Constitutional judgment 3-4-1-6-12

JUDGMENT
OF THE SUPREME COURT EN BANC

No. of the case	3-4-1-6-12
Date of judgment	12 July 2012
Composition of court	Chairman Märt Rask, members Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Jaak Luik, Priit Pikamäe, Ivo Pilving, Jüri Põld, Harri Salmann and Tambet Tampuu
Court Case	A request of the Chancellor of Justice to declare Article 4(4) of the Treaty establishing the European Stability Mechanism signed on 2 February 2012 in Brussels to be in conflict with the Constitution.
Basis of proceeding	Request no. 8 of the Chancellor of Justice of 12 March 2012
Hearing	Oral proceedings

Date of hearing	08 May 2012
Persons who attended the hearing	Chancellor of Justice Indrek Teder, his Senior Adviser Kaarel Eller and Acting Adviser Merike Saarmann; as representatives of the Government of the Republic – Minister of Justice Kristen Michal, Acting Director of the Public Law Division of the Legislative Policy Department of the Ministry of Justice Illimar Pärnamägi and Adviser of the same Division Age Inkinen; as representatives of the Ministry of Finance – Minister of Finance Jürgen Ligi, Deputy Secretary-General of Foreign Relations Tanel Ross, Head of the Legal Department Tiit Rebane and Head of the State Treasury Department Merle Wilkinson; as representatives of the Ministry of Foreign Affairs – Minister Urmas Paet and Acting Director of the European Law Division Kadri Elias; as representatives of the Bank of Estonia – Deputy Governor Madis Müller and Head of the Legal Department Kadi Kapral; as a representative of the Department of Economics of the Estonian Business School – Acting Head of the Department of Economics Andres Tupits; as a representative of the Tallinn University Law School – Lecturer Ivar Raig; and as a representative of the Faculty of Law of the University of Tartu – Docent Carri Ginter

DECISION **To dismiss the request of the Chancellor of Justice.**

FACTS AND COURSE OF PROCEEDINGS

1. At a meeting of the European Council on 16–17 December 2010 the European Union (EU) Member States agreed about the need to establish for EU Member States where the single currency euro is in use a permanent stability mechanism for ensuring the financial stability (of the euro area). At the same meeting the EU Member States also agreed on amendment of Article 136 of the Treaty on the Functioning of the European Union (TFEU) in such a manner that the euro area Member States would have a clear authorisation to establish a stability mechanism. On 11 July 2011 the Minister of Finance signed the Treaty establishing the European Stability Mechanism (ESM) (the Treaty). On 9 December 2011 at a meeting of the European Council the Heads of Government of the euro area Member States agreed on the amendment of the Treaty.

2. On 26 January 2012 the Chancellor of Justice addressed the Minister of Finance with a memorandum concerning the amendments to the Treaty. The Minister of Finance replied to the Chancellor of Justice on 1 February 2012.

3. On 2 February 2012 the Government of the Republic adopted an order no. 60 “Approval of the Draft Treaty establishing the European Stability Mechanism and grant of authorisation”. By the order the Draft Treaty was approved and the permanent representative of Estonia to the EU was authorised to sign it. On 2 February 2012 the representative of Estonia in Brussels signed the amended Treaty which the Member States are required to ratify. The Treaty is planned to enter into force in July 2012.

4. On 12 March 2012 the Chancellor of Justice had recourse to the Supreme Court, relying on § 6(1)4) of the Constitutional Review Court Procedure Act (CRCPA), with a request to declare Article 4(4) of the signed Treaty to be in conflict with the principle of parliamentary democracy arising from § 1(1) and § 10 of the Constitution, and with § 65 10) and § 115 of the Constitution.

5. By a ruling of 22 March 2012 the Constitutional Review Chamber of the Supreme Court referred the case to the Supreme Court *en banc*. The Supreme Court *en banc* asked the opinion of experts on the constitutionality of Article 4(4) of the Treaty. Opinions were submitted to the Supreme Court *en banc* by Dr

Anneli Albi, the Department of Economics of the Estonian Business School, the Tallinn University Law School, the Faculty of Social Sciences of the Tallinn University of Technology and the Faculty of Law of the University of Tartu.

REQUEST OF THE CHANCELLOR OF JUSTICE

6. The Chancellor of Justice deems the request admissible. § 6(1)4) of the CRCPA grants the Chancellor of Justice the right to file with the Supreme Court a request to declare a signed international agreement or a provision thereof to be in conflict with the Constitution. The Treaty is a signed international agreement. Review of the constitutionality of international agreements differs from the review provided for in § 142(1) of the Constitution. The CRCPA has granted the Chancellor of Justice the competence to challenge international agreements in order to guarantee what has been provided for in § 123(1) of the Constitution, i.e. that Estonia would not enter into international agreements which are in conflict with the Constitution. Prior submission of a proposal is not a precondition for having recourse to the Supreme Court. If according to the earlier wording of the CRCPA the Chancellor of Justice could file a request after the entry into an international agreement, i.e. after ratification in case of an agreement subject to ratification, then as of 2005 the Act provides that a request may be filed already after signature.

7. The Treaty is an international agreement. It will establish an international financing institution ESM which is not an EU institution. The ESM will have its own members, its own voting procedure, and its employees will have their own privileges and immunities. An international agreement is an agreement governed by international law. The Treaty will be governed by international law; the Contracting Parties to the Treaty will create rights and obligations for themselves by the agreement. For instance, Estonia will be required to irrevocably and unconditionally subscribe the authorised capital stock.

8. In EU law there is a principle of attributed competences and the EU has three types of competences – exclusive competence, shared competence and competence to take measures for supporting, coordinating or complementing measures taken by Member States. Although the monetary policy of the euro area is within the exclusive competence of the EU, then based on Article 5(1) of the TFEU, the EU plays only a supporting role in coordination of economic policies. It means that in the said area the Member States may independently exercise their competence, including to cooperate to this end and to involve EU institutions in the cooperation. It does not arise from the applicable EU law or from Article 136 of the TFEU that the Member States have an obligation to establish a stability mechanism like the ESM. Only the legislation in the adoption of which the procedure provided for in the Treaties establishing the European Union has been adhered to is the legislation of the EU. This position is supported also by the planned amendment to Article 136 of the TFEU. Since the Treaty is not an Act of the secondary law of the EU, the Supreme Court can verify its accordance with the Constitution.

9. Article 4(4) of the Treaty interferes with the principles of parliamentary democracy and reservation by the parliament, and the budgetary powers of the *Riigikogu*. The principle of parliamentary democracy embodies the chain of legitimacy and political responsibility where the executive power is liable to the parliament and the parliament in turn to the people in whom the supreme authority is vested. Based on the reservation by the parliament, the *Riigikogu* shall establish all provisions relevant from the aspect of the functioning of the state and the society. On the basis of § 115(1) of the Constitution, for each year the *Riigikogu* passes a law which contains a budget that sets out all items of government revenue and expenditure. The budget is also an instrument of the *Riigikogu* by which the obligation provided for in § 14 of the Constitution to guarantee the fundamental rights and freedoms of persons is fulfilled. § 65 10) of the Constitution pursuant to which the *Riigikogu*, acting on a proposal of the Government of the Republic, decides whether to authorise government borrowing or assumption of other financial obligations is related to the budgetary powers. The budgetary powers of the *Riigikogu* is one of the most central elements of the parliamentary organisation of state and the state budget is one of the most important source documents of governance. Budgetary-political choices are within the *Riigikogu*'s core competence where the legislature has wide discretion.

10. The nominal value of the capital stock to be subscribed by Estonia in the Treaty is about 8.5% of the gross domestic product; this means that it is an extremely vast proprietary obligation. In accession to the

Treaty the budgetary-political choices of the *Riigikogu* will diminish. It is not to be ruled out that the debt obligations of the ESM shall be reflected as a government debt for the purposes of Article 126(2)(b) of the TFEU and Article 2 of Protocol No. 12 to the TFEU.

11. By ratifying the Treaty the *Riigikogu* will decide only on the assumption of a proprietary obligation, but it has been provided very generally on which conditions the ESM may use the right guaranteed by Estonia to grant financial assistance. A declarative condition that the ESM will exercise its right to grant financial assistance on strict and appropriate conditionality if it is indispensable for safeguarding financial stability in the euro area as a whole and in its member states is not sufficient, with a view to the volume of proprietary obligations which may arise, to legitimise all subsequent decisions of the ESM. It arises from § 65 10) of the Constitution in conjunction with the principle of parliamentary democracy and the budgetary powers of the *Riigikogu* that the *Riigikogu* shall have an option to affect through the Government of the Republic the conditions of a financial assistance agreement. An inevitable precondition for the involvement of the *Riigikogu* is that the Board of Governors of the ESM will take decisions on matters related to the grant of financial assistance provided for in Article 5(6)(f) and (g) of the Treaty exclusively by mutual agreement. However, Article 4(4) of the Treaty enables the ESM to approve financial assistance by a qualified majority of 85% of the votes cast, i.e. the Estonian vote is not decisive. In order to reach 85% only the consent of the six major countries is required.

12. The seriousness of the interference is deepened by the fact that in the emergency procedure provided for in Article 4(4) of the Treaty the volume of financial assistance is limited only to the general lending volume of the ESM. Article 4(4) of the Treaty in Estonian language provides that an emergency procedure shall be used if a failure to urgently adopt a decision would threaten to a significant extent the economic and financial sustainability of the euro area. However, the Treaty in English, German, French and Finnish does not contain the requirement to a significant extent for which reason the emergency procedure according to those languages resembles all the more the general definition in Article 12(1) of the Treaty for grant of financial assistance. The emergency reserve fund established under Article 4(4) of the Treaty does not eliminate interference with constitutional principles accompanied by emergency procedure.

13. Neither the volume nor the nature of the obligations can be compared to other assumed international obligations. Although Estonia cannot prevent the International Monetary Fund (IMF) from granting loans to a country, Estonia's contribution to the IMF is limited to about 108 million euros which amounts to 0.7% of the gross domestic product.

14. Although it is questionable whether the interference with the Constitution accompanying Article 4(4) of the Treaty can be constitutional altogether, the benefit of the contested provision shall be considered on the one hand and the seriousness of the interference on the other. The general purpose of the ESM is to safeguard the financial stability of the euro area and its Member States. The purpose of Article 4(4) of the Treaty is to guarantee to the ESM an option to take necessary decisions in every situation and to ensure the effective functioning of the ESM.

15. Safeguarding the financial stability of the euro area and its Member States is an important purpose but it is decisive to what extent the measure favours the achievement of the purpose. In order to implement an emergency procedure provided for in Article 4(4) of the Treaty it is necessary to have the votes in favour of at least six countries in the case of at least one of which, i.e. Germany, prior approval by the parliament is required based on its Constitution. This takes time. Consequently, an emergency procedure may not always guarantee the speed and efficiency of taking decisions which is pursued by the contested Article. In addition, the speed and efficiency of taking decisions is not guaranteed in cases where one country whose contribution is more than 15% (Germany, France or Italy) is opposed while the rest of the countries as well as the European Commission and the European Central Bank (ECB) regard the decision as necessary.

16. The benefit accompanying Article 4(4) of the Treaty to the financial stability of the euro area does not outweigh the interference with the principles of parliamentary democracy and reservation by the parliament, and the budgetary powers of the *Riigikogu*. Consequently, the provision is in conflict with the Constitution.

OPINIONS OF PARTICIPANTS TO THE PROCEEDINGS AND EXPERTS

Government of the Republic

17.–24. [Not translated.]

Ministry of Finance

25.–38. [Not translated.]

Ministry of Foreign Affairs

39.–48. [Not translated.]

Bank of Estonia

49.–55. [Not translated.]

Dr Anneli Albi

56.–67. [Not translated.]

Department of Economics of the Estonian Business School

68.–76. [Not translated.]

Tallinn University Law School

77.–81. [Not translated.]

Faculty of Social Sciences of the Tallinn University of Technology

82.–83. [Not translated.]

Faculty of Law of the University of Tartu

84.–90. [Not translated.]

CONTESTED PROVISION

91. Paragraph (4) of Article 4 "Structure and voting rules" of the Treaty:

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

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

OPINION OF THE SUPREME COURT *EN BANC*

92. The Chancellor of Justice submitted to the Supreme Court a request to declare Article 4(4) of the Treaty in conflict with the principle of parliamentary democracy arising from § 1(1) and § 10 of the Constitution, and with § 65 10) and § 115 of the Constitution.

93. To adjudicate the case, the Supreme Court *en banc* first addresses the nature of the ESM (I). Next, the Supreme Court *en banc* weighs the admissibility of the request submitted by the Chancellor of Justice and determines the extent of the review of the request of the Chancellor of Justice (II). The Supreme Court *en banc* identifies the relevant principles of the Constitution and addresses their interference (III). The Supreme Court *en banc* also establishes the purpose of Article 4(4) of the Treaty and assesses its legitimacy (IV). Thereafter the Supreme Court *en banc* verifies the proportionality of the interference arising from Article 4(4) of the Treaty (V). In part VI of the judgment the Supreme Court *en banc* summarises the main positions outlined in the judgment. In part VII of the judgment the Supreme Court *en banc*addresses issues related to

the ratification of the Treaty and in part VIII addresses issues related to Estonia's membership of the European Union.

I. Nature of the ESM

94. In order to assess the constitutionality of Article 4(4) of the Treaty, the Supreme Court *en banc* first introduces its interpretation of the Treaty. The Supreme Court *en banc* notes that based on Article 37(3) of the Treaty, the final interpreter of the Treaty is the Court of Justice of the European Union.

95. Contracting Parties to the Treaty are 17 countries of the euro area. The Treaty will establish an international financing institution ESM which will grant financial assistance to euro area Member States, including to Estonia if necessary, for the purpose of safeguarding the financial stability of the euro area.

96. The authorised capital stock of the ESM is EUR 700 000 million, there is seven million shares, having a nominal value of EUR 100 000 each (Article 8(1) of the Treaty). The authorised capital stock is divided into paid-in shares (total nominal value EUR 80 000 million) and callable shares (EUR 620 000 million – the first sentence of Article 8(2) of the Treaty).

97. Pursuant to Article 8(4) of the Treaty, ESM Members undertake to provide their contribution to the authorised capital stock (EUR 700 000 million) in accordance with their contribution key in Annex I as follows: Kingdom of Belgium 3,4771%, Federal Republic of Germany 27,1464%, Republic of Estonia 0,1860%, Ireland 1,5922%, Hellenic Republic 2,8167%, Kingdom of Spain 11,9037%, French Republic 20,3859%, Italian Republic 17,9137%, Republic of Cyprus 0,1962%, Grand Duchy of Luxembourg 0,2504%, Malta 0,0731%, Kingdom of the Netherlands 5,7170%, Republic of Austria 2,7834%, Portuguese Republic 2,5092%, Republic of Slovenia 0,4276%, Slovak Republic 0,8240%, Republic of Finland 1,7974%.

98. According to the contribution key arising from Annex I to the Treaty, Estonia is required to subscribe 0,1860% of the authorised capital stock which pursuant to Annex II to the Treaty is 13 020 shares with the nominal value of 100 000 euros (Article 8(1) and (2) of the Treaty). Consequently, Estonia's contribution amounts to 1 302 million euros. The capital corresponding to the contribution key contains both paid-in (148.8 million euros) and callable (1 153.2 million euros) capital stock, total of 1 302 million euros. On the basis of Article 42(1) of the Treaty, such amount of capital will apply to Estonia for a period of twelve years after the date of adoption of the euro.

99. Estonia shall be required to pay the paid-in capital to the ESM within five years in equal instalments (Article 41(1) of the Treaty). Estonia shall be required to pay the callable capital (1 153.2 million euros) to the ESM when it is called in under Article 9 of the Treaty.

