

Denham C.J.  
Murray J.  
Hardiman J.  
Fennelly J.  
O'Donnell J.  
McKechnie J.  
Clarke J.  
Between/

Thomas Pringle

Plaintiff/Appellant

and  
The Government of Ireland,  
Ireland and the Attorney General

Defendants/Respondents

**Judgment delivered on the 19th day of October, 2012 by Denham C.J.**

1. Thomas Pringle, the plaintiff/appellant, referred to as "the appellant", appealed to this Court the judgment of the High Court (Laffoy J.), delivered on the 17th July, 2012, and the orders made on foot of the said judgment which were perfected on the 18th July, 2012.

2. On the 24th July, 2012, and on the 26th July, 2012, as a matter of urgency, this Court heard submissions on three issues arising in the appeal. The three issues were:-

(a) Whether the European Stability Mechanism Treaty, done at Brussels on the 2nd February, 2012, referred to as "the ESM Treaty" involves a transfer of sovereignty to a degree that makes it incompatible with the Constitution, when one applies the principles set out by this Court in **Crotty v. An Taoiseach** [1987] I.R. 713, such that a referendum amending the Constitution is necessary to permit the State to ratify the ESM Treaty on behalf of Ireland.

(b) Whether the Supreme Court should refer to the Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union, referred to as "the TFEU", the question of the validity of European Council Decision 2011/199/EU of 25th March 2011, referred to as "the European Council Decision", and the question of whether Ireland, by entering into and ratifying the ESM Treaty, would undertake obligations incompatible with the Union Treaties.

(c) Whether the Supreme Court should grant an interlocutory injunction, pending the final determination of these proceedings, restraining the State from ratifying the ESM Treaty.

3. The Court considered these three issues and gave its ruling on the 31st July, 2012, and reserved its reasons for publication in judgments to be delivered at a later date.

(i) On the first issue considered as a matter of urgency, the Court was of the opinion that the ESM Treaty does not involve a transfer of sovereignty so as to make it incompatible with the Constitution, when applying the principles set out in **Crotty v. An Taoiseach** [1987] I.R. 713, referred to as "**Crotty**", such that a referendum amending the Constitution is necessary to permit the State to ratify the ESM Treaty on behalf of Ireland. The decision of the Court was to treat the ESM Treaty as one which does not involve any impermissible transfer of powers from the Executive.

(ii) On the second issue, the Court made a reference seeking a preliminary ruling to the Court of Justice of the European Union on a number of questions arising on the validity of the European Council Decision and querying whether a member state of the European Union whose currency is the euro is entitled to enter into and ratify an international treaty such as the ESM Treaty; and querying if the European Council Decision is held as valid, is the entitlement of a member state to enter into and ratify an international agreement such as the ESM Treaty subject to the entry into force of that Decision. As a consequence of the reference, issues raised by this aspect of the appeal were adjourned until the Court receives the ruling of the Court of Justice.

The Court of Justice has agreed to apply the accelerated procedure to the reference. The provisional date for the oral hearing by the Court of Justice is the 23rd October, 2012.

(iii) On the third issue, the Court noted that the appeal by the appellant of the refusal of interlocutory relief by the High Court was then, because of the Court's ruling on the first two issues, a relief sought pending the determination of the reference for preliminary ruling by the Court of Justice. Consequently, as regards the EU law issues, while the fundamental test is that stated in **Campus Oil Ltd v. Minister for Industry and Energy (No. 2)** [1983] I.R. 88; it should be informed by decisions of the Court of Justice, including the joined cases of C-143/88 & C-92/89 **Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe** and **Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn** ECR I-415 as well as C-465/93 **Atlanta Fruchthandelsgesellschaft mbH v. Bundesamt für Ernährung and Forstwirtschaft** [1995] ECR I-3761. Applying the relevant criteria, the Court was not satisfied that it was appropriate to grant an injunction. In particular, it was considered that should the appellant be successful on the preliminary reference then that would be an adequate remedy.

Consequently, the Court refused the application for an interlocutory injunction restraining the State from ratifying, approving or accepting the ESM Treaty, pending the final determination of the proceedings.

4. It was stated that judgments on the matters referred to in paragraph 3(i) and (iii) above would be delivered at a later date. This is my judgment on the two issues.

There are other issues on the appeal, but it was not considered necessary to have those issues determined urgently, and therefore, those issues, which are referred to later in this judgment in the section "High Court Judgment", were not before the Supreme Court at

this time.

## Constitutional Issue

5. The first issue is whether the ESM Treaty involves a transfer of sovereignty to a degree that makes it incompatible with the Constitution, when one applies the principles set out by this Court in **Crotty**, such that a referendum amending the Constitution is necessary to permit the State to ratify the ESM Treaty on behalf of Ireland

### Background

6. The background to these proceedings was set out by the learned High Court judge in the judgment of the 17th July, 2012. I gratefully adopt those findings.

6. i These proceedings were initiated by a plenary summons which issued on 13th April, 2012. The appellant is a citizen of Ireland, a member of Dáil Éireann, and a citizen of the European Union, hereinafter referred to as "the EU". In essence, the appellant challenged the validity under EU law and Bunreacht na hÉireann of –

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

(b) a Treaty entered into by the seventeen euro-area Member States of the European Union; and

(c) the appellant also initially challenged the validity of a Treaty which, since the proceedings were commenced, in the High Court, was approved of by the People in a referendum held on 31st May, 2012.

6. ii Because of the importance of the issues raised in the proceedings, the hearing of the proceedings was expedited in the High Court. It commenced on 19th June, 2012 and concluded on 29th June, 2012. While the matter was at hearing, various events occurred which were of relevance to the proceedings, for instance, the referendum referred to above, and the enactment of three Acts of the Oireachtas. The judgment of the High Court was based on the state of affairs as they existed on 9th July, 2012.

6. iii The learned High Court judge identified in chronological order the acts and instruments the validity of which the appellant impugned, either as to validity or as to incompatibility with EU law, or to the Constitution, or both.

### Decision 2011/199/EU

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

"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 EU.

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."

6. v 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:

(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. vi 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. Article 1 mandates 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".

Article 2 makes provision for the Decision, and thereby Article 1, to have legal effect as follows in paragraph 2 of Article 2:-

"This Decision shall enter into force on 1 January 2013, provided that all 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".

6. vii The European Communities (Amendment) Act, 2012 referred to as the Amendment Act of 2012, was enacted after the High Court hearing was concluded, but before the High Court judgment was due to be given. 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) . . ."

Section 2(3) 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.

6. viii The initial reliefs sought in the statement of claim by the appellant based on the alleged invalidity of Decision 2011/199/EU with EU law and the Constitution were:-

(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 [EU] 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 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.

6. ix In a notice of motion returnable on 26th June, 2012, the appellant 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.

6. x A written summary of the appellant's claim was put before the High Court on 27th June, 2012, in which counsel for the appellant outlined the appellant's claims in their final form. The learned High Court judge used the written summary as the basis for identifying the elements of the appellant's claim which the High Court had to determine. The grounds set out in the written statement on which the appellant challenged the constitutionality of the Amendment Act of 2012 and the validity of Decision 2011/199/EU were 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.

(b) In summarising the grounds for his challenge to the constitutionality of the ESM Treaty, the appellant asserted his 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.

(c) As regards Decision 2011/199/EU vis-à-vis Union law and the Constitution:

(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 is 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 appellant 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 procedural issue raised by the defendants.

### **European Stability Mechanism Treaty**

6. xi On 2nd February, 2012 the seventeen member states of the European Union which are euro area member states entered into an intergovernmental agreement, the ESM Treaty, of which Article 1.1 provides:

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

6. xii After these proceedings commenced, a Bill was initiated, which was enacted after the High Court hearing concluded, but before the High Court judgment was due to be given, and is now the European Stability Mechanism Act 2012, 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 other 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. However, s. 3 puts a limit on payments out of the Central Fund, "or the growing produce of that Fund", of €11,145,400,000, to enable the State to make payments in respect of its contribution.

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

6. xiv At the hearing before the High Court, the High Court was informed that the Government of Ireland proposed to ratify the ESM Treaty on 9th July, 2012. The process of ratification 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 Depository."

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

6. xv The reliefs initially sought in the statement of claim by the appellant based on his allegation of the incompatibility of the ESM Treaty with the Constitution and the EU Treaties were:-

- (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;
- (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 High Court on 26th June, 2012, the appellant 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.

6. xvi In outlining in the written summary the grounds on which the appellant asserted the incompatibility of the ESM Treaty with EU law and the Constitution and the unconstitutionality of the ESM Act of 2012, the appellant 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.

