

## INTRODUCTORY NOTE

The following speech was given by Juliane Kokott, Advocate-General at the European Court of Justice, on March 6, 2013, in Karlsruhe on invitation of the Judicial Press Conference of Karlsruhe, an independent association of journalists currently headed by Gigi Deppe. The speech primarily dealt with the *Pringle* proceedings of the European Court of Justice. Juliane Kokott was the Advocate-General assigned to these proceedings. In its subsequent judgment, the Court declared the European Stability Mechanism compatible with the EU Treaties.

Juliane Kokott

*Translation from German to English by Heidi Madden, Duke University.*

## SPEECH TO JUDICIAL PRESS CONFERENCE OF KARLSRUHE (JPK)

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Good evening, ladies and gentlemen.

I am very happy to speak to you today in the rooms of the Federal Constitutional Court, a court that has made so many important decisions concerning Europe in the last few years.

You announced my presence here with the subject “European Debt and the Law.” That is to say, we are talking about the European sovereign debt crisis, the euro, and everything connected with this issue. Much has been said and written about this topic. It is going to be hard for me, to offer you anything really new.

What I can offer to you though, is my own personal perspective. A perspective that is informed by my involvement in the *Pringle* proceedings of the European Court of Justice; that is, the decision about the compatibility of European Stability Mechanism: in short, the ESM, with the EU treaties. This decision was and still is considered to be extremely important in the eyes of the European Court of Justice, not least because of its importance for the Court’s sense of its own identity and task.

For me, everything began one beautiful summer morning on the coast of Montenegro, a place in Europe, but outside of the European Union, something that is fortunately hard to find nowadays. There I received

a phone call while on summer holiday, a call from the then-First Advocate-General of the Court of Justice of the European Union, Mr. Mazák. The call concerned the rescue of the euro. And the matter was urgent.

The euro and urgency seem to be inseparable concepts. Anytime there is an issue with the euro, it seems to always be something that needs to be dealt with quickly. So why should a referral in this matter to the Court of Justice of the European Union be an exception?

Still, my staff was surprised by Mr. Mazák's call for another reason: why did he call me, especially since I was occupied with another urgent matter, the mass retirement of Hungarian judges?

You have to understand that the First Advocate-General of the Court of Justice is free to assign cases to the eight Advocates-General as he or she sees fit. The rules of procedure do not contain any criteria guiding these selections. However, in practice there is an understanding for how legal cases should be distributed to the Advocates-General, and usually those guidelines are observed. The workload is distributed among Advocates-General equitably, and in addition to that, independence and neutrality of an Advocate-General in a given case are key criteria for selection. For example, for a case originating in Germany instead of Ireland, Mr. Mazák would not have called me; nor would he have called me if the judge-rapporteur had been my German colleague on the bench. This is because judge-rapporteurs and Advocates-General are always supposed to represent different legal cultures in the resolution of the cases. Still, the First Advocate-General enjoys discretion in distributing cases. I considered it a sign of trust that Mr. Mazák turned to me on that day.

Back to the case in question: the Irish Supreme Court was considering an appeal by a member of parliament, Mr. Pringle. Mr. Pringle believed that the Eurozone states – by creating the European Stability Mechanism – had gone too far in many ways and had actually violated European Union law. This Mechanism is supposed to collect money from all Eurozone states outside the EU-legal framework, in order to distribute the funds during a European sovereign debt crisis in the form of credits to states that need financial help. This was and still is politically highly controversial, but this case was only about law.

From a German perspective, one question of particular interest was: are the loans made to member states via the ESM compatible with the “No-Bailout Clause” derived from Article 125 of the Treaty on the Functioning of the European Union. That provision determines that a Member State shall not be liable for the commitments of another Member State, and also no Member State shall “assume” the commitments of another Member State.