100. Under Article 9 of the Treaty, unpaid capital may be called in:
1) at any time by a unanimous decision of the Board of Governors (Article 5(6)(c), Article 9(1) of the Treaty);
2) by a simple majority decision of the Board of Governors to restore the level of paid-in capital (i.e. 80 000 million euros) if the amount of the latter is reduced by the absorption of losses below 80 000 million euros (Article 9(2) of the Treaty);
3) by the Managing Director if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors (Article 9(3) of the Treaty). But only in a situation where losses arising in the ESM operations cannot be covered from the reserve fund of the ESM or from the paid-in capital, i.e. 80 000 million euros (Article 25(1) of the Treaty).

101. The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price (Article 8(5) of the Treaty). The Treaty does not give rise to an obligation of an ESM Member to subscribe authorised capital stock (700 000 million euros) to the extent not corresponding to the contribution key of that ESM Member. An ESM Member shall not be required to subscribe contributions of other Contracting States. Consequently, the Treaty does not give rise to an obligation of an ESM Member to subscribe or pay in ESM capital to a greater extent than that agreed upon

in Annex II to the Treaty. In case of Estonia it is 13 020 shares, i.e. 1 302 million euros.

102. No ESM Member shall be liable for obligations of the ESM (the second sentence of Article 8(5) of the Treaty). The obligations of ESM Members to contribute to the authorised capital stock are not affected if any such ESM Member becomes eligible for, or is receiving, financial assistance from the ESM (the last sentence of Article 8(5) of the Treaty).

103. Although the capital stock of the ESM is EUR 700 000 million, the maximum lending volume of the ESM is set at EUR 500 000 million (paragraph (6) of the preamble to and Article 41(2) of the Treaty). This means that the ESM will not issue greater loans.

104. Article 25(2) of the Treaty allows to increase the volume of the callable capital. If an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9(2) or (3), a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed. A revised increased capital means that a call made to the ESM Members pursuant to Article 9(2) or (3) increases compared to the initial one. When an ESM Member settles its debt to the ESM, as referred to in paragraph 2, the excess capital shall be returned to the other ESM Members (Article 25(3) of the Treaty). At the same time it is still a call for subscribed but unpaid capital; thereby a maximum limit corresponding to the subscribed capital stock applies, in case of Estonia 1 302 million euros (Article 8(1) of the Treaty in conjunction with Annex I thereto). Such a position has been adopted also by the Chancellor of Justice in paragraph 53 of his request.

105. Article 25(2) of the Treaty does not constitute a legal basis for changing the amount of the authorised capital stock provided for in Article 8(1) of the Treaty (EUR 700 000 million), the bases for capital subscription specified in Annex I and II to the Treaty, or the ESM Member's contribution to the capital stock. Since the ESM Members undertake to subscribe the capital stock according to the contribution key in Annex I and the liability of each ESM Member shall be limited to its portion of the authorised capital stock (Article 8(5) of the Treaty), the Members are not required to subscribe greater capital stock than agreed upon in Annex I to the Treaty or make a contribution larger than their portion. Consequently, the volume of the callable capital provided for in Article 25(2) of the Treaty can be increased in case of every ESM Member only to the limit agreed upon in Annex I and II to the Treaty, that means that the total amount of paid-in and callable capital in case of Estonia is 1 302 million euros.

106. Should it be necessary to increase the capital stock, the Board of Governors shall, pursuant to Article 10(1) of the Treaty, change the authorised capital stock and amend Article 8 and Annex II accordingly. Such decision enters into force after the ESM Members have notified the General Secretariat of the Council of the European Union of the completion of their applicable national procedures (the third sentence of Article 10(1) of the Treaty). If all the ESM Members do not give their consent, the authorised capital stock will not be changed.

107. Pursuant to Article 48 of the Treaty, the Treaty shall enter into force on the date when instruments of ratification, approval or acceptance have been deposited by signatories whose initial subscriptions represent no less than 90% of the total subscriptions. If less than 100% of shares have been subscribed, the key in Annex I will then be recalculated and the total authorised capital stock in Article 8(1) and Annex II and the initial total aggregated nominal value of paid-in shares in Article 8(2) shall be reduced accordingly. This means that if some states withdraw, the maximum liability of any other state will not increase.

II. Admissibility and extent of the request of the Chancellor of Justice

108. The Chancellor of Justice notes in his request that the Treaty is an international agreement because it has been entered into between states, the Contracting Parties have not expressed with the Treaty intent to subject the Treaty to the laws of any state and it does not constitute EU law. Pursuant to § 123(1) of the Constitution, the Republic of Estonia may not enter into international treaties which are in conflict with the Constitution.

109. The Supreme Court *en banc* agrees with the position of the Chancellor of Justice that the Treaty is an international agreement for the purposes of § 123(1) of the Constitution. In the assessment of the Supreme Court *en banc* the Treaty corresponds to the requirements provided for in Article 2(1)(a) of the Vienna Convention on the Law of Treaties because it is an international agreement entered into between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

110. Primary and secondary law of the EU are distinguished for the purposes of the TFEU and TEU. The basis of the European Union law is comprised of Treaties establishing the European Union and Accession Treaties (including the TFEU and TEU), i.e. the primary law which serves as the basis for the legislation adopted in EU institutions, which is the secondary law (regulations, directives, decisions and recommendations within the meaning of Article 288 of the TFEU). Based on competency and procedural rules and requirements of formalities, the Treaty is clearly not the primary law of the EU nor an amendment of the founding treaties of the European Union for the purposes of Article 48 of the TEU. On the same considerations the Treaty is not a legislative act within the secondary law of the EU. The Treaty will not be adopted by an EU institution. The Supreme Court *en banc* is of the opinion that a similar position is shared by experts, e.g. the Faculty of Law of the University of Tartu. For the above-mentioned reasons the Constitution of the Republic of Estonia Amendment Act does not apply in the adjudication of this case.

111. § 6(1)4) of the CRCPA grants the Chancellor of Justice the right to file with the Supreme Court a request to declare a signed international agreement or a provision thereof to be in conflict with the Constitution. The Supreme Court *en banc* is of the opinion that § 6(1)4) of the CRCPA grants the Chancellor of Justice the right to challenge a signed international agreement or a provision thereof both before the ratification of the international agreement, i.e. by way of preliminary review, and after the ratification, i.e. by way of subsequent review. The Supreme Court *en banc* holds that the competence of the Chancellor of Justice arising from § 6(1)4) of the CRCPA is not in conflict with the Constitution.

112. § 139(1) of the Constitution grants the Chancellor of Justice the right to inspect the legislative instruments of the legislative and executive branch of government and of local authorities in terms of their accordance with the Constitution. The Supreme Court *en banc* holds that § 139(1) of the Constitution grants the Chancellor of Justice the right to challenge an act in accordance with which the *Riigikogu* ratifies an international agreement.

113. § 139(2) of the Constitution provides that the Chancellor of Justice also considers proposals made to the Chancellor of Justice concerning the work of state authorities. Neither § 139(1) nor (2) of the Constitution give rise to the competence of the Chancellor of Justice to challenge an international agreement. The Supreme Court *en banc* notes that the Constitution does not prohibit the legislature from granting to state bodies competences not specified in the Constitution if this does not contradict the Constitution. The Supreme Court found in a case of granting to the National Audit Office the competence to inspect local authorities that compared to constitutional competence, the imposition of additional duties on the National Audit Office must be justifiable by some good reason (judgment of the Constitutional Review Chamber of the Supreme Court of 19 March 2009 in case no. 3-4-1-17-08, point 45).

114. In assessing the competence of the Chancellor of Justice to carry out a preliminary review of an international agreement, it will be taken into account that pursuant to § 123(1) of the Constitution, the Republic of Estonia may not enter into international treaties which are in conflict with the Constitution. A preliminary review of the constitutionality of an international agreement enables the prevention of entry into an unconstitutional agreement and of subsequent difficulties which may occur if the unconstitutionality of the international agreement is established in the course of a subsequent review. According to § 15(3) of the CRCPA, if an international agreement or a provision thereof is declared to be in conflict with the Constitution, the body which entered into the agreement is required to withdraw from it, if possible, or commence denunciation of the international agreement or amendment thereof in a way which guarantees its accordance with the Constitution.

115. A signed unconstitutional international agreement does not become constitutional when ratified by the *Riigikogu*. A preliminary review prevents a situation in which an unconstitutional international agreement should later be withdrawn or denunciated. If doubts as to the unconstitutionality of an international agreement arise after the signing thereof, it is appropriate to verify the constitutionality of the international agreement before its ratification.

116. Such an interpretation also allows the state to take steps to amend the text of an already signed unconstitutional international agreement and to bring it into accordance with the Constitution before it is ratified and brought into force. If a state wishes to amend an international agreement which has entered into force in order to bring it into accordance with the Constitution, this wish in itself does not release the state from carrying out the international agreement which has entered into force.

117. The Minister of Finance holds that since the Chancellor of Justice did not follow the required pre-litigation procedure in the framework of subsequent review, his request is in conflict with § 142 of the Constitution. The Supreme Court *en banc* does not concur with this position of the Minister of Finance. § 142 of the Constitution provides for a procedure for the performance of the duty of the Chancellor of Justice provided for in § 139(1) of the Constitution. The Treaty was signed under the authorisation of the Government of the Republic but does not make a signed international agreement a legislative instrument passed by the legislative or executive branch of government for the purposes of § 142 of the Constitution. It is in line with the meaning of § 123(1) of the Constitution that the legislature has, in accordance with § 6(1)4) of the CRCPA, allowed the Chancellor of Justice to challenge a signed international agreement. If the legislature imposed on the Chancellor of Justice an additional duty, it was also free to choose the procedure for performing it and was not required to tie it to the procedure provided for in § 142 of the Constitution. Therefore, § 142 of the Constitution does not require the Chancellor of Justice to have first submitted his proposal to the body which signed the international agreement, i.e. the Government of the Republic.

118. In keeping with the aforesaid, the Supreme Court *en banc* holds that the request of the Chancellor of Justice is admissible.

119. The Supreme Court *en banc* notes in addition that on 26 January 2012 the Chancellor of Justice addressed the Minister of Finance with a memorandum to which the Minister of Finance replied on 1 February 2012. The Chancellor of Justice found in his memorandum that the emergency procedure established with the amendments to the Treaty may be in conflict with the Constitution, and did not rule out that he would deem it necessary to make further comments on the Treaty. The Chancellor of Justice recommended that Minister of Finance to take steps before the signing of the Treaty to ensure the accordance of the Treaty with the Constitution.

120. In the adjudication of the case, the Supreme Court may declare an international agreement which has entered into force or has not yet entered into force or a provision thereof to be in conflict with the Constitution (§ 15(1)3) of the CRCPA). The Chancellor of Justice requested to declare "Article 4(4) of the Treaty establishing the European Stability Mechanism signed on 2 February 2012 in Brussels to be in conflict with the principle of parliamentary democracy arising from § 1(1) and § 10 of the Constitution, and with § 65 10) and § 115 of the Constitution". The Supreme Court *en banc* holds that the Chancellor of Justice requested the review of the constitutionality of only Article 4(4) of the Treaty and not of the whole Treaty. Such a position was expressed by the Chancellor of Justice in the statement of reasons for his request and in the thesis submitted for the session of the Supreme Court *en banc*. The Chancellor of Justice said also at the session that he was challenging only Article 4(4) of the Treaty.

121. In keeping with the aforesaid, the Supreme Court *en banc* verifies the constitutionality of the Treaty only to the extent challenged by the Chancellor of Justice, and assesses the constitutionality of Article 4(4) of the Treaty.

III. Principles of the Constitution and interference therewith

A. Positions of the Chancellor of Justice on the principles of the Constitution and interference therewith

122.

First the Supreme Court *en banc* shall summarise of the main positions on the interference with the principles of the Constitution presented in the request of the Chancellor of Justice.

123. In his request the Chancellor of Justice deems relevant four principles of the Constitution: parliamentary democracy; reservation by the parliament; the budgetary powers of the *Riigikogu* and the competence of the *Riigikogu* to decide on the assumption of financial obligations for the state. Concerning the budgetary powers of the *Riigikogu* (§ 115 and § 65 6) of the Constitution) the Chancellor of Justice holds that this is one of the most central elements of the parliamentary organisation of state and that the state budget is one of the most important source documents of governance. Budget policy choices are within the *Riigikogu*'s core competence where the legislature has wide discretion. At the same time, the budget is also an instrument of the *Riigikogu* by which the obligation provided for in § 14 of the Constitution to guarantee the fundamental rights and freedoms of persons is fulfilled. The Chancellor of Justice notes that the competence of the *Riigikogu* to decide on the assumption of financial obligations for the state is closely related to the budgetary powers of the *Riigikogu* and subjected to the reservation by the parliament (§ 65 10) of the Constitution, also § 121(4) of the Constitution).

124. The Chancellor of Justice compares the obligations arising for Estonia from the Treaty with the provision of a state guarantee (for the purposes of § 402 of the State Budget Act), and finds that provision of a state guarantee must be subjected to reservation by the parliament. This is because a guarantee does not bring about an obligation to pay money to the recipient of the guarantee or his or her creditors, but if the guarantee should be collected in the future, then it will lead to expenses for the state and affect the state budget, irrespective of the *Riigikogu*'s will. The Chancellor of Justice holds that an obligation to subscribe callable shares is a financial obligation for the purposes of § 65 10) and § 121 4) of the Constitution. Since it is a significant financial obligation, merely ratifying the Treaty based on § 121 4) of the Constitution is not enough to adhere to the principle of reservation by the parliament and that of the budgetary powers of the *Riigikogu*. The Chancellor of Justice admits that the Constitution does not explicitly provide a limit on guarantees provided or other financial obligations assumed by the state of Estonia. A situation wherein the *Riigikogu* decided to provide a guarantee or assume other obligations to an extent– in the event of the obligations needing to be performed – that would create the possibility that the *Riigikogu* would not be able to decide on the merits of the budgetary expenditure of future years would be in conflict with the principle of democracy.

125. The Chancellor of Justice emphasises that it would be in conflict with the principle of democracy if the fulfilment of extensive financial obligations assumed would restrict the *Riigikogu*'s discretion to such an extent that the *Riigikogu* would in fact lose its ability to make fundamental political choices through budgetary decisions, including the ability to ensure the fundamental rights of persons at the level required by the Constitution. The Chancellor of Justice notes that predicting the occurrence of such a situation is complicated at the moment of provision of a guarantee or assumption of other financial obligations required to be performed in the future.

B. Position of the Supreme Court *en banc* on the principles of the Constitution under review

126. The Supreme Court *en banc* addresses hereunder the principles of the Constitution which it deems the most relevant in the adjudication of this case.

127. Under § 1(1) of the Constitution, Estonia is an independent and sovereign democratic republic wherein supreme political authority is vested in the people. With this provision the principle of sovereignty has been fixed constitutionally as the basis for the Estonian people and the state of Estonia. The sovereignty of the people gives rise to the sovereignty of the state and thereby all state institutions obtain their legitimation from the people. The core essence of sovereignty is the right of discretion in all matters, irrespective of external influences. One element of the state's sovereignty is its financial sovereignty, which contains taking decisions on budgetary matters and on the assumption of financial obligations for the state.

128. The sovereignty clause of the Estonian Constitution is strict in wording, providing that the independence and sovereignty of Estonia are timeless and inalienable. The sovereignty provision of the

Estonian Constitution may not be interpreted to the effect that Estonia may not enter into international agreements or assume obligations before other states. The norms of the Constitution are characterised by wide discretion of interpretation. In the assessment of the Supreme Court *en banc*, despite the strict sovereignty clause the present-day context must be considered in furnishing sovereignty.

