THE SUPREME COURT

[Appeal No: 339/2012]

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 of Mr. Justice Clarke delivered the 19th of October, 2012.

1. Introduction

1.1 On the 11th July, 2011 those of the Member States of the European Union who are also members of the euro area agreed the Treaty Establishing the European Stability Mechanism (respectively the "ESM Treaty", or simply the "Treaty", and "the ESM"). The ratification procedure for the ESM Treaty in the subscribing Member States is under way. Ireland had not, when these proceedings came before this court, ratified the Treaty. It is in that context that these proceedings were brought by the plaintiff/appellant ("Deputy Pringle") who is an Independent Member of Dáil Éireann.

1.2 Deputy Pringle alleged that the ratification by the Irish government of the ESM Treaty would be in breach of the Constitution. Deputy Pringle also alleged that the ESM Treaty was inconsistent with aspects of the treaties of the European Union and in particular certain provisions of the Treaty on the Functioning of the European Union ("TFEU") so that, it was said, Ireland's ratification of the ESM Treaty and membership of the ESM would entail obligations which were incompatible with the EU treaties.

1.3 In addition Deputy Pringle asserted that, in the absence of the Government being prepared to give an undertaking to the court that it would not ratify the ESM Treaty pending the outcome of these proceedings, an injunction should be granted restraining the Government from such ratification.

1.4 It should also be noted that the European Council has adopted European Council Decision 2011/199/EU on the 25th March, 2011 ("the Council Decision"). The precise interaction between the Council Decision and the ESM Treaty will need to be considered later in this judgment. However, on a number of bases, Deputy Pringle asserts that the Council Decision is inconsistent with the EU treaties and is therefore invalid.

1.5 These proceedings moved with considerable urgency. A plenary summons was issued in the High Court on the 13th April, 2012 with a statement of claim being delivered on the 25th April. Detailed particulars were exchanged with a defence being filed on behalf of the defendants/respondents ("the State") on the 1st June and a reply being filed on behalf of Deputy Pringle on the 11th June. The matter was listed for an expedited hearing before Laffoy J. and was heard between the 19th and the 29th June.

1.6 On the 9th July Laffoy J. gave a brief outline ruling as a result of which, subject to one matter, Deputy Pringle's claim was dismissed in its entirety. At para. 4 of the order made on that day, Laffoy J. indicated that one part of Deputy Pringle's claim should be referred to the Court of Justice of the European Union. On the 17th July a detailed written judgment was delivered by Laffoy J. setting out her full reasons. Deputy Pringle appealed against the judgment and order of Laffoy J. to this court.

1.7 This judgment deals with some, but not all, aspects of the issues which were raised by Deputy Pringle's appeal. In order to set out why this judgment is directed to only some of the issues raised it is necessary to say something about the procedural history of this appeal before this court. I therefore, turn, to the procedural history.

2. Procedural History

2.1 As noted earlier Laffoy J. gave an oral ruling on the 9th July setting out, in summary form, her conclusions. On the same day counsel for Deputy Pringle and counsel for the State applied to this court for an expedited hearing. It will be necessary to return briefly to the issues said to give rise to urgency. However, this court concluded that it would endeavour to provide such an expedited hearing in respect of at least some of the issues which arose on the appeal and fixed the week of the 23rd July for that hearing. The court arranged for the appeal to be listed for case management on the previous Friday being the 20th July. At that case management hearing a number of practical issues were canvassed.

2.2 By that time the parties had filed detailed written submissions. From those submissions it appeared to the court that, at least in broad and general terms, it was possible to group the issues which seemed likely to arise on the appeal as a whole in the following manner:-

> (a) Issues which arose from the arguments which suggested that, as a matter of Irish constitutional law, the adoption and proposed ratification by Ireland of the ESM Treaty would amount to an impermissible delegation of the sovereignty of the State and an excessive exercise by the government of its executive powers in conducting the external relations of the State ("the sovereignty claim");

(b) Issues which derived from the claim that the legislation enacted by the Oireachtas to implement the ESM Treaty in Ireland (the European Stability Mechanism Act 2012 ("the 2012 Act")) involved a constitutionally impermissible transfer of power from the Oireachtas (and in particular the Dáil) to the Minister for Finance ("the power transfer claim");

(c) Issues arising from the claim that Member States, contracting in accordance with the provisions of the ESM Treaty, would undertake obligations which would be in contravention of provisions of the Treaty on European Union ("TEU") and the TFEU concerning economic and monetary policy and would directly allow encroachment on what were said to be exclusive competences of the Union in the matter of the euro and related policies ("the ESM Treaty claim");

(d) Issues arising from the argument that the Council Decision is invalid as (a) it was not lawfully adopted because of the use of the simplified revision procedures provided for by Art. 48(6) of the TEU (it being said that the Council Decision involves an alteration of the competences of the Union contrary to the third paragraph of that article) and also (b) because it is said that the Council Decision is inconsistent with provisions of the Treaties concerning economic and monetary union and general principles of the law of the European Union in particular the principle of legal certainty ("the Council Decision claim"); and

(e) Issues concerning whether it is appropriate to grant an injunction to restrain the State from ratifying the ESM Treaty pending a final resolution of these proceedings ("the injunction claim").

2.3 It is, perhaps, appropriate to note one possible refinement of that analysis. Counsel on behalf of Deputy Pringle argued that there was a potential connection between at least some of the arguments raised under what might loosely be called the "EU element" of the appeal (that is the ESM Treaty claim and the Council Decision claim) and the argument raised concerning the alleged inconsistency of ratification with the Constitution. In brief it was argued by counsel that the fact that the people of Ireland adopted the EU treaties, and in particular the Maastricht Treaty which provided for the measures necessary to establish the euro, meant that a material alteration to that regime which was in breach of those treaties was, it was said, also in breach of the Irish Constitution. It is obvious that this issue only arises in the event of the alleged incompatibility of the ESM Treaty with the EU treaties being established. It should be noted that counsel for the State argued that such questions were matters of EU law only and had no bearing on the Irish constitutional position.

2.4 The court was concerned to ensure that any issues in respect of which real urgency arose were afforded as early a hearing as could be facilitated. In that context counsel on both sides were invited to indicate the basis of any urgency asserted. On behalf of Deputy Pringle it was said that urgency only arose in the event that there was no undertaking given on behalf of the State or injunction imposed by the court which would have the effect of preventing the State from ratifying the ESM Treaty pending a resolution of these proceedings. The argument of counsel for the State was, in a sense, the mirror image. It was said that the matter was not urgent, strictly speaking, because the State was not constrained from ratifying the Treaty. However, it was acknowledged that the Government would be reluctant to ratify the Treaty while a challenge based on purely Irish constitutional grounds was before this court. On the other hand counsel indicated that it was the view of the Government that it would be contrary to the national interest for the Treaty to come into effect without, as counsel put it, Ireland having a seat at the table.

2.5 In that context it is appropriate to mention the practicalities which surround the ratification of the ESM Treaty. In order for the Treaty to come into effect it is necessary that it be ratified by countries representing at least 90% of the capital sums to which the ESM Treaty would require subscribing states to commit. It is clear that the allocation to Germany represents a sum of 27.1464% of that capital so that the 90% barrier cannot be reached without the support of Germany (in passing it should be noted that France, Italy and Spain also have allocations in excess of 10% so that overall ratification is not possible without the individual ratification of each of those countries as well). In any event German ratification had been delayed pending a decision of the German Constitutional Court. When the matter was first mentioned before this court, counsel for the State indicated that it was possible that at least a preliminary ruling of the German Constitutional Court which might, on one view, clear the way for German ratification, could be given prior to the end of July. However, by the time of the case management hearing to which reference has been made, it had become clear that the relevant preliminary ruling was not to be delivered until at least the 12th September, when it was in fact delivered.

2.6 However, counsel on behalf of the State indicated that it was the Government's view that, in the event that the ruling of the German Constitutional Court was such as permitted German ratification, a sufficient level of ratification would occur very soon after the 12th September so as to allow the Treaty to come into effect. The Government's concern, as expressed by counsel and supported by affidavit evidence filed on behalf of the State, was that it would not be in Ireland's interest if that were to occur without Ireland being a participant from the beginning. It was in the same context that counsel had, when the case was first mentioned before the court, indicated that the Government was willing to give an undertaking not to ratify pending a hearing in this court on the sovereignty claim provided that the court was able to accommodate an expeditious hearing. Counsel for the State also explained the Government's view that early ratification, even before any decision of the German Constitutional Court, was important as a measure designed to build international confidence in Ireland and thus, it was said, increase the chances of Ireland being in a position to return to the international lending markets.

2.7 A second matter touched on at the case management hearing was the question of a possible reference to the Court of Justice under Art. 267 of the TFEU. Counsel for Deputy Pringle suggested that it was almost inevitable that this court, as a court of final appeal, would be required to make a reference. Counsel for the State, while acknowledging that there were only limited circumstances in which this court could decline to make a reference, nonetheless indicated that there might be matters which the court would wish to consider before making a final decision on whether to make a reference.

2.8 Finally, a question arose as to whether, as counsel for Deputy Pringle argued, the issues of Irish constitutional law which arose on the appeal were so inextricably linked with issues of European Union law that it would not be possible to reach any conclusions on the Irish constitutional issues until a reference had been made and answered by the Court of Justice. On the other hand counsel for the State argued that there were matters of Irish constitutional law which could and should be determined by this court independent of any matters which might require to be the subject of a reference to the Court of Justice.

