

Date de réception : 25/08/2014

TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

IN CASE C- 62/14

Gauweiler e.a. v German Bundestag and Federal Government

Referring Court: the German Constitutional Court (Second Chamber)

Written Observations of Ireland

Ireland, pursuant to Article 23 of the Protocol on the Statute of the Court of Justice, qua Member State, represented by Eileen Creedon, Chief State Solicitor, Osmond House, Little Ship Street, Dublin 8, acting as Agent, accepting service via e-curia, assisted by Michael Cush, Senior Counsel and Mark J Dunne, Junior Counsel, both Barristers and of the Bar of Ireland, has the honour of submitting the following written observations to the Court of Justice on the questions referred for preliminary ruling pursuant to Article 267 TFEU by the German Constitutional Court (Second Chamber), by order of that Honourable Court of 14th January 2014 and received at the Registry of the Court of Justice of the European Union on 10th February 2014

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1. Introduction

- 1.1 This case concerns a referral to the Court of Justice of the European Union of a preliminary reference by the German Federal Constitutional Court as to the compatibility of Outright Monetary Transactions (OMTs) by the European Central Bank (ECB) with Articles 119, 123 and 127 of the Treaty on the Functioning of the European Union (TFEU). The Federal Constitutional Court on 14 January 2014 expressed the view that the OMT programme is incompatible with the TFEU but nevertheless referred the question of whether the ECB Decision can be interpreted in a way that is compatible with the TFEU. The Federal Constitutional Court sees "important reasons to assume that it exceeds the European Central Bank's monetary policy mandate and thus infringes the powers of the member states, and that it violates the prohibition of monetary financing of the budget".
- 1.2 Ireland considers the ECB's OMT programme to have been an essential and effective instrument for maintaining the stability of the euro and price stability in the euro area. Ireland underlines the ECB's independence, as set out in the Treaties. Ireland considers the ECB's decision on OMT to have been taken in full respect of its mandate as set out in the Treaties. Ireland considers that the ECB's decision on OMT is consistent with the Treaties, taking account of the ECB's explanations in this respect. The potential scale of OMT is critical to its effectiveness and publicly specifying limits on this, beyond those implicit in the programme as set out in the ECB's presentation to the German Federal Constitutional Court, would impair this effectiveness in a way which would impede the ECB from carrying out its Treaty mandated role. Further such public limits could put the financial stability of the euro area in immediate jeopardy.

2. The Background to the OMT decision

2.1 In order to understand the need for the OMT decision, it is necessary to consider the economic environment of the time and the financial crisis facing the Euro zone. Since 2008 the euro area had been engulfed by a financial and economic crisis which many believed threatened the survival of the euro and undermined the achievement of the objectives of the Union as contained in Article 3 TEU. As a response to the crisis, Member States and the institutions of the European Union adopted a succession of measures to contain the crisis and prevent the disintegration of the euro area¹. The ECB played an active role in the efforts to contain the crisis by deploying a number of monetary policy instruments including its Securities Markets Programme (SMP)² and Long Term Refinancing Operations. Despite reductions in the short term interest rate to historically low levels in 2011/2012 re-denomination fears (based on the mistaken view that the single currency was reversible) resulted in very high interest rates in peripheral economies. During 2012, tensions in government bond markets reached a point where financing conditions and sovereign yields were out of line with fundamentals. The fear that the euro area would dissolve caused yields to rise and created significant levels of financial market fragmentation, which significantly hampered the transmission of the ECB's monetary policy to certain parts of the euro area.

2.2 Sovereign bonds and the sovereign debt markets play an important role in the transmission of monetary policy to the real economy through a number of channels.³ The flight of capital from peripheral sovereign debt markets severely affected the

¹ Council Regulation 407/2010 EC established the European Financial Stabilisation Mechanism (EFSM). The intergovernmental agreement the EFSF Framework Agreement 2010 established the European Financial Stability Facility (EFSF) and the Treaty Establishing the European Stability Mechanism in 2012 established the ESM.

