1. **THE APPLICANTS** – one possible approach.

The applicants could contend that the plain meaning of the words contained Article 123 means that OMT’s are not permitted and are beyond the Scope of the treaties.

This argument depends on using the wording of the Treaty provision itself, but also arguing that the purpose of the Article is to ensure that it is not circumvented by any mechanism which would subvert the treaties i.e. the spirit and not just the letter of the law.

Since the Applicants did not bring the case (it is a preliminary ruling request), they could argue that the case should not have been referred under Article 267 and that the national court could have decided the case on its own. This is especially true where the German constitutional court has always gone its own way previously and never referred a case to the CJEU before. Why now?

The German court has said in its preliminary ruling that if the CJEU rules OMT impermissible then it will find in favour of the Applicants and declare OMT illegal. That will end the OMT programme.

1. **THE RESPONDENT, Germany and the German constitutional court** – one possible approach

POLITICAL BACKGROUND TO GERMAN REFERRAL TO CJEU

• Held a strong position politically at the time.

• Strong financial position in comparison to other countries.

• Assumed a leadership role within the eurozone during the financial crisis. • Showed a willingness to lend bilateral support to struggling countries.

LEGAL BACKGROUND TO GERMAN REFERRAL TO CJEU

* This is the first ever preliminary reference by the German Constitutional Court. While the court acknowledges the principle of the supremacy of EU law, Germany’s constitutional court has reserved the right to say both whether it has both competence to deal with the case (which contradicts supremacy) and competence to decide the case or refer it to the CJEU. It could therefore be an open question as to whether Germany would abide by the CJEU decision.
* The German court has said in its preliminary ruling that if the CJEU rules OMT impermissible then it will find in favour of the Applicants and declare OMT illegal. That will end the OMT programme.

1. The Respondent could say that because of the importance of the issues raised are not appropriately dealt with by a national court and that a referral under Article 267 was necessary (this is a more political than legal point in light of bullet point above).
2. The Respondents may argue that a very close textual analysis of the press conference and the Treaty articles merely means that such transactions cannot take place directly but can take place ‘second hand’. This means the respondents can argue either that a) OMT is permissible based on the actual words of the treaty articles (literal interpretation) or, b) even if the actual words don’t *say* that, that the purpose of the articles is support and cohesion and therefore what they actually mean is that OMT is permissible (the teleological interpretation). The Respondent can argue both of these approaches and doesn’t have to pick one or the other.
3. **The ECB** – one possible approach

The ECB could point to the massive systemic dangers that had arisen as a result of the development of the sovereign debt crisis, which had reached its apex by 2012. The ECB’s remit, notwithstanding that it is focussed on price stability primarily, has a responsibility to ensure that the Euro currency did not fall apart because of unsustainable spreads on different sovereign debts within the Eurozone. The OMT policy of September 2012 was consistent with the July 2012 promise of ECB President Draghi to do ‘*whatever it takes*’ to sustain the Eurozone – and actions on OMT have to be seen in that light. The ECB could also say that secondary purchases via intermediaries, rather than direct purchases from States are not explicitly forbidden – and are thereby permissible within the Treaties. The OMT decision was therefore lawful and the Court should rule accordingly. This is based on a teleological view of what the treaties are meant to achieve.

D. **THE NETHERLANDS** (2/3 persons) **AN INTERVENER AND NOT A PARTY TO THE CASE**

**POLITICAL BACKGROUND**

• Not as badly affected by the Eurozone crisis as Ireland or Greece.

• Did not need a bailout

• By 2012, the country was in a recession, but nothing compared to the scale of the issues faced by other countries (Greece, Ireland)

• Up until then, the Netherlands had maintained a current account surplus.

**OVERALL QUESTION REGARDING NATIONAL APPROACH**

1. Is The Netherlands likely to support OMT for political or economic reasons?

Depending on the answer to that question, the Dutch intervener might make the following preliminary points on the admissibility of the claim

1. About the court making the referral (the German Constitutional Court)

Holland could submit that the present request for a preliminary ruling may not be examined by the Court of Justice, since the referring court does not accept the binding and definitive interpretative value that the answer given by the Court in response to that request has i.e. the referring court (in this instance) doesn’t completely recognise the supremacy of the CJEU. It could that the referring court considers that it has ultimate responsibility for ruling on the validity of the decisions in question in the light of the conditions and limits imposed by the German Basic Law

1. Is there any actual cause of action yet or is the case hypothetical and contrived

* How are the applicants at risk from this decision and in need of a legal remedy
* What is the Bundestag (as Respondent) accused of?

Depending on whether these questions are asked, main question is:

1. Why/why not OMT consistent with relevant treaty articles – based on Articles 3 TFEU, 5 TEU and 123 – use a plain reading of the text

E. **GREECE** (2/3 persons) **AN INTERVENER AND NOT A PARTY TO THE CASE**

**POLITICAL BACKGROUND**

• In the midst of a profound and protracted financial crisis.