Contrary to some media reports, the European Court of Justice was not called to decide Mr. Pringle's case. Rather, the Irish Supreme Court had referred several questions to the European Court of Justice as part of a reference for a preliminary ruling, with the intention to use the answer provided by the European Court of Justice to decide the *Pringle* case on its own. However, many had been waiting for these types of questions: are the Eurozone states violating the No-Bailout Clause by creating the ESM? Or do they infringe on the competence of the European Union within the EMU framework? Are they allowed to use the Commission, the European Central Bank and the European Court of Justice for purposes of the ESM, even though the ESM is not an institution of the European Union? And even if none of this is allowed according to current EU law: could the Eurozone states save the mechanism by changing the Treaties so that the existence of the ESM is explicitly allowed, even though, unfortunately, this approval only comes after the hasty establishment of the ESM?

There were a lot of complex questions for the European Court of Justice to consider. And on top of that the matter was urgent. The Irish Supreme Court had requested an expedited preliminary ruling procedure. In such a fast-track procedure, several deadlines to respond for participants who want to comment are moved up, and there is also less time to schedule a hearing.

Further, an expedited preliminary ruling procedure has higher priority in the organization of the workflow of the Court. This means, for example, that the required translation of the Irish Supreme Court's reference into the 21 official languages is completed faster. Any reference for a preliminary ruling submitted by a national court has to be sent to all Member States in their respective official languages, so that they can participate in the procedure, but also so that they can consider whether a decision by the European Court of Justice might affect the national laws of that Member State. This also means that no decision by the Court comes as a true surprise to the Member States.

In the *Pringle* case, the fast-track nature of the process was fairly successful: from the time of submission of the case to the judgment barely four months had passed. Note that this refers to the final response, not to a decision on granting temporary legal protection.

There is another special consideration in an expedited preliminary ruling procedure, and this one was relevant for me as the Advocate-General. Part of the fast-track procedure is that there's no need to wait for the opinion of the Advocate-General. In regular proceedings, the deciding chamber waits for the Advocate-General's reasoned proposal for a decision before it starts deliberations. In addition to that, the

Advocates-General have a privilege intended to strengthen the representation of diverse legal cultures: they can choose the language in which they submit their opinions. Usually the Advocates-General choose their native language – rather than French, which is the working language of the European Court of Justice. Consequently, the deciding chamber usually has to wait for the translation into French of the opinion, even if many colleagues speak German very well. But all of this means that in ordinary procedures the start of the deliberations is delayed by six to eight weeks.

In order to save this amount of time, the assigned Advocate-General is only brought in for oral arguments. Obviously the Advocates-General do not want to miss the opportunity to submit a reasoned proposal for a decision even in more urgent cases, especially because these may involve particularly important legal matters. For this reason it has become common practice that the Advocates-General will submit a written “view”, almost identical to a formal opinion, in French under great time pressure, before they are called in front of the chamber for oral arguments. But at this stage the view is only considered to be an internal document, because – unlike formal opinions – it is only published and translated after the judgment.

This means that the influence of the Advocates-General is somewhat less visible in an expedited procedure. But you have to remember that the job of the Advocates-General in cases before the European Court of Justice rather is to assist the decision-making process than to render a decision. Aside from submitting an independent proposal for a final decision in the form of an opinion, they also give their view regarding all questions that come up during the procedures; this ranges from deciding how much time a party to the case should have for oral arguments to choosing the decision making body within the Court of Justice. Since many of these decisions are usually made based on consensus, the Advocates-General have many opportunities to influence the procedures.

In the procedure concerning *Pringle*, the judge-rapporteur, the Vice President of the Court, Mr. Koen Lenaerts, and I, acting as the assigned Advocate-General, confronted the members of the Court of Justice with a great challenge. We asked that the case be considered by a “full Court;” in other words, in the presence of all 27 judges. The referral to the full Court is very rare and had never happened in the case of a preliminary ruling. In such a procedure all 27 legal cultures of the European Union clash together, which can render the decision-making very difficult. By the same token, a decision reached by the full Court represents maximal consensus among the European Union Member States.

In the *Pringle* procedure, the members of the Court, who to this day meet together every week to discuss basic rules of procedure for every case referred to the Court, decided to agree to our proposal to refer the case to the full Court. I believe they agreed for two reasons, one political and one legal in nature.