2.9 Having considered the submissions of counsel, the court came to the view, without reaching a final conclusion, that it was possible that there were issues of pure Irish constitutional law which the court could and should determine independent of any reference to the Court of Justice. The court was persuaded that any such issues (being the sovereignty claim) were ones of real urgency and that argument should be heard on those issues and, if possible, a determination given in relation to same, at the earliest possible date. The court listed those issues for hearing on Tuesday the 24th July. In addition it should be noted that the court decided to direct a system of fixed periods for all oral submissions on those issues, allocating two hours to Deputy Pringle's side, a further two hours to the State in response and half an hour to Deputy Pringle in reply.

2.10 Second, the court indicated that it would list, on Thursday the 26th July, the question of whether, and if so in what form, a reference should be made to the Court of Justice. The court indicated that it would endeavour to provide the parties, on Tuesday the 24th, with the court's suggested draft of such a reference. A draft reference was so provided.

2.11 The court also indicated that it would hear counsel on the question of whether it was appropriate to restrain the Government, pending a final resolution of all of the issues which arise in these proceedings, from ratifying the ESM Treaty with such argument also to be heard on Thursday the 26th. The court left over all other questions until a future date. For the reasons which follow I supported the court's decision so to do.

2.12 The remaining issues did not seem to me to be of the same level of urgency. If it were found to be permissible, as a matter of pure Irish constitutional law, for Ireland to ratify the ESM Treaty then the precise mechanism, which might be employed for Ireland's participation and, in particular, any question as to the extent of the oversight by the Dáil over the exercise by the Minister for Finance of his role in the ESM Treaty, would be an entirely internal Irish matter over which this court could exercise effective control. Thus the power transfer claim did not seem to me to be of the same level of urgency as the other claims.

2.13 Likewise the argument raised as to the interconnection between aspects of the claims based on EU law and the Irish constitutional claims seemed to me to be one which could await the result of the reference to the Court of Justice for further consideration. Indeed by then the point may well be moot for if the Court of Justice finds for the State then the point does not arise and if the Court of Justice finds for Deputy Pringle then it seems highly unlikely that the ESM Treaty in its present form could go ahead, at least without further measures being adopted.

2.14 Having conducted the hearings referred to, the court, on the 31st July, made a ruling on the issues there argued. It should be noted that, as a result of hearing the observations of the parties on the question of a possible reference, the court had invited counsel on both sides to attempt to agree certain amendments to the draft reference which had been provided to the parties by the court. Counsel very helpfully supplied an agreed amended version of the reference. On further consideration the court made a number of, relatively minor, further adjustments. The final form of the reference was annexed to the Ruling of the Court delivered on the 31st July.

2.15 It should also be recorded that counsel for the State did not strongly press the suggestion that no reference was appropriate. In addition, counsel on both sides were agreed that if there was to be a reference it should encompass not simply questions concerning the validity of the Council Decision but also questions arising from the ESM Treaty issue and a question concerning the entitlement of a Member State to enter into and ratify the ESM Treaty pending the entry into force of the Council Decision.

2.16 It followed that all of the EU issues which arose in these proceedings were referred by this court to the Court of Justice. This court requested the Court of Justice to apply to the reference the accelerated procedure pursuant to Art. 104a of the Rules of Procedure of the Court of Justice. The result of the reference is still awaited.

2.17 In addition, however, on the 31st July this court ruled that the ESM Treaty did not involve a transfer of sovereignty so as to make its ratification by Ireland incompatible with the Constitution. In addition this court refused the application for an interlocutory injunction restraining the State from ratifying, approving or accepting the ESM Treaty pending the final determination of these proceedings. The court went on to indicate that judgments on those latter issues would be delivered at a future date. This judgment is directed towards setting out the reasons why I support the decision of the court on both the sovereignty claim and the injunction claim. I propose to turn first to the sovereignty claim and on that basis it seems appropriate to turn to the arguments made in the High Court on the issue of pure Irish constitutional law and to the judgment of Laffoy J. on that question.

3. Issues of Irish Constitutional Law – The High Court

3.1 Section IV of the judgment of Laffoy J., which begins at para. 91, is entitled "The ESM Treaty and the Constitution". Most usefully that section of the judgment commences by noting three points of substantial agreement which had emerged in both the written submissions filed before the High Court and at the oral hearing before that court. In addition the judgment, at para. 95, summarises what are described as the three limbs to Deputy Pringle's constitutional argument.

3.2 It is, therefore, helpful to start by noting the parameters of the claim made in the High Court. The three issues on which there appears to have been consensus start with the acceptance on behalf of the State that the ESM Treaty is not "necessitated" by the obligations of membership of the European Union. Like Laffoy J., I agree that the State was correct to accept that proposition. The State could not seek to rely on Art. 29.4.6° of the Constitution (which renders immune from constitutional challenge measures necessitated by membership of the European Union) so as to provide a legal basis for the ESM Treaty. Indeed, much of the argument advanced on behalf of the State centres on the fact that the ESM Treaty is an international agreement such that the State's participation is, it is said, voluntary and not, therefore, necessitated by membership of the EU.

3.3 The second matter of agreement was that, for the purposes of proceedings in which the courts are invited to consider whether ratification by the State of the ESM Treaty, without the approval of the people in a referendum in accordance with Art. 46 of the Constitution, would be consistent with his constitutional rights, Deputy Pringle has standing. There were some disputes as to Deputy Pringle's standing to raise certain of the EU related arguments also raised in the proceedings. However, there was no contest as to his standing to make the Irish constitutional argument.

3.4 Third, it was accepted by the State that the Government is not immune from judicial control in the conduct of the State's external relations (placing reliance on the judgment of Henchy J. in *Crotty v. An Taoiseach* [1987] I.R. 713, at p.786). However, counsel for the State did, as noted by the trial judge, also seek to place reliance on the wide discretion enjoyed by the Government in foreign policy and in the conduct of international relations as noted by Kearns J. in *Horgan v. An Taoiseach* [2003] 2 I.R. 468, at p.512.

3.5 None of those matters were, therefore, in controversy before the High Court or this court save, perhaps, to the extent that there may be an issue as to the precise extent of the discretion enjoyed by the Government in the conduct of foreign affairs and international relations.

3.6 It is next appropriate to turn to what were described as the three limbs of Deputy Pringle's argument for contending that the ESM Treaty is incompatible with the Constitution. As noted by Laffoy J. at para. 95 of her judgment, counsel for Deputy Pringle had submitted a summary of the grounds underlying his claim which formed the basis of the trial judge's analysis of the issues which arose. The three limbs identified are derived from that summary.

3.7 The first limb was to the effect that the ESM Treaty allegedly constitutes such a degree of delegation of sovereignty that it is

incompatible with the Constitution and, as a consequence, that a referendum to amend the Constitution is necessary to permit ratification of the ESM Treaty and Ireland's participation in the ESM. This is the sovereignty claim. As noted by the trial judge the argument under this heading is based primarily on the decision of this court in *Crotty*.

3.8 The second limb involved an argument that the implementation of the ESM Treaty in the manner contemplated involves an impermissible transfer from the Oireachtas of a degree of monetary and budgetary power to the Executive, and, in particular it is said, to the Minister for Finance, which infringes the Constitution. This is the power transfer claim. A little needs to be said about the background to this argument. While the case was at hearing before the High Court the 2012 Act was before the Oireachtas. That Act was enacted after the hearing was concluded but before judgment was delivered in the court below. Deputy Pringle had sought to amend his claim to include a challenge to the validity of the 2012 Act. A question arose in the High Court as to the extent to which it was possible, given that the 2012 Act had not been passed by the Oireachtas and signed into law by the President, for the courts to entertain such a challenge. However, by the time Laffoy J. came to make her ruling, the 2012 Act had become law and the judgment of the trial judge deals, therefore, with the specific challenge brought to the constitutionality of that Act. However, as the 2012 Act was concerned with the internal means adopted by Ireland to implement the ESM Treaty, rather than with the capacity of Ireland to ratify the ESM Treaty and participate in the ESM, this court did not, as pointed out, consider that the issues arising (being those which derive from the power transfer claim) were of the same degree of urgency and those questions were left over for further consideration.

3.9 The third limb of Deputy Pringle's challenge was to the effect that the ESM Treaty is incompatible with European Union law and in fundamental contradiction to the EU treaties. On that basis it was argued that the Constitution was breached. While the trial judge considered, and rejected, that argument there was a question as to whether it was either necessary or appropriate for this court to consider those issues at this stage.

3.10 However, as pointed out earlier, it seemed to me that the third limb of Deputy Pringle's argument was entirely dependant on it being established that there was an incompatibility or inconsistency between the ESM Treaty and the provisions of the EU treaties. Those questions were to be and have been referred to the Court of Justice. In the event that the Court of Justice rules in favour of Deputy Pringle in such a way as renders it incompatible with the EU treaties for all Member States who are members of the euro zone to participate in the ESM then it is difficult to envisage any circumstances in which the ESM could survive. It follows that, in those circumstances, the question of whether any such incompatibility with the EU treaties might also render participation by Ireland in the ESM inconsistent with Irish constitutional law could hardly arise in practice. If participation in the ESM is not found by the Court of Justice to be incompatible with the EU treaties then this latter argument of Irish constitutional law does not arise. It follows that no useful purpose would have been achieved by attempting to resolve that question of Irish constitutional law as a matter of urgency as any issues which might, in theory, arise under that heading would inevitably be answered, one way or the other, as a matter of practicality, by the result of the reference. For those reasons I supported the court's decision not to address that issue at this stage.