6. xvii The grounds on which the appellant contended in the High Court that the validity of the ESM Treaty is incompatible with the Constitution were 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.
- (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.
- (c) The ESM Treaty is incompatible with EU law and, consequently, constitutes a breach of Article 29.4 of the Constitution, given the status of EU 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 appellant 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 EU Treaties and of EU 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 appellant has standing to institute the present proceedings concerning the constitutionality of the ESM Treaty and Decision 2011/199/EU and to raise questions of EU law arising in relation to the evaluation of constitutionality, the ratification of the ESM Treaty and the approval of Decision 2011/199/EU.

6. xviii The grounds for the challenge to the validity of the ESM Act of 2012 having regard to the provisions of the Constitution were also summarised in the High Court. While that issue is not before this Court at this time, I have included the grounds as background information, and it is 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 EU 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 EU Treaties on the basis of the grounds set out at (a) to (e) in para. 16 above.

6. xix In summarising the grounds of the alleged incompatibility of the ESM Treaty with EU law, the appellant advanced in the High Court the following arguments:

(a) It is incompatible with the EU 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 EU Treaties. This was understood by the learned High Court judge 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 EU 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 EU 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 EU 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 EU treaties.

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

(g) The combined and cumulative effect of the breaches of EU law that it entails (as particularised at (c) to (f) above), would constitute a fundamental alteration of the EU 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 EU framework and the EU legal order.

(h) Article 4(3) TEU and the principle of sincere co-operation, prohibits member states from entering into international agreements that are incompatible with the EU treaties. Ireland is prohibited from acceding to the ESM Treaty under EU law.

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

### **Fiscal Stability Treaty**

6. xx The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, referred to as "the Fiscal Stability Treaty" was signed in Brussels on 2nd March, 2012 by twenty five member states of the EU, 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.

6. xxi The people of Ireland approved of the ratification by the State of the Fiscal Stability Treaty in a 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, referred to as "the Thirtieth Amendment of the Constitution Act", was enacted on 27th June, 2012. Section 1 provides that Article 29 of the Constitution is amended by the insertion after subsection 9<sup>o</sup> of section 4 of the following provision:

"10<sup>o</sup> 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."

6. xxii In the prayer for relief in the statement of claim (at paragraph 6) the appellant 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. As was pointed out by counsel for the State in their written submissions in the High Court, the claim for that relief was not substantiated by any claims made in the statement of claim. It was 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. It was not supported by any arguments in the appellant's written or oral submissions.

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

6. xxiv Nonetheless, the Fiscal Stability Treaty was drawn into the arguments in the High Court in support of the appellant's case; the

appellant contended that the considerations which led the State to conclude that a referendum was necessary in relation to its ratification, apply *a fortiori* with respect to the ESM Treaty, and he submitted that the ESM Treaty also falls outside the EU legal framework and affects the sovereignty of the State, and therefore, that the State had adopted an inconsistent approach to the two treaties. The State's response was that no inconsistency existed. Further, it was submitted that 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. In the circumstances, the High Court did not express any view on those submissions.

### Reference to the Court of Justice by the High Court

6. xxv In the written summary of the appellant's claim put before the High Court on 27th June, 2012, the appellant formally requested that the High Court make a reference to the Court of Justice pursuant to Article 267 TFEU, for a preliminary ruling and the basis on which the reference was sought was summarised as follows:

(a) The appellant challenged the compatibility of the ESM Treaty both with the Constitution and with EU law.

(b) The determination of certain of the constitutional aspects of the case is dependent on the interpretation of the EU 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 High Court has indicated that it will be referring a question to the Court of Justice. The question was not identified to this Court.

### Interlocutory Injunctive Relief

6. xxvi In the notice of motion returnable for 26th June, 2012, before the High Court, the appellant sought the following interlocutory injunctive relief, pending the final determination of these proceedings:

(a) an order restraining the State from ratifying, approving or accepting the ESM Treaty; and

(b) an order restraining the State from completing the procedures for the approval of Decision 2011/199/EU.

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

### High Court Judgment

7.i The High Court judgment noted that there were three limbs to the appellant's constitutional argument before that Court. (i) The first limb was that the ESM Treaty constituted such a degree of delegation of sovereignty that it is incompatible with the Constitution, and that as a consequence a referendum to amend the Constitution is necessary pursuant to Article 43 of the Constitution to permit ratification of, and Ireland's participation in, the ESM Treaty. This argument is based on the **Crotty** case. (ii) The second limb was that the ESM Treaty, or more properly its implementation, entails a 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. This ground was not pleaded. However, the High Court considered it. As the ESM Act of 2012 has been enacted this limb arises in the context of the appellant's challenge to the constitutionality of that Act. (iii) The third limb, which also was not pleaded, but which was addressed in the High Court, and considered by the learned High Court judge, was that the ESM Treaty is incompatible with EU law and that it is in fundamental contradiction to the EU Treaties, and, consequently, that the Constitution is breached and that the approval of the people in a referendum is necessary to give effect to the necessary amendment to the Constitution.

7. ii The first limb of the appellant's constitutional argument is addressed on this appeal, and is determined. The other two limbs were not before the Court at this time.

7. iii The nub of the appellant's case before the High Court on the **Crotty** issue was that participation in the ESM Treaty involved a transfer of sovereignty to the ESM, because such participation impinged on and diminished Ireland's budgetary, economic and fiscal sovereignty, in that it entailed an open-ended and irreversible transfer of powers to an autonomous institution that exposed 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.

7. iv The learned High Court judge held that, unlike participation in the Treaty at issue in the **Crotty** case, *i.e.* Title III of the Single European Act, participation in the ESM Treaty would not involve any transfer or diminution of sovereignty by Ireland to the ESM or other Members of the ESM, and thus the ESM is not incompatible with the Constitution.

7. v On the claim made by the appellant for an interlocutory injunction restraining the Government from ratifying the ESM Treaty pending the determination of the proceedings, the High Court concluded that such an order should not be made.

8. The appellants filed a notice of appeal to this Court.

### Issue papers

9. The Court requested the parties to furnish an agreed issue paper. This was not possible.

9. (a) On behalf of the appellants the issues identified for determination were:-

- (i) The ESM Treaty amounts to a binding agreement with other States according to which the State abdicates its freedom to decide matters of policy covered by the Treaty, and its freedom to act as it sees fit in so far as such policy is concerned, by obliging the State to exercise its powers in a particular way, or to refrain from exercising those powers, such that the Treaty limits the full freedom of action conferred by the people upon the Institutions of Government under the Constitution.
- (ii) The ESM Treaty imposes an initial obligation and liability on the State to divert €11,145,400,000 of its budgetary resources to bail out other ESM Member States and/or their banks, by the use of that contribution in a total fund of €700,000,000,000 together with potential borrowings by the ESM Institution of £3,900,000,000,000.
- (iii) By entering into this Treaty commitment, the State would irrevocably abandon the terms on which it committed to economic and monetary union within the EU, including the terms upon which it adopted the single currency, the euro, which terms are a core component of economic and monetary union, and would instead commit to the long term preservation of the euro on terms that are wholly inconsistent with those terms of EMU to which Ireland committed in 1992.
- (iv) The issues raised in point 3 above entail questions of interpretation of EU law.
- (v) The stated complementarity of the ESM Treaty with the Fiscal Stability Treaty is legally significant. Given that the Fiscal Stability Treaty, obliging the State to determine its budget in a particular way as stated in Article 1, required the prior approval of the people by way of referendum, it follows that this complementary treaty which permanently commits the State to finance and guarantee the bailing-out of other member states and/or their banks, where this is indispensable to safeguard the euro area as a whole, also requires the prior approval of the people by referendum.
- (vi) The provisions of the ESM Treaty irrevocably trench on the capacity of Dáil Éireann to decide matters of public expenditure, and the settling of the national budget deficit or surplus. On the basis of present arrangements, potentially the State is liable to pay in capital in the order of an additional €9,871,164,000.
- (vii) The object and scope of the ESM Treaty extend beyond the establishment of a fund intended to provide financial assistance to states which are experiencing, or are threatened by, severe financing problems. The ESM Treaty requires the State's contribution to the ESM to be applied immediately to borrowing, to providing financial assistance to other Member States and / or their banks and as a guarantee, where this is necessary to safeguard the euro area as a whole.
- (viii) The ESM Treaty, including the operating processes of the ESM Institution, limits and fetters the State's freedom of action in adopting policy or altering or reversing existing policies enshrined in the ESM Treaty, in the following respects:
- (a) by virtue of rules governing qualified majority voting in respect of certain decisions, including the decision to provide financial assistance in circumstances deemed as an emergency pursuant to Article 4(4) of the ESM Treaty. Critical decisions may be taken regardless of and in opposition to Ireland's views.
  - (b) by the absence of any provision regarding its termination and the absence of any provision for denunciation or withdrawal. The ESM Treaty is therefore not subject to denunciation or withdrawal within the meaning of Article 56 of the Vienna Convention on the Law of Treaties (1969). The Treaty is intended to be permanent.
  - (c) by virtue of the imprecise, undefined and open-ended provisions of the ESM Treaty so that its operational and structural parameters are unforeseeable (for example, what constitutes 'special circumstances' within the meaning of Article 8(2) of the ESM Treaty, or what circumstances constitute an 'emergency' within the meaning of Article 4(4) of the ESM Treaty that would not also be covered by the principles set out in Article 12 of the Treaty).
  - (d) by virtue of the unaccountability and the questionable and limited possibility of judicial and/or parliamentary scrutiny of the decisions of the ESM Institution.
  - (e) by virtue of the generally recognised principles of public international law that would determine the interpretation, application and effect of the ESM Treaty, including the doctrine of *pacta sunt servanda* and the principle that a State entering into a treaty must act in good faith (as referred to in the judgment in the case of **Crotty v. An Taoiseach**) that further serves to restrict the discretion of the organs of the State with respect to national procedures required to give effect to decisions of the ESM Institution, such as, for example, is contemplated in Article 10(1) of the ESM Treaty.
- (ix) A Treaty that irrevocably commits the State to divert its budgetary resources to finance and guarantee potentially unlimited borrowing in order to bail out Member States and/or their banks for the purposes of safeguarding the euro currency is a Treaty that restricts the capacity of the organs of State to determine policy in the future and requires the mandate of the people by referendum.
- (x) The ESM Treaty and the European Stability Mechanism Act 2012 are incompatible with Articles 5, 6, 15.2.1, 15.4, 17, 28.2, 28.4 and 29.4 of the Constitution.