² More information on the SMP can be found in the ECB's press release of 10 May 2010, in the ECB's Decision of 14 May 2010 establishing a securities markets programme, and in the weekly financial statements of the Eurosystem.

³ "Price channel" whereby bonds are used as a benchmark for the pricing of loans and other financial contracts; "balance sheet channel" whereby changes in bond yields affect the value of holdings on banks' balance sheets and can therefore impact the health of balance sheets and "liquidity channel" whereby sovereign yields have an effect as they are the primary source of collateral used by banks in the interbank market.

monetary transmission mechanism. The obstructions in this market, have serious implications for how the policy of the ECB can feed through banks to the real economy and achieve its objective of price stability.

- 2.3 The increase in yields and volatility in certain countries' sovereign bond markets during 2012 was, in the view of most analysts, far beyond what would be merited given their underlying macroeconomic situation. During July 2012, Italian and Spanish yields reached over 500 and 600 basis points over German bond yields. Most commentators felt that the spikes in Spanish and Italian yields were not accompanied by deterioration in macroeconomic conditions or fiscal positions of a scale to warrant the moves. However, at the time the perceived risks of dissolution of the currency union became increasingly widespread and the markets were reflecting fear of a Euro area breakup.⁴ These market expectations of dissolution looked as though they could become self-fulfilling and monetary authorities were entitled and indeed, it can be argued, obliged to act to restore the transmission mechanism, even if this required measures to dispel market expectations of a possible collapse of the single currency.
- 2.4 There were many signs that the breakdown in the monetary transmission mechanism caused by sovereign market tensions was impacting on the real economy. In July 2012, dispersion in interest rates on bank loans became very high (standard deviation of interest rates on loans to non-financial corporates across euro area countries increased by around 50% as compared to the middle of 2011). The cost of bank loans to SMEs in Spain and Italy relative to those in Germany (as measured by the interest rate on loans up to €1 million) increased by around 150 basis points between July 2011 and July 2012. The ECB's standard and non-standard monetary policy measures were

⁴ Dabrowski, Marek. 2012. *The Need for Contingency Planning: Potential Scenarios of Eurozone Disintegration*. E-Brief no 11/2012 (June). Warsaw: Center for Social and Economic Research (CASE).

Das, Arnab, and Nouriel Roubini. 2012. A Blueprint for an Amicable Divorce Settlement. *Financial Times*, April 3.

Normand, John, and Arindam Sandilya. 2011. Answers to 10 Common Questions on EMU Breakup. JP Morgan, December 7.

Portes, Richard. 2012. Market Forces Will Destroy the Euro If We Do Not Take Action Soon. Letter in *Financial Times*, July 10, 8.

not being transmitted evenly throughout the currency union. Serious credit constraints were developing in parts of the Euro area and as a result, risks of a severe contraction in economic activity increased, which threatened a deflationary spiral and, therefore, presented a risk to price stability.

2.5 In a speech at the Global Investment Conference in Europe on 26th July 2012⁵ the ECB President Draghi signalled that *‘within our mandate, the ECB is ready to do whatever it takes to preserve the euro’*.

2.6 It was against this background that the OMT announcement was made by the ECB as a crucial monetary policy instrument in order to fulfil its mandate of price stability. As set out below, it is clear that the aim of the ECB in facilitating secondary market bond purchases through OMTs was to reduce tensions on the bond market and ensure the smooth functioning of monetary policy. If such circumstances were present, the ECB could not maintain price stability across the euro area and it was primarily concerned with disturbances in the monetary policy transmission mechanism, resulting from the debt crisis.

3. The ECB’s Securities Market Programme (SMP)

3.1 The Governing Council decided in May 2010 to establish the SMP. The objective of this temporary programme was to address the malfunctioning of certain euro area debt securities market segments and to restore an appropriate monetary policy transmission mechanism.