• In 2011, it was agreed that a second bailout was necessary for Greece. The bailout package was valued at €130 billion.

• The second bailout programme was ratified in February 2012. A total of €240 billion was to be transferred in regular tranches through December 2014. The recession worsened and the government continued to dither over bailout program implementation. In December 2012 the Troika provided Greece with more debt relief, while the IMF extended an extra €8.2bn of loans to be transferred from January 2015 to March 2016.

• Politically this period saw a rise in support for the radical left wing party Syrzia.

* The government agreed to creditor proposals that Greece raise up to €50 billion through the sale or development of state-owned assets, but receipts were much lower than expected, while the policy was strongly opposed by the left-wing political party, Syriza. In 2014, only €530m was raised. Some key assets were sold to insiders

**OVERALL QUESTION REGARDING NATIONAL APPROACH**

1. Is Greece likely to support OMT for political or economic reasons

Depending on the answer to that question, Greece might make the following preliminary points on the admissibility of the claim

1. That the questions raised are hypothetical since the ECB has not adopted any measure which directly affects the rights conferred by EU law on the applicants in the main proceedings
2. Is OMT preparatory and/or does it have legal effects

Depending on whether these questions are asked, main question is

1. Why/why not OMT consistent with relevant treaty articles – based on Articles 3 TFEU, 5 TEU and 123 – use a plain reading of the text

F. **IRELAND** (2/3 persons) **AN INTERVENER AND NOT A PARTY TO THE CASE**

**POLITICAL BACKGROUND**

• Ireland was also in financial difficulty at this time.

• 2011 election resulted in a change of government (from Fianna Fail to Fine Gael/Labour

coalition)

• Still feeling effects of banking crisis of 2008.

• This crisis forced to Ireland to negotiate a bailout package for the banks, which amounted to

€64 billion

• In November 2011 the Credit Institutions (Eligible Liabilities Guarantee) Scheme was extended by the Fine Gael - Labour coalition government to 31 December 2012, subject to European Union approval of state aid. This scheme guarantees specific issuances of short- and long-term eligible bank liabilities, including on-demand and term deposits, senior unsecured certificates of deposit, senior unsecured commercial paper, senior unsecured bonds and notes and certain other senior unsecured debt whose maturity could range from overnight to five years.

**OVERALL QUESTION REGARDING NATIONAL APPROACH**

1. Is Ireland likely to support OMT for political or economic reasons?

Depending on the answer to that question, Ireland might make the following preliminary points on the admissibility of the claim

1. That the questions raised are hypothetical since the ECB has not adopted any measure which directly affects the rights conferred by EU law on the applicants in the main proceedings
2. Is OMT preparatory and/or does it have legal effects

Depending on whether these questions are asked, main question is

1. Why/why not OMT consistent with relevant treaty articles – based on Articles 3 TFEU, 5 TEU and 123 – use a plain reading of the text

G. **THE COURT – decision makers**

The political significance of this case is notable because of the risk to the sovereign debt of a number of countries if the programme is invalidated. Could this cause a domino effect necessitating countries eventually having to leave the Euro? The salience of the issue is apparent from the number of interveners in this case, far more than usual. The German court has said in its preliminary ruling that if the CJEU rules OMT impermissible then it will find in favour of the Applicants and declare OMT illegal. That will end the OMT programme.

**FOR THE HEARING ITSELF**

* Gives each party two minutes to make their arguments, Applicant first, ECB second, interveners third, fourth and fifth, respondent (Germany) last
* No interruptions by parties but judges can ask question at any time
* After opening comments can give each party a further minute to comment on what they have heard from the other parties.
* Judges can then ask questions of each party to test their position
* Retire to deliberate
* Has to make a decision unanimously
* All decisions have to be referred back to text of treaties/other documents and bear in mind literal and teleological methods of interpretation
* Court needs to decide on preliminary points regarding whether referral should have been made and whether question raised in referral is purely hypothetical (only if these questions are raised in submissions of course!) – if answer to either of these questions is yes then case over
* Depending on answer to that, if no, then decide whether OMT programme as outlined in press release is consistent with relevant treaty provisions and is consistent with principle of proportionality i.e. does measure do no more than is strictly necessary to achieve the desired result? If answer is no, then what would be proportionate?
* Return to court and announce decision and reasons why.
* Conclude case and prepare to face misinformed public comment

FYI

1. **What is the objective of EU Monetary Policy?**

Extract from **Pringle** judgment (C-370/12 Judgment of the Court, 27 November 2012)(Para 54)

*‘Under Articles 127(1) TFEU and 282(2) TFEU, the primary objective of the Union’s monetary policy is to maintain price stability. The same provisions further stipulate that the European System of Central Banks (‘ESCB’) is to support the general economic policies in the Union, with a view to contributing to the achievement of its objectives, as laid down in Article 3 TEU. Further, under Article 139(2) TFEU, Article 127(1) TFEU is not to apply to Member States with a derogation within the meaning of Article 139(1).’*

**NOTES**