129. In legal literature it has been found that before the adoption of the Vienna Convention on the Law of Treaties in 1969, treaties had to be interpreted restrictively and in favour of the sovereignty of the state. This Convention does not contain such a principle and as of the judgment of the European Court of Human Rights of 21 February 1975 in the court case *Golder vs. United Kingdom*, practice which based on a thesis that a convention is a treaty with which sovereign states agree to restrict their sovereignty was established. An international agreement is an instrument by which every Contracting State assumes an obligation to act in a certain manner in certain cases. This means that the state waives the option to choose a different manner of conduct in such cases. Consequently, the state waives a part of its sovereignty, no matter how small of a part it is in that specific case. Estonia has entered into over 1000 international agreements.

130. Entry into international agreements is allowed by Chapter IX of the Constitution. If sovereignty is interpreted as absolute, entry into international agreements should not be allowed, because entering into international agreements always means restricting one's sovereignty to some extent. It follows that the Constitution does not require, despite the strict wording of the sovereignty clause, observation of absolute sovereignty. In her opinion submitted to the Supreme Court, Dr A. Albi refers to the fact that membership of the EU and in international organisations has become a natural part of sovereignty in this day and age.

131. Next, the Supreme Court *en banc* addresses the principle of a democratic state subject to the rule of law. § 10 of the Constitution provides that the rights, freedoms and duties set out in the second chapter do not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and which are in accordance with the principles of human dignity, social justice and a democratic state subject to the rule of law. According to § 3(1) of the Constitution, governmental authority is exercised solely pursuant to the Constitution and laws which are in accordance therewith. § 1(1), § 3(1) and § 10 of the Constitution express the principle of a democratic state subject the rule of law. The principle of a democratic state subject to the rule of law means that the general principles of law that are recognised in the European legal space are valid in Estonia (judgment of the Constitutional Review Chamber of the Supreme Court of 17 February 2003 in case no. 3-4-1-1-03, point 14).

132. The Supreme Court has held that democracy implies the exercising of power with the people’s participation and making important management decisions on a basis that is as broad and harmonized as possible (judgment of the Constitutional Review Chamber of the Supreme Court of 21 December 1994 in case no. III-4/A-11/94). According to the Constitution, democracy is representative democracy where political authority is indeed vested in the people but political authority is exercised by different public bodies under the people's authorisation. The principle of democracy is aimed at the legitimacy of the public authority, containing formation, legitimation and supervision of public bodies, and affecting all stages of formation of a political will. The principle of a democratic state subject to the rule of law, on the other hand, governs the content, extent and manner of the functioning of political authority.

133. The nature of a democratic state subject to the rule of law is also expressed by the principle of reservation by the parliament, which regulates the division of power between the legislature and executive. The Supreme Court has held that what the legislature is justified or obliged to do under the Constitution cannot be delegated to the executive, not even temporarily and under the condition of court supervision (judgment of the Constitutional Review Chamber of the Supreme Court of 12 January 1994 in case no. III-4/A-1/94).

134. Sovereignty, the principle of a democratic state subject to the rule of law and the principle of reservation by the parliament specifying the latter are general principles. The Constitution contains several norms which specify these principles. The Supreme Court *en banc* notes that the state's financial sovereignty, the principles of a democratic state subject to the rule of law and of reservation by the

parliament are also specified in § 65 6) and 10) and § 115(1) and § 121 4) of the Constitution.

135. § 65 of the Constitution provides for the competence of the *Riigikogu* to decide on various matters of the state. Pursuant to § 65 6) of the Constitution, the *Riigikogu* passes the national budget and approves the report on its implementation. The Supreme Court *en banc* holds that in furnishing § 65 6) of the Constitution, the connection of this provision with Chapter VIII of the Constitution "Finance and the National Budget", primarily with § 115(1), pursuant to which the *Riigikogu* passes an act for each year that contains a budget that sets out all items of government revenue and expenditure, must be taken into account.

136. The Supreme Court *en banc* holds that § 65 6) and § 115(1) of the Constitution give rise to the budgetary powers of the *Riigikogu*. The Supreme Court *en banc* agrees with the Chancellor of Justice that the budgetary powers of the *Riigikogu* are one of the core competences of the *Riigikogu* and its essence is the right and obligation of the *Riigikogu* to decide on the revenue and expenditure of the state budget.

137. The Supreme Court *en banc* is of the opinion that § 65 10) and § 121 4) of the Constitution give rise to the competence of the *Riigikogu*to decide on the assumption of financial obligations for the state. § 65 10) of the Constitution provides that the *Riigikogu*, acting on a proposal of the Government of the Republic, decides whether to authorise government borrowing or the assumption of other financial obligations. Under § 121 4) of the Constitution, the *Riigikogu* ratifies or denounces treaties of the Republic of Estonia by which the Republic of Estonia assumes military or financial obligations. § 106(1) of the Constitution does not allow for issues regarding the ratification of international treaties, state budget or financial obligations of the national government to be submitted to a referendum. § 121 4) and § 106(1) of the Constitution thereby give the *Riigikogu* the sole competence to decide on the state's financial sovereignty in the form of assumption of financial obligations.

138. Therefore, from § 65 6) and 10) of the Constitution in conjunction with § 115(1) and § 121 4) of the Constitution arises the right and obligation of the *Riigikogu* to plan budgetary revenue and expenditure and to decide on the assumption of financial obligations which the Supreme Court *en banc* comprehends as the financial competence of the *Riigikogu* and the interference with which is subject to review in this case.

139. The financial competence of the *Riigikogu* gives the *Riigikogu* the right to make budgetary choices and decide on financial obligations. Based on the reservation by the parliament, the financial competence of the *Riigikogu* also ties the *Riigikogu* to the obligation to make decisions concerning financial obligations and budget policy decisions itself. In conclusion, the state must use public assets in a manner which enables the performance of the duty, arising from § 14 of the Constitution, to guarantee the protection of fundamental rights and freedoms.

140. The financial competence of the *Riigikogu* is closely related to the state's financial sovereignty and the principles of a democratic state subject to the rule of law and of reservation by the parliament. By reviewing the interference with the financial competence of the *Riigikogu*, the Supreme Court *en banc* assesses, to a relevant extent, adherence to the principle of sovereignty, the principle of a democratic state subject to the rule of law and the principle of reservation by the parliament which forms part of the latter. The principle of a democratic state subject to the rule of law contains Estonia's parliamentary democracy, including the budgetary powers of the *Riigikogu*, and also the competence of the *Riigikogu* to assume financial obligations, as pointed out by the Chancellor of Justice. Consequently, the Supreme Court addresses, to a relevant extent, all of the principles indicated in the request of the Chancellor of Justice.

C. Position of the Supreme Court *en banc* on the interference with the principles of the Constitution

141. Next, the Supreme Court *en banc* addresses the issue of whether and how Article 4(4) of the Treaty interferes with the principles of the Constitution described above.

142. The Chancellor of Justice found that grant of a loan, in an emergency procedure, to a state in need of assistance affects the possibility that the ESM will make a capital call to Estonia which in turn affects the budgetary powers of the *Riigikogu*. Thereby the budgetary-political choices of the *Riigikogu* diminish and

the state budget will be planned so that it would be possible to respond to the capital calls of the ESM.

143. Although the Chancellor of Justice challenges the constitutionality of only Article 4(4) of the Treaty, the Supreme Court *en banc* is of the opinion that the arguments of the Chancellor of Justice concerning interference with the principles of the Constitution are based to a great extent on the Treaty's provisions which govern the performance of the obligations of a Member State, particularly in case of a call for authorised capital stock. Proceeding from the reasoning of the request of the Chancellor of Justice, the Supreme Court *en banc* considers, in assessing the interference with the principles of the Constitution, also other relevant provisions of the Treaty, but the Supreme Court *en banc*will not go beyond the limits of the request of the Chancellor of Justice and will not assess the constitutionality of the rest of the Treaty's provisions.

144. In case of Estonia, the amount of the paid-in capital in the ESM is 148.8 million euros and the callable capital is 1 153.2 million euros. The paid-in and callable capital form the total amount of Estonia's obligations in the ESM, i.e. 1 302 million euros. That is the maximum limit of Estonia's obligations which cannot be changed without the consent of Estonia and without amending the Treaty (see more in part I of the judgment on the nature of the ESM).

145. Estonia is required to pay the paid-in capital of 148.8 million euros within five years in equal instalments (Article 41(1) of the Treaty). In the present case the Supreme Court *en banc* does not assess whether the financial competence of the *Riigikogu* can be interfered by Estonia's obligation to pay to the ESM paid-in capital of 148.8 million euros. This is because decisions on grant of financial assistance taken in an emergency procedure under Article 4(4) of the Treaty cannot affect the payment of 148.8 million euros. The time of performance and the extent of that obligation have been determined in the Treaty (Article 41 of the Treaty).

146. The ESM may call in the paid-in capital from Estonia, if necessary. The grounds and procedure for calling in the capital have been provided for in Articles 9 and 25 of the Treaty. The unpaid capital may be called in:
1) at any time by a unanimous decision of the Board of Governors (Article 5(6)(c), Article 9(1) of the Treaty);
2) by a simple majority decision of the Board of Governors to restore the level of paid-in capital (i.e. 80 000 million euros) if the amount of the latter is reduced by the absorption of losses below 80 000 million euros (Article 9(2) of the Treaty);
3) by the Managing Director if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors (Article 9(3) of the Treaty);
4) by a qualified majority decision of the Board of Governors if an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9(2) or (3) of the Treaty. In that case, a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed (Article 25(2) and Article 5(7)(g) of the Treaty).

147. Article 4(4) of the Treaty is a provision which governs grant of financial assistance to a state in need or taking decisions on implementation of financial assistance in an emergency. In such a situation a decision will not be taken by mutual agreement, i.e. unanimously as upon grant of assistance in a regular procedure, but a decision is taken by a qualified majority of 85%. Both in an emergency and regular procedure the ESM grants financial assistance to a state in need by doing so on account of the ESM's own funds, e.g. by borrowing money from markets.

148. Article 9(2) and (3) and Article 25 of the Treaty enable to call in capital to cover losses arising in the ESM operations. Losses are charged firstly, against the reserve fund, secondly, against the paid-in capital, and lastly, against an appropriate amount of the authorised unpaid (callable) capital, which shall be called in in accordance with Article 9(3) (Article 25(1) of the Treaty). In respect of Article 9(1) of the Treaty, the Treaty does not provide in case of which necessity the Board of Governors of the ESM may decide to call in the capital from the Member States. Unlike other grounds for calling in capital, Article 9(1) of the Treaty

prescribes a unanimous decision of the Board of Governors. This means that under that provision capital can be called in only with the consent of the representative of Estonia.

149. The Supreme Court *en banc* holds that Article 4(4) of the Treaty interferes with the financial competence of the *Riigikogu* with a possibility that in the future the ESM may make a capital call to Estonia (1 153.2 million euros). Under Article 4(4) of the Treaty, grant or imposition of financial assistance to a state in need is decided. Grant of financial assistance from the ESM funds may give rise to a need to make to the ESM Members a capital call, and Estonia must fulfil its obligations to the ESM.

150. In taking decisions under Article 4(4) of the Treaty, the participation of the representative of Estonia in the voting does not guarantee the*Riigikogu*'s actual possibility to review Estonia's financial obligations. A precondition for the *Riigikogu*'s possibility for review is that by national law the *Riigikogu* has been granted an opportunity to give to the representative of Estonia binding orders for voting in the ESM bodies. Decisions are taken under Article 4(4) of the Treaty by a qualified majority of 85%. Therefore, the *Riigikogu* 's binding orders to the representative of Estonia may not affect the decisions of the ESM.

151. By ratifying the Treaty, the *Riigikogu* exercises the right arising from its financial competence and assumes financial obligations for Estonia. The *Riigikogu*'s possibility to make new future political choices is thereby restricted because the choices already made have decreased the state's financial resources. The composition of the *Riigikogu* which passes a law giving rise to the state's long-term financial obligations does not thereby restrict only its own possibilities for exercising financial competence within the same year's state budget, but also restricts the budgetary-political choices of next compositions of the *Riigikogu*.

152. The Supreme Court *en banc* notes that the obligations assumed for the state may have different degrees of binding force. That way the*Riigikogu* can decrease the expenditure planned by the state budget, although it may interfere with the principle of legitimate expectation and other constitutional values. Obligations arising from the Treaty have different degree of binding force than the obligations to which the*Riigikogu* ties itself at the national level. The Treaty is an international agreement and amendment thereof is subjected to the international law. This means that the Treaty may be amended by agreement between the parties (the first sentence of Article 39 of the Vienna Convention on the Law of Treaties). Based on Article 8(4) of the Treaty, ESM Members irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock.

153. In keeping with the aforesaid, the Supreme Court *en banc* is of the opinion that Article 4(4) of the Treaty interferes with the financial competence of the *Riigikogu* arising from § 65 6) of the Constitution in conjunction with § 115(1) of the Constitution, and from § 65 10) of the Constitution in conjunction with § 121 4) of the Constitution. The *Riigikogu* cannot fully review, through the representative of Estonia, whether and how financial assistance is granted in an emergency procedure under Article 4(4) of the Treaty. At the same time, a decision on grant of financial assistance taken under Article 4(4) of the Treaty may affect the fulfilment of Estonia's obligations to the ESM in the future – by way of a capital call (1 153.2 million euros). In the opinion of the Department of Economics of the Estonian Business School it is pointed out that the state must be ready for additional financial payments to the extent of the amount referred to. Therefore, financial assistance granted in an emergency procedure under Article 4(4) of the Treaty may affect the revenue and expenditure of the Estonian state budget and thereby restrict the budgetary-political choices of the *Riigikogu*. Such an interference with the financial competence of the*Riigikogu* brings about also an interference with the principle of a democratic state subject to the rule of law and of the state's financial sovereignty since indirectly the people's right of discretion is restricted.

IV. Purpose of Article 4(4) of the Treaty and its legitimacy

154. Next, the Supreme Court *en banc* establishes the purpose of Article 4(4) of the Treaty and assesses whether the purpose is legitimate for interfering with the principles addressed above.

155. Article 4(4) of the Treaty provides that by way of a derogation, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or

implement financial assistance, as defined in Articles 13 to 18, would threaten to a significant extent the economic and financial sustainability of the euro area.

156. In Estonian the procedure of Article 4(4) of the Treaty is called *kiirmenetlus* (expedited procedure). In English, German and French it is more like *hädaabimenetlus* (emergency voting, Dringlichkeitsabstimmungsverfahren, procédure de vote d'urgence). Article 4(4) of the Treaty may not guarantee a faster procedure compared to taking unanimous decisions. Representatives of the states receive their authorisations under national laws in parallel, not in succession. Consequently, the number of states taking part in decision-making does not significantly affect the speed of taking decisions. The procedure provided for in Article 4(4) of the Treaty is rather an emergency procedure, bearing in mind its purpose.

157. The text of the challenged provision in English, German, French and Finnish does not contain a requirement that a failure to adopt a decision should threaten the economic and financial sustainability of the euro area *to a great extent*. Thus, in other languages the basis for grant of assistance in the general norm (the first sentence of Article 12(1) of the Treaty "if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States") differs little from the special norm of the procedure provided for in Article 4(4) of the Treaty ("would threaten the economic and financial sustainability of the euro area"). Therefore, an opinion must be formed that the emergency procedure has been established for a situation where both the Commission, the European Central Bank and the states representing at least 85% of the ESM capital stock are of the opinion that the economic and financial sustainability of the euro area is threatened without grant or implementation of financial assistance, but some states have not been able to make a decision or they do not wish to grant or implement financial assistance.

158. This means that the purpose of Article 4(4) of the Treaty is to guarantee the efficiency of the ESM also in case the states are unable to make a unanimous decision to eliminate a threat to the economic and financial sustainability of the euro area.