First because it concerned the euro, the financial crisis was still the predominant topic of discussion. In dealing with billions and billions, the Court of Justice felt that it had to offer everything in its power, even though “everything” in this case was the relatively small number 27.

Secondly, the *Pringle* case concerned a very specific constitutional question of European Union primary law. The Member States had, based on an initiative lead by Germany, already decided on a change in the European Treaties in 2011 by simplified procedure in order to secure the founding of the ESM. This simplified treaty amendment procedure was created in the Treaty of Lisbon, with the intention to allow for the revision of certain areas of the European Treaties without having to go through the elaborate procedures of a Convention.

The Irish Supreme Court essentially asked if that change was actually legally effective. There was a possibility that the change constituted a violation of the European Treaties. This meant that we were dealing here with a problem well known in Germany, which concerns the issue of unconstitutional constitutional amendments.

Of course, the Member States went on record in the *Pringle* case with the assertion: what they decided to do to the European Treaties was up to them. But the Court of Justice had a different opinion on this issue in the end. It went on to examine the treaty amendments via those treaty provisions that were excluded from the simplified treaty amendment procedure. This means that Union primary law now consists of several hierarchy levels.

In my opinion, the Court reserved an important area of authority for itself with this move, which could lead to many interesting questions in the future regarding the compatibility of treaty amendments with the basic principles of the Union and its fundamental rights.

With regard to fundamental rights, a German citizen will of course immediately think about the Federal Constitutional Court. That Court might also have had a certain influence on the decision of the European Court of Justice in the *Pringle* case. Interestingly, on September 12, 2012, relatively early in the *Pringle* procedure, the Federal Constitutional Court rendered its ESM-judgment.

My legal secretaries followed the announcement of this decision mostly live via the Internet. Not just because they wanted to feel like they were part of history, because the matter concerned – once again – the future of Europe, even though the decision came from just one constitutional court of a single Member State. In addition to that, the decision of the Federal Constitutional Court referred in part to the same issues as the European *Pringle* procedure, albeit from a different perspective. The reasoning of the decision could prove to be stimulating for the view I was to submit in the *Pringle* procedure.

And after reading the reasoning of the judgment things got even more interesting: Not only did the Federal Constitutional Court interpret German constitutional law, but also the European Treaties right along with it, even those regulations that were to be interpreted in the *Pringle* case by the European Court of Justice.

Since the provisions of the European Treaties secure the German constitutional requirements for the Monetary Union, it seems that the Federal Constitutional Court found itself impelled to flesh out the guarantees provided by Union law. Concerning the content of the requirements to the ESM, the judgment of the Federal Constitutional Court offered some quite astonishing ideas.

The aforementioned amendment to the European Treaties, which was designed to legitimize the ESM from the point of view of Union law, and which was also at issue in the *Pringle* procedure, was considered by the German Federal Constitutional Court to be a fundamental revision of the current EMU. In other words: without this amendment to the Treaties, that means at that time in the past, as well as at the time of entry into force of the ESM Treaty two weeks later and still today, on March 6, 2013 – on a day on which the amendment to the Treaties is still not in effect – the ESM violated the European Treaties according to the opinion of the Federal Constitutional Court.

We now know that the European Court of Justice went on to decide the opposite in the *Pringle*-Judgment later on: the Court decided that the amendment to the Treaties was only declaratory. The ESM is in its present form already in compliance with the European Treaties. This means that the amendment to the Treaties, which was meant to legitimize the ESM, does not rise to the level of a change in the Economic and Monetary Union, much less a fundamental change.

I do not mean to say that the opposite opinion of the Federal Constitutional Court can't be justified; it might reflect the prevailing opinion at that time in Germany. But since it is a fact that the European Court

of Justice has the final say on interpreting Union law, one simply has to state: it was an opinionated assessment on the part of the Federal Constitutional Court. But it was encouraged by the Federal Government of Germany that had pressed ahead with the – declaratory – amendment to the Treaties in opposition to the opinion of other Member States.