9. (b) The State submitted that the issue for consideration at this time by the Court was:-

Having regard to the various arguments advanced by the appellant, does the ESM Treaty involve a transfer of sovereignty to a degree that makes it incompatible with the Constitution when one applies the principles set out by this Court in [Crotty -v- An Taoiseach and Others](#) I.R 713, such that a referendum amending the Constitution is necessary to permit the State to ratify the ESM Treaty on behalf of Ireland? In particular, would ratification, absent such a referendum be incompatible with Articles 5, 6, 15.2.1, 15.4, 17, 28.2, 28.4 and 29.4 of the Constitution.

## Submissions

### Submissions of Appellant

10. i The appellant filed written legal submissions to the Court, and a written summary of the appellant's claim, which I have considered carefully. *Inter alia*, it was submitted that the determination of constitutional issues entail a prior interpretation of the EU treaties and EU law more generally. It was submitted that the issues of EU law arising ought first to be referred to the Court of Justice, before this Court considered the constitutionality of the ESM Treaty.

10. ii In oral submissions, counsel for the appellant stressed several points concerning the ESM Treaty. It was submitted that the ESM Treaty was making a permanent provision for the ESM and its policy. The fixed policy is the saving and stability of the common euro currency. Counsel argued, with reliance on the Recitals to the ESM Treaty, that the complementarity or connectedness and dependence of the ESM Treaty on the Fiscal Stability Treaty indicated the true nature of the mechanism that has been established. A binding policy on the states had been formulated and agreed which was not merely a funding mechanism nor a bank but rather, *per* Article 3 of the ESM Treaty, was the expression of the collective decision of the 17 states to pool resources so as to mobilise funding with the purpose of giving financial assistance, *i.e.* stability support, where a member state has severe financial problems, but with a governing clause regarding the safeguarding of the financial stability of the euro zone as a whole and of its member states. In concise terms, the purpose and policy of the ESM Treaty was to provide support to states if necessary to protect the euro area as a whole.

Counsel submitted that the Oireachtas cannot commit the sum of more than €11 billion in pursuit of this policy because of the Constitution and, in particular, the application of **Crotty**. Counsel argued that in addition to the policy being fixed, the State's commitment was irreversible and its capacity to say "no" was restricted. Counsel particularly focused on provisions where decisions could be taken and expenditure made without the consent of the State, such as when unanimous decision making was not required. The Court was referred to Article 4(8) of the ESM Treaty which provides that if the State fails to meet any part of its payments due, then the State will be unable to exercise its voting rights for so long as the payment is due. Counsel argued that this provision would cause the State to lose its sovereignty in the decision making of the ESM and this loss could be at a moment of the State's greatest peril, when the State would need its voice more than ever, in a situation where the State could not make the payment required. The Court was also referred to the emergency voting procedure outlined in Article 4(4) where only 85% of the votes cast are necessary to decide to grant or implement financial assistance to a state. A consequence of these provisions is that the other states may decide to grant financial support to a state that the State does not support.

Counsel also referred the Court to the decisions that could be taken by a qualified majority, which could be decisions of substantive content. Reference was also made to Article 8, which provides that the full amount of the State's capital subscription is liable to be called in, and that the State irrevocably and unconditionally agrees to provide its contribution if called in, and to provide such amount in a timely basis. Counsel also made submissions as to Article 37 and argued that it cannot have the effect of giving jurisdiction to the Court of Justice of the European Union. He argued that the ESM is not a member state of the EU and cannot go to the Court of Justice under Article 273 of the TFEU.

In conclusion, counsel submitted that the totality of the provisions of the ESM Treaty constituted a trenching on the sovereignty of the State.

10. iii Counsel made submissions on **Crotty v. An Taoiseach** [1987] I.R. 713 especially referring to and adopting the judgments of Walsh J. and Henchy J., and argued that they applied to this case. Counsel submitted that in this case the Government decided it would commit itself into the future and that that is what **Crotty** said the Government could not do; it could not restrain its discretion into the future; the policy of the Government must be capable of being changed. Counsel submitted that the ESM Treaty circumscribes the policy of the Government.

10. iv *Inter alia*, counsel also stressed that the precise nature of the borrowing power is ill defined. Counsel submitted that the ESM is a transfer of sovereignty to an independent institution acting corporately, which may make decisions, that the State may not have participated in, and that these decisions may involve commitment of the State's money to the rescue of other states, and significant borrowing to that end. Counsel stressed that the principle in Article 5 of the Constitution, *i.e.* that "sovereign" is an imperative word, that insofar as this procedure involves a departure by the State to act as a sovereign, the State has lost its sovereignty. Counsel stated that he adopted the **Crotty** principles, that a government could not render itself hamstrung to pursue the common good, as to do so requires a mandate from the people.

### **Submissions of State**

11. i The State filed written submissions to the Court. It was stated that the most urgent claims that this Court had to decide at this juncture are constitutional claims.

11. ii It was submitted by the State that there were three constitutional law based issues:-

(a) The first limb being that the ESM Treaty constituted such a degree of delegation of sovereignty that it is incompatible with the Constitution and that a referendum was necessary to permit its ratification by Ireland. This is the **Crotty** limb, based primarily on the majority judgments of the Supreme Court in that case.

(b) The second limb was that the ESM, or more properly its implementation, entails transfer from the Oireachtas of an impermissible degree of monetary and budgetary power to the Executive, in particular to the Minister for Finance. The High Court recognised that this ground was not pleaded. The State relied on this fact. Further, no permission to amend the statement of claim was sought by the appellant in his notice of motion of the 26th June, 2012, which the High Court dealt with on the 27th June, 2012. It was submitted by the State that in the circumstances it was unnecessary to consider this limb of the constitutional argument. In all the circumstances, this issue does not arise for decision at this time.

(c) The third limb was the contention that because the ESM Treaty breaches EU law, it would also comprise a discrete breach of Article 29.4.4 of the Constitution. The learned High Court judge acknowledged that this limb was also not pleaded. The High Court did not address its admissibility nor the claim itself, given the conclusion it arrived at as to the compatibility of the ESM Treaty with EU law. It was a claim that the High Court considered it did not have to address. Consequently, this third issue does not arise for determination at this time.

11. iii Therefore, this judgment addresses the first limb, the first constitutional issue, only.

11. iv On the first limb, the Crotty issue, the State distinguished aspects of the SEA in issue in the Crotty case and the ESM Treaty at issue in this case. It was submitted that there is nothing in the ESM Treaty such that its ratification would breach the principles established in Crotty. Specifically that there was nothing in the ESM Treaty such that its ratification by the State would:-

(a) constitute or result in a transformation, let alone a fundamental transformation, in the relations between Ireland and its fellow euro area member states, or between Ireland and other EU member states more generally;

(b) undermine the essential nature of Ireland's residual sovereignty in relation to the exercise of foreign policy powers, i.e. those which have not in the meantime been limited by virtue in particular of what is now Title V of the TEU and the Union's external action powers. It was submitted that the ESM Treaty has nothing to do with foreign policy and therefore that it has nothing to do with exercising the right to say yes or to say no in respect of foreign policy;

(c) fetter in any way executive or legislative powers that remain bestowed unfettered by the Constitution on the organs of government of the State.