3.11 In the light of that consideration and of the deferral of the issues arising under the power transfer claim until after a result of the reference becomes known, it follows that the only issues of Irish constitutional law on which this court has already ruled are the issues arising under the sovereignty claim. As pointed out, the arguments which arise under that heading stem from the decision of this court in *Crotty*. I, therefore, turn to a consideration of that case.

4. *Crotty*

4.1 *Crotty* was concerned with the ratification by Ireland of the so called Single European Act ("the SEA"), but insofar as this court held that ratification without an amendment to the Constitution was impermissible, the decision was concerned with those aspects of the SEA which required coordination of foreign policy. It is logical, in my view, therefore, to start with an analysis of the relevant provisions of the SEA which were found, in *Crotty*, to give rise to a potentially impermissible transfer of sovereignty. Those provisions were found in Title III of the SEA.

4.2 In the head note to the report of *Crotty*, at pp.713-714, the relevant provisions are described in the following way:-

> *"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."*

4.3 In characterising, for the purposes of his judgment, the commitments which would be entered into by Ireland on ratifying the SEA so far as Title III was concerned, Walsh J. noted the following at pp.781 and 782:-

> *"It commits 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."

4.4 Likewise Henchy J., at p.785, characterised the principal courses of conduct to which the High Contracting Parties bound themselves in the following terms (being a quote from s.2 of Art. 30 of the SEA):-

"(a) The High Contracting Parties undertake to inform and consult each other on any foreign policy matters of general interest so as to ensure that their combined influence is exercised as effectively as possible through coordination, the convergence of their positions and the implementation of joint action.

(b) Consultations shall take place before the High Contracting Parties decide on their final position.

(c) In adopting its positions and in its national measures each High Contracting Party shall take full account of the positions of the other partners and shall give due consideration to the desirability of adopting and implementing common European positions.

In order to increase their capacity for joint action in the foreign policy field, the High Contracting Parties shall ensure that common principles and objectives are gradually developed and defined.

The determination of common positions shall constitute a point of reference for the policies of the High Contracting Parties.

(d) The High Contracting Parties shall endeavour to avoid any action or position which impairs their effectiveness as a cohesive force in international relations or within international organizations."

4.5 Henchy J. characterised the effect of those provisions of Title III as giving rise to a situation where, on ratification, "each State's foreign policy will move from a national to a European or Community level." In addition Henchy J. noted that, at p.785, apart from becoming bound to endeavour jointly to formulate and implement a European foreign policy, "each Member State will become specifically bound to inform and consult its fellow-members, to refrain from deciding on a final position as to an issue of foreign policy without prior consultations, to take full account of the positions of the other partners in adopting its positions and in its national measures, to ensure that common principles and objectives are gradually developed and defined, and to recognise that the determination of common positions shall constitute a point of reference."

4.6 On that basis Henchy J. expressed the view that it was clear that each Member State would immediately, on ratification, "cede a portion of its sovereignty and freedom of action in matters of foreign policy".

4.7 Likewise Walsh J., at pp.780 and 781, characterised the relevant provisions in the following terms:-

"What the Treaty does is to commit the State to pursuing a policy which has, inter alia , as one of its objectives the transformation of the relations of Ireland with the other Member States of the European Communities into a European Union."

4.8 It is against the backdrop of those provisions that the judgments of the majority in this court in *Crotty* need to be analysed. The key passages from those judgments seem to me to be as follows. First, Walsh J. said the following:-

"All of these matters impinge upon the freedom of action of the State not only in certain areas of foreign policy but even within international organisations such as the United Nations or the Council of Europe. That latter effect of the Treaty could amount to the establishment of combinations within these organisations. In touching upon the maintenance of the technological and industrial conditions necessary for security the Treaty impinges upon the State's economic, industrial and defence policies. The obligation on the High Contracting Parties after five years to examine whether any revision of Title III is required does not give the Treaty a temporary character." (p.782)

...

"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 itself 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." (p.783)

In addition Walsh J. suggested that the "essential nature of sovereignty is the right to say yes or to say no" (p.781).

4.9 In coming to the same overall conclusions Henchy J. said the following:-

"The essence of this fundamental transformation in the relations between the Member States of the European Communities is that they are no longer to have separate foreign policies but are, as far as possible, to merge their

national foreign policies in a European (i.e. Community) foreign policy and to work together in the manner indicated, so as to implement what is called European Political Cooperation, with a view to achieving eventual European union." (p.785)

...

"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." (p.787)

...

"A perusal of Title III of the SEA satisfies me that each ratifying Member State will be bound to surrender part of its sovereignty in the conduct of foreign relations. That is to happen as part of a process designed to formulate and implement a European foreign policy. The freedom of action of each state is to be curtailed in the interests of the common good of the Member States as a whole." (p.787)

4.10 In addition Hederman J. came to the following view:-

"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." (p.794)

4.11 Before going on to analyse the reasoning of the majority of this court in *Crotty* there are some other aspects of the decision in that case which bear noting. One feature of *Crotty* was a challenge brought to the validity of the European Communities (Amendment) Act 1986 ("the 1986 Act") having regard to the provisions of the Constitution. The terms of the SEA concerning foreign policy cooperation were not affected by the 1986 Act. Given that there was a direct challenge to the constitutionality of the 1986 Act a single judgment of this court was delivered by Finlay C.J.. For the reasons set out at pp.769 and 770, this court came to the view that the then 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, both in terms of the numbers of its Member States and in terms of the mechanics to be used in the achievement of its agreed objectives".

4.12 In that context Finlay C.J. went on to state the following:-

"Having regard to these considerations, it is the opinion of the Court that neither the proposed changes from unanimity to qualified majority, nor the identification of topics which while now separately stated, are within the original aims and objectives of the EEC, bring these proposed amendments outside the scope of the authorisation contained in Article 29, s. 4, sub-s. 3 of the Constitution. As far as Ireland is concerned, it does not follow that all other decisions of the Council which now require unanimity could, without a further amendment of the Constitution, be changed to decisions requiring less than unanimity."

4.13 Two aspects of that passage require comment. First, it is clear that absence of unanimity was not considered, of itself, to necessarily involve a transfer of sovereignty. Some competences which had already been conferred on the then European Economic Community ("EEC") on the basis of requiring a unanimous decision were changed, as a result of the relevant provisions of the SEA, so that decisions could be made on the basis of qualified majority voting. That change was not, of itself, on the facts of *Crotty*, found to involve a transfer of sovereignty. It should, however, also be noted that Finlay C.J. cautioned against what might be described as a path of gradualism by noting that it did not follow that there could be a complete alteration, in all cases, of the requirement for unanimity without a transfer of sovereignty thus leading to a requirement for a change in the Constitution.

4.14 In like vein, Henchy J., in that portion of the judgment concerned with foreign policy cooperation, said the following, 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. National objectives and ideological positions must defer to the aims and decisions of an institution known as European Political Cooperation, which is to work in tandem with the European Communities. A purely national approach to foreign policy is incompatible with accession to this Treaty. The methods of co-operation between the Member States, which hitherto have been informal, aspirational or, at most, declaratory (as under the Stuttgart Declaration), now pass into a realm of solemnly covenanted commitment to the conduct of foreign policy in a way that will lead to European political union, at least in the sphere of foreign policy. In that respect, Title III of the SEA is the threshold leading from what has hitherto been essentially an economic Community to what will now also be a political Community."

4.15 Thus both the judgments of Finlay C.J. and Henchy J. emphasised a cautionary approach to gradualism. It does always need to be kept in mind that it is not permissible to do by four separate small steps that which could not be done in one giant leap. However, what persuaded Henchy J., along with the majority, to find that the ratification of the foreign policy cooperation elements of the SEA was inconsistent with the Constitution was that those provisions amounted to an immediate ceding of sovereignty and freedom of action in the matter of foreign affairs.

4.16 On a narrow reading of some of the passages cited it might be said that this court, in *Crotty*, came to the conclusion that the overall architecture of the Irish Constitution does not permit the Government, in exercise of its power to conduct the foreign policy of the State in accordance with Art. 29.4.1° of the Constitution, to enter into binding arrangements with other countries which would, in any way, have the effect of circumscribing Ireland's freedom of action in the foreign policy field. For reasons which I hope to demonstrate it does not seem to me that such a conclusion can be found in the judgments of this court in *Crotty*. If such were to be the proper analysis of the reasoning of the majority of this court in *Crotty*, then I would, respectfully, disagree with it.

4.17 The backdrop to *Crotty* is, of course, the constitutional architecture relating to executive power and the conduct of international relations. Article 29.4.1° provides that the executive power of the State "in or in connection with its external relations" is

to be in accordance with Art. 28, exercised "by or on the authority of the Government". Art. 28.2, of course, provides that the executive power of the State is to be, subject to the provisions of the Constitution, exercised by or on the authority of the Government. Thus, the Constitution is explicit that, in the conduct of the foreign policy of the State, the Government is constrained by the provisions of the Constitution.