159. Next, the Supreme Court *en banc* assesses whether this purpose is legitimate. The Supreme Court *en banc* found that Article 4(4) of the Treaty interferes with the financial competence of the *Riigikogu* provided for in § 65 6) of the Constitution in conjunction with § 115(1) of the Constitution and in § 65 10) of the Constitution in conjunction with § 121 4) of the Constitution, and is related to the principle of a democratic state subject to the rule of law and with the state's financial sovereignty. Consequently, Article 4(4) of the Treaty interferes with the principle of sovereignty arising from the preamble to and from § 1 of the Constitution.

160. The Supreme Court *en banc* held that by verifying the interference with the financial competence of the *Riigikogu* it is possible to consider all the principles challenged by the Chancellor of Justice – the budgetary powers of the *Riigikogu*, the competence of the *Riigikogu*to assume financial obligations, reservation by the parliament and parliamentary democracy. None of the provisions referred to by the Chancellor of Justice provide conditions for the interference with the said principles. The Constitution does also not provide for grounds for restricting the principle of sovereignty (§ 1 of and the preamble to the Constitution) or of a democratic state subject to the rule of law (§ 10 of the Constitution). Therefore, the legitimate aim of the restrictions must be found in other provisions. The legitimate aim of the restrictions must be to protect some other value provided for in the Constitution.

161. In keeping with the aforesaid, the Supreme Court *en banc* ascertains whether the aim of the restriction arising from Article 4(4) of the Treaty to ensure efficient decision-making of the ESM in order to eliminate a threat to the economic and financial sustainability of the euro area coincides with the principles and values of the Constitution.

162. The purpose of Article 4(4) of the Treaty is related to the purpose of the ESM. The first sentence of Article 3 of the Treaty provides that the purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if

indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. In brief, the purpose of the ESM is to safeguard the financial stability of the euro area. Article 4(4) of the Treaty seeks to ensure the achievement of the goals of the ESM in an emergency.

163. The Supreme Court *en banc* finds that the economic and financial sustainability of the euro area is contained in the constitutional values of Estonia as of the time Estonia become a euro area Member State. In the referendum on 14 September 2003 the people passed the Constitution of the Republic of Estonia Amendment Act by which they authorised Estonia's accession to the European Union. Due to Estonia's membership in the European Union, Estonia undertook to adopt the single currency euro. Estonia adopted the euro on 1 January 2011, thereby fulfilling its obligation to the European Union. The Supreme Court *en banc* holds that by authorising, in the referendum, Estonia's accession to the European Union, the people also gave the authorisation for Estonia to adopt the single currency euro.

164. Estonia is a part of the euro area and therefore economically and financially integrated with the other euro area Member States. Pursuant to Article 3(1)(c) of the TFEU, the Union shall have exclusive competence in the monetary policy for the Member States whose currency is the euro. In the field of economic policy of the EU Member States the Union and the Member States have shared competence (Article 3(3) of the TEU, Article 4(1), (2) and Article 120 of the TFEU). According to Article 119(2) of the TFEU, the primary objective of a single monetary policy and exchange-rate policy shall be to maintain price stability. Article 119(3) prescribes that these activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments. The first sentence of Article 127(1) of the TFEU provides that the primary objective of the European System of Central Banks shall be to maintain price stability. The above-mentioned means that Estonia does not carry out its economic policy alone, but in coordination with EU policy and in cooperation with other Member States; however, the monetary policy is within the sole competence of the European Union.

165. Estonia is a euro area Member State and therefore a threat to the economic and financial sustainability of the euro area is also a threat to the economic and financial sustainability of Estonia. Estonia's economy and finance are closely related to the rest of the euro area and if there are economic and financial problems in the euro area, then it inevitably affects Estonia – export and import of goods and services, state budget and thereby also social and other fields. Problems in the euro area harm also Estonia's competitiveness and reliability. The ESM as a financial assistance system may help to ensure that the euro area as a whole as well as a part of it, Estonia, would be economically and financially competitive. It is necessary to guarantee people's income, quality of life and social security. In a situation where the rest of the euro area would be in difficulties it is not probable that Estonia would be financially or economically successful, including in the field of people's income, quality of life and social security.

166. Economic stability and success ensure the planned receipt of state budget revenue. Incurring necessary expenditure ensures constitutional values. The obligation to guarantee fundamental rights arises from § 14 of the Constitution. Extensive and consistent guarantee of fundamental rights is extremely complicated, if not impossible, without a stable economic environment.

167. From the preamble to the Estonian Constitution arises the obligation of Estonia to strengthen and develop the state which is founded on liberty, justice and the rule of law. In order for such a state to function it is necessary, inter alia, to ensure an environment where state budget revenue is received as planned, enabling the fulfilment of the state's core functions.

168. The common purpose of the euro area Member States to counter threats endangering the economy and financial stability, including by way of efficient decision-making in an emergency, coincides with the purpose of Estonia to fulfil the obligation of the state of Estonia, provided for in the preamble to and in § 14 of the Constitution, to guarantee rights and freedoms. By disregarding the common purpose of the euro area Member States or the measure planned for the achievement thereof, Estonia cannot follow its objectives arising from the Constitution. Consequently, the purpose of safeguarding the efficiency of the ESM also in

case the states are unable to take a unanimous decision to eliminate a threat to the economic and financial sustainability of the euro area, including of Estonia, is legitimate.

169. The Supreme Court *en banc* holds that the interference arising from Article 4(4) of the Treaty is justified by substantial constitutional values – obligation arising from the preamble to and § 14 of the Constitution to guarantee the protection of fundamental rights and freedoms.

V. Review of proportionality

A. Choice of method and competence of the Supreme Court

170. The Supreme Court *en banc* notes that in this case the issue is not one of the interference with fundamental rights, but of the principles of the Constitution. In its earlier case-law the Supreme Court has assessed the proportionality of the interference with not only fundamental rights, but also of principles of the Constitution (see, for instance, the case of funding local authorities from the state budget, the Supreme Court *en banc* judgment of 16 March 2010 in case no. 3-4-1-8-09, point 64).

171. The Supreme Court *en banc* holds that in this case the constitutionality of the interference with the principles of the Constitution must be assessed by way of review of proportionality.

172. Pursuant to the principles of separation and balance of powers provided for in §§ 4 and 14 of the Constitution, different institutions perform duties prescribed for them by the Constitution. According to the Constitution, the duty of the *Riigikogu* is to ratify or denunciate international treaties (§ 65 4) and § 121 of the Constitution), pass the national budget and approve its implementation (§ 65 6) and § 115 of the Constitution), and decide whether to authorise the assumption of financial obligations (§ 65 10) of the Constitution).

173. § 152 of the Constitution obliges the Supreme Court to verify whether the activities of the legislature and the executive are in accordance with the Constitution. However, by performing this duty the Supreme Court must consider the principle of separation and balance of powers and the competences of state bodies established by the Constitution. The Supreme Court must verify whether the activities of the legislature are constitutional, but it cannot decide on matters entrusted to the *Riigikogu* by the Constitution.

174. By ratifying the Treaty the *Riigikogu* exercises its competence to assume financial obligations for Estonia. Setting economic and budget policy objectives and assessing the state budget possibilities and the state's economic capability have been placed within the competence of the *Riigikogu*. Therefore, the *Riigikogu* is competent to assess risks arising in respect of the state budget and economic capability of Estonia in accession to the Treaty. The Supreme Court could verify by way of constitutional review whether the *Riigikogu* has performed its duty in accordance with the Constitution. In respect of the Treaty the *Riigikogu* has not yet been able to exercise its right of discretion in the ratification procedure.

175. The *Riigikogu* can also decide on how and by which means to fulfil the future obligations arising from the Treaty. Several different ways of fulfilling the obligations arising from the Treaty may be in accordance with the Constitution. The court's duty in constitutional review is not to prescribe for the legislature a choice on how to later fulfil the obligation assumed. Also performance of obligations is a budget policy choice and forms a part of the financial competence of the *Riigikogu*. The court can also verify by way of constitutional review the constitutionality of subsequent choices made by the legislature.

B. Appropriateness and necessity of the interference arising from Article 4(4) of the Treaty

176. Next, the Supreme Court *en banc* weighs the proportionality of the interference with the principles of the Constitution arising from Article 4(4) of the Treaty against its objective. The interference is proportional if it is appropriate, necessary and reasonable for the achievement of the objective. In this part of the judgment the Supreme Court *en banc* addresses the appropriateness and necessity of the interference. Since the appropriateness of the measure for the achievement of the objective and possible alternative measures are under review, the principles interfered are not to be addressed here.

177. The Supreme Court *en banc* notes that a measure is appropriate if it favours the achievement of the objective. Thus, by assessing the appropriateness of the measure for the achievement of the objective, it must be asked whether the measure favours the achievement of the objective or is completely inappropriate for it.

178. In his request the Chancellor of Justice came to the conclusion that it is questionable how large of a benefit the emergency procedure provided for in Article 4(4) of the Treaty has in safeguarding the stability of the euro area. The Chancellor of Justice also noted that the emergency procedure may not always guarantee the speed of taking decisions sought by Article 4(4) of the Treaty because in the emergency procedure provided for in Article 4(4) of the Treaty it is necessary, for granting financial assistance, to have the votes in favour of at least six states and the ESM Members the percentage of whose vote is greater than 15% have de facto right of veto in decision-making. From the aspect of how fast decisions are taken there is no guarantee that those states whose representatives' votes are indispensable for achieving the majority of 85% in the Board of Governors can carry out the national procedures necessary for approving the assistance faster than other ESM Members. Also in the emergency procedure there is a possibility of a situation where the negative vote of one representative in the Board of Governors prevents the grant of financial assistance.

179. In point 158 the Supreme Court *en banc* found that the purpose of Article 4(4) of the Treaty is to guarantee the efficiency of the ESM also in case the states are unable to make a unanimous decision to eliminate a threat to the economic and financial sustainability of the euro area. The Supreme Court *en banc* holds that the procedure in Article 4(4) of the Treaty facilitates the achievement of the said purpose because it establishes a more efficient mechanism for deciding on grant of financial assistance in an emergency procedure. A possibility of taking decisions by a majority of 85% has been provided by Article 4(4) of the Treaty. In regular procedure, financial assistance is granted by mutual agreement (Article 4(3) of the Treaty). By ensuring a more efficient decision-making process, Article 4(4) of the Treaty facilitates the achievement of the objective – elimination of a threat to the economic and financial sustainability of the euro area. In keeping with the aforesaid, Article 4(4) of the Treaty is an appropriate measure for the achievement of the purpose.

180. The Supreme Court *en banc* concurs with the arguments of the Chancellor of Justice that Article 4(4) of the Treaty may not always and in every situation ensure that in an emergency the ESM can grant financial assistance and eliminate a threat to the financial stability of the euro area. However, the Supreme Court *en banc* is of the opinion that this does not make Article 4(4) of the Treaty inappropriate for the achievement of the purpose. Appropriateness of a measure does not mean that it must guarantee the achievement of the purpose in every situation. A measure is inappropriate if it does not facilitate the achievement of the purpose at all.

181. In respect of the necessity of the measure provided for in Article 4(4) of the Treaty it must be assessed whether the best of the available possibilities was chosen – whether there is no other measure which would facilitate the achievement of the purpose at least as much; thereby restricting the interfered principles less. This means that in verifying the constitutionality of Article 4(4) of the Treaty, the Supreme Court *en banc* assesses whether there is a decision-making mechanism which would enable in an emergency to eliminate a threat to the economic and financial sustainability of the euro area as efficiently, but would interfere with the Estonian Constitution less. The Chancellor of Justice does not point out in his request any alternative measure which would facilitate the achievement of the purpose as much but would interfere with constitutional values less.

182. The Supreme Court *en banc* considers that Article 4(4) of the Treaty is necessary for the achievement of the purpose. The Supreme Court *en banc* is of the opinion that there is no other decision-making mechanism which would ensure as efficiently the sustainability of the euro area for countering a threat thereto but would interfere with the Estonian Constitution less.

183. In case of an international organisation like the ESM, three possibilities in taking decisions are imaginable: unanimous, qualified majority or simple majority decisions. All those decision-making

mechanisms are applied in the Treaty.

184. The Supreme Court *en banc* is of the opinion that raising the limit of the qualified majority (i.e. 85%) in Article 4(4) of the Treaty would decrease the interference for Estonia only in case it would be raised higher than 99.814% because Estonia's contribution to the ESM is 0.1860%. In essence, the seriousness of the interference for Estonia would decrease only if unanimous decisions would be provided for in Article 4(4) of the Treaty. Raising the limit of the qualified majority in taking decisions in an emergency procedure provided for in Article 4(4) of the Treaty to taking unanimous decisions would not facilitate the achievement of the purpose as much. If simple majority would be provided for in Article 4(4) of the Treaty, it would facilitate the achievement of the purpose more but the interference with the Estonian Constitution would be even more serious.

185. For the above-mentioned reasons the Supreme Court *en banc* holds that the interference is appropriate and necessary for the achievement of the purpose.

C. Reasonableness of the interference arising from Article 4(4) of the Treaty

186. As the last stage of the review of proportionality the Supreme Court *en banc* verifies the reasonableness of the interference, arising from Article 4(4) of the Treaty, of the financial competence of the *Riigikogu*, also of the financial sovereignty of the state related thereto and of the principle of a democratic state subject to the rule of law compared to the achievement of the purpose.

187. The Chancellor of Justice was of the opinion that the interference with the principles of parliamentary democracy and reservation by the parliament and of the budgetary powers of the *Riigikogu* accompanying Article 4(4) of the Treaty is very serious. The Chancellor of Justice holds that an extremely vast financial obligation is assumed by the Treaty, for which reason merely ratifying the Treaty based on § 121 4) of the Constitution is not enough to adhere to the principle of reservation by the parliament and the principle of budgetary powers of the*Riigikogu*. In the assessment of the Chancellor of Justice, the Constitution requires that the *Riigikogu* shall have an actual possibility to influence through the Government of the Republic the conditions of an agreement on financial assistance in order to guarantee parliamentary review corresponding to the extent of the obligations assumed by the Treaty.

188. Next, the Supreme Court *en banc* weighs, on the one hand, the extent and seriousness of the interference with the principles of the Constitution, and, on the other hand, the importance of the purpose. In the present case the efficient decision-making procedure of Article 4(4) of the Treaty which must ensure, as the purpose of the Treaty, the financial stability of the euro area, including of Estonia, is on one scale. Financial stability is related to significant constitutional values. The other scale carries the preservation of Estonia's right to decide on its public funds. The Supreme Court *en banc* holds that the financial competence of the *Riigikogu* and Estonia's financial sovereignty are significant principles of the Constitution – values which are closely related to the principle of a democratic state subject to the rule of law.

189. The Supreme Court *en banc* does not concur with the Chancellor of Justice that Article 4(4) of the Treaty interferes with the principles of the Constitution very seriously. The Supreme Court *en banc* holds that in assessing the constitutionality of Article 4(4) of the Treaty, an interference accompanying assumption of a financial obligation in ratification of an agreement and a possible interference in carrying out the agreement in the future must be distinguished.

190. If the *Riigikogu* decides to ratify the Treaty, it will thereby decide assumption of a financial obligation for the state of Estonia. Interference with the financial competence of the *Riigikogu* arises from the possibility that the obligations arising from the Treaty must be performed in the future if Estonia is required to pay a part of or the entire callable capital (up to 1 153.2 million euros) to the ESM. The Supreme Court *en banc* is of the opinion that in case the Treaty is ratified, the interference with the financial competence of the *Riigikogu* is not serious merely because it constitutes a vast financial obligation.

191. Next, the Supreme Court *en banc* assesses circumstances related to carrying out the Treaty and the

seriousness of the accompanying interference. First, the Supreme Court *en banc* addresses circumstances related to grant of financial assistance in an emergency procedure under Article 4(4) of the Treaty, and then, the fulfilment of Estonia's obligations in case of a possible capital call.