11.v The State submitted that the analysis of the majority judgments in **Crotty** by the learned High Court judge was correct.

11.vi The State endorsed the conclusions of the learned High Court judge on the basic features of the ESM Treaty as set out in the High Court judgment, and which are referred to above. The State submitted that of particular note in the conclusion of the judgment of the High Court was that any increase in the State's "call-able up" capital contribution to ESM cannot come about without the consent of the State and that it would involve the consent of the Minister for Finance, acting on behalf of the Government as Ireland's representative on the Board of Governors of the ESM, and the approval of Dáil Éireann, as well in effect as the approval of the Oireachtas through the requirement to amend the ESM Act of 2012. Counsel for the State also drew attention to the finding of the High Court that there would be no compulsion on Ireland to accept financial assistance that may be on offer if the terms, by way of conditionality imposed, were not acceptable to the Government of the day. Further, that the instances where Ireland would not have a veto on a decision of substance, namely under Article 4(4), are strictly limited to an emergency procedure necessary to address financial crises and could not "on any common sense basis be regarded as a diminution of sovereignty".

## **The Constitution**

12. The Articles of the Constitution of Ireland relevant to this appeal commence with Article 5 which provides:-

"Ireland is a sovereign, independent, democratic State."

Article 6 states:-

"1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the Rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.

2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.

Article 28.2 states:-

"The executive power of the State, shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government."

Article 29.4.1° states:-

"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° states:-

"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."

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."

13. Thus, Ireland is a sovereign, independent, democratic State. The powers of government are exercisable only by the organs of State established by the Constitution. The executive power of the State is exercised by the Government.

## The Decision

### The Crotty Decision

14. Limitations on the exercise of the executive power were addressed in **Crotty v. An Taoiseach** [1987] I.R. 713, where this Court, by a majority, held that the Government had acted beyond its powers.
14. i At the core of this appeal are the principles stated in **Crotty**. Both the appellant and the State relied on the majority judgments in that case, which both parties asked the Court to apply.
14. ii At issue in **Crotty** were treaties made in Luxembourg on the 17th February, 1986, and at the Hague on the 28th February, 1986, collectively called the Single European Act, referred to as "the SEA", by which the twelve member states resolved to amend the treaties of the European Communities. Article 33 of the SEA provided:-
- "This Act will be ratified by the High Contracting Parties in accordance with their respective constitutional requirements. The instruments of ratification will be deposited with the Government of the Italian Republic.
- This Act will enter into force on the first day of the month following that in which the instrument of ratification is deposited of the last signatory State to fulfil that formality."
14. iii Title III of the SEA embodied a separate treaty, whereby each of the High Contracting Parties agreed to adapt 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. Title II included structural changes to the treaties of and governing the European Communities and, in the case of the European Economic Community, referred to as "the EEC", provided for increased use of voting by qualified majority in the European Council, the enumeration of objectives of the EEC, and a new court of first instance, inferior to the Court of Justice. Most of the provisions of the SEA, with the exception of Title III, were inserted into the European Communities Act, 1972, by the European Communities (Amendment) Act, 1986, referred to as "the Act of 1986", and became part of the domestic law of the State on the 24th December, 1986. Section 3(3) of the Act of 1986 provided that the Act should come into operation on such date as the Minister for Foreign Affairs would appoint.
14. iv Mr. Crotty issued a plenary summons on the 22nd December, 1986, seeking declarations that any purported ratification of the SEA would be void having regard to the provisions of the Constitution, and he sought injunctions restraining ratification. He also sought a declaration that the European Communities (Amendment) Bill, 1986, would, if enacted, be repugnant to the Constitution and null and void in purporting to enact certain parts of the SEA into domestic law.
14. v On the application for injunctions, the High Court (Barrington J.) granted interlocutory injunctions.
14. vi On the matter being heard by a Divisional Court of the High Court (Hamilton P., Barrington and Carroll J.J.) the reliefs sought were refused and the injunctions were discharged.
14. vii Mr. Crotty appealed to this Court, and obtained similar interim and interlocutory injunctions, pending the hearing of the appeal.
14. viii This Court held that the plaintiff had *locus standi* to challenge the Act in the circumstances where its coming into force would affect every citizen. This Court considered that Article 29.4.3° should be interpreted as giving authorisation to the State not only to join the European Communities as they stood in 1973, but also to join in amendments of the treaties so long as such amendments do not alter the essential scope or objectives of the European Communities. Following consideration of the essential nature of the scope and objectives of the European Communities and the amendments that the Act of 1986 made to incorporate the SEA, the Court held that the European Community was a developing organism with diverse and changing methods for making decisions and an inbuilt and clearly expressed objective of expansion and progress including the terms of the mechanics to be used in the achievement of its agreed objectives, and that the amendments were permissible and thereby the Act of 1986 was valid according to the Constitution.
14. ix On the issue of Title III, by which Treaty Ireland agreed to adopt its foreign policy positions within the framework of European Political Cooperation, it was held by a majority of the Supreme Court (Walsh J., Henchy J. and Hederman J.) that the appeal be allowed, and a declaration was made that the ratification of Title III was unconstitutional.
14. x It was held by all the members of the Court that the Constitution vested in the Government the executive power of the State in its external relations, subject to the provisions of the Constitution
14. xi As both parties in this appeal relied on the majority judgments in **Crotty**, it is necessary to analyse that decision carefully.
14. xii The judgments of Walsh J., Henchy J. and Hederman J. hold the essence of the decision.
14. xiii. The core issue in **Crotty**, and in this case, is whether the State in attempting to ratify the Treaty before the Court is endeavouring to act free from the restraints of the Constitution.
14. xiv The position was described by Walsh J. at p. 777 to 778 as:-

"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 powers of external sovereignty on the part of the State do not depend on the affirmative grant of this in the Constitution. They are implicit in the provisions of Article 5 of the Constitution. The State would not be completely sovereign if it did not have in common with other members of the family of nations the right and power in the field of international relations equal to the right and power of other states. These powers of the State include the power to declare war or to participate in a war, to conclude peace, to make treaties, and maintain diplomatic relations with other states."

14. xv At issue in the **Crotty** case was, and in this case is, whether the Government was acting within its executive power, under the Constitution. Walsh J. set out in detail the nature of the SEA, pointing out that the essential nature of sovereignty is the right to say yes or say no, but that that right would be materially qualified by the SEA which committed the State, and therefore all future Governments and the Oireachtas, to the other member states to do the following things;-

- "1. To endeavour to formulate and to implement a European foreign policy.
2. To undertake to inform or consult the other Member States on any foreign policy matters of general interest (not just of common interest) so as to ensure that the combined influence of the States is exercised as effectively as possible through co-ordination, the convergence of their positions and the implementation of joint action.
3. In adopting its position and in its national measures the State shall take full account of the position of the other Member States and shall give due consideration to the desirability of adopting and implementing common European positions.
4. The State will ensure that with its fellow Member States common principles and objectives are gradually developed and defined.
5. The State shall endeavour to avoid any action or position which impairs the effectiveness of the Community States as a cohesive force in international relations or within international organisations.
6. The State shall so far as possible refrain from impeding the formation .of a consensus and the joint action which this could produce.
7. The State shall be ready to co-ordinate its position with the position of the other Member States more closely on the political and economic aspects of security.
8. The State shall maintain the technological and industrial conditions necessary for security of the Member States and it shall work to that end at national level and, where appropriate, within the framework of the competent institutions and bodies.
9. In international institutions and at international conferences which the State attends it shall endeavour to adopt a common position with the other Member States on subjects covered by Title III.
10. In international institutions and at international conferences in which not all of the Member States participate the State, if it is one of those participating, shall take full account of the positions agreed in European Political Cooperation.

One other matter expressed in somewhat ambiguous terms at Article 6 (c) in Title II is as follows:

"Nothing in this Title shall impede closer cooperation in the field of security between certain of the High Contracting Parties within the framework of the Western European Union or the Atlantic Alliance."

14.xvi Walsh J. held that:-

"In my view it would be quite incompatible with the freedom of action conferred on the Government by the Constitution for the Government to qualify that freedom or to inhibit it in any manner by formal agreement with other States to qualify it".

14.xvii Walsh J. described the boundary on the Government to determine matters of foreign policy. He stated at p. 783 to 784:-

"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. The latter two have now been curtailed by the consent of the people to the amendment of the Constitution which is contained in Article 29, s. 4, sub-s. 3 of the Constitution. If it is now 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, it is not within the power of the Government to do so.

The foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself, the State or upon the people the contemplated restrictions upon freedom of action. To acquire the power to do so would, in my opinion, require a recourse to the people 'whose right it is' in the words of Article 6 ' . . . in final appeal, to decide all questions of national policy, according to the requirements of the common good.' In the last analysis it is the people themselves who are the guardians of the Constitution. In my view, the assent of the people is a necessary prerequisite to the ratification of so much of

the Single European Act as consists of title III thereof. On these grounds I would allow this appeal.”

14. xvii Henchy J. analysed the SEA, and held that the essence of the treaty was a “fundamental transformation” in the relations between the member states of the European Communities – that they would no longer have separate foreign policies, but, as far as possible, merge their natural foreign policies in a European foreign policy, so as to implement European Political Cooperation, with a view to achieving European Union. Henchy J. held that the Government could not cede sovereignty to such an institution. He stated at p. 786:-

“Those and other commitments expressed in Article 30 make manifest that, although the approach to the ultimate aim of European Union is to be reached by a pathway of gradualism, each Member State will immediately cede a portion of its sovereignty and freedom of action in matters of foreign policy.”

Henchy J. stated that pursuant to Article 1 of the Constitution:-

“The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right ... to determine its relations with other nations ... in accordance with its own genius and traditions.’

It appears to me that this affirmation means that the State's right to conduct its external relations is part of what is inalienable and indefeasible in what is described in Article 5 as ‘a sovereign, independent, democratic State.’ It follows, in my view, that any attempt by the Government to make a binding commitment to alienate in whole or in part to other states the conduct of foreign relations would be inconsistent with the Government’s duty to conduct those relations in accordance with the Constitution.

The ultimate source and limits of the Government's powers in the conduct of foreign relations are to be found in Article 6, s. 1 of the Constitution:

‘All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.’

It follows that the common good of the Irish people is the ultimate standard by which the constitutional validity of the conduct of foreign affairs by the Government is to be judged. In this and in a number of other respects throughout the Constitution the central position of the common good of the Irish people is stressed as one of the most fundamental characteristics of Ireland as a sovereign, independent, democratic state.

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.”

14. xix Hederman J. stated at p. 794:-

“I agree with the judgments of Walsh J. and Henchy J. for the reasons given by them. There is little I can usefully add.

It appears to me that the essential point at issue is whether the State can by any act on the part of its various organs of government enter into binding agreements with other states, or groups of states, to subordinate, or to submit, the exercise of the powers bestowed by the Constitution to the advice or interests of other states, as distinct from electing from time to time to pursue its own particular policies in union or in concert with other states in their pursuit of their own similar or even identical policies.

The State's organs cannot contract to exercise in a particular procedure their policy-making roles or in any way to fetter powers bestowed unfettered by the Constitution. They are the guardians of these powers-not the disposers of them. For the reasons already stated I would allow the appeal.”

## Principles

15. (i) An important aspect of the sovereignty of the State is the exercise of the fundamental powers of the state by the organs designated in the Constitution. Under the Constitution the Government has been given the power to exercise the executive functions of state.

(ii) Foreign policy is an important aspect of executive power and is a function of the Government.

(iii) It is a routine exercise of executive power for the Government to enter into a treaty, as a matter of foreign policy, for the State.

(iv) All treaties involve an element of policy. That is the nature of a treaty.

(v) Thus, the Constitution empowers the Government to exercise executive policy, which includes a decision to enter into a treaty as a matter of policy. However, in **Crotty** there was a specific aspect of the treaty in issue which took it outside the norm. As was stated in **Crotty**, the Government may not abdicate its power as the executive organ of the State. If such a decision is required it may be taken only by the people, as the ultimate authority in the State. If a treaty involves a fundamental transformation, such as a ceding of sovereignty, then it would require a mandate of the people.

(vi) As Hederman J. pointed out, the organs of State, including the Government, cannot enter into an agreement to subordinate its

powers to another. The Government may not qualify sovereign power to formulate foreign policy by abdicating such decisions to a foreign institution.

(vii) In the **Crotty** case the Court held that Title III of the SEA would bind the State to concede part of its sovereignty in foreign policy by conducting foreign policy in the future, future decisions on foreign policy, without reference to the common good, and that such a step required authorisation by the people through a referendum.

## **ESM**

15. It is thus necessary to consider the ESM treaty to determine how the principles in the **Crotty** decision apply to this treaty.

16. i As the ESM is at the heart of the appellant's submissions, I refer to it in some detail.

16. ii The Recitals to the Treaty state:-

"(1) The European Council agreed on 17 December 2010 on the need for euro area Member States to establish a permanent stability mechanism. This European Stability Mechanism ("ESM") will assume the tasks currently fulfilled by the European Financial Stability Facility ("EFSF") and the European Financial Stabilisation Mechanism ("EFSM") in providing, where needed, financial assistance to euro area Member States.

(2) On 25 March 2011, the European Council adopted Decision 2011/199/EU amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro 2 adding the following paragraph to Article 136: "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".

(3) With a view to increasing the effectiveness of the financial assistance and to prevent the risk of financial contagion, the Heads of State or Government of the Member States whose currency is the euro agreed on 21 July 2011 to "increase [the] flexibility [of the ESM] linked to appropriate conditionality".

(4) Strict observance of the European Union framework, the integrated macro-economic surveillance, in particular the Stability and Growth Pact, the macroeconomic imbalances framework and the economic governance rules of the European Union, should remain the first line of defence against confidence crises affecting the stability of the euro area.

(5) On 9 December 2011 the Heads of State or Government of the Member States whose currency is the euro agreed to move towards a stronger economic union including a new fiscal compact and strengthened economic policy coordination to be implemented through an international agreement, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("TSCG"). The TSCG will help develop a closer coordination within the euro area with a view to ensuring a lasting, sound and robust management of public finances and thus addresses one of the main sources of financial instability. This Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union. It is acknowledged and agreed that the granting of financial assistance in the framework of new programmes under the ESM will be conditional, as of 1 March 2013, on the ratification of the TSCG by the ESM Member concerned and, upon expiration of the transposition period referred to in Article 3(2) TSCG on compliance with the requirements of that article.

(6) Given the strong interrelation within the euro area, severe risks to the financial stability of Member States whose currency is the euro may put at risk the financial stability of the euro area as a whole. The ESM may therefore provide stability support on the basis of a strict conditionality, appropriate to the financial assistance instrument chosen if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. The initial maximum lending volume of the ESM is set at EUR 500 000 million, including the outstanding EFSF stability support. The adequacy of the consolidated ESM and EFSF maximum lending volume will, however, be reassessed prior to the entry into force of this Treaty. If appropriate, it will be increased by the Board of Governors of the ESM, in accordance with Article 10, upon entry into force of this Treaty.

(7) All euro area Member States will become ESM Members. As a consequence of joining the euro area, a Member State of the European Union should become an ESM Member with full rights and obligations, in line with those of the Contracting Parties.

(8) The ESM will cooperate very closely with the International Monetary Fund ("IMF") in providing stability support. The active participation of the IMF will be sought, both at technical and financial level. A euro area Member State requesting financial assistance from the ESM is expected to address, wherever possible, a similar request to the IMF.

(9) Member States of the European Union whose currency is not the euro ("non euro area Member States") participating on an ad hoc basis alongside the ESM in a stability support operation for euro area Member States will be invited to participate, as observers, in the ESM meetings when this stability support and its monitoring will be discussed. They will have access to all information in a timely manner and be properly consulted.

(10) On 20 June 2011, the representatives of the Governments of the Member States of the European Union authorised the Contracting Parties of this Treaty to request the European Commission and the European Central Bank ("ECB") to perform the tasks provided for in this Treaty.

(11) In its statement of 28 November 2010, the Euro Group stated that standardised and identical Collective Action Clauses ("CACs") will be included, in such a way as to preserve market liquidity, in the terms and conditions of all new euro area government bonds. As requested by the European Council on 25 March 2011, the detailed legal arrangements for including CACs in euro area government securities were finalised by the

Economic and Financial Committee.

(12) In accordance with IMF practice, in exceptional cases an adequate and proportionate form of private sector involvement shall be considered in cases where stability support is provided accompanied by conditionality in the form of a macro-economic adjustment programme.

(13) Like the IMF, the ESM will provide stability support to an ESM Member when its regular access to market financing is impaired or is at risk of being impaired. Reflecting this, Heads of State or Government have stated that the ESM loans will enjoy preferred creditor status in a similar fashion to those of the IMF, while accepting preferred creditor status of the IMF over the ESM. This status will be effective as of the date of entry into force of this Treaty. In the event of ESM financial assistance in the form of ESM loans following a European financial assistance programme existing at the time of the signature of this Treaty, the ESM will enjoy the same seniority as all other loans and obligations of the beneficiary ESM Member, with the exception of the IMF loans."