4.18 Article 29.5 provides a number of specific examples of express constitutional constraints that apply to the Government in exercising its foreign policy or external relations mandate. Article 29.5.1° requires that every international agreement to which the State becomes a member must be laid before Dáil Éireann, while Art. 29.5.2° provides that the State is not to be bound by an international agreement involving a charge upon public funds unless the terms of the agreement have been approved by Dáil Éireann. The only exception to these later requirements applies where the relevant agreement is of a technical and administrative character. Separately, Art. 29.6 provides that an international agreement is not to become part of domestic law, unless so determined by the Oireachtas. A fourth requirement is of a more general nature (but nonetheless required by Art.28.2) and it might be expressed as being the requirement that an international agreement not infringe the terms of the Constitution.

4.19 It is important to note, therefore, that the Constitution does not require, as a matter of principle, that all international agreements be put to the people for approval through a referendum. It is only where an international agreement (either indirectly or by design) breaches the terms of the Constitution as it then stands that there is a requirement for an appropriate amendment to be made to the Constitution. The question of whether an international agreement infringes the Constitution is ultimately a matter for the determination of the courts and, in accordance with Art. 34.4.6°, the decision of this court, in that regard, is final and conclusive.

4.20 The question of how the terms of a particular international agreement interacted with the terms of the Constitution was one of the issues facing this court in *Crotty*. As described earlier, the particular aspect of concern within the SEA was the requirements on the coordination of foreign policy. It was on the facts of those requirements that this court found that Title III of the SEA amounted to a potentially impermissible transfer of sovereignty, thus breaching the Constitution and in turn requiring a referendum.

4.21 When speaking of international agreements, it is, of course, necessary to distinguish a particular type of such agreement or Treaty, to which the Constitution accords special status. Article 29.4.6° grants a special status to the EU treaties in that acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union are deemed not to infringe the Constitution. A similar provision, Art. 29.10, applies in respect of the Treaty on Stability, Coordination and Governance in the Economic and European Monetary Union ("TSGC"). Thus the EU Treaties, from time to time recognised by appropriate amendments to the Constitution, are by definition consistent with the Constitution. The only issue which arises, in the light of *Crotty*, is as to whether changes in the EU Treaties are of a type which would bring the scope of the competences of the EU beyond those which might be said to have been authorised by the Constitution in its then current form in a way which would render ratification of the new amending Treaty itself a breach of the Constitution. Against the background of that general constitutional architecture it is next necessary to say something about the conduct of foreign policy.

4.22 The Government is given a very wide discretion as to how to conduct the foreign policy of this State under the Constitution. (See *Horgan v. An Taoiseach* [2003] 2 I.R. 468). It would be a strange conclusion indeed if that broad discretion was to mean that the Government could not, as a means of exercising that discretion and, thus, exercising its sovereignty, enter into what must be the most usual way in which sovereign states exercise their sovereignty, i.e. by agreeing with other sovereign states to pursue a specified policy in a specified way. Many legitimate policy objectives which the Government, in exercise of its constitutional entitlement to formulate and implement foreign policy, might wish to pursue can only, as a matter of practicality, be achieved by entering into bi-lateral or multi-lateral treaty arrangements with other countries of like or similar mind with a view to securing specified ends.

4.23 Obviously, such treaties, if they involve an exposure to financial obligations, require the approval of the Dáil in accordance with Art. 29.5.2° of the Constitution. However, subject to that requirement, what limitations can properly be said to lie on the discretion of the Government to enter into international treaties?

4.24 It seems to me that the limitation can be found in the language of the judgments of the majority in *Crotty*. Walsh J., at p.783, spoke of the limitation as being one which did not permit the Government "to abdicate that freedom or to enter into binding agreements with other States to exercise that power in a particular way … so to bind the State in its freedom of action in its foreign policy". Henchy J., at p.787, spoke of the Government not being permitted "to alienate in whole or in part to other States the conduct of foreign relations". Henchy J. also spoke of Title III of the SEA as amounting to a fundamental transformation in relations between the Member States of the then European Communities while Hederman J., at p.794, spoke of the limitation as being one which did not permit the Government "to subordinate, or to submit, the exercise of the powers bestowed by the Constitution to the advice or interest of other states".

4.25 On that basis it seems to me that the overall position is quite clear. The Government enjoys a wide discretion, under Art. 29.4, to enter into international treaties subject only to the obligation to obtain the approval of the Dáil, if there is a commitment to financial expenditure, or that of the Oireachtas, if it is considered necessary to change domestic Irish law so as to comply with obligations undertaken by the treaty concerned. The limit on the discretion which the Government holds arises where the relevant treaty involves Ireland in committing itself to undefined policies not specified in the treaty and in circumstances where those policies, which Ireland will be required to support, are to be determined not by the Government but by institutions or bodies specified in the treaty. It is an abdication, alienation or subordination of policy formation and adoption which is not permitted. A transference of the means of implementing a policy agreed by the Government, and specified in the treaty concerned, to an appropriate implementation institution or body may be permitted provided that it does not go so far as to amount, in substance, to an abdication, alienation or subordination of the role of government under the Constitution.

4.26 Very many international treaties involve an acceptance, at the level of international law, that Contracting States will be bound by certain obligations. If, in accordance with the policies of the institutions of the United Nations, sanctions are imposed on a country in accordance with the UN treaties, Ireland will be bound, as a matter of international law, to enforce those sanctions. That would be so even if it were to transpire that the Irish Government was not entirely comfortable with the imposition of sanctions on the country in question. However, the underlying policy behind the imposition of sanctions by the UN (including the circumstances in which a decision to impose sanctions might be adopted) is one to which Ireland subscribed by joining the United Nations. The implementation of that policy on the facts of any individual case is a matter which, under the UN treaties, is to be determined by the competent bodies within the UN. Short of leaving the UN, Ireland is bound to meet the obligations imposed by decisions made by competent bodies within the UN. Many other examples could be given.

4.27 Against that general background it is necessary to turn to the provisions of the ESM Treaty to which counsel for Deputy Pringle draws attention for the purposes of suggesting that ratification and acceptance of the Treaty by Ireland would amount to a

constitutionally impermissible transference of sovereignty.

5. The ESM Treaty

5.1 It will be necessary to touch on some aspects of the detail of the ESM Treaty and, indeed, certain aspects of that treaty which may not be absolutely clear, in due course. However, the underlying structure of the Treaty can hardly be doubted. The Treaty establishes what is described as an international financial institution given the name ESM. As pointed out earlier the members of the ESM are the members of the European Union who are part of the euro zone. The ESM Treaty contemplates that any other EU Member States who become members of the euro zone may join the ESM.

5.2 The key objective of the ESM Treaty is, as is pointed out in Art. 3, to "mobilise" funding so as to provide support to members in financial difficulty where the provision of that support is "indispensable to safeguard the financial stability of the euro area as a whole and of its Member States".

5.3 It is, at this stage, appropriate to note some relevant features of the governance of the ESM. The principal means of governance is by a Board of Governors which is provided for in Art. 4. The minister responsible for finance of each member (including, therefore, the Irish Minister for Finance) is to be a member of the Board of Governors (see Art. 5.1), although there is provision for an alternate. Most of the important decisions of the Board of Governors are required to be taken by what is described as "mutual agreement" which under Art. 4.3 requires unanimity. However, there are two exceptions to that situation. First, Art. 4.4 allows a decision to grant financial assistance to a member (but only such a decision) to be taken by a qualified majority of 85% where the Commission of the European Union and the European Central Bank both conclude that a failure to urgently adopt a decision to grant such assistance would be to "threaten the economic and financial stability of the euro area". It is unnecessary to consider the precise circumstances in which the derogation set out in Art. 4.4 might apply. It is acknowledged on behalf of the State that there may be circumstances where, therefore, a decision to give financial assistance (as opposed to other types of decisions) could be taken without Ireland's agreement. The second manner in which it is possible that important decisions could be made without Ireland's agreement is to be found in Art. 4.8 whereby a member who has failed to pay sums required under the Treaty will, so long as the relevant sums remain outstanding, lose its entitlement to vote.

5.4 At least at a general level the overall situation seems clear. There are limited circumstances, which I have set out, in which it is possible that a decision to provide financial assistance to a member may be made without unanimity and, therefore, by necessary implication, without Ireland's agreement. Also Ireland may lose its vote if Ireland is in arrears. However, in all other circumstances important decisions of the ESM must be taken by a unanimous decision of the Board of Governors including, as it will, if ratified by Ireland, Ireland's representative.

5.5 The mechanism adopted to allow the ESM to have the funds necessary to provide financial assistance is to require the members of the ESM to provide capital and to permit the ESM itself to engage in borrowing. Capital is to be provided both on a paid-in basis and an authorised basis. The authorised capital stock is defined as €700 billion divided in a proportionate way between the Member States in a manner calculated in accordance with Annex I to the ESM Treaty (see Art. 8.1). Ireland's share is specified (in Annex II) as being €11,145,400,000. Likewise the so called "paid-in" shares are to total €80 billion with a proportionate allocation to each member.

