty amendment was "required" for the entry into force of the ESM. This, according to the appellant, was evidence that the European Council itself considered the ESM incompatible with the TFEU as it then was. More specifically he argued that the ESM breached the Treaty's provisions on EMU, namely Articles 122, 123, 125 and 126 TFEU, both in their substance and with regard to the objective and spirit of those provisions. The ESM also conferred competence for monetary and economic matters to a non-Union body, the ESM, and conferred new competences on Union institutions, namely the ECB and the Court of Justice. Finally, the principle of sincere cooperation prohibited Ireland from ratifying a Treaty that was incompatible with its obligations under Union law.

The appellant argued that the ESM Treaty and the ESM Act breached the Irish constitution. The Treaty, particularly when read in combination with the Fiscal Treaty went beyond the mere provision of aid but was intended to be an instrument of a more general policy of economic and financial stability and solidarity within the Eurozone. As such it represented an unconstitutional delegation of sovereignty to an international institution per *Crotty*. He argued that the Treaty was a permanent commitment and surrendered to an international body decision making power that could have severe budgetary implications for Ireland. The defendants argued that the treaty at issue in *Crotty*, namely Title III of the SEA, Ireland's membership of the ESM Treaty would not reduce or fetter the executive or legal powers of the state, in particular in relation to foreign affairs. It pointed to the fact that Ireland's contribution was limited and could only be increased with the future consent of the Irish Parliament.

8. CONCLUSIONS OF THE COURT

The Court referred the Union matters (Points 3 and 4) to the Court of Justice under a separate judgement and requested the use of the accelerated procedure.

Point 2, the transfer of powers claim, was not considered urgent by the Supreme Court as it related not to Ireland's ability to ratify the ESM Treaty but rather giving internal effect to Ireland's obligation under the Treaty.

The Court found it unnecessary to address Point 5 as any determination would not have any practical effect. If the Treaty was contrary to Union law then it would not go ahead in which case a determination of its compatibility with Irish constitution would be moot. In the alternative and the Treaty was in fact compatible with Union law then it would, for the purposes of this argument, also be compatible with the Irish constitution.

The Court therefore dealt with Points 1 and 6 in the present judgment, namely whether the ESM Treaty was compatible with the Irish constitution (Point 1) and whether an injunction restraining the Irish government from ratifying that Treaty should be granted (Point 6).

A majority of the seven member Court found against the appellant under both points. It held that the ESM Treaty did not constitute an unconstitutional delegation of sovereignty per *Crotty* and that the balance of convenience overwhelmingly favoured refusing an injunction. A minority of one, Hardiman J, dissented, finding that a referendum and a constitutional amendment would be required in order for the State to legally ratify the ESM Treaty.

Point 1 - The Sovereignty Claim

A majority consisting of Denham CJ, Clarke, Fennelly, MacKechnie, Murray and O'Donnell JJ, (judgements by Denham CJ, Clarke, MacKechnie and O'Donnell JJ) found that the Treaty did not represent an unconstitutional delegation of power as defined in *Crotty*.

The majority contrasted the international treaty at issue in *Crotty*, namely Title III of the SEA dealing with coordination between members of the EC in the conduct of their foreign policies with the ESM Treaty. *Crotty* found that under the Irish constitution sovereignty flowed from the Irish people. This sovereignty was exercised by various organs established by the Constitution in accordance with the provisions of that constitution. The government had a wide discretion in the exercise of foreign policy. This discretion did not however include the ability to limit or delegate that power. Title III of the SEA was an open-ended, vague and wide-ranging commitment to adjust the State's foreign policy in accordance with the concerns and actions of other states. As such it was a delegation of the Government's freedom to direct the State's foreign policy. It was therefore an unconstitutional delegation of sovereign authority to an international institution.

The ESM Treaty by contrast had a clearly defined scope. It was a narrow, if important, commitment on behalf of the state. The policy, namely the maintenance of stability in the Eurozone by the provision of appropriate financial assistance to members of the ESM, was defined and set down by the parties to the Treaty. The institution itself only implemented this policy. As stated by MacKechnie J '[i]n effect the fundamental difference between [Title III of the SEA and the ESM Treaty] is the fact that the ESM Treaty is essentially policy implementing and not policy making.' Furthermore it was not an open-ended financial commitment. The liability of Ireland was limited and any increase in the capital would have to be approved by the Irish Parliament by legislation. Finally the limited circumstances in which Ireland would not exercise its voting rights (in the event of a failure to meet its commitments or in the event that a threat existed to the sustainability of the Euro zone) would not represent instances of policy making.

Hardiman J wrote the single dissenting judgement. After an assessment of the various judgments in *Crotty* he came to a different conclusion to the majority regarding its *ratio*, finding that the essence of that judgment was the point of reference for which the

sovereign powers of the state should be exercised.[10] In particular he found that when exercising its powers the State was to have reference to the 'common good' as mentioned in Article 6 of the Irish constitution, where that 'common good' was to mean the common good of the Irish people. By contrast the ESM Treaty delegated decision making power over a considerable sum of money of the Irish people to be disbursed in the interest of maintaining the stability of the Eurozone as a whole. An interest that may, or may not, coincide with the "common good" of the Irish people. Furthermore, he found that under the ESM the Irish government would be obliged to submit to decisions regarding expenditure according to 'particular procedures', something that amounted to a delegation of sovereignty within the meaning of *Crotty*. Finally, Hardiman J had 'considerable doubts' regarding whether the procedures of the ESM and in particular the accountability of the Minister for Finance when exercising his powers as a member of the Board of Governors of the ESM.

Point 6 - The Injunction Claim

The appellant sought an injunction restraining the Government from ratifying the ESM Treaty pending the outcome of the Article 267 TFEU reference to the Court of Justice. A question arose as to the appropriate test with the appellant arguing that a test based on Union law should be used, in particular as articulated in *Zuckerfabrik* and *Atlanta*. This was not however evident, as the ESM Treaty is not a Union measure, and Ireland in ratifying it would not in fact be implementing Union law.

The majority found against the appellant with the most substantial treatment of the injunction question by Clarke J. A definitive judgment was not made on whether the domestic test based on *Campus Oil* or that based on Union law should be used or in fact what might be the substantial differences between the two tests. Rather it was found that the appellant's case failed under either test. Based on an affidavit provided by a senior civil servant in the Department of Finance stating that it was in the financial interest of Ireland and other members of the ESM that it enter into force as soon as possible and that it was in Ireland's interest to be involved in the ESM as early as possible, it was concluded that the balance of convenience overwhelmingly favoured the refusal of an injunction.

9. LEGAL EFFECTS OF JUDGMENT

The judgment confirmed the compatibility of the ESM Treaty with the Irish constitution.[11]

[10] This point was also made by Denham CJ (paras 14 xviii and 17 ii) but did not play as significant a role in her reasoning.

[11] Point 5 on the effect of a finding of incompatibility with Union law would have on the constitutionality of the ESM Treaty was not determined in the present judgment (see judgment of Denham CJ para 11 ii).

10. OUTCOME AND IMPLICATIONS:

The Government was not prevented from ratifying the ESM Treaty. In particular it was not obliged to hold a referendum amending the constitution in order to accede to the ESM.

Mr Pringle has indicated he is dropping the outstanding claim relating to the constitutionality of the ESM Act (in particular the appropriateness of the delegation of power under the Act to the Minister). Accordingly, following the judgement of the Court of Justice in the preliminary reference proceedings, it is expected that the Supreme Court will make an order refusing the appeal from the High Court leaving that Court's judgment standing.[12]

12 Correspondence with Mr Pringle, TD, 13 June 2013, on file with author.