(14) The euro area Member States will support equivalent creditor status of the ESM and that of other States lending bilaterally in coordination with the ESM.

(15) ESM lending conditions for Member States subject to a macroeconomic adjustment programme, including those referred to in Article 40 of this Treaty, shall cover the financing and operating costs of the ESM and should be consistent with the lending conditions of the Financial Assistance Facility Agreements signed between the EFSF, Ireland and the Central Bank of Ireland on the one hand and the EFSF, the Portuguese Republic and Banco de Portugal on the other.

(16) Disputes concerning the interpretation and application of this Treaty arising between the Contracting Parties or between the Contracting Parties and the ESM should be submitted to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 of the Treaty on the Functioning of the European Union ("TFEU").

(17) Post-programme surveillance will be carried out by the European Commission and by the Council of the European Union within the framework laid down in Articles 121 and 136 TFEU.

16. iii The purpose of the ESM Treaty is set out in Article 3, being:-

"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."

16. iv The key points in the submissions made on behalf of the appellant related to the structure and voting rules, which are set out in Article 4. The provisions are:-

"1. The ESM shall have a Board of Governors and a Board of Directors, as well as a Managing Director and other dedicated staff as may be considered necessary.

2. The decisions of the Board of Governors and the Board of Directors shall be taken by mutual agreement, qualified majority or simple majority as specified in this Treaty. In respect of all decisions, a quorum of 2/3 of the members with voting rights representing at least 2/3 of the voting rights must be present.

3. The adoption of a decision by mutual agreement requires the unanimity of the members participating in the vote. Abstentions do not prevent the adoption of a decision by mutual agreement.

4. By way of derogation from paragraph 3, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance, as defined in Articles 13 to 18, would threaten the economic and financial sustainability of the euro area. The adoption of a decision by mutual agreement by the Board of Governors referred to in points (f) and (g) of Article 5(6) and the Board of Directors under that emergency procedure requires a qualified majority of 85% of the votes cast.

Where the emergency procedure referred to in the first subparagraph is used, a transfer from the reserve fund and/or the paid-in capital to an emergency reserve fund is made in order to constitute a dedicated buffer to cover the risks arising from the financial support granted under that emergency procedure. The Board of Governors may decide to cancel the emergency reserve fund and transfer its content back to the reserve fund and/or paid-in capital.

5. The adoption of a decision by qualified majority requires 80% of the votes cast.

6. The adoption of a decision by simple majority requires a majority of the votes cast.

7. The voting rights of each ESM Member, as exercised by its appointee or by the latter's representative on the Board of Governors or Board of Directors, shall be equal to the number of shares allocated to it in the authorised capital stock of the ESM as set out in Annex II.

8. 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."

16. v A board of governors is provided for in Article 5. Each ESM member shall appoint a governor, and an alternate. Each governor

shall be a member of the government of the ESM member who has responsibility for finance. The member of the European Commission in charge of economic and monetary affairs and the president of the ECB, as well as the president of the Euro Group, may participate in the meetings of the Board of Governors as observers.

16. vi The Board of Governors shall take the following decisions, per Article 5(6), by mutual agreement:-

- "(a) to cancel the emergency reserve fund and transfer its content back to the reserve fund and/or paid-in capital, in accordance with Article 4(4);
- (b) to issue new shares on terms other than at par, in accordance with Article 8(2);
- (c) to make the capital calls, in accordance with Article 9(1);
- (d) to change the authorised capital stock and adapt the maximum lending volume of the ESM, in accordance with Article 10(1);
- (e) to take into account a possible update of the key for the subscription of the ECB capital, in accordance with Article 11(3), and the changes to be made to Annex I in accordance with Article 11(6);
- (f) to provide stability support by the ESM, including the economic policy conditionality as stated in the memorandum of understanding referred to in Article 13(3), and to establish the choice of instruments and the financial terms and conditions, in accordance with Articles 12 to 18;
- (g) to give a mandate to the European Commission to negotiate, in liaison with the ECB, the economic policy conditionality attached to each financial assistance, in accordance with Article 13(3);
- (h) to change the pricing policy and pricing guideline for financial assistance, in accordance with Article 20;
- (i) to change the list of financial assistance instruments that may be used by the ESM, in accordance with Article 19;
- (j) to establish the modalities of the transfer of EFSF support to the ESM, in accordance with Article 40;
- (k) to approve the application for membership of the ESM by new members, referred to in Article 44;
- (l) to make adaptations to this Treaty as a direct consequence of the accession of new members, including changes to be made to the distribution of capital among ESM Members and the calculation of such a distribution as a direct consequence of the accession of a new member to the ESM, in accordance with Article 44; and
- (m) to delegate to the Board of Directors the tasks listed in this Article."

16. vii The Board of Governors shall take the following decisions, per Article 5(7), by qualified majority:-

- "(a) to set out the detailed technical terms of accession of a new member to the ESM, in accordance with Article 44;
- (b) whether to be chaired by the President of the Euro Group or to elect, by qualified majority, the Chairperson and Vice-Chairperson of the Board of Governors, in accordance with paragraph 2;
- (c) to set out by-laws of the ESM and the rules of procedure applicable to the Board of Governors and Board of Directors (including the right to establish committees and subsidiary bodies), in accordance with paragraph 9;
- (d) to determine the list of activities incompatible with the duties of a Director or an alternate Director, in accordance with Article 6(8);
- (e) to appoint and to end the term of office of the Managing Director, in accordance with Article 7;
- (f) to establish other funds, in accordance with Article 24;
- (g) on the actions to be taken for recovering a debt from an ESM Member, in accordance with Article 25(2) and (3);
- (h) to approve the annual accounts of the ESM, in accordance with Article 27(1);
- (i) to appoint the members of the Board of Auditors, in accordance with Article 30(1);
- (j) to approve the external auditors, in accordance with Article 29;
- (k) to waive the immunity of the Chairperson of the Board of Governors, a Governor, alternate Governor, Director, alternate Director or the Managing Director, in accordance with Article 35(2);
- (l) to determine the taxation regime applicable to the ESM staff, in accordance with Article 36(5);
- (m) on a dispute, in accordance with Article 37(2); and
- (n) any other necessary decision not explicitly provided for by this Treaty."

16. viii A board of directors is provided for in Article 6. Each governor shall provide one director and one alternate from among people of high competence in economic and financial matters.

16. ix Pursuant to Article 7, a managing director shall be appointed by the Board of Governors from among candidates having the nationality of an ESM member, relevant international experience, and a high level of competence in economic and financial matters.

16. x Article 8 governs the matter of authorised capital stock. It provides:-

"1. The authorised capital stock shall be EUR 700 000 million. It shall be divided into seven million shares, having a nominal value of EUR 100 000 each, which shall be available for subscription according to the initial contribution key provided for in Article 11 and calculated in Annex I.

2. The authorised capital stock shall be divided into paid-in shares and callable shares. The initial total aggregate nominal value of paid-in shares shall be EUR 80 000 million. Shares of authorised capital stock initially subscribed shall be issued at par. Other shares shall be issued at par, unless the Board of Governors decides to issue them in special circumstances on other terms.

3. Shares of authorised capital stock shall not be encumbered or pledged in any manner whatsoever and they shall not be transferable, with the exception of transfers for the purposes of implementing adjustments of the contribution key provided for in Article 11 to the extent necessary to ensure that the distribution of shares corresponds to the adjusted key.

4. ESM Members hereby irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock, in accordance with their contribution key in Annex I. They shall meet all capital calls on a timely basis in accordance with the terms set out in this Treaty.

5. The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The obligations of ESM Members to contribute to the authorised capital stock in accordance with this Treaty are not affected if any such ESM Member becomes eligible for, or is receiving, financial assistance from the ESM."

16. xi Article 10 enables changes in authorised capital stock. 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 and may decide to change and to amend Article 8 and Annex II accordingly.

16. xii Article 12 sets out the principles by which stability support may be granted. Section 1 states:-

"1. 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."

16. xiii An ESM member may address a request for stability support to the chairperson of the Board of Governors. On receipt of such request the chairperson of the Board of Governors shall entrust the European Commission, in liaison with the ECB, with the following tasks:-

"(a) to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis under Article 18(2);

(b) to assess whether public debt is sustainable. Wherever appropriate and possible, such an assessment is expected to be conducted together with the IMF;

(c) to assess the actual or potential financing needs of the ESM Member concerned."

16. xiv After such request of an ESM member and the above assessment, the Board of Governors may decide to grant, in principle, stability support to the ESM member in the form of a financial assistance facility.