192. Under Article 4(4) of the Treaty the ESM can grant financial assistance in an emergency procedure if such an opinion is adopted by the European Commission and the European Central Bank. This means that persons who have profound special expertise and are at the disposal of the European Commission and the European Central Bank take part in preparing the decision. One of the decision-makers in the European Central Bank is also the Governor of the Bank of Estonia.

193. In addition, the emergency procedure contains a general condition that financial assistance shall be granted only under strict conditionality. Based on Article 13(1) of the Treaty, the European Commission and the European Central Bank shall assess the following: 1) the existence of a risk to the financial stability of the euro area as a whole or of its Member States; 2) whether public debt is sustainable (together with the IMF); 3) the actual or potential financing needs of the ESM Member concerned. If after the above facts have been determined financial assistance is decided to be granted, the European Commission in liaison with the ECB and together with the IMF will detail the conditionality attached to the financial assistance facility (Article 13(3) of the Treaty). Since financial assistance is granted in instalments, it allows not to make a subsequent instalment if the recipient of the assistance refuses to comply with the agreed conditionality. The ESM shall establish an appropriate warning system to ensure that it receives any repayments due by the ESM Member under the stability support in a timely manner (Article 13(6) of the Treaty). In addition, the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – shall be entrusted with monitoring compliance with the conditionality attached to the financial assistance facility (Article 13(7) of the Treaty).

194. Under paragraph (5) of the preamble to the Treaty, recipients of financial assistance can be only those ESM Members which have ratified the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (“TSCG”) and which comply with it. Pursuant to the TSCG, the Contracting States shall ensure that their general government deficit does not exceed 3% of their gross domestic product at market prices and that their general government debt does not exceed 60% of their gross domestic product at market prices (the fourth paragraph of the preamble to the TSCG and Article 3 of the TSCG).

195. Irrespective of whether Estonia is in favour of grant of financial assistance in an emergency procedure or not, it must be presumed that the recipient of the assistance fulfils the obligations it has assumed. It cannot be presumed that the ESM would grant financial assistance to a state if at the time of taking the decision it would be known that the recipient of the assistance does not intend to fulfil its obligations to the ESM. Even if Estonia would have the right of veto upon grant of financial assistance, the *Riigikogu* would not have better chances than the other states and EU institutions to foresee the recipient's future conduct.

196. The Supreme Court *en banc* finds that the *Riigikogu* can decrease the interference with its financial competence and Estonia's financial sovereignty arising from a capital call. The *Riigikogu* has the right to assume financial obligations but it also has the right to decide on how and by which measures the obligation assumed is later fulfilled. Several different ways of fulfilling the obligation may be in compliance with the Constitution. The court's duty is not to prescribe for the legislature how the *Riigikogu* should fulfil financial obligations assumed for the state. The court has no reason to presume that the legislature will choose an unconstitutional manner of conduct. The legislature's subsequent choices in the fulfilment of financial obligations are subject to judicial review.

197. The seriousness of the interference arising from the fulfilment of the obligation is increased by the fact that it is unknown whether, when and to what extent the ESM will require Estonia to pay the callable capital. At the same time, a capital call cannot be completely unexpected for Estonia. The activities of the ESM shall be audited by auditors who shall file annual financial statements which shall be made available for the parliaments of the ESM Members (Articles 28–29 of the Treaty). Thus, it is possible to foresee whether and when the ESM may encounter difficulties and Estonia must start fulfilling its obligations. In addition, losses

arising in the ESM operations shall be charged firstly against the reserve fund and secondly against the paid-in capital (Article 25(1) of the Treaty). If the paid-in capital has decreased, it shall be restored by capital calls. Consequently, there is a gap of time between coverage of losses and a capital call. The Supreme Court *en banc* holds that it is not probable that the ESM will require Estonia to pay the entire callable capital (1 153.2 million euros) at once.

198. The Chancellor of Justice admitted in his request that safeguarding the financial stability of the euro area and of its Member States is an important objective. The Supreme Court *en banc* deems the purpose of the interference established in point 169 of the judgment – obligation arising from the preamble to and § 14 of the Constitution to guarantee the protection of fundamental rights and freedoms – very significant.

199. In order to fulfil the obligation arising from the preamble to and § 14 of the Constitution to guarantee the protection of fundamental rights and freedoms, Estonia must ensure a stable economic and financial environment and a sustainable budgetary policy. As pointed out in part IV of the judgment, the efficient decision-making procedure of Article 4(4) of the Treaty is aimed at safeguarding the economic and financial stability of the euro area. What takes place in the finance and economy of the entire euro area directly affects Estonia as a euro area Member State. The stability of the currency used in Estonia can be ensured only by cooperation with the other euro area Member States. By acceding to the ESM, Estonia's chances of participating in ensuring the reliability of the single currency used in Estonia and in ensuring the sustainability of its economy increase.

200. In order to guarantee a sustainable budgetary policy, Estonia must insure itself against possible future economic recessions. Should Estonia's economy encounter difficulties in the future, the ESM is one possibility for assistance (Article 3 and Article 12(1) of the Treaty). Financial assistance granted by international organisations helps a state in economic difficulties to cope with the fulfilment of its core functions and to guarantee the protection of fundamental rights and freedoms.

201. Estonia's interests are advanced by cooperation with various international organisations and other states. This is the way to carry out the foreign and security policy which is at the final stage aimed at guaranteeing the preservation of the Estonian people, the Estonian language and the Estonian culture through the ages provided for in the preamble to the Estonian Constitution. International cooperation ensures that Estonia has in the international environment better chances of surviving and achieving its objectives.

202. In keeping with the aforesaid, the Supreme Court *en banc* finds that Article 4(4) of the Treaty interferes with the financial competence of the *Riigikogu* and also the sovereignty related thereto, and the principle of a democratic state subject to the rule of law, but the interference cannot be deemed serious. The seriousness of the interference also depends on how the *Riigikogu* organises the future fulfilment of the obligations arising from the Treaty. By today the *Riigikogu* has not made those choices and based on the principle of separation of powers, the Supreme Court cannot assess beforehand the constitutionality of the fulfilment of the obligations. The interference is justified, in the assessment of the Supreme Court *en banc*, by very significant constitutional values. Consequently, the Supreme Court *en banc* assumes the position that the interference arising from Article 4(4) of the Treaty is not disproportionate to the purpose.

203. For the above reasons the Supreme Court *en banc* holds that Article 4(4) of the Treaty is not in conflict with the Constitution, and dismisses the request of the Chancellor of Justice under § 15(1)6) of the CRCPA.

VI. Summary of the opinions of the Supreme Court *en banc*

204. The Supreme Court *en banc* addressed the Treaty and obligations arising therefrom for Estonia. First, the Supreme Court *en banc* came to the conclusion that with the contribution key the Treaty determines the upper limit of the obligations of the Member States. Estonia undertakes to contribute 0.1860% of the authorised capital stock of the ESM and Estonia's contribution amounts to 1 302 million euros. The Treaty sets out when and how the capital to be paid in must be paid in – for Estonia it is 148.8 million euros within five years. The Treaty determines the conditions as to how the ESM can make a call for callable capital to a Member State which for Estonia is 1 153.2 million euros.

205. The Supreme Court *en banc* held that the request of the Chancellor of Justice is admissible. The Treaty is an international agreement which the Chancellor of Justice is competent to challenge based on § 123(1) of the Constitution and § 6(1)4) of the CRCPA. The Supreme Court *en banc* was of the opinion that the Treaty is not part of the primary or the secondary law of the European Union. The Chancellor of Justice is not challenging in his request the constitutionality of the entire Treaty, but merely the constitutionality of Article 4(4) of the Treaty. Therefore, the Supreme Court *en banc* is in this case competent to review said provision only.

206. The Supreme Court *en banc* found that Article 4(4) of the Treaty interferes with the financial competence of the *Riigikogu* provided for in § 65 6) of the Constitution in conjunction with § 115(1) of the Constitution and in § 65 10) of the Constitution in conjunction with § 121 4) of the Constitution, and is related to the principle of a democratic state subject to the rule of law. By ratifying the Treaty the *Riigikogu* exercises the right arising from its financial competence and assumes financial obligations for Estonia. The *Riigikogu*'s possibility to make political choices is thereby restricted, because the choices already made have decreased the state's financial resources. It also interferes with the financial sovereignty of the state of Estonia arising from the preamble to and § 1 of the Constitution, because the people's right of discretion is thereby indirectly restricted. Article 4(4) of the Treaty interferes with the financial competence of the *Riigikogu*, as well as the state's financial sovereignty related thereto and the principle of a democratic state subject to the rule of law due to the possibility that at the request of the ESM the callable capital must be paid in the future (up to 1 153.2 million euros).

207. In order to assess the constitutionality of the contested provision, the Supreme Court *en banc* weighed up the interference with principles and its objectives. The Supreme Court *en banc* is of the opinion that the purpose of Article 4(4) of the Treaty is to guarantee for the ESM in an emergency the efficiency of the decision-making mechanism to eliminate a threat to the economic and financial sustainability of the euro area. The Supreme Court *en banc* held that this objective is legitimate for interfering with the financial competence of the *Riigikogu* arising from § 65 6) of the Constitution in conjunction with § 115(1) of the Constitution and from § 65 10) of the Constitution in conjunction with § 121 4) of the Constitution, with the principle of a democratic state subject to the rule of law arising from § 10 of the Constitution, and with the principle of sovereignty arising from § 1 of the Constitution.

208. The purpose of Article 4(4) of the Treaty is related to the purpose of the Treaty to safeguard the financial stability of the euro area. The financial instability and closely related economic instability of the euro area also endanger the financial and economic stability of the state of Estonia, because Estonia is a part of the euro area. Economic and financial stability is necessary in order for Estonia to be able to fulfil its obligations arising from the Constitution. Consequently, the interference arising from Article 4(4) of the Treaty is justified by substantial constitutional values – the need arising from the preamble to and § 14 of the Constitution to guarantee the protection of fundamental rights and freedoms.

209. The Supreme Court *en banc* assessed the constitutionality of the interference arising from Article 4(4) of the Treaty by way of review of proportionality, and found that Article 4(4) of the Treaty provides for an appropriate, necessary and reasonable measure for the achievement of the objective. In weighing up reasonableness the Supreme Court *en banc* deemed it necessary to distinguish the interference occurring on the ratification of the Treaty and the interference which may occur later in implementing the Treaty when, at the request of the ESM, the callable capital must be paid. The Supreme Court *en banc* held that the interference occurring on ratification is not in itself very serious; however, the interference is based on weighty constitutional values – the need to guarantee the protection of fundamental rights and freedoms. On the basis of the aforesaid, the Supreme Court *en banc* assumed the position that Article 4(4) of the Treaty does interfere with the financial competence of the *Riigikogu* and thereby also the principle of the financial sovereignty of the state and of a democratic state subject to the rule of law, but the objectives justifying the interference are sufficiently significant.

210. In keeping with the aforesaid, the Supreme Court *en banc* found that Article 4(4) of the Treaty is not in

conflict with the Constitution, and dismissed the request of the Chancellor of Justice.

VII. About ratification of the Treaty

211. The Supreme Court *en banc* additionally notes that carrying out a ratified international agreement must also be in accordance with the Constitution. A precondition for the constitutionality of an agreement is the constitutionality of the national provisions governing the implementation of the agreement.

212. Ratification of an international agreement may give rise to a need to amend other acts which are related to carrying out the international agreement. Therefore, in addition to passing the international agreement ratification act, a separate act governing the carrying out of the international agreement or amending the existing regulatory frameworks related to the carrying out of the agreement may have to be passed. The Supreme Court *en banc* is of the opinion that it is not excluded that by the ratification act, laws related to the implementation of the international agreement are amended. It is also possible that the ratification act does not formally amend the norms of laws related to the carrying out of the agreement, but it refers to the provisions of an appropriate act. However, it must be taken into account that in such case the ratification act may, due to norms of reference, amend another act so that a new regulatory framework applied in a field related to the international agreement is established.

213. In processing a ratification act, a procedure prescribed for processing the Act which is amended by the ratification Act or to which a reference changing the legal regulatory framework is made by the ratification Act should be followed. Implementation of Article 4(4) of the Treaty may be related to, e.g., the State Budget Act and the *Riigikogu* Rules of Procedure and Internal Rules Act (RRPIRA).

214. The Constitution does not prescribe the number of readings at which bills should be deliberated. § 104(1) of the Constitution provides that the procedure for the passage of laws is provided in the *Riigikogu* Procedure Act. Based on § 111(2) of the RRPIRA, a bill shall be deliberated in a standard procedure at three readings. Under § 115 of the RRPIRA, a bill concerning an international agreement shall be deliberated at two readings unless the leading committee moves to conduct a third reading. The Supreme Court *en banc* is of the opinion that in the event that the ratification act amends other acts or makes a reference to other acts changing their norms, the draft ratification act should be deliberated at three readings. The Supreme Court *en banc* deems it questionable whether it would be in accordance with § 104(1) of the Constitution and § 111(2) of the RRPIRA were the final vote on the ratification act containing or amending legal norms belonging to the scope of application of other acts to take place at the second reading. In the case of a bill passed at three readings the members of the*Riigikogu* have more possibilities of forming their opinions before the final vote.

215. The international agreement under dispute is not a legislation of the European Union, but at the request of the *Riigikogu* it may be deemed a European Union affair for the purposes of § 18(3) and § 1521(2) of the RRPIRA. Therefore, § 18(3) and Chapter 181 (Procedure for Legislative Proceeding of European Union Affairs) of the RRPIRA may also extend to carrying out Article 4(4) of the Treaty. As a result there may be a situation whereby the activities of the Government of the Republic in carrying out Article 4(4) of the Treaty are only subjected to review by the European Union Affairs Committee of the *Riigikogu*.

216. Based on § 71(1) of the Constitution, a committee of the *Riigikogu* is a working body of the *Riigikogu*. It does not violate the Constitution if a committee of the *Riigikogu* reviews the activities of the Government of the Republic in some area and prescribes binding opinions for the Government in that area. It also does not violate the Constitution if a committee of the parliament adopts in some matters an opinion on behalf of the *Riigikogu*. A situation whereby a committee expresses the opinions of the *Riigikogu* without the *Riigikogu* having a legal opportunity to adopt an opinion in the matter may be in questionable accordance with the Constitution. Within the meaning of the Constitution it may not suffice if the role of the *Riigikogu* is limited to merely receiving information. The budgetary powers of the *Riigikogu*may be strongly interfered with if for casting a vote in the matter of granting financial assistance under Article 4(4) of the Treaty, the representative of Estonia may be prescribed on behalf of the *Riigikogu* a binding opinion only by the European Union Affairs Committee of the *Riigikogu*. Although the granting of financial assistance under

Article 4(4) of the Treaty is decided by a qualified majority decision, it may still depend on adherence to the opinion prescribed for the representative of Estonia as to whether the *Riigikogu* is required to amend the state budget after taking the decision on granting financial assistance. The opinion of the *Riigikogu* may not merely constitute a prescription for the representative of the Government of the Republic on how to cast the vote. The *Riigikogu* may prescribe for the Government of the Republic also that steps must be taken in order to form the opinions of contracting partners must be taken.

VIII. About Estonia's membership of the European Union

217. The Supreme Court *en banc* deems it additionally necessary to note the following concerning the Constitution of the Republic of Estonia Amendment Act and Estonia's membership of the European Union.

218. By Article 1 of the European Council Decision No. 2011/199 of 25 March 2011 it was decided to amend Article136 of the TFEU and add the following paragraph thereto: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality." According to paragraph (4) of the preamble to the Decision, the stability mechanism will provide the necessary tool for dealing with such cases of risk to the financial stability of the euro area as a whole, and hence help preserve the economic and financial stability of the Union itself.