5.6 Thus what is contemplated is that the members of the ESM will, in a relatively short period of time, contribute €80 billion to the ESM in a manner proportionate to their economies. The members will also have an allocation of authorised capital which they can be called on to contribute in circumstances specified in the Treaty, up to a total collective sum of €700 billion. While there was some debate at the hearing about the precise borrowing provisions of the ESM Treaty there is no dispute but that the ESM is entitled to borrow although it is clear (see Art. 8.5) that the liability of each ESM member is limited to its share of the authorised capital stock at its issue price. The exposure of each member is, therefore, limited to the value of its share of the authorised capital stock unless the authorised capital stock is increased in accordance with the terms of the Treaty.

5.7 Such an increase can only occur in accordance with the terms of Art. 10 which provides that the Board of Governors may review the adequacy of the authorised capital stock and can decide to alter that stock by making appropriate amendments both to the total and to the share of each member. However, it seems to me to be clear from Art. 10 that such a decision of the Board of Governors can only "enter into force after the ESM Members have notified the Depository of the completion of their applicable national procedures".

5.8 As has been pointed out there are two circumstances in which a member such as Ireland might not have the opportunity to exercise an effective veto over a decision of the Board of Governors which is otherwise required to be unanimous. While counsel for Deputy Pringle suggested that the provisions of Art. 10 might be ambiguous it seems to me that its terms are clear. In order for an increase in authorised capital stock to "come into effect", "applicable national procedures" require to be completed. As an increase in authorised capital stock beyond the current sum of €700 billion would necessarily carry with it (unless it arose solely out of an increase in the membership of the ESM) an increase in the allocation of shares to Ireland with the consequential exposure of Ireland to an increased liability to meet any call on the as yet not "paid-in" shares, it follows that the Irish Constitution would require any such measure to be passed by the Dáil as part of Ireland's national procedures. I, therefore, respectfully disagree with the analyses of the circumstances in which the authorised capital of the ESM can be increased as suggested by Hardiman J. in his dissenting judgment. If the Dáil does not approve an increase then Ireland, as an ESM member, will not be able to complete "applicable national procedures" and the increase will not be able to "enter into force".

5.9 It seemed to me that that analysis leads to two conclusions. The first might arise in circumstances where the Irish Government is in favour of an increase in authorised capital so that the Minister for Finance of the day, in his/her capacity as a member of the Board of Governors of the ESM, votes in favour of such a measure. The second might arise where Ireland is against the proposed increase in authorised capital but is unable in practice to block it for one or other of the reasons identified earlier. However, in either eventuality the increase cannot come into effect until all members have completed their applicable national procedures which, in practical terms, means that it is not possible to increase the authorised capital of the ESM without, amongst other things, that measure being approved by Dáil Éireann (and, doubtless, going through many other national procedures under the constitutional architecture of the other members).

5.10 The combination of the limited liability of the members of the ESM to which reference has already been made and the fact that the authorised capital of the ESM cannot be increased without the approval of Dáil Éireann means, in substance, that the exposure of Ireland to the ESM is capped, in the absence of approval by Dáil Éireann, at the sum of €11.145 billion to which reference has already been made.

5.11 I have already noted that there was some debate as to the precise parameters of the borrowing entitlement of the ESM. One

preliminary point should be noted. There is already in being a funding mechanism termed the European Financial Stability Facility (the "EFSF"). While not material to the issues which this court has to decide it should be noted that the ESM Treaty contemplates that the ESM will take over the position of the EFSF. Certain of the transitional provisions of the ESM Treaty, therefore, make reference to total sums by reference both to the position of the ESM and the EFSF. Recital 6 of the ESM Treaty refers to the fact that the initial maximum lending volume of the ESM is set at €500 billion (including any outstanding EFSF stability support). The same recital notes that a reassessment of that amount is to occur "prior to entry into force of this Treaty". The recital further notes that the Board of Governors may increase the maximum lending volume in accordance with Art. 10.

5.12 Thereafter, Art. 10 does make provision for a review by the Board of Governors of the maximum lending volume. Curiously, however, none of the articles of the Treaty actually make provision for a maximum lending volume as such (the only reference being in the recital to which I have referred). Further, while Art. 10 speaks of the Board of Governors carrying out a review of the maximum lending volume, no operative provision for an increase in that volume is to be found in Art. 10 although, again, Recital 6 seems to contemplate such a possibility. Finally, while that recital seems to contemplate a potential reassessment of the maximum lending volume prior to the Treaty coming into force, no particular mechanism for the carrying out of that reassessment is specified such that it is difficult to see how such a reassessment could be operative in the absence of an amendment to the Treaty.

5.13 There is, therefore, some confusion as to the precise manner in which the maximum lending volume is to operate. However, it seems clear that, irrespective of how the maximum lending volume is determined, the ESM can only give financial assistance out of money which it has, either on the basis of capital contributed by its members or money obtained from financial institutions or on the financial markets. Irrespective of how much the ESM borrows, the members' limited liability means that the exposure of those members cannot, without the agreement of each member in accordance with the appropriate national acceptance procedures relevant to that member, exceed the authorised capital attributable to the relevant member. It follows that, irrespective of the amount of borrowing that the ESM engages in, Ireland's exposure is capped at the sum of €11.145 billion unless and until an approval of a larger capital allocation to Ireland is obtained from Dáil Éireann. Extra borrowing by the ESM does not expose Ireland to any larger potential liability. In those circumstances I found it difficult to see how there can be an argument that the borrowing entitlement of the ESM (however the relevant provisions may be interpreted and operate) can amount to a diminution in Irish sovereignty. Ireland has no obligation to cover such borrowings beyond the monies already committed to the ESM by reference to Ireland's allocation of the authorised capital.

5.14 There was argument at the hearing before this court on what might be said to be the practicalities of a situation which might develop where there was a demand for further funding for the purposes of the ESM which, whether as a matter of accounting or as a matter of practicality (derived from an inability to borrow further) exceeded the current authorised capital. I do not doubt that circumstances could arise where it might be perceived that there was a political imperative to increase the authorised capital of the ESM. Doubtless, in such circumstances, there would be significant political pressure on Ireland to agree to an increase. However, it is clear that the Government of Ireland, through the Minister for Finance as a governor of the ESM, would, in almost all circumstances, retain the right to say no and, in any event, Dáil Éireann, in all circumstances, retains the right to say no.

5.15 There are many circumstances in which both the Government and the Oireachtas may come under significant practical political pressure, either domestically or internationally, to adopt certain measures. That is the way of the world. However, the architecture of the Irish Constitution is concerned with where the final decision lies. The fact that institutions of government may, as a matter of practical politics, from time to time have to make decisions or bend their policies in the direction of the wishes of other countries does not, of itself, breach that model. That constitutional architecture may be interfered with when the institutions of government enter into commitments which amount to an abdication, alienation or subordination of the powers which the Constitution itself gives to those institutions.

5.16 In the domestic field many schemes involve the expenditure of funds either as a result of legislation or administrative schemes for which the Dáil votes to allocate money. Changes in such schemes can be a matter of significant political controversy. Indeed, as current conditions demonstrate, it is often easier to resist pressure to implement a new scheme than to reverse a scheme already in place. However, such practical political effects do not alter the situation which is that the Oireachtas (if it be legislation) or the Government (with the support of the Dáil if it be administrative) retains the ultimate decision. The fact that previous action (i.e. the implementation of a scheme) may make it politically harder to change policy is a practical reality. However, the constitutional architecture is preserved because the decision is made by those organs of government which the Constitution specifies.

5.17 Against the background of that analysis of the principal features of the ESM Treaty I now turn to the arguments made on behalf of Deputy Pringle which suggest that Ireland's participation in the Treaty would amount to an impermissible diminution in Irish sovereignty.

6. Deputy Pringle's Arguments

6.1 While a range of more detailed arguments were addressed on his behalf, at the core of the case made by Deputy Pringle is an assertion that the Government cannot agree to provide, and the Oireachtas cannot commit, money for the purposes of the ESM Treaty because to do so amounts to the adoption of an irreversible policy not capable of being withdrawn from. On that basis it is said that, to use the words of Walsh J. in *Crotty*, Ireland loses, by ratifying the ESM Treaty, the right to say no.

6.2 In putting forward that argument reliance was placed on a number of aspects of the Treaty. First it was said that the Treaty is permanent. Attention was drawn to the fact that there are no express provisions contained in the ESM Treaty permitting a member of the ESM to withdraw. In that context it should be noted that that the State argued that there is an implied entitlement to withdraw. That is an issue considered but, for reasons set out in her judgment, not dealt with by the trial judge and is one to which I will return.

6.3 Second, attention is drawn to the two bases already analysed on which it is possible that what might loosely be called a lending transaction in favour of a member can be put into effect without the support of each of the ESM members. Counsel for the State accepts that that analysis is correct and that it is possible for a "lending" decision to occur without the support of Ireland in those limited circumstances. Given that agreed position on the functioning of the ESM Treaty it is argued on behalf of Deputy Pringle that future policy, in the sense of a decision as to whether money placed into the ESM by Ireland should be lent to other members, will be capable of being determined without Ireland’s agreement. On that basis it is said that Ireland has committed not to change its policy in a way analogous to the manner in which Ireland had committed to adapt its foreign policy to those of the other Member States of the then European Community which was found to be constitutionally impermissible without a referendum in *Crotty*.