Nonetheless, I believe that the initial assessment was not decisive for the final ESM judgment by the Federal Constitutional Court; otherwise the Court should have referred the questions to the European Court of Justice. Still, I believe it is unfortunate when the findings of the European Court of Justice and the Federal Constitutional Court are publicly at odds with each other.

The often affirmed and practiced cooperation between the courts in Europe also demands mutual respect and consideration. Everyone holds to their own culture. The European Court of Justice refrains from interpreting national law, and national courts of the Member States should follow suit by leaving the interpretation of Union law to the courts of the Union, especially when it comes to controversial questions concerning the ESM.

In this context the question might arise in the future – as was determined in the ESM judgment issued by the Federal Constitutional Court – whether the acquisition of state bonds on the secondary market by the European Central Bank for the purpose of financing the budgets of the Member States, is in breach of Article 123 of the TFEU. It would be nice if this question could be answered by the European Court of Justice, i.e. the Court having jurisdiction on this matter.

But, back to the *Pringle* case. The oral arguments were presented on October 23 of last year in Luxembourg. The room was full. European Institutions and the governments of the Member States paid close attention to the proceedings. But did the citizens of the Member States of the European Union understand the significance of this case as well?

Mrs. Deppe, I think you should take credit for the fact that the German television even became aware of the *Pringle* proceedings on the day that the oral arguments were heard. From the point of view of the general public, the Federal Constitutional Court had already reached a decision about the ESM six weeks earlier anyway, so what more was to be expected?

When it comes to legal issues in the technical sense, one can assert: the judgment by the European Court of Justice in the *Pringle* case was more important for the ESM than the judgment of the Federal

Constitutional Court. A negative judgment by the European Court of Justice would have prohibited all the Member States to participate in the ESM. The Federal Constitutional Court could have only directed Germany in this matter.

But the Federal Constitutional Court seems to have got the affection not only of Germans but also of the financial markets. In their eyes the Federal Constitutional Court had decided for Europe; what could the European Court of Justice possibly add to this?

I have heard said in various places that people felt that it was pretty clear from the outset how the European Court of Justice would decide the *Pringle* case. The Court was expected not to oppose the Member States by allowing the ESM to fail. And, the thinking went, if the outcome of a procedure seems clear from the beginning, then the procedure itself becomes less interesting.

On the other hand, though, was it actually in question whether the Federal Constitutional Court would approve the ESM? Of course there were some demands made on the German government; but they could be met relatively easily. The clear “yes” from the Federal Constitutional Court coupled with a small “but” pretty much corresponded to what legal circles were expecting. But the uncertainty of whether the Federal Constitutional Court might nonetheless decide to let the blade of the guillotine come down was enough to cause worry.

With this background you can view, in my opinion, the outcome of the *Pringle* procedure with the European Court of Justice not opposing the ESM as follows: the European Court of Justice came to a judgment that might have been expected by many. But by rendering this judgment, the Court resisted the temptation to play up its own influence by declaring parts of the ESM to be in breach of law.

This brings us to the judgment regarding the *Pringle* case, which was rendered a month after the oral arguments took place. And, by the way, as usual, the judgment was delivered in the 22 official languages of the European Union, which means that the ubiquitous translation service at the Court had delivered its work again very swiftly.

The judgment in the *Pringle* case does not at all mean that the Member States are under no legally binding requirements in the euro bailout scheme, and that they can do whatever they want.

By looking at the view I submitted in the *Pringle* case, you might see that I do not agree with the judgment on all points. Still, I do agree with the end result. One may consider the ESM and the Bailout politics of the Member States as a mistake. But this does not necessarily mean that it is against the law. Anyone who believes that the breach of law is self-evident is called upon to provide conclusive arguments against the *Pringle* judgment. It will not be easy.