219. The Treaty was signed by the euro area Member States. It establishes the ESM as an organisation which aims to eliminate threats to the financial stability of the euro area (paragraph (6) of the preamble to the Treaty). In essence, the ESM helps to ensure the functioning of the economic and monetary union and the sustainability of the monetary policy for the purposes of Article 3(4) of the TEU and Article 3(1)(c) and Article 127 of the TFEU.

220. Although the Treaty is neither the primary nor the secondary law of the European Union, it cannot be precluded that in the future it may be integrated into the primary or secondary law of the European Union. In its Resolution of 23 March 2011 the European Parliament noted that all possibilities should be explored with a view to bringing the European stability mechanism fully into the institutional framework of the Union and providing for the involvement in it of those Member States whose currency is not the euro. Also the European Central Bank expressed in its opinion the hope that the ESM would not just be an intergovernmental mechanism, but that it would become a mechanism of the Union. Consequently, there is a wish for the legal relationships that will be formed by the establishment of the ESM to be reflected in the EU law. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union signed on 2 March 2012 at the European Council in Brussels explicitly aims to incorporate this international agreement into the legal framework of the European Union.

221. The Supreme Court *en banc* is of the opinion that the above-mentioned confirms that the Treaty concerns EU law and thereby Estonia's membership of the European Union. Based on the aforesaid the Supreme Court *en banc* notes the following regarding the constitutional basis of Estonia's membership of the European Union.

222. On 14 September 2003, the people of Estonia passed in a referendum the Constitution of the Republic of Estonia Amendment Act (CREAA). Pursuant to § 1 of the CREAA, Estonia may belong to the European Union, provided that the fundamental principles of the Constitution of the Republic of Estonia are respected. According to § 2 of the CREAA, when Estonia acceded to the European Union, the Constitution of the Republic of Estonia applied without prejudice to the rights and obligations arising from the Accession Treaty. The Supreme Court *en banc* is of the opinion that the people of Estonia gave, in a referendum held on 14 September 2003, their consent in form and in substance for Estonia to accede to the European Union and thereby enjoy the rights and obligations arising from the membership of the European Union.

223. The Supreme Court *en banc* holds that § 1 of the CREAA is to be considered as an authorisation to ratify the Accession Treaty as well as an authorisation which allows Estonia to be a part of the changing

European Union. Provided the amendment of the founding treaties of the European Union or a new treaty is in accordance with the Constitution. At the same time, the Supreme Court *en banc* is of the opinion that the CREAA does not authorise the integration process of the European Union to be legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent. Therefore, it is primarily the *Riigikogu* which must, upon a change in any founding treaty of the European Union and also upon entry into a new treaty, deliberate separately and decide whether the amendment to the founding treaty the European Union or the new treaty leads to a deeper integration process of the European Union and thereby an additional delegation of the competence of Estonia to the European Union, and thus also a more extensive interference with the principles of the Constitution. If it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty of the European Union gives rise to a more extensive delegation of the competence of Estonia to the European Union and a more extensive interference with the Constitution, it is necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably amend the Constitution once again. These requirements are to be considered also if the Treaty leads to amendments to the TFEU and TEU.

A dissenting opinion of the justice of the Supreme Court Villu Kõve on the Supreme Court *en banc* judgment in case no. 3-4-1-6-12

1. I am of the opinion that the request of the Chancellor of Justice should not have been reviewed. I do not question the legislature's right to extend the competence of the Chancellor of Justice compared to what has been prescribed in the Constitution (see points 111–116 of the judgment). However, I find that the legislature cannot extend together with the competence of the Chancellor of Justice the principles of constitutional review.

The principles of constitutional review and, thus, the so-called review model have been provided for in the Constitution itself. In general, constitutional review of legislative acts has been prescribed in the Constitution as a so-called subsequent review. A preliminary review of the constitutionality of a legislative act which has not entered into force has been prescribed only as the right of the President of the Republic pursuant to § 107 of the Constitution to refuse to promulgate a law and to apply to the Supreme Court for a declaration of unconstitutionality in respect of that law. I am of the opinion that the legislature cannot extend the competence of the Supreme Court, compared to the Constitution, to make binding judgments in matters of constitutionality, even if it would be so-called practical (see points 115 and 116 of the judgment). I have expressed such an opinion also in the dissenting opinion on the Supreme Court opinion of 11 May 2006 on the interpretation of § 111 of the Constitution (3-4-1-3-06) and I stand by it.

Therefore, § 6(1)4) of the Constitutional Review Court Procedure Act should have been interpreted in this present case so that it allows the Chancellor of Justice to challenge only the constitutionality of a ratified international agreement (or an international agreement which has entered into force) (or a provision thereof) or to declare the provision referred to to be in conflict with the Constitution to the extent of allowed preliminary review.

2. Since the majority of the Supreme Court *en banc* held that the Chancellor of Justice is competent to challenge the Treaty, I proceeded therefrom in subsequent decision-making. At the same time I deem it necessary to note that I am not convinced that the opinions of the Supreme Court *en banc* on the interpretation of the Treaty are correct. Namely, I am not convinced that Estonia's maximum limit of possible obligations according to the Treaty does not in any case exceed 1 302 000 million euros and that obligations larger than that may arise for Estonia only through amendment of the Treaty (see point 144 of the judgment). Although according to the Treaty itself it is interpreted by the Court of Justice of the European Union (see point 94 of the judgment) and the *Riigikogu* is not able to make any final conclusions on Estonia's possible obligations anyway, the review of the constitutionality of the Treaty should have been extended, next to Article 4(4) of the Treaty directly challenged by the Chancellor of Justice, to at least the

provisions related thereto concerning obligations arising for Estonia.

3. I do not feel that in ratifying every international agreement containing financial obligations as in granting another guarantee the exact volume of obligations should be known if there is no risk that these obligations or accompanying conditions would start to influence, inter alia, the state budget so that the fulfilment of Estonia's obligations to its residents would be endangered and thereby also the principle of a democratic state subject to the rule of law, or if a threat to the preservation of the state's sovereignty may arise thereby. The state of Estonia may not enter into an international agreement which, when the obligations arising therefrom need to be performed, casts doubt on the continuance of the statehood as it is (§ 123(1) of the Constitution).

Since the majority of the Supreme Court *en banc* is of the opinion that no such threats arise for Estonia from the Treaty and I am not convinced enough to claim otherwise, declaration of unconstitutionality of Article 4(4) of the Treaty would be premature in such a situation, to say the least. Therefore, based on the opinions of the majority, I support the decision of the judgment to dismiss the request of the Chancellor of Justice.

A dissenting opinion of the justice of the Supreme Court Jüri Ilvest in case no. 3-4-1-6-12

Although I agree with the criticism in the dissenting opinion of the justices of the Supreme Court H. Jõks, O. Järvesaar, E. Kergandberg, L. Kivi, A. Kull and L. Laarmaa, I would still like to emphasise that I look at the matter from a fundamentally different point of view.

I cannot affirm a theory according to which in a globalising world a new “universally infiltrating” content pursuant to which everybody “voluntarily” waives to everybody all elements of identity created over millenniums in order to thereby share the universe with everybody the best is attributed to all concepts – also, e.g., to “sovereignty”.

Therefore, the sovereignty declared in the Constitution of the Republic of Estonia – according to my interpretation, a possibility free of external influences (and why not also pride) to make decisions ourselves – is the main criterion determining the legal status of the people who are worthy of their own state.

I find that in the hat trick of this present case the essence of the matter has been nicely concealed by all the debates which appear to have been intensive, as it always is with black magic. Namely, it is sought to make it look like it is a problem of the euro area (money problem) which revolves around safeguarding the stability of the currency. Actually, all participants to the proceedings admit that the Treaty does not constitute EU law, but it is an agreement within the scope of international agreements. An elementary question to follow is – why should EU Members want to conclude among themselves agreements which are not covered by the law of their own union? The answer is just as elementary – the provisions challenged by the Chancellor of Justice could not be established within EU law because the principle of taking unanimous decisions applies there. This unanimity will be lost for Estonia in the future, just like for other “little brothers” of the Treaty. This confirms my belief that one of the concealed purposes of the provision under dispute is – to deviate from the principles of EU law and to usurp the extent of the authorisation granted by nations to representative bodies in accession to the Union. The end justifies the means… a very old jesuitic principle which does not go with my comprehension of the bases of a state based on the rule of law.

Deliberation conforming to my logic shows that interpretation of the Constitution of the Republic of Estonia through these legislations which determine the scope of application of our Constitution after accession to the EU is not applicable in this case because the authorisation granted by the Estonian nation to the political forces reigning at the moment does not contain waiver of any shred of sovereignty which is not in accordance with the fundamental principles of the Constitution of the Republic of Estonia, and particularly emphasising it – outside EU law. Whether waiver of disposition of such an important part of Estonia's annual state budget (and moreover – handing over the right of disposition without an argument) is waiver of

sovereignty is naturally a question of everyone's better judgment. Sovereignty is not an object of trade which one composition of the *Riigikogu* can (though maybe in the interests of Estonia) waive “a bit”, hoping that the next composition will bargain something back. Reading Article 4(4) of the Treaty it is very clear that what is gone is gone.

Therefore, my problem is competence, or in other words, who should have the right to decide in such a situation. The high point of this dilemma is the question of whether the constitutional sovereign – the people – has, through a single referendum known to us all, granted to any composition of the *Riigikogu* holding office the right to waive, forever and ever, on current political considerations the sovereignty of the state of Estonia to any extent, or whether affirming such a concept (even through a legal doctrine valuable at first – be it the test of proportionality) is still erroneous bearing in mind the rights of the actual sovereign – the people? I am of the opinion that the Constitution of the Republic of Estonia Amendment Act does not give the *Riigikogu* the right to ratify the Treaty without holding a referendum. It gives rise to my conviction that although the Chancellor of Justice has challenged the constitutionality on a more restricted basis, his ultimate position is correct.

A dissenting opinion of the justices of the Supreme Court
Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull and Lea Laarmaa on the Supreme Court *en banc* judgment of 12 July 2012 in case no. 3-4-1-6-12

We find that the request of the Chancellor of Justice should have been satisfied.

The dissenting opinion on the Supreme Court *en banc* judgment of 12 July 2012 expresses, above all, the opinion of the justices who were in minority in voting, departing from the decision and several reasons of the judgment. Moreover, in writing this dissenting opinion we also see an opportunity to express our concern over the fact that the Supreme Court *en banc* has made the judgment clearly in a rush. The court case in question is the most important one in our constitutional review history so far. This is precisely why such emotional arguments like “the Treaty will solve the financial crisis of the European Union and will at last ensure the financial stability of the euro area” cannot cause rush with the adjudication of the court case. Due to the rush, the judgment does not reflect by far all the important aspects of the problems which are the object of the court case and extremely significant from the statehood of Estonia point of view.

More specifically, we wish to note the following regarding the problems and decisions of this court case.

1. We admit that in general the writers of a dissenting opinion should not address those opinions and reasons of the judgment with which they agree. However, we feel that in this dissenting opinion it is necessary to explore some more the subject of the competence of the Chancellor of Justice. We agree with the summarising conclusion contained in point 118 of the judgment of the Supreme Court *en banc* that the Chancellor of Justice was competent to challenge in the Supreme Court the constitutionality of Article 4(4) of the Treaty. In point 106 of the judgment it has been sufficiently justified that formally the Treaty is definitely an international agreement and above all points 114–116 of the judgment contain sufficient and convincing reasons as to why the preliminary review of international agreements by the Chancellor of Justice is in accordance with the spirit of the Constitution. In the context of the case as a whole it must be deemed noteworthy that in the opinions of the Government of the Republic as well as of other representatives of the executive powers the Chancellor of Justice lacks competence to initiate the present case. It is sought to be justified in brief by the fact that preliminary review by the Chancellor of Justice would decrease or even eliminate the competence of the *Riigikogu* in ratification of international agreements. In our opinion, rejecting such competence of the Chancellor of Justice significantly complicates the constitutional review of international agreements as a whole. Namely, based on the facts noted in points 114–116 of the judgment, the review of the constitutionality of a ratified international agreement is hindered by those problems which are practical, on the one hand, and which harm a state's international prestige, on the other hand, and which would occur when Estonia would like to withdraw from a ratified international agreement which has been declared unconstitutional. Such rejection of preliminary review of the

constitutionality of international agreements with a slight probability of a subsequent review is not, in our opinion, in accordance with § 14 of the Constitution pursuant to which it is the everyday duty of, inter alia, the executive power to guarantee the fundamental rights and constitutional values. By generalising the case-law it can be noticed that the problems of competence are raised for two purposes: either with the intent to guarantee in the legal landscape a more general legal certainty and clarity, or on the other hand – based on the wish of a specific participant to the proceedings to avoid solving problems of essence. In this present court case the opinion of the representatives of the executive power in the matter of the competence of the Chancellor of Justice does not follow the first purpose of disputes over competence – the purpose of guaranteeing legal certainty and legal clarity in the Estonian legal order.

2. The problem of legal clarity and certainty is, in our opinion, one of the main problems of this case of constitutionality, and it is alarming that the judgment has not been able to solve this problem to a significant extent. As mentioned previously, there is no doubt that formally the Treaty is an international agreement. But without a doubt the Treaty is not an ordinary international agreement by nature. The main question was, is and due to the judgment will be for a certain period of time what should the Treaty be deemed as materially, or in other words: how is the Treaty positioned according to the meaning and intent of its creators in the context of EU law, and how should the controversy between how the Treaty is seen and what is its nature be assessed in order to guarantee as efficient protection of constitutional values as possible. The position of the Government of the Republic reflected in point 19 of the judgment is that due to the dualistic nature of the Treaty, it cannot be addressed apart from the EU legal space, economic and monetary union; that the Treaty must be assessed based on Estonia's membership in the EU because its content and nature are related to membership in the EU and they strongly concern EU law; that the Finnish Eduskunta processes the Treaty as an EU matter and its constitutionality is assessed through Finland's membership in the EU; that in acceding to the EU, Estonia undertook to join the economic and monetary union and to adopt the euro. We find that the arguments concerning the dualism of the Treaty are not convincing. There is no doubt that the motive for establishing the Treaty – inefficiency of the functioning mechanisms of the euro area and the weakness of the review mechanisms – is the second most important matter for Estonia compared to accession to the euro area.

3. In the law of the EU Member States and also in the case-law there really is such a term as “an EU matter”, and in addition to Finland, also in a judgment of the German Constitutional Court of 19 June 2012 no. 2 BvE 4/11 (mostly points 100–105 of the judgment) the Treaty has been considered to be an EU matter. It can also not be denied that it appears quite clearly also from § 1521 (2) of the *Riigikogu* Rules of Procedure and Internal Rules Act that it is possible to deem as an EU matter something that is not regulated by EU legislation. However, we find that references to the dualistic nature of the Treaty and, inter alia, the fact that it is an EU matter does not help us in any way in the adjudication of this constitutional review case.

4. In point 222 of the judgment it is appropriately recalled that “[o]n 14 September 2003, the people of Estonia adopted in a referendum the Constitution of the Republic of Estonia Amendment Act. Pursuant to § 1 of the CREAA, Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected. According to § 2 of the CREAA, when Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty. The Supreme Court *en banc* is of the opinion that the people of Estonia gave, in a referendum held on 14 September 2003, their consent in form and in substance for Estonia to accede to the European Union and thereby enjoy the rights and obligations arising from the membership in the European Union”. We hold that membership in the European Union cannot and should not be easily identified with deeming EU matters completely binding on us. It should not be forgotten that the people have given a clear authorisation to belong to the European Union in accordance with the fundamental principles of the Constitution, but the people hardly consented, by giving the said authorisation, to subjecting themselves to any obligations which do arise from an EU matter but are outside EU law. Or if to interpret the authorisations granted by the people in such an extended manner, then can we state that in subjecting ourselves to any EU matter, the accordance of the matter with the fundamental principles of the Constitution should not be reviewed? We still find that answering that question requires a more thorough

analysis than is included in the Supreme Court judgment in question.