6.4 Next, attention was drawn to what were said to be the unlimited borrowing powers of the ESM. I have already addressed the somewhat unclear provisions of the ESM Treaty in this regard. However, for the reasons then noted, being that Ireland cannot, by virtue of the limited liability of the ESM, have any exposure in respect of ESM borrowings which exceed the amount of the authorised capital applicable to Ireland which the State would commit to, in the ESM Treaty, it follows that no question of loss of sovereignty under that heading can arise.

6.5 Next reliance was placed on what was said to be the close interconnection between the TSGC and the ESM Treaty. Indeed both Treaties are described, in Recital 5 to the ESM Treaty, as complementary in "fostering fiscal responsibility and solidarity within the economic and monetary union". It was said on behalf of Deputy Pringle that the ESM Treaty amounts, therefore, to a permanent and irreversible implementation of the policy behind both the TSGC and the ESM Treaty.

6.6 Attention was also drawn to Art. 3 of the ESM Treaty which sets out its purpose (although, as counsel for the State noted, the title of Art. 3 is "purpose" and not "purposes"). The underlying requirement, as has already been noted, is that the giving of financial assistance is restricted to circumstances where it is considered that providing the relevant support is "indispensable to safeguard the financial stability of the euro area as a whole and of its Member States". It was thus argued that the permanent policy inherent in the ESM is one which has as its primary focus the stability of the euro area as a whole with the provision of monies to that end. On that basis it was argued that a permanent and irreversible commitment by Ireland to such a policy is impermissible without the approval of the people on the basis of *Crotty*.

6.7 Because the trial judge largely agreed with the submissions of the State on this aspect of the case it was, perhaps, hardly surprising that the written submissions filed on behalf of the State in this court were directed, to a significant extent, to expressing agreement with the relevant conclusions of the trial judge. In that context it is appropriate to turn to that aspect of the judgment of Laffoy J. which considered the sovereignty claim.

7. The High Court Judgment

7.1 As described at para. 111 of her judgment, the nub of Deputy Pringle's argument before the High Court on this issue (as it was before this court), was that Ireland's participation in the ESM Treaty involved a transfer of sovereignty to the ESM because of the impact of such involvement on Ireland's budgetary, economic and fiscal sovereignty involving, it was said, an open-ended, irreversible and permanent transfer of powers to an autonomous institution.

7.2 In considering that matter, at para. 117, Laffoy J. indicated, correctly in my view, that the starting point was to identify what power the Constitution confers on the Government in relation to entering into an international treaty such as the ESM Treaty. Having reviewed a number of relevant provisions of the Constitution the trial judge noted that it was implicit in Art. 29.5.2° that the Government had power, subject to approval by Dáil Éireann, to enter into an international agreement, at least at the level of principle, which gives rise to financial liability on the part of the State. However the trial judge also noted that *Crotty* provides authority for the proposition that there are implicit restraints in the Constitution in relation to the manner in which the Government may exercise its power in relation to external relations.

7.3 The trial judge went on, at para. 119, to suggest that the proper interpretation of *Crotty* is that the Constitution restrains the Government from abdicating or relinquishing in part its power to formulate and implement policy. For the reasons already set out in this judgment, in the section dealing with the judgment of this court in *Crotty*, I agree with the conclusions of the trial judge in that regard. On that basis it seemed to me to follow that the trial judge was correct when she suggested that the core question which arose in respect of this aspect of Deputy Pringle's claim is as to whether the consequence of the ratification of the ESM Treaty will be that the formulation and implementation of the State's policy in relation to economic and monetary matters is to be significantly abdicated or subordinated to others.

7.4 In seeking to answer that question the trial judge, at paras. 123 to 127 of her judgment, noted, correctly in my view, that neither Ireland nor any other member of the ESM assumes limitless financial liabilities. Laffoy J. went on, at para. 126, to decide that the fact that there were circumstances in which a decision to provide financial assistance could be made without Ireland's agreement, but in furtherance of a policy to which Ireland had committed, could not amount to a transfer of sovereignty.

7.5 Finally, and for completeness, it should be noted that Laffoy J. did not consider it either necessary or appropriate to reach a conclusion on the argument over whether a member of the ESM could withdraw. Like Laffoy J., it seems to me that it is appropriate to consider first whether there would be anything impermissible from a constitutional perspective in Ireland participating in the ESM Treaty (in the absence of a referendum) on the assumption that withdrawal is not possible and, therefore, without considering whether Ireland could withdraw. Given that the withdrawal issue involves an interpretation of an international treaty which, if it comes into effect by sufficient ratification, may have its own means of interpretation, it would, in my view, be preferable not to reach a conclusion on that question unless it was essential to the determination of these proceedings. On that basis I propose to consider the merits of Deputy Pringle's claim.

8. Discussion

8.1 It is important to start with sovereignty. As a general concept sovereignty is much debated both by political scientists and international (and of course constitutional) lawyers as well as other interested parties. However, it is important to start with recognition that the Irish Constitution does not simply embrace a general notion of sovereignty leaving it up to the courts to consider its parameters. It is true that the Constitution does use the term "sovereign" in both Art.1 which speaks of the sovereign right to, amongst other things, determine relations with other nations and in Art.5 which defines Ireland as a sovereign independent democratic State. However, the Constitution is, in many respects, quite specific about the model of sovereignty adopted. Article 15.2 confers on the Oireachtas "the sole and exclusive power" of law making. Article 34.1 requires that justice only be administered in courts established by law by judges appointed under the Constitution itself. As already noted the power of conducting foreign policy is conferred exclusively on the Government (Art. 29.4.1) as is the executive power of the State (Art. 28.2). The constitutional regime is clear. The judicial, legislative and executive organs of government are given exclusive power in their respective domains. The Constitution does not, by its clear terms, permit those powers to be given away or significantly shared with others. That constitutional restriction does not, of course, mean, for the reasons set out by O'Donnell J. in his judgment in this case, that there may not be an interaction between the way in which those organs of government may operate. However, that interaction is itself specified expressly by the terms of the Constitution.

8.2 There may well be arguments in favour of models of sovereignty which see the ability of nations (and especially small nations) to achieve self determination as being enhanced by a pooling of sovereignty so as to give greater practical leverage at an international level. However, such models are not those adopted in the Irish Constitution except, of course, in those provisions of Art. 29 which recognise the supremacy of measures necessitated by EU membership. The starting point of any discussion has to be to acknowledge the model specified in the Constitution and the limitations it imposes. It is also necessary to note that the power with which this judgment is concerned (the power to conduct external relations) is one expressly conferred by the Constitution on the Government and not the Oireachtas (save for the requirements to obtain Dáil approval for measures involving financial commitment).

8.3 It follows that the fact that Ireland is a sovereign state whose government or parliament has not the constitutional capacity to give away its sovereignty cannot be doubted. The terms "inalienable" and "indefeasible", as analysed by Hardiman J. in his judgment in this case make that clear. Powers conferred by the Constitution cannot be given away or "fettered", to use the term adopted by

Hederman J. in *Crotty*. But in international relations, as in very many other areas of public and private life, freedom to act will often, as a matter of practicality, involve freedom to make commitments which will, to a greater or lesser extent, limit ones freedom of action in the future. Persons are free to enter into lawful contracts. However by so doing the person concerned may restrict their ability to enter into other contracts in the future. It is inherent in certain types of decision that the decision in question will have a reach into the future to a greater or lesser extent. It seems to me to follow that the mere fact that decisions taken now can have such a reach cannot mean, on any proper analysis, that the relevant decision is necessarily taken to amount to an impermissible restriction on freedom to act in the future. If it were to be otherwise, parties, both in the private, public and international spheres would, in truth, be deprived of a significant freedom of action.

8.4 That is not to say that certain decisions may not be so far reaching and so diminishing of the freedom to act in the future that they can be said to amount to a denial of the very freedom exercised in making the decision in the first place. A person might commit to a contract of employment for (say) five years. In so doing it seems to me that such a person is exercising freedom of contract. To say that such a person has lost the freedom to deal with their services in whatever way they wished (within the law) would, in my view, be a mischaracterisation. Any contract of employment will, to some extent, restrict the right of the employee for some period into the future.

8.5 On the other hand a contract which amounted to little more than indentured servitude or slavery might well legitimately be characterised as one which, although agreed to, would nonetheless entirely negate the very freedom to contract for one's services exercised in making the contract in the first place.

8.6 Without pushing the analogy too far, it seems to me that there are parallels in the international sphere. The way in which international policy is pursued in a whole range of areas is by states entering into treaties whether bi-lateral or multi-lateral. In modern conditions many multi-lateral treaties involve the establishment of bodies or institutions with a greater or lesser permanence. At the level of principle, sovereign nations who enter into such agreements are exercising their sovereign right to adopt policy directed towards what they perceive to be their own advantage or in support of values which they wish to uphold. Inevitably entering into such treaties involves some diminution in freedom of action in the future. As a matter of international law countries are bound by the obligations which they undertake in treaties. The international community is entitled to expect that countries can be taken at their word most particularly when that word is expressed in the solemn form of a treaty. Having to be taken at your word means that your freedom of action is necessarily circumscribed. However, even then, as a matter of practicality, sovereign nations retain the ability to breach treaty obligations provided they are prepared to face what ever consequences, as a matter of law or politics, flow from such a decision.