16. xv If such a decision is made 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.

4. The European Commission shall sign the MoU on behalf of the ESM, subject to prior compliance with the conditions set out in paragraph 3 and approval by the Board of Governors.

5. The Board of Directors shall approve the financial assistance facility agreement detailing the financial aspects of the stability support to be granted and, where applicable, the disbursement of the first tranche of the assistance.

6. The ESM shall establish an appropriate warning system to ensure that it receives any repayments due by the ESM Member under the stability support in a timely manner.

7. The European Commission - in liaison with the ECB and, wherever possible, together with the IMF - shall be entrusted with monitoring compliance with the conditionality attached to the financial assistance facility."

16. xvi Other relevant articles include Article 21 which relates to borrowing options. It provides:-

"1. 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.

2. The modalities of the borrowing operations shall be determined by the Managing Director, in accordance with detailed guidelines to be adopted by the Board of Directors.

3. The ESM shall use appropriate risk management tools, which shall be reviewed regularly by the Board of Directors.”

16. xvii Issues of interpretation or application of the provisions of the ESM Treaty and the bye-laws of the ESM arising between any ESM member and the ESM, or between ESM members, shall be submitted to the Board of Directors for decision: per Article 37. The Board of Governors shall decide any such dispute. If an ESM member contests that decision Article 37 provides that the dispute shall be submitted to the Court of Justice of the European Union, which judgment will be binding on the parties.

16. xviii Article 41 makes provision for the payment of the initial capital, as follows:-

“1. Without prejudice to paragraph 2, payment of paid-in shares of the amount initially subscribed by each ESM Member shall be made in five annual instalments of 20% each of the total amount. The first instalment shall be paid by each ESM Member within fifteen days of the date of entry into force of this Treaty. The remaining four instalments shall each be payable on the first, second, third and fourth anniversary of the payment date of the first instalment.

2. During the five year period of capital payment by instalments, ESM members shall accelerate the payment of paid-in shares, in a timely manner prior to the issuance date, in order to maintain a minimum 15% ratio between paid-in capital and the outstanding amount of ESM issuances and guarantee a minimum combined lending capacity of the ESM and the EFSF of Eur 500,000 million.”

## 17. Application of the Crotty principles

17. i The Government has the power under the Constitution to exercise the executive power of the State. Foreign policy, including entering into a treaty, is part of the executive role. The exercise of this power is subject to the Constitution. The Constitution explicitly empowers the State to enter into international agreements: Article 29.4.2°. There are express limitations on the power of the Government, for example, Article 29.5.1° requires that every international agreement be laid before Dáil Éireann, and Article 29.5.2° provides that the State is not bound by an international agreement involving a charge upon public funds unless Dáil Éireann has agreed the terms.

17. ii At issue in **Crotty** was the future conduct of external relations of the State, *i.e.* the executive power of the sovereign State to decide future external relations. **Crotty** held that the Constitution provided that the Government could not dispose of its executive power by entering into an agreement with another to abdicate its powers under the Constitution, in circumstances where the interests of others may supersede the interests of the State, as the powers that are given to the organs of State under the Constitution are for the common good of the people of Ireland. Thus, if such a decision is required to be taken to relinquish the powers of an organ of State it must be taken by the people.

17. iii No such fundamental decision arises in relation to the ESM Treaty.

17. iv In the ESM Treaty, the member states of the euro area have determined to join and establish the ESM. There are two important functions of the ESM. The ESM will be entitled to raise funds, by subscriptions from the states and to borrow money, and the ESM will support member states in financial difficulties.

17.v Under the ESM Ireland will have a financial liability. The Dáil has already permitted a maximum liability of €11,145,400,000; section 3 of the European Stability Mechanism Act, 2012, which constitutes Ireland’s capital subscription: Article 8(1) and Annex II of the ESM Treaty. This figure is divided into paid-in and callable shares. According to Article 8(2) of the ESM Treaty, Ireland’s subscription to be paid-in amounts to €1,273,760,000, which, as set out in Article 41(1), is to be paid in five annual instalments of €254,752,000, or, if Article 42(2) applies, to be paid at an accelerated rate. The callable shares are the remainder and amount to €9,871,640,000, *i.e.* the difference between the paid-in amount and the capital subscription. This remainder may be called-in in accordance with the provisions in Article 5(6)(c) and Article 9 of the ESM Treaty. However, a decision to change the authorised capital stock, and thereby, for example, increase Ireland’s capital subscription beyond €11,145,400,000, requires to be made by the unanimous decision of the Board of Governors: Article 5(6)(d) and Article 10. Also, this requires the completion of national procedures, which, in Ireland, is the approval of Dáil Éireann, and amendment of the Act of 2012. Thus, any increase in the financial liability of Ireland would require the unanimous decision of the Board of Governors, and Irish national procedures, including the amendment of the Act of 2012.

17. vi On the matter of financial support, Ireland could request financial assistance. If the State applied for such funding, any terms for such funding would be required to be within the constitutional ambit. The Government has a duty to ensure that by its decisions and actions the terms of the Constitution are not infringed.

17.vii Neither of the above functions impinges upon the economic or monetary sovereignty of the State.

17. viii The policy of the ESM Treaty is clearly defined in the treaty and the State has agreed to that policy of safeguarding the financial stability of the euro area as a whole and of its member states through the mechanisms provided for in the treaty. The State has agreed to a specific policy and the mechanism of implementation, which are grounded by a specified maximum financial contribution.

17. ix The appellant argued that the State has abdicated some of its decision-making competency in foreign policy in a manner that is an unconstitutional derogation of the State’s sovereignty. However, the decisions from which the State may be excluded or vote against without impact on the result, for example, by virtue of a loss of voting rights or the impact of qualified majority or simple majority voting, are decisions concerning the implementation of the policy, and are not decisions that (i) determine policy, (ii) create a mechanism of policy determination, or (iii) increase the State’s specified maximum financial contribution.

17. x The decisions of particular concern to the appellant arise in very specific circumstances. The State may be excluded from voting under Article 4(8) by failing to make a payment required under Articles 8, 9, 10, 16 or 17. However, if Ireland found itself in such a

position, it would not incur increased financial liability beyond the maximum contribution specified in s. 3 of the Act of 2012, without the approval of Dáil Éireann, the amendment of the Act of 2012, and the notification of the Depositary of the completion of these steps. Consequently, such a situation would not diminish the State's sovereignty.

17. xi In addition, the appellant raised the fact that mutual agreement is not required under the emergency procedure provided for in Article 4(4), and in such a situation a decision affecting Ireland could be made in the State's absence. While in the general course the treaty provides for unanimous decisions to grant or implement financial assistance, circumstances of urgency create contingency voting requirements of 85% of votes cast if the "economic and financial sustainability of the euro area" is threatened. Such a situation would arise only if the European Commission and the ECB both considered that a failure to urgently make a decision to grant or implement financial assistance would threaten the economic and financial sustainability of the euro area. The policy remains the same and, indeed, more concentrated *i.e.* the consideration is the sustainability of the euro area, rather than the stability of the euro area as a whole and of its member states.

Article 4(4) implements a specific policy of the ESM Treaty, through a specified mechanism, within the limits of the specified maximum financial contribution. Consequently, such a situation does not diminish the State's sovereignty.

17. xii Thus, in relation to this limb of the appeal, it is clear that the relevant policy was determined by the Irish executive and legislature. The State has not ceded policy making for the future. The State has not ceded power to another institution to enable the creation of policy in the future. Nor has the State ceded to elsewhere the power to increase the State's financial contributions. Consequently, there has been no transfer of sovereignty to any degree which is incompatible with the Constitution. To refer to the analysis by Walsh J. in **Crotty**, there has not been an abdication of freedom of action or to bind the State in its freedom of action in its formulation of foreign policy. Nor, in reference to the judgment of Henchy J. in **Crotty**, has there been any attempt by the Government to make a binding commitment to alienate to other States the conduct of foreign relations. Nor has there been any attempt at a fundamental transformation or diminution of sovereignty, such as arose in the **Crotty** case. Nor, in reference to the judgment of Hederman J. in **Crotty**, is this an agreement to subordinate or submit the exercise of the powers bestowed by the Constitution to the interests of other States. Rather, it is an election by the Government of a policy in union with other States in pursuit of an identical policy.

17. xiii The decision by the Government to enter into the ESM Treaty was a policy decision of the Government, an exercise of the executive power pursuant to the Constitution. The role of the Court is only to determine whether powers exercised under the Constitution have been exceeded. For the reasons stated, I am satisfied that they have not been exceeded on this issue. As to the policy, the Court has no role in relation to the policy itself, the policy is a matter for the Government.