5. That is why we consider the following text of point 223 of the judgment debatable: “The Supreme Court *en banc* holds that § 1 of the CREAA is to be considered as an authorisation to ratify the Accession Treaty as well as an authorisation which allows Estonia to be a part of the changing European Union. Provided the amendment of the founding treaties of the European Union or a new treaty is in accordance with the Constitution. At the same time, the Supreme Court *en banc* is of the opinion that the CREAA does not authorise the integration process of the European Union to be legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent. Therefore, it is primarily the *Riigikogu* which must, upon a change in any founding treaty of the European Union and also upon entry into a new treaty, deliberate separately and decide whether the amendment to the founding treaty the European Union or the new treaty leads to a deeper integration process of the European Union and thereby an additional delegation of the competence of Estonia to the European Union, and thus also a more extensive interference with the principles of the Constitution. If it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty of the European Union gives rise to a more extensive delegation of the competence of Estonia to the European Union and a more extensive interference with the Constitution, it is necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably amend the Constitution once again. These requirements are to be considered also if the Treaty lead to amendments to the TFEU and TEU”.

We wish to emphasise the doubts which are actually the basis for point 223 of the judgment – the last and probably the most memorable point of the judgment. These are doubts as to doesn't the Treaty itself constitute in substance such amendment of the founding treaty of the European Union which would have given rise to asking for the people's consent. We hold that the Supreme Court *en banc* should have reviewed those doubts and assessed within which limits the European Union may be shaped with instruments outside the EU law.

6. The Supreme Court *en banc* has reviewed the constitutionality of Article 4(4) of the Treaty (but in connection therewith also of the entire Treaty) with a very low intensity. It is revealed, firstly, in the determination of the extent of the review (points 120, 121, 143 of the judgment) where it is stressed that the review is limited to only Article 4(4); secondly, in the determination of the purpose of the interference with the interfered principles of the Constitution; thereby this purpose is hard to catch (points 154, 158, 165, 169, 198); and lastly, in the determination of the competence of the Supreme Court (points 173 and 174 of the judgment). From the purposes of a preliminary review specified in points 114–116 of the judgment arises logically, in our opinion, that a review of a contested international agreement should be as extensive and thorough as possible. Therefore, provisions related to Article 4(4) of the Treaty should have been subjected to the review as well. We find that in addition to Article 4(4) of the Treaty referred to by the Chancellor of Justice, also the irreversible and unconditional nature of the financial obligations to be assumed by the Treaty (point 58 of the judgment) and the limited nature of judicial review of the operations of the ESM (point 62 of the judgment), as referred to by Dr Anneli Albi, jurisprudent, should have been addressed as related provisions.

7. In respect of the thoroughness of the review we cannot concur with the conclusion arising from points 173–175 of the judgment like the Supreme Court could review the constitutionality of the provision in question in full only after the *Riigikogu* has been able to exercise its right of discretion in the ratification procedure. By such a self-restraint the Supreme Court *en banc* made the review of the request of the Chancellor of Justice meaningless in a large part, although in points 114–116 of the judgment the Chancellor of Justice was granted unrestricted competence for filing such a request in the preliminary review stage. The self-restraint may be explained by a wish of the Supreme Court *en banc* to avoid assumption of final responsibility. If to agree with the position of the Supreme Court *en banc* that the method of preliminary and subsequent review of constitutionality may differ, then final conclusions concerning the constitutionality of one and the same provision may also differ. It is worth mentioning that at the same time with the self-restraint in question the Supreme Court has deemed itself competent, in addressing the necessity of the measure provided in Article 4(4) of the Treaty, to nonetheless assess whether the euro area Member States

have a decision-making mechanism which would allow to eliminate in an emergency a threat to the economic and financial sustainability of the euro area as effectively but which would interfere with the Estonian Constitution less (point 182 of the judgment).

8. Unfortunately, the majority of the Supreme Court *en banc* chose in this court case the review of proportionality in order to assess the constitutionality of the interference with the principles of the Constitution; thereby referring to the case of funding local authority budget (the Supreme Court *en banc* judgment of 16 March 2010 in case no. 3-4-1-8-09, point 64). This reference which should justify the choice of review is misleading because the point referred to pertains to the right of a local authority to assume debt obligations and to the authorisation granted to the legislator to restrict the independence of local authorities and to the need of that restriction, i.e. interference, to be appropriate, necessary and reasonable for the achievement of its purpose. The central issue in that court case was the fundamental right of local authorities – the autonomy clause "all local matters are determined and administered by local authorities, who discharge their duties autonomously in accordance with the law" provided for in § 154 of the Constitution, not the principles of the Constitution: sovereignty of the state, including the financial competence of the parliament and the principle of a democratic state subject to the rule of law. By applying the proportionality test the majority of the Supreme Court *en banc* held that the interference occurring on the ratification of the Treaty is not very serious; however, the interference is based on significant constitutional values – the need to guarantee the protection of fundamental rights and freedoms. It is unclear how the Supreme Court *en banc* could assess the appropriateness and necessity of the interference in a situation where the Supreme Court *en banc* lacked a certain analysis as to how great the benefit of the emergency procedure provided for in Article 4(4) of the Treaty is in safeguarding the stability of the euro area. In assessing reasonableness it was proceeded from unreasoned belief that the interference occurring in the ratification of the Treaty and the interference which could occur later in carrying out the Treaty must be distinguished. We are of the opinion that it should have been assessed whether the contested emergency procedure which leaves the state of Estonia out of the decision-making outweighs the sovereignty of the state of Estonia, including the financial competence of the *Riigikogu* and the principle of a state subject to the rule of law which are one of the most substantial principles. The answer to that question is negative in our opinion.

9. It can be concluded from the reasoning of the judgment that the Supreme Court *en banc* did not assess or even deem it necessary to assess the risks arising for the state budget and economic capability of Estonia in accession to the Treaty. The Supreme Court *en banc* held that the Supreme Court can, in principle, verify whether the *Riigikogu* has fulfilled its duty in accordance with the Constitution only by way of a subsequent review of constitutionality (i.e. after the ratification of the Treaty) (see point 174 of the judgment). Such an approach cannot be agreed with. Already in these present proceedings – therefore in a preliminary review of the constitutionality of a provision of an international agreement the Supreme Court must assess all the risks. This should have been done by the Supreme Court *en banc* also with regard to Article 4(4) of the Treaty. This in turn means that the representatives of the executive power should have actually filed with the Supreme Court a thorough risk analysis, but they failed to do so.

10. The authors of this dissenting opinion cannot understand the line of thought proceeding from points 175 and 189 of the judgment as if after ratifying the Treaty Estonia would have sufficiently various options for carrying out this international agreement and all that is required is to choose the options which are constitutional. The constitutional problem, in fact, is that after ratifying the Treaty Estonia lacks any options in essence. The fact that the Treaty is to be carried out no matter what after its ratification means in the end that Estonia's financial possibilities of carrying out constitutional obligations nationally decrease by the amount which Estonia must pay for carrying out the Treaty. In this context it is irrelevant from which sources the funds necessary for carrying out the Treaty are obtained. Let us note here that in a situation where Article 4(4) of the Treaty would have to be carried out, the conditions for receiving loan money are most likely not favourable.

The Supreme Court *en banc* has noted that the court's duty in the constitutional review is not to prescribe for the legislator a choice on how to later fulfil the obligation assumed and that the court can verify by way of constitutional review also the constitutionality of subsequent choices made by the legislator (point 175 of the

judgment). We find that such a position is irrelevant. The constitutionality of carrying out the Treaty is a problem different from the constitutionality of the provisions of the Treaty itself. This present case is not and it cannot be a dispute over how Estonia is going to carry out the Treaty. At the same time the validity of the Treaty does not depend on the validity of legislation adopted for carrying out the Treaty. This means that the Treaty will remain in force also in case some legislation adopted for carrying out the Treaty is declared invalid by the Supreme Court by way of constitutional review.

11. The conclusion of the Supreme Court *en banc* that the Treaty is indispensable for safeguarding the economic and financial stability of the euro area and of Estonia, and through it also the protection of fundamental rights and freedoms (point 208 of the judgment) is unfounded. Such a position should have been based on an economic-scientific analysis.
The fulfilment of financial obligations arising from the Treaty presumably decreases the allocation of state budget funds to Estonian institutions which guarantee the protection of fundamental rights. There is no doubt that the implementation of the Treaty harms the principle of a social state arising from §§ 10 and 28 of the Constitution because making payments to the capital stock of the ESM decreases state budget funds. Keeping the state budget in balance will probably be more difficult than so far as well. Dr Anneli Albi, legal researcher, pointed out in her opinion the risk of hyperinflation which may accompany the ESM and the interference with the right of ownership related thereto. Unfortunately, these issues have gone unnoticed by the Supreme Court *en banc*.

12. Participation in international cooperation (point 201 of the judgment) is without a doubt an argument in favour of accession to the ESM but the judgment lacks the smallest of analyses that not being a part of the ESM would give rise to serious setbacks for Estonia in international cooperation. It is hard to agree with the comprehension of the majority that if Estonia's economy should encounter difficulties in the future, the ESM is one option to receive assistance (point 200 of the judgment). The source of such optimism is not revealed in the judgment. Both Articles 3 and 12(1) of and paragraph (6) of the preamble to the Treaty referred to in the judgment tie assistance to a threat to the euro area. The situation of Estonia's economy alone does not constitute a threat to the euro area in our opinion.

13. We also note that considering only the lack of Estonia's right of veto is not possible in weighing the constitutionality of the Treaty. It is important to state that in the decision-making process of the ESM, the possibility of small countries, including of Estonia, to jointly protect their interests have significantly decreased. The required 85% majority can be obtained under a decision of merely the six largest Member States. By adding up the votes of Germany's 27.1464, France's 20.3859, Italy's 17.9137, Spain's 11.9037, the Netherlands' 5.7170 and Belgium's 3.4771 we get a majority of 86.5438 votes. In other words, the six Member States have a possibility to take a decision without needing the votes in favour of the remaining 11 Member States. Consequently, unlike decision-making processes in the European Union, the decision-making mechanism of the ESM is based on the fact that the contributed money determines the voting rights (see R. Narits and G. Ginter, ESM lepingu põhiseaduslikkus kui demokraatliku protsessi defitsiidi küsimus (Constitutionality of the Treaty Establishing the ESM as a Matter of Deficit of Democratic Process), Juridica, 2012, No. 5, pp. 343–358).

A dissenting opinion of the justice of the Supreme Court Tambet Tampuu on the Supreme Court *en banc* judgment of 12 July 2012 in case no. 3-4-1-6-12

1. I agree with points 2–13 of the dissenting opinion of the justices of the Supreme Court Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull and Lea Laarmaa.

2. Unlike the majority of the Supreme Court *en banc* I find that in assessing the constitutionality of Article 4(4) of the Treaty it was not correct to assess the proportionality of the interference with the principles of the Constitution. The so-called proportionality test is suitable for assessing the constitutionality of a provision of legislation in cases where the matter of an interference with a person's fundamental rights is being

adjudicated. This present case does not constitute a dispute of such type.

The main issue of this court case is a question of whether the *Riigikogu* may waive a part of its budgetary powers to the ESM. The Supreme Court *en banc* justifiably held that Article 4(4) of the Treaty interferes, inter alia, the principles of Estonia's sovereignty and a democratic state subject to the rule law provided for in § 1 of the Constitution. I am of the opinion that these principles constitute fundamental principles of the Constitution. The waiver of the *Riigikogu*'s budgetary powers accompanying Article 4(4) of the Treaty does not decrease only Estonia's sovereignty, but is also undemocratic because the people have, by electing the *Riigikogu*, authorised the members of the composition of the*Riigikogu* to make budgetary decisions themselves pursuant to § 65 6) and § 115(1) of the Constitution. Since it is an interference with the fundamental principles of the Constitution which have been provided for in the first chapter of the Constitution, the right to decide on the permissibility of such interferences is vested, based on § 162 of the Constitution, solely in the people of Estonia as a sovereign. In connection with Article 4(4) of the Treaty the *Riigikogu* can decide whether to hold a referendum for amending the Constitution (see § 65 2), § 161, § 163(1) and § 164 of the Constitution).

The Supreme Court *en banc* has wrongly deemed the Treaty as an ordinary international agreement (see points 129 and 130 of the judgment of the Supreme Court *en banc*), failing to notice that Article 4(4) of the Treaty gives rise to a situation where the people's possibility to decide, through *Riigikogu* elections, on how to use state budget funds decreases. By passing annual state budgets (concerning all revenue and expenses of the state) the *Riigikogu* exercises on behalf of the people the budgetary powers of the state which is one of the most important characteristics of the sovereignty of a state. Since the Treaty and Article 4(4) thereof will remain valid in case the Treaty is ratified also when the people elect future compositions of the *Riigikogu*, the people cannot fully express their political will, by *Riigikogu* elections, in the future in matters related to the expenditure of the state budget.

For the reasons mentioned above I find that the Supreme Court *en banc* should have satisfied the request of the Chancellor of Justice because in order for Article 4(4) of the Treaty to enter into force, the Constitution needs to be amended by way of a referendum.

3. I concur with the opinion of the majority of the Supreme Court *en banc* that the Treaty is not a part of the primary or the secondary law of the European Union. But considering the fact that the Treaty will probably give rise to the amendment of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (see points 217–223 of the judgment of the Supreme Court *en banc*), the Supreme Court *en banc* should have assessed in this matter whether Article 4(4) of the Treaty is in accordance with the fundamental principles of the Constitution for the purposes of § 1 of the Constitution of the Republic of Estonia Amendment Act (CREAA). Giving such an assessment would eliminate a situation where Estonia accedes to the Treaty validly but the future amendments of the TEU and TFEU related thereto may prove to be in conflict with the fundamental principles of the Constitution and therefore invalid for Estonia.

I would like to note in addition that the people of Estonia did not waive, by passing the CREAA in a referendum, the *Riigikogu*'s budgetary powers to the European Union. It can be concluded from point 223 of the judgment of the Supreme Court *en banc* that in order to waive the*Riigikogu*'s budgetary powers to the European Union the Constitution needs to be amended. Logically, the requirement to amend the Constitution should apply in all cases where the *Riigikogu*'s budgetary powers are waived, including in case of Article 4(4) of the Treaty.

4. I do not agree with the opinion of the majority of the Supreme Court *en banc* that the seriousness of the interference with the Constitution depends also on how the *Riigikogu* organises the fulfilment of the obligations arising from the Treaty (see points 175, 189, 196 and 202 of the judgment of the Supreme Court *en banc*). According to the first sentence of Article 8(4) of the Treaty, ESM Members irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock. Pursuant to the second sentence of Article 8(4) of the Treaty, ESM Members shall meet all capital calls on a timely basis in accordance with the terms set out in this Treaty. Consequently, the*Riigikogu* cannot, without breaching the

Treaty, alleviate the effect of possible negative consequences for Estonia arising from the application of Article 4(4) of the Treaty.

5. In assessing the seriousness of the interference, the majority of the Supreme Court *en banc* has proceeded also from how the Treaty governs the application of Article 4(4) of the Treaty (see points 191–195 of the judgment of the Supreme Court *en banc*). But the fact that Estonia has no means to affect the application of that provision by way of voting has gone unnoticed.

Dissenting opinion of the justice of the Supreme Court Jaak Luik on the Supreme Court *en banc* judgment of 12 July 2012 in case no. 3-4-1-6-12

I do not agree with the judgment of the Supreme Court *en banc* concerning dismissal of the request of the Chancellor of Justice. The Supreme Court *en banc* was forced to make a rushed judgment in a situation of confusion, uncertainty and legal vagueness dominating in the legal space of both Estonia and the European Union. Reading the judgment of the Supreme Court *en banc* I am overwhelmed with concern, perplexity and puzzlement. I am not capable of thoroughly analysing in the dissenting opinion all the positions, conclusions and beliefs of the judgment of the Supreme Court *en banc*. For that reason I will concentrate on the most important aspects, addressing first the constitutionality of the Treaty from the fundamental principles of the Constitution point of view (I), then the efficiency and possible effect on Estonia of the ESM as an instrument (II).