8.7 However there may be circumstances where the commitment entered into does, in truth, amount not to an exercise in sovereignty which has, as a necessary consequence, a narrowing of the freedom to act in the future but rather amounts to such a significant narrowing of future policy options so that it can be properly be said that there has been a transfer or pooling of sovereignty. This will be particularly so where those future policies by which the contracting parties are bound are as yet undecided and are to be determined in the future by others or by collective bodies.

8.8 The real question on the issue of loss of sovereignty seems to me to turn on the nature of the commitments entered into and the extent to which those commitments can truly be said to involve an abdication of the powers conferred by the Constitution, an alienation to others of such powers or the subordination of those powers to the interests of others.

8.9 Against that background it is appropriate to turn to the ESM Treaty itself. For the reasons already addressed I propose considering this issue, at least initially, on the assumption that it is not possible for a member to withdraw. In that sense counsel for Deputy Pringle argues that it is permanent. However it seemed to me that it is not appropriate to become overly focused on whether, in a technical sense, the ESM Treaty is permanent or not, i.e. whether any member can withdraw and if so in what circumstances. There is a very real sense in which the obligations of membership of the ESM Treaty are one off and will occur in the very near future. As already pointed out there is an immediate obligation to put up, over a short period of time, Ireland’s proportionate share of €80 billion. There is also an immediate commitment, approved of by the Oireachtas, to take up, if required under the terms of the Treaty, the balance of Ireland’s share of the authorised capital.

8.10 However Ireland undertakes no further obligations under the Treaty. For the reasons already analysed it does not seem to me that there is any basis for suggesting that Ireland can be obliged, without a decision of the Dáil, to commit to putting up any further capital. Likewise, for the reasons already analysed, Ireland can have no liability, beyond the amount of authorised capital to which commitment will have been made if the Treaty is ratified, to make good any losses of the ESM. It follows that Ireland has really only one obligation under this Treaty (or perhaps one obligation in two parts). That obligation is to commit, if necessary, to making available capital up to the sum of €11.145 billion (with a portion of that capital being provided in early course).

8.11 The ESM Treaty is, arguably, permanent in the sense that monies contributed, and monies in respect of which a commitment has been given which have not yet been called on, must be made available (at an appropriate time) for the purposes of the ESM indefinitely. However, it seems to me that there is a very significant difference indeed between giving a current and finite commitment to making monies available for a specified purpose, on the one hand, and giving a commitment to meet obligations, to be decided by others, on an indeterminate basis and in furtherance of policies not yet determined, on the other. It seems to me to be appropriate to characterise the ESM Treaty as one in which Ireland's obligations are current and immediate but where the practical consequences of those obligations, being the ability of the ESM to provide financial assistance to other members in accordance with a pre-ordained policy, may be indefinite. In that context it is important to draw attention to the very narrow purpose provided for in Art. 3 of the ESM Treaty. As correctly pointed out by counsel for the State it is a single purpose. It is clearly set out. It is true that the judgment as to whether the purpose is met on the facts of any individual case proposed for financial assistance is to be made by the Board of Governors and that there are limited circumstances in which such a decision could be made without Ireland's agreement. But it does not seem to me that those limited circumstances are material. Absence of unanimity does not necessarily mean a transfer of sovereignty as pointed out by Finlay C.J. in *Crotty*. The basis on which the money in this case can be utilised is fixed once and for all by the terms of the ESM Treaty.

8.12 It is, of course, the case that decisions to provide financial assistance carry with them the possibility that monies provided may be lost. It is true, therefore, that those decisions could have an effect on the level of continuing monies available to the ESM and, to the extent that not all of the authorised capital had not been called in, to the need to invoke the provisions of the ESM Treaty to require further capital (up to the agreed limit) to be paid in. It is not, therefore, the case that decisions to provide financial assistance might have no effect on Ireland. Ireland might well have views as to whether it was appropriate, in all the circumstances, to lend to a particular member. However, the commitment given by Ireland on ratifying the ESM Treaty is one which enables the ESM to provide financial assistance in clearly defined circumstances. The fact that there may be very limited occasions when financial assistance could be provided against Ireland's wishes does, in those circumstances, seem to me to fall far short of the circumstances

where there could be said to be a material transference of sovereignty.

8.13 Characterised in that way, it seems to me that the ESM Treaty is, as was argued by counsel for the State, an exercise in sovereignty rather than an abdication or transference of sovereignty. It involves an immediate commitment which is finite in the sense that it cannot be increased without the agreement of Dáil Éireann. It is no different, in principle, to the allocation of monies to any international purpose without the expectation of their return. The monies can be deployed, by whatever international body the monies are given to, in any manner within the remit of the body concerned. The fact that the sum is large does not necessarily render a commitment to such a sum as being one which is outside the competence of a sovereign state. It must, after all, be remembered that the total sum being committed to the ESM is only a fraction of the amounts which this State has had to commit to meeting its obligations in respect of the Irish banking system. It is not the function of the courts to consider the merits of the underlying policy behind any such decisions including the decision of the Government to agree to the ESM Treaty and the decision of Dáil Éireann to approve it.

8.14 In addition, it seems to me that a comparison of the features of the SEA identified in the judgments of the majority in *Crotty* with the material features of the ESM Treaty bears close consideration. The ten commitments applying to all future Irish governments, as identified by Walsh J. in the passage from his judgment in *Crotty* already cited, involve a permanent obligation on the State to deal, in all respects, with its foreign policy in a manner designed to promote the formulation of a common European foreign policy. While the obligations undertaken were not specific they were overarching across all aspects of foreign policy and required, as Henchy J. noted, that national objectives must defer to the aims and decisions of the relevant European institutions. It seems to me that there is a very significant difference indeed between those types of obligations and those contained in the ESM Treaty. As pointed out the ESM Treaty involves a once-off, albeit significant, commitment to set up an institution designed to provide support for the euro (such support being, in the Government's view, in Ireland's interest as a member of the euro zone) where the only decisions which will be binding in any sense on Ireland, are decisions made by the ESM Board of Governors to provide financial assistance to other members of the ESM where such assistance is considered "indispensable to safeguard the financial stability of the euro area as a whole and of its Member States". That financial assistance must come from funds already committed by Ireland (with the approval of the Dáil) or from funds borrowed by the ESM in circumstances where there will be no recourse to Ireland. The ESM Treaty has a narrow, if important, policy objective to which an immediate commitment of substantial funds is made with the attainment of the specified objectives being left to a Board of Governors on which Ireland will have a representative. That Board of Governors will not make policy but rather will implement it.

8.15 In passing I should note that, in my view, there may be circumstances in which a permanent and irreversible commitment to a very wide ranging set of policies in an important field, such that the Government lost the ability to ever change those policies in the future, might (even though the policies were specifically identified) cross the boundary of involving an impermissible ceding or pooling of the type of sovereignty found in the Irish constitutional model. However, it seems to me that the commitments which Ireland would make by ratifying the ESM Treaty fall a long way short of breaching any such boundary. I would leave to another case the question of determining with precision where any such boundaries might lie. For the purposes of this case it seems to me that the ESM Treaty can be distinguished from the aspects of the SEA which were under consideration in *Crotty* in the manner which I have already identified. The ESM Treaty does not involve a transference of the power to make policy into the future, in any material way, to other countries or institutions. In addition the ESM Treaty does not involve a permanent commitment to a set of policies which is so far reaching as to amount to an effective transference of sovereignty.

8.16 In all those circumstances it did not seem to me that there was any basis for the suggestion that participation by Ireland in the ESM Treaty amounted to an abdication or diminution in sovereignty such as would be outside the competence of the Government to agree and Dáil Éireann (within its specific financial constitutional remit) to approve. For the reasons already set out, that conclusion is based solely on a consideration of Irish constitutional law and does not, therefore, determine any of the issues raised by Deputy Pringle as to the alleged incompatibility of either the ESM Treaty or the Council Decision with EU law.

8.17 I now propose to turn to the reason why I supported this court's decision not to grant an interlocutory injunction in favour of Deputy Pringle.

9. The Injunction Claim

9.1 A starting point on the considerations which apply to the grant or refusal of an injunction to restrain ratification of an international treaty requires a return to an aspect of the decision of this court in *Crotty*. Subsequent to the rejection of Mr. *Crotty*'s claim in the High Court and the bringing of an appeal to this court, the question of the grant of an interlocutory injunction, to restrain ratification pending that appeal, arose. This court was persuaded that a fair issue to be tried had been made out by Mr. *Crotty*. In addition Finlay C.J., speaking for the court, said the following at p.763:-

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

9.2 It seemed to me that the key sentence from the passage cited is the one which notes that this court would be deprived, in the absence of an interlocutory injunction, of any power to grant the plaintiff the remedies necessary to protect his constitutional rights if he were to succeed. However, the circumstances which gave rise to that situation need to be examined. The SEA purported to amend the treaties of the then EEC. If the SEA was ratified by all of the then Member States then the treaties would be amended. It would not have been within the power or competence of the Supreme Court of Ireland to make an order which would require the reversal of those amendments. Thus, if Ireland had ratified the SEA pending the appeal in *Crotty* to this court (and all other states had also ratified), the issues raised by Mr. *Crotty* would, in effect, have become moot.