I am also convinced that this time, nobody can accuse the European Court of Justice of not seriously engaging with the substance of the case, or that the decision cannot be inferred from the grounds. The Court has developed the traditional French format for expressing a judgment – simply put: keeping it as short as possible and then offering the resulting texts in sentences that are as long as possible – into a style of its own. You can still find judgments that are hard to understand, because members of the deciding chamber could not agree on the reasoning and there is no opportunity to register a dissenting opinion at the Court, which would allow listing two lines of reasoning next to each other. That is why the arguments justifying a judgment can be cryptic, as they represent the lowest common denominator. Every now and then, in extreme cases, the decision is thus not very clear to the reader.

The *Pringle* judgment does not fall into this category; it is well-reasoned and contains clear assertions.

One of these clear statements is that financial help from the ESM to a Member State is only compatible with the No-Bailout Clause if it is indispensable to safeguard the financial stability of the euro area as a whole and that granting financial help is subject to certain conditions. According to the *Pringle* judgment these conditions must be suited to encourage the Member State in need to pursue a solid budgetary policy.

These requirements lead to exciting questions. For the *Pringle* judgment, the European Court of Justice only had to consider the basic admissibility, the basic structure, of the ESM. What if, in the context of a new reference for a preliminary ruling – and parliamentarians happy to launch lawsuits like Mr. Pringle are no rarity in Europe – a question is referred to the Court about whether the financial help of the ESM in a particular case is in breach of the No-Bailout Clause?

According to the statements by the Court of Justice in the *Pringle* case, the financial help has to be indispensable to safeguard the financial stability of the euro area as a whole. Isn't it conceivable that the Court of Justice might be forced to investigate whether there are Member States that are too insignificant for safeguarding the financial stability of the euro area? Would Europe survive such a question?

I am also very curious what criteria the European Court of Justice would apply while evaluating the suitability of the requirements that the ESM links to the granting of financial help in regards to fiscal consolidation. The European Court of Justice would basically have to examine whether the requirements of the ESM in connection with the financial help are adequate for leading to a balanced budget. Will there be cases where the European Court of Justice tells the Member States: this is not enough, the Member State in need of help has to be more frugal? Or the aid being given is too low?

Keeping in mind these consequences, one realizes that the *Pringle* decision is anything but a simple decision for the Member States. They are allowed to move outside of the legal framework of the Union from an organizational point of view. But what they do there still falls under Union law, especially under those provisions of the European Treaties which are meant to ensure sound fiscal policies.

The door is now open for the European Court of Justice to exercise strong control over the Member States also in the area of economic and monetary policy. But the Court of Justice can only exercise this control effectively if the courts of the Member States cooperate with it. The Court of Justice depends on the Pringles and the Supreme Courts of Europe to be given the opportunity to offer judgments about questions of the legality of the bailout measures around the euro. By no means does it strengthen the trust in the field of law if accusations of breach of law are widely made in connection with the European sovereign debt crisis, yet nobody administers justice.

For this reason I have always been particularly interested in the developments regarding the cooperation between the courts of Europe. The motto of the European Union “United in Diversity” also applies to the judiciary.

For one, this motto is a description of the European Court of Justice itself. Not only do we have a collaboration of the 27 different legal cultures. The European Court of Justice is also at the same time a constitutional court, the highest court for several legal areas, the court of appeal for the General Court, the Court of First Instance in European Union law matters. It is not easy to reunite these various functions under one roof, and in addition to that to do justice to all legal areas of Union law, which nowadays concerns almost every sphere of life. This means that the European Court of Justice brings all of them together: the legal cultures, all types of courts, and all legal areas.

“United in Diversity” also has to mean that the higher courts of all Member States should be aware of the European dimension of their work. When these higher courts render a judgment that has a Union specific

legal context, then every judge should ask him or herself: am I fairly certain that in other Member States this legal question will or would be answered in the same way? Of course in the majority of cases the answer to this question will be “no”. This is why in case of doubt a case should be referred. How else will a consistent practice emerge in the application and interpretation of Union law?

In view of the number of legal matters that are pre-shaped by Union law, the number of references for a preliminary ruling referred by national courts is still too low in my opinion. Yet the reference for a preliminary ruling, even though it lengthens the duration of proceedings, offers a great advantage for the national court: whoever refers a question, shapes the debate. A well-argued reference for a preliminary ruling can serve as a proposal for a decision for the Court of Justice that it can simply agree with.