I

1. The fundamental principles of the Constitution can be divided on the basis of purpose (function): 1) ideas (values bearing a main idea, so-called self-values, e.g. guarantee of preservation of the Estonian nation, culture and language, but also guarantee of human dignity and safe living environment for all who have settled in Estonia); 2) instrumental (aims/values of a measure, e.g. the state and law, fundamental rights, freedoms and obligations, bases of and procedure for amending the Constitution); and 3) expressing measure (e.g. justice, independence and sovereignty).

2. On the basis of an agreement founded on the national right of self-determination of the people of Estonia (preamble to, Chapter I “General Provisions” and Chapter XV “Amendments of the Constitution” of the Constitution), an integral and single system of the fundamental principles of the Constitution (the fundamental principles can also be called pillars) can be formed: 1) purpose; 2) independent and sovereign democratic republic; 3) sovereign – in which the supreme political authority is vested – the people; and 4) the bases of and procedure for amending the Constitution. In brief, the principle of integrity and unanimity allows us to assess the depth and extent of interference with the fundamental principles.

3. Pursuant to § 1(1) of the Estonian Constitution, Estonia is an independent and sovereign democratic republic wherein supreme political authority is vested in the people. I agree with the position of the Supreme Court *en banc* that the main essence of the sovereignty fixed as the basis for the people and state of Estonia by the Constitution is expressed in the right of discretion in all matters of exercise of political authority irrespective of external influences. The state's financial sovereignty is one element of sovereignty which includes taking decisions on budgetary matters and on assumption of financial obligations for the state (paragraph 127 of the judgment of the Supreme Court *en banc*).

4. By finding that the sovereignty clause of the Estonian Constitution is strict by wording, providing that the independence and sovereignty of Estonia are timeless and inalienable, the Supreme Court *en banc* failed to ascertain the spirit and purpose of timelessness and inalienability of the sovereignty, adopting the opinion that also this norm is characterised by wide discretion of interpretation (paragraph 128 of the judgment of the Supreme Court *en banc*). It is not possible to agree with the linear legal-positivist approach to the concept of

sovereignty.

5. According to § 1(2) of the Constitution, the independence and sovereignty of Estonia are timeless and inalienable. In furnishing the timelessness and inalienability of independence and sovereignty it is appropriate to recall that on 21 June 1940 President K. Päts released by a decree no. 55 issued under a special right the Government of the Republic and by a decree no. 56 appointed a Government headed by Prime Minister Johannes Vares. What happened next to Estonia's independence and sovereignty, and people and dignity is well known to us all. Let it be said that the President was competent, on the basis of a special right, to release and appoint the Government. Probably based on those and other fears a special sovereignty protection clause was provided in the Constitution in order to avoid alienation (waiver) of the independence and sovereignty of Estonia merely under competence norms. The sovereignty clause is also an indisputable requirement of safeguarding the self-determination right of the people of Estonia, the democratic state subject to the rule of law and social state, and the dignity of the people and state of Estonia.

6. Since § 1(2) of the Constitution explicitly provides for the timeless prohibition on alienation of independence and sovereignty, here is no room for interpretation – the prohibition on alienation of sovereignty is absolute both in time and in a changing legal space. Also partial handing over (surrender/waiver) of independence and sovereignty is alienation of sovereignty. If as a rule assumption of a financial obligation with an ordinary international agreement narrows/restricts/limits only the state's budgetary-political choices, then assumption of an obligation to partially waive the financial sovereignty in question eliminates in essence parliamentary democracy in issues related to the ESM. As I understand it, the sovereignty provided for in § 1(1) of the Constitution is expressed in entry into international agreements in exchange of amenities and cooperation, based on the parties' free will, which is not related to waiver of competences of an independent and sovereign state. The Republic of Estonia may not enter into international treaties which are in conflict with the Constitution (§ 123(1) of the Constitution). An international agreement containing an obligation to partially waive sovereignty is in conflict with § 1(2) of the Constitution. Thus, in the context of the Constitution, restriction and waiver of sovereignty are in principle terms with different meanings.

7. The principle of a democratic state subject to the rule of law has been derived from § 10 of the Constitution. According to § 3(1) of the Constitution, governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith. Therefore, also the prohibition on alienation of sovereignty is a requirement of a democratic state subject to the rule of law which shall be adhered to unconditionally in the exercise of political authority.

8. The Constitution of the Republic of Estonia Amendment Act (CREAA) passed at a referendum did not alter the system of fundamental principles of the Constitution. Pursuant to § 1 of the CREAA, Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected. When Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty (§ 2 of the CREAA). This is how Estonia as a EU Member State preserved parliamentary democracy, including reservation by the parliament as well as independent budgetary powers.

9. In a meeting of 21 July 2011 between the Heads of State and Government of the euro area Member States it was decided to make the ESM more efficient by replacing, inter alia, in the text of the Treaty signed by the Minister of Finance on 11 July 2011 the original requirement of unanimity with a qualified majority of 85% if the European Commission and the European Central Bank conclude that in order to safeguard the financial and economic stability of the euro area it is necessary to urgently adopt a decision related to financial assistance. Under the Government of the Republic order of 2 February 2012 no. 60 “Approval of the draft “Treaty Establishing the European Stability Mechanism” and grant of authorisation”, the representative of Estonia signed the Treaty in Brussels. Hereby I join and agree with the conclusion and its reasoning in paragraph 11 of the dissenting opinion of the justices of the Supreme Court Henn Jõks and others that due to the said replacement, the possibility of small countries, including Estonia, to jointly protect their interests decreased significantly.

10. According to Article 8(4) of the Treaty, ESM Members irrevocably and unconditionally undertake to provide their contribution to the capital stock. Grant of emergency assistance under Article 4(4) of the Treaty may give rise to a capital call (subscribed but not paid 1 153 200 million euros, paid-in 148.8 million euros, total of 1 302 000 million euros). Article 4(4) of the Treaty does not allow the *Riigikogu* to influence the decision-making of the ESM in an emergency procedure. This can be done by the following countries having the right of veto in emergency procedure: Germany, France and Italy. From the aspect of the Constitution it is worth to point out a warning of professor Dr Dietrich Murswiek that the ESM constitutes a transformation from the fundamental principle of the European monetary union (the European Union as a whole or a single Member State is not required to assume the debt obligations of another Member State) to a different principle where market economy, the Member States' own risk, democracy and sovereignty mean less and less, leading to interference with the budgetary and financial policy as well as with economic and social policy of the Member States.

11. The Supreme Court has held in its earlier decision that reservation by the parliament expresses the nature of a democratic state subject to the rule of law: what the legislator is justified or obliged to do under the Constitution cannot be delegated to the executive, not even temporarily and under the condition of court supervision (the Constitutional Review Chamber of the Supreme Court judgment of 12 January 1994 in court case no. III-4/A-94; see also paragraph 133 of the judgment of the Supreme Court *en banc*).

12. In connection with the Treaty, important financial decisions have been made beforehand by the Government instead of the parliament. The Treaty does not allow the *Riigikogu* to make any amendments. So the *Riigikogu* cannot decide independently on Estonia's amount of the paid-in and callable capital or on the method (equation) of calculating the obligation, on the rules of emergency procedure and grant of financial assistance. In carrying out the Treaty the *Riigikogu* does not have the competence to shape, to the extent of capital called in, the conditions for grant of emergency assistance, assess whether emergency assistance has been granted under strict conditionality (the ESM is not required to report to the *Riigikogu*, so it is free to grant emergency assistance on other considerations without setting any conditions) and whether the assistance is productive. At the same time the parliament is liable to the people for the state's expenditure and revenue as well as for the balance between them. Whether and how can the *Riigikogu* bear financial-political general liability within its budgetary powers if it merely plays the role of guaranteeing the execution of a capital call? Now it is time to ask: what is / will be left of the *Riigikogu*'s financial sovereignty besides a merely formal competence to decide on the ratification of the Treaty in question and on the post-ratification obligation to establish a legal environment necessary for the fulfilment of the financial obligation assumed irrevocably and unconditionally and to reserve 1 153 200 million euros to ensure the satisfaction of a claim filed at any given time? In perplexity I place here three question marks.

13. The ESM is a measure for alleviating the consequences of the global financial crisis (in the present situation it is difficult to form an opinion on other purposes which may appear in the ESM operations, also on possibilities of establishment of new instruments and assumption of new obligations). At the same time it is obvious that the Treaty concerns the fundamental principles of the Constitution as a whole: the self-determination right of the people, the state's sovereignty, including financial sovereignty (depth of interference) and monetary policy and functioning of a democratic state subject to the rule of law and social state in all its areas, including guarantee of fundamental rights (extent of interference).

14. § 162 of the Constitution explicitly and unambiguously provides that Chapter I (General Provisions) and Chapter XV (Amendment of the Constitution) of the Constitution may only be amended by referendum. Namely amend: by adding to the Constitution it is not possible to furnish the timeliness and inalienability of Estonia's independence and sovereignty as a fundamental principle differently and to attribute a different purpose to it so that the uniform system of fundamental principles as a whole would remain unchanged. Consequently it is not important whether the Treaty is just an international agreement or an international agreement which concerns EU law more or less: due to the existence of the prohibition on partial waiver of sovereignty, the Constitution does not allow to ratify the Treaty. The Chancellor of Justice submitted to the Supreme Court a request to declare Article 4(4) of the Treaty to be in conflict with the principle of

parliamentary democracy arising from § 1(1) and § 10 of the Constitution, and with § 65 10) and § 115 of the Constitution. The Supreme Court has not assessed the conformity of Article 4(4) of the Treaty and of the Treaty as a whole with § 1(2) of the Constitution.

II

15. According to the judgment of the Supreme Court, the purpose of the ESM is to safeguard the financial stability of the euro area. Be it so. But the conclusion of the Supreme Court *en banc* that the economic and financial sustainability of the euro area is included in the constitutional values of Estonia (paragraph 163 of the judgment) is problematic and disputable. Firstly, it is not possible to be sure that by authorising in a referendum Estonia's accession to the European Union the people thereby authorised Estonia's accession to the single currency euro and as a result of that agree to partial waiver of sovereignty and assumption of an enormous financial obligation with inevitably accompanying new restrictions. Secondly, in applying the proportionality test the Supreme Court *en banc* set the fundamental principles (values) and ESM instruments on the same level by considering Article 4(4) of the Treaty as a value justifying restrictions on requirements arising from the principles of sovereignty and a democratic state subject to the rule of law (paragraphs 160–162 of the judgment of the Supreme Court *en banc*). Thirdly, the judgment of the Supreme Court *en banc* does not contain a word about the nature of the global, including of the euro area's financial crisis, about political, economic and ideologic reasons and about the actual situation. Therefore I find that without having a clear overview of the situation and without thoroughly knowing the facts of the financial and economic crisis it was not possible for the Supreme Court *en banc* to make a thoroughly deliberated and reasoned judgment.

16. According to Article 119(2) of the TFEU, the primary objective of a single monetary policy and exchange-rate policy shall be to maintain price stability (including consumer prices). The nations of the wealthiest countries in the euro area still enjoy that benefit. As of the adoption of the euro the consumer prices have constantly risen in Estonia. And so the rise in consumer prices in Estonia this year has been the highest within the euro area. This means the consumer price stability has acquired a negative output in Estonia. Alleged economic success is seeming: Estonia is without a doubt one of the poorest countries in the euro area. A rise in prices due to opening of the electricity market lies ahead. The Constitution obliges us to develop the state which shall ensure to present and future generations social progress and welfare (preamble to the Constitution). Is social progress and welfare to be understood as a guarantee of well-being for few?

17. The Treaty attributes an opposite value also to the principle of solidarity: Estonia undertakes to guarantee with the taxpayer's money the sustainability of the states of the euro area which are many times wealthier than Estonia, including the sustainability of the private sector (banks) of the said states. The idea probably is that the inhabitants of those states are used to well-being which shall be maintained as long as possible. The living standard in Estonia may safely decrease. Estonia is a small country, the people are patient and understanding: it laboured to adopt the euro to meet the Maastricht criteria, when the economic depression came and in the interests of budget balance it agreed to restrictions without complaining. Is it not unjust? Or does it in the contemporary interpretation mean a state founded on liberty, justice and the rule of law (preamble to the Constitution). I am perplexed.

18. In its earlier judgment the Supreme Court has defined democracy as the exercise of power with the people's participation and making important management decisions on a basis as broad and harmonized as possible (the Constitutional Review Chamber of the Supreme Court judgment of 21 December 1994 in court case no. III-4/A-11/94; see also paragraph 132 of the judgment of the Supreme Court *en banc*). Yet, democratic participation as a national mentality has still not found a place in the Estonian society: the people are not informed of problems related to the Treaty and therefore have not been able to participate at all in the decision-making process or to influence it. An enormous obligation is wished to be assumed for the state; however, it is the people who bear the obligation. My serious concern here is that although pursuant to § 14 of the Constitution it is the duty of the legislature, the executive, the judiciary, and of local authorities, to guarantee rights and freedoms, the Government has failed, in preparing the draft Treaty and in ratifying it, to seriously consider or analyse the conformity of the Treaty in question with the Constitution.

19. The euro is a means of payment, currency and capital. It is common knowledge that the principle of free movement of capital which is known as one of the pillars of the European Union has become, in a situation of lack of supervision and control on the merits of the operations of banks, a factor endangering the financial stability of the euro as well as the sustainability of the euro area Member States. Foundation of a bank and budget union is conceivable as a solution to the problem of capital management and sustainability of the euro area Member States. In guaranteeing sustainability, adherence to the Maastricht criteria could prove to be helpful. But regardless of how hard I try, I cannot understand how emergency assistance/assistance increasing the burden of debt of a state/bank allows in the long run to guarantee the economic and financial sustainability thereof and of the entire euro area (see paragraph 181 of the judgment of the Supreme Court *en banc*). So I find that the beliefs of the Supreme Court *en banc* in the mystical efficiency of the ESM in safeguarding the prosperity of the euro area Member States, including Estonia, (see paragraphs 163–169, 179, 199–201, 208 and 209 of the judgment of the Supreme Court *en banc*) do not fit in the boundaries of intelligent probability.

20. Capital is a phenomenon guided by the principle of absolute greed. It means that capital always moves there where the biggest gain can be expected, being completely indifferent to ethics and other spiritual values. Therefore also being indifferent to the preservation of the Estonian nation, language and culture (paragraph 201 of the judgment of the Supreme Court *en banc*).

21. A financial crisis is a phenomenon of a global value crisis. The nature of a value crisis has been captured well by a theologian Dorothee Sölle: “Our relationship with the world has been defined by the most important idols worshipped by the contemporary culture: money and violence. In terms of language it means that a lot of people have become interestingly helpless with respect to all that cannot be obtained, acquired, taken possession of, conquered, controlled or marketed.” A value crisis is chaos in thinking, characterised by aimlessness, shallowness and vagueness, lack of fundamental values as fulcrums, the centre of multiplicity of values is occupied by material gain. In lack of an ethical discipline the reigning political authority deems also the people/person as an instrument. Time will tell whether/when/how the value system of Estonia will change. One thing is clear already: Estonia's attempt to become one of the wealthiest countries in Europe – is not a reasonable goal. However, Estonia may reach the dignified states with the combination of skilful possession of means and understanding.
On the twentieth anniversary of the Constitution of the Republic of Estonia I wish the people of Estonia happy endurance in the past, present and future.