#### **Injunction Issue**

18. Counsel for the appellant argued two issues before the Court in relation to the application for an interlocutory injunction: first, that C-106/77 **Simmenthal II** [1978] ECR 629, which found that there was a duty to set aside provisions of national law which are incompatible with EU law, usurped the traditional test of **Campus Oil Ltd v. Minister for Industry and Energy** (No. 2) [1983] I.R. 88, referred to as "**Campus Oil**", in the circumstances of this case; second, that there would be irreparable damage if the injunction sought was not granted. In written submissions, in support of the first issue, reliance was placed on C-213/89 **Factortame** ECR I-2433 and C226/99 **Sipiles** [2001] ECR I-277 to argue that this Court's obligation was to ensure the full effectiveness of EU law, including the judgments of the European Court of Justice, and that interim relief is a tool to be used in fulfilling that obligation. Counsel argued that there were serious doubts concerning the compatibility of the ESM Treaty with EU law, upon which the European Court of Justice would provide preliminary rulings following the reference procedure; that this Court was acting as a court of the EU by referring questions to the European Court of Justice and therefore should apply **Simmenthal II** jurisprudence to preserve Ireland's status as in conformity with EU law; and that once the ESM Treaty enters into force, it would be immune from national judicial proceedings, and, counsel argued, that the ESM Treaty was irreversible. In addition, counsel argued that if the ESM Treaty was found unlawful, the State would have acted in defiance of the rule of law, the State had no method to reverse its commitment to the ESM Treaty, and the State would have paid money into the ESM.

19. Counsel for the State argued that the correct test was **Campus Oil** as informed by the joined cases of C-143/88 & C-92/89 **Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe** and **Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn** [1991] ECR I-415, referred to as "**Zuckerfabrik**". Counsel argued that the case before the Court concerns an international treaty, that the ESM Treaty does not require the European Council Decision for ratification; that the State would be bound by a decision of the Court following consideration of the preliminary ruling of the European Court of Justice, if it were in the appellant's favour; that the appellant would suffer no damage from ratification; and, that the State would risk incalculable harm if the injunction was granted and the treaty came into force, in circumstances where the appellant has not given an undertaking as to damages. Counsel also sought to distinguish the decision in **Crotty** on the basis that the Court there accepted that the appellant would be left without a remedy in the absence of an injunction, that the State did not argue the urgency of ratification, and that the duration of the injunction was seven weeks from application to judgment.

20. There were affidavits before the High Court (which refused an injunction) and this Court. In an affidavit by Jim O'Brien, Second Secretary General of the Department of Finance, deposed on behalf of the State on the 27th June, 2012, he stated, *inter alia*,:-

"14. I say and believe and have been advised by my legal advisors that the need for the ESM is urgent, and the Government believes that it is essential in the national interest that Ireland should be a member of the ESM from the outset.

...

17. There are of course, important reasons of policy and national and broader EU interests for ratifying the ESM at the earliest possible stage. The Euro Area Member States, including Ireland, have announced their intention to ratify the ESM in July, specifically on 9th July 2012. It is important that Ireland should be in a position to be in the vanguard of the countries ratifying the ESM, and to be a member from the outset. It is critical that the ESM should have the largest possible capital base from the outset, and Ireland's contribution, though relatively small, is important in the aggregate. Of equal importance is the fact the decisions of substance in the ESM are taken by mutual agreement. If Ireland is not a party from the outset, it will not have the ability to participate in and vote on the early decisions of the ESM.

18. For these reasons, it is the considered view of the Government that it is essential and imperative for Ireland, and for the euro zone as a whole, that the ESM enters into force in accordance with the envisaged

timetable, and also, that Ireland should be a member from the ESM's initial entry into force - for which the target date is 9th July 2012. The essential interests of Ireland and of the Union in the stability of the euro zone are in issue and the establishment and creation of the ESM is regarded by all Member States, but particularly those whose currency is the euro, as well as by the European Commission, the European Central Bank and the European Parliament, as an essential component in the ongoing efforts to achieve that stabilisation. Those interests could be seriously damaged if the State is injuncted from ratifying the ESM Treaty.

19 On the other hand, I say and believe that the [appellant] would suffer no personal irreparable other harm, whether financial or otherwise, including irreparable harm to him in his capacity as a member of Dáil Éireann, by ratification of the ESM Treaty by Ireland, if the CJEU were ultimately to decide that the said Treaty were incompatible with Union law.

20. If Ireland were prevented from ratifying the ESM Treaty, this could impact very detrimentally on Ireland's proposed re-entry to the financial markets and on the State's capacity to raise the funding it needs to run the country going into 2014. This would represent a serious setback to the substantial progress made to date towards completing and exiting this programme by the end of 2013. I say therefore that the balance of convenience in this case favours a refusal by this Honourable Court of the injunctive relief now sought by the [appellant].

21. Although Ireland is not under a Union law obligation to approve the European Council Decision 2011/199/EU before 1st January 2013, it is obliged thereunder to take the step necessary to secure, in accordance with the necessary constitutional requirements, Ireland's approval. The Government considers that there is no reason why it should delay taking a decision to notify Ireland's approval of the European Council Decision to the Secretary-General of the Council once the Oireachtas has enacted the European Communities (Amendment) Bill 2012. The Government considers that delaying the said notification would introduce an element of uncertainty - whether legal or in the markets - at a time of economic instability, and that this would be contrary to the vital national interests of Ireland in the present deeply uncertain times. Furthermore, the [State] recognise the legality of the European Council Decision, which was adopted unanimously by all of the Member States of the Union and approved by all of the institutions involved in and consulted its adoption under Article 48(6) of the TEU, and, thus, the legality of the proposed amendment to Article 136 TFEU, not least for the reasons already set out above. If this Honourable Court ultimately determines that the [appellant] may maintain his challenge in these proceedings to the validity of that Decision and that the Court has sufficiently serious doubts as to the Decision's validity such as might require it to refer the question of its validity to the CJEU, that Court has power to deal with the temporal effects of its judgment if it ultimately determines that the Decision is invalid. The [State] respectfully consider that there would therefore be neither a need nor a justification for this Court to prevent the Government from notifying Ireland's approval of the Decision as proposed."

### **Decision on Injunction**

21. The appeal by the appellant of the refusal of interlocutory relief by the High Court is a relief sought pending the determination of the reference for preliminary ruling by the Court of Justice, because of the Court's ruling on the first two issues determined in this appeal.

22. The appellant's argument that **Simmenthal II**, **Factortame** and **Siples** require

this Court to grant an injunction without the framework of **Campus Oil** is not well

founded as, in the instant case, this Court has the capacity to grant an injunction.

23. The longstanding test to guide the Court in the exercise of its discretion as to whether to grant an interlocutory injunction was stated in **Campus Oil** which I would apply. In **Campus Oil**, O'Higgins C.J. stated at pp. 105 to 106:

"Interlocutory relief is granted to an applicant where what he complains of is continuing and is causing him harm or injury which may be irreparable in the sense that it may not be possible to compensate him fairly or properly by an award of damages. Such relief is given because a period must necessarily elapse before the action can come for trial and for the purpose of keeping matters in *statu quo* until the hearing. The application is made on motion supported by affidavit. [...] In cases where rights are disputed and challenged and where a significant period must elapse before the trial, the court must exercise its discretion (to grant interlocutory relief) with due regard to certain well established principles. Not only will the court have regard to what is complained of and whether damages would be an appropriate remedy but it will consider what inconvenience, loss and damage might be caused to the other party, and will enquire whether the applicant has shown that the balance of convenience is in his favour."

24. At the kernel of the discretion to be exercised is the balance of convenience to be achieved. I am satisfied that a significant, but not determinative, factor in this case is the described Government policy, and its consequences, as stated in the affidavit of Jim O'Brien, which has been referred to earlier in this judgment.

25. I agree with the judgment of O'Donnell J. in his analysis of the jurisprudence on the granting of interlocutory injunctions and his conclusion that the balance of convenience, on any view, weighs heavily against the grant of an injunction in these circumstances. The appellant's claim has been addressed with considerable expedition in the High Court, this Court, and the Court of Justice of the European Union, which process will provide a very speedy resolution of the issues raised by the appellant, and pending the final outcome of those proceedings the challenged measures should remain in place.

### **Conclusion**

26. On the first issue, applying the principles stated in **Crotty** to the facts of the case, I am satisfied that the Government did not abdicate, alienate, cede, or subordinate its power to another. The decision of the Government to enter into the ESM Treaty was a policy decision within its executive power, pursuant to the Constitution, and so did not involve an impermissible transfer of

sovereignty.

As to the application for an injunction, for the reasons stated, I am satisfied that it was not appropriate to grant an injunction.