A higher number of references for preliminary ruling could naturally change the Court of Justice as well. When a hearing takes place, the procedure is tightly managed and includes time limits for presenting the oral argument. In addition to that, more and more legal procedures are decided in a Chamber sitting with three Judges. This allows the Court of Justice to handle its workload fairly efficiently. More problems are to be found at the General Court, the former Court of First Instance. It would make sense to raise the number of judges in that Court, though this is politically difficult.

I do admit that some courts would face disadvantages if they consistently used the tool of reference for a preliminary ruling. I am not sure, for example, if the two senates of the German Federal Fiscal Court dealing with value added tax (VAT) had anything left to decide. The substantive value added tax legislation is comprehensively harmonized at the level of the European Union and only legal questions that are difficult to answer reach the Federal Fiscal Court.

The value added tax law brings me to my concluding thoughts on a recent development. On Tuesday, February 26, the Court of Justice issued its judgment in the *Åkerberg Fransson* case (Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR I-000). This case seems to have received some attention in Germany.

The procedure raised, amongst other things, questions about the scope of application of the Charter of Fundamental Rights of the European Union. Mr. Åkerberg Fransson had to pay increased taxes because of noncompliance with rules on income tax and value added tax. In addition, he was charged with tax fraud. The referring Swedish criminal court considered that the imposition of a punishment might infringe the *ne bis in idem* principle as laid down in Article 50 of the Charter.

However, the Charter only applies when a Member State is implementing European Union law. But is it legitimate to say that Sweden was implementing European Union law in prosecuting tax fraud? Even though the Union law contains neither grounds for prosecution of tax fraud nor associated procedural regulations?

This is a question where national and European points of view collide once again. The European point is probably something like: of course Sweden is implementing Union law, because the tax fraud relates to value added tax. Even though several Member States aren't really willing to acknowledge this, Germany every now and then seems to be among these states, it is actually crystal clear that the value added tax is a European tax. Member States have been collecting value added tax since 1967, because it is required by Union law. Since 1977, the corresponding legislation that the Member States have to observe is regulated in great detail. The income side of the budget of the Union includes an amount taken from the value added tax income of the Member States. By these reasons, the Member States are required by Union law to collect the value added tax properly. Naturally, any proper collection of taxes requires sanctions to fight tax fraud.

With this background in mind, is it really so surprising that the Court of Justice decided that Sweden has to adhere to the Charter of Fundamental Rights of the European Union also in this criminal tax procedure?

Actually, the Court of Justice came to quite a similar decision already in 2005 in a case concerning Silvio Berlusconi: the Accounting Directives require the Member States to have appropriate measures in place to punish violations of the duty to disclose account balances. When it came to the corresponding penal provisions of Italy, the European Court of Justice naturally applied the principle of retroactive application of the more lenient penalty. This didn't upset anyone at the time; as far as I know, nobody raised the issue that the Court of Justice had interfered with competences of the Member States by applying principles of Union law to national criminal law. Similar circumstances can be seen in the case *Commission against Italy* of 2008 which concerned, just like the *Åkerberg Fransson* case, the efficient collection of value added tax. Here the Court of Justice declared the Italian amnesty laws with regard to value added tax to be in violation of (community) Union law. The Court recognized a violation of the duty to collect effectively the Union's own resources as well as a violation of the Sixth Value Added Tax Directive. Neither this judgment nor the judgment in the Berlusconi case were considered to be an infringement of national competences. This is why it is astonishing to read the press coverage in the *Åkerberg* case.

According to the European point of view, one can only have a different interpretation of the case if one does not know that, for example, the value added tax is actually a European tax. In fact, the scope of European Union law is often underestimated. And not because people couldn't anticipate how broadly the European Court of Justice might rule, but because it is easy to lose a sense for how many areas exist that the governments of the Member States have already transferred to Union law.

I would like to close with this provocative consideration and I am curious to hear your point of view, especially as to the *Pringle* case.