9.3 It seemed to me that the situation with which this court was confronted in this appeal was entirely different. Pending a resolution by this court of the sovereignty claim there may, or may not, have been an argument available to Deputy Pringle along the same lines as that which prevailed at the interlocutory stage in *Crotty*. I express that view in a somewhat equivocal way because, unlike the situation that pertained in *Crotty*, the ESM Treaty is not a European Community or Union treaty which would have the effect of amending the underlying legal basis for a Community or Union of which Ireland was a member.

9.4 However, be that as it may, the sovereignty issue has now been found against Deputy Pringle. The remaining issues of Irish constitutional law are the power transfer issue and the residual question of whether it might be a breach of the Irish Constitution for

Ireland to ratify a treaty which was in breach of the EU treaties. The power transfer claim does not affect Ireland's entitlement to ratify the ESM but rather, if found to be valid, would affect the manner in which Ireland's obligations in respect of the ESM were to be operated on an internal basis. The residual constitutional claim is, itself, entirely dependant on the success of Deputy Pringle on the reference already made. It follows that the sort of situation with which this court was faced in *Crotty*, being that there would be no ultimate remedy available in the event of ratification, does not apply. If the power transfer claim succeeds then the Oireachtas will be constrained to enact a different, and constitutionally legitimate, form of legislation implementing the ESM Treaty. The residual Irish constitutional claim, and each of the claims based on European law, can only succeed if the Court of Justice so determines. However, if the Court of Justice does so determine then there is no reality to the ESM continuing as counsel for the State readily and properly conceded. Deputy Pringle has, therefore, a remedy in the shape of whatever determination the Court of Justice might make. The situation is, therefore, radically different from that with which this court was faced in *Crotty*. It also follows that the real question is as to whether Ireland should be restrained from ratification pending the resolution of the reference, the other issues having been either decided or not affecting the power to ratify.

9.5 Insofar as Finlay C.J. suggested, in *Crotty*, that the considerations which determine where the balance of convenience lies, in relation to claims made in a constitutional context, may be different to those arising in private civil litigation, then it seems to me that that is but an expression of the fact that the sort of considerations which apply, in the public law field, to the grant of interlocutory relief, while based on the same underlying principles as those which apply in private law, being to minimise the risk of injustice, nonetheless may, in their practical application, be different to those which arise in private litigation.

9.6 In that context it is appropriate to refer to the recent decision of this court in *Okunade & anor v. Minister for Justice, Equality & Law Reform* [2012] IEHC 49 for an analysis of the application of the balance of justice test in the public law field. Similar (although not necessarily identical) considerations apply in determining the proper course to adopt at an interlocutory stage in proceedings involving constitutional issues. In that context I should record my agreement with O'Donnell J. as to the significant weight to be attached in assessing the balance of justice to the fact that the decision-making power with which this case is concerned (i.e. the conduct of relations with other nations) is specifically conferred by the Constitution on the Government (Art.29.4.1).

9.7 With those observations made, I now turn to a consideration of the proper test to be applied.

9.8 There are, in my view, potential complications about the precise test to be applied by this court in considering an interlocutory injunction pending the resolution of issues referred to the Court of Justice such as those which are the subject of the reference in this case. Those issues are even more complicated, so far as the reference in respect of the ESM Treaty is concerned, by the fact that that treaty is not, of course, a Union measure at all.

9.9 The question is as to whether the appropriate principles are those identified in the Irish jurisprudence in cases such as *Campus Oil Limited v. Minister for Industry and Energy* (No.2) [1983] I.R. 88 (modified, perhaps, to reflect the public law and constitutional nature of the case) or those set out in the decisions of the Court of Justice in cases such as the joined cases of C-143/88 & C-92/89 *Zuckerfabrik Süderdithmarschen AG v. Hauptzollampt Itzehoe* and *Zuckerfabrik Soest GmbH v. Hauptzollampt Paderborn* [1991] ECR I-415, as well as C-465/93 *Atlanta Fruchthandelsgesellschaft mbH v. Bundesant für Ernährung and Forstwirtschaft* [1995] ECR I-3761.

9.10 The *Campus Oil* test is well settled. First the court must decide whether it has been shown by the relevant plaintiff that there is a fair issue to be tried. Thereafter the court may consider whether damages would be an adequate remedy although the relevance of such a consideration in the public law field may be doubted. Third, where damages would not be an adequate remedy, the balance of convenience must be considered. The relevant test in relation to the grant of interim measures where European Union law arises is to be found at para. 51 of the decision in Atlanta where the Court of Justice indicated that injunctive relief might be granted by a national court in relation to a national administrative measure adopted in implementation of a Union act only if:-

> i. The court entertains serious doubts as to the validity of the Union Act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;
>
> ii. There is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
>
> iii. The court takes due account of the Union interest;
>
> iv. In its assessment of all those conditions, it respects any decisions of the Court of Justice or of the now General Court of the European Union (formerly the Court of First Instance) ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Union level.

9.11 There are, thus, some differences between the two tests. Under *Campus Oil* only a fair issue to be tried needs to be established. Under Atlanta the court must "entertain serious doubts" about the validity of the measure. It is at least arguable that the strength of the case needs to be established to a higher degree to meet the Atlanta test.

9.12 In my view it may be necessary, in another case, to analyse with some care whether, and if so to what extent, there may be other substantial or material differences between those two tests. There is no doubt that, at a minimum, the tests laid down by the Court of Justice in the cases to which reference has been made require a national court, in considering whether to grant an interlocutory injunction, to have regard to the Union interest. However, it does not seem to me to be necessary, on the facts of this case, to engage in any such analysis.

9.13 In my view, whether viewed as a matter of the domestic Irish jurisprudence or on the basis of the tests laid down in the jurisprudence of the Court of Justice, the balance in this case is overwhelmingly in favour of the refusal of an injunction. Deputy Pringle can only succeed in these proceedings in preventing the ESM from coming into or continuing in operation if he persuades the Court of Justice that it is not possible for Member States of the European Union, consistent with their obligations under the EU treaties, to participate in the ESM and, to the extent that the Council Decision might, on one view, be necessary to provide a legal basis for such participation, that the Council Decision is invalid. If Deputy Pringle succeeds in so persuading the Court of Justice then he will have his remedy. If he does not succeed then he will be found to have no interests to protect. To the extent that there might be any theoretical detriment in allowing ratification to go ahead in circumstances where participation in the ESM might be determined to be inconsistent with obligations found in the EU treaties, that detriment is significantly tempered by the fact that success for Deputy Pringle will require that all Member States respect the decision of the Court of Justice so that the ESM will be unable to continue, in the absence of further legitimate measures, and the Member States will need to put in place an appropriate regime for dealing with that situation which is consistent with the EU treaties. Thus the only detriment will, at most, be largely theoretical and

certainly short term.

9.14 On the other hand if Ireland were to be prevented, by injunction, from ratifying the Treaty at this stage but if the Court of Justice was ultimately to find that the ESM could proceed without any Member States being in contravention of their obligations under the EU treaties, then very significant detriment indeed would be caused at least to Ireland, which would be deprived of its ability to participate from the beginning in the ESM, and, possibly, to other Member States as well. The State has placed before the court, on this issue, cogent evidence from the affidavit of Mr. O'Brien of the Department of Finance, as to the serious risks to the national interest that such a course of action would involve.

9.15 If Deputy Pringle succeeds before the Court of Justice then the ESM will fall for all Member States. If Deputy Pringle fails before the Court of Justice, but Ireland is excluded from participation pending the result of the reference, then significant detriment to the national interest is risked.

9.16 This court did not, of course, enter into a discussion of the merits of Deputy Pringle's claim insofar as the relevant issues were referred to the Court of Justice. In order to conclude, in accordance with Atlanta, that the court "entertains significant doubts" about any relevant matters, then it might well have been necessary for the court to enter into such a consideration. In addition it would have been necessary to consider whether, and if so in what way, the Atlanta principles apply in the different circumstances which arise in this case where it is suggested that a Member State might be acting in breach of its obligations under the EU treaties by entering into a separate multi-lateral international treaty with other Member States. Atlanta was concerned with the effect on a private company of national measures designed to implement a Union act where it was argued that the Union act was invalid. However, whether viewed as an order required to avoid serious and irreparable damage (in accordance with Atlanta) or one required to meet the balance of convenience (as per *Campus Oil*) it seems to me that Deputy Pringle's claim for an interlocutory injunction fails.

9.17 Irrespective, therefore, of the precise test to be applied, I was satisfied that the balance of justice overwhelmingly favoured the refusal of an injunction. In those circumstances I did not consider it necessary to form a view on the precise test to be applied for it did not seem to me that a determination on that question was decisive in this case.

10. Conclusions

10.1 For those reasons I supported the court's ruling to the effect that ratification of the ESM Treaty did not involve an impermissible transfer of sovereignty and thus that the sovereignty claim should be dismissed. I was satisfied that ratification of the ESM Treaty would not abdicate, alienate or subordinate constitutional power conferred on the Government to another.

10.2 I also agreed with the court's view that the issues referred to in the draft reference annexed to the court's ruling should be referred to the Court of Justice.

10.3 For the reasons set out in section 9 of this judgment I supported the court's ruling which refused to grant an interlocutory injunction against ratification.

10.4 Finally, I agreed with the court's decision to leave over all other issues arising on this appeal until the Court of Justice has ruled on the reference.