3.2 The SMP allowed euro-area NCBs and the ECB to intervene if dysfunctional market segments were disrupting the transmission mechanism or, put another way, if the ECB’s rate signals were not being transmitted evenly to all parts of the euro area.

⁵ Speech by the President of the European Central Bank at the Global Investment Conference in London 26 July 2012

- 3.3 Interventions by euro-area NCBs and the ECB took the form of buying the sovereign bonds of several countries – initially those of Greece, Ireland and Portugal (full Programme countries) and from August 2011, Spanish and Italian bonds.
- 3.4 Purchases of bonds issued by euro-area governments were strictly limited to secondary trading, i.e. from banks and against market prices. This was necessary so as not to contravene EU Treaty provisions which prohibit monetary financing.
- 3.5 The impact of the interventions carried out under the SMP is sterilised every week. In other words, the ECB conducts specific operations to re-absorb the liquidity injected through the programme. This is done to ensure that the overall monetary policy stance isn't affected.
- 3.6 The last SMP purchases took place in February 2012 and the programme was terminated in September 2012 with the announcement of the technical features of the Outright Monetary Transactions (OMTs).
- 3.7 The ECB's Annual Report for 2013 (Page 88) reported on the SMP programme as follows:

“As in the past, the liquidity injected through the SMP continued to be absorbed on a weekly basis in 2013. The securities bought under the SMP will in principle be held to maturity. However, Eurosystem accounting rules allow sales of held-to-maturity securities when the remaining time to maturity is less than one month. The Eurosystem therefore participated in the public buy-back offer initiated by the Irish National Treasury Management Agency on 17 December 2013 and sold all of its SMP holdings of the Irish security maturing on 15 January 2014 at the offer price. At the programme's peak, the Eurosystem held SMP securities for a total settlement amount of €219.5 billion. By the end of 2013 the Eurosystem's holdings of SMP securities had been reduced to €178.8 billion owing to redemptions and participation in the Irish buy-back operation. In February 2013 the Governing Council decided to

publish details of the Eurosystem's holdings of securities acquired under the SMP. This decision was taken in line with the transparency envisaged for the OMTs."

- 3.8 It is clear that the ECB was already implementing non-standard monetary policy measures such as the Securities Market Programme. The announcement of OMTs thus represented a development of existing policy, and as has been seen, has proven to be more effective, not least because it has not yet been used.

4. **Outright Monetary Transactions**

- 4.1 In August 2012 the European Central Bank's Governing Council announced the setting-up of the OMTs, the technical features of which were further specified in a press release dated 6 September 2012. In the Introductory Statement to the ECB Press Conference of 2 August 2012⁶ it was explained that:

"The Governing Council extensively discussed the policy options to address the severe malfunctioning in the price formation process in the bond markets of euro area countries. Exceptionally high risk premia are observed in government bond prices in several countries and financial fragmentation hinders the effective working of monetary policy. Risk premia that are related to fears of the reversibility of the euro are unacceptable, and they need to be addressed in a fundamental manner. The euro is irreversible.....

The adherence of governments to their commitments and the fulfilment by the EFSF/ESM of their role are necessary conditions. The Governing Council, within its mandate to maintain price stability over the medium term and in observance of its independence in determining monetary policy, may undertake outright open market operations of a size adequate to reach its objective." [Emphasis added]

- 4.2 On 6 September 2012 the ECB took the decision on the technical features regarding OMTs. In the Introductory Statement to the ECB Press Conference of 6th September

⁶ ECB Introductory Statement to the press conference Frankfurt am 2 August 2012

2012⁷ ECB President Draghi clearly outlined the purpose of OMTs as being the safeguarding of the monetary policy transmission mechanism and the singleness of monetary policy stating:

“the Governing Council today decided on the modalities for undertaking Outright Monetary Transactions (OMTs) in secondary markets for sovereign bonds in the euro area. As we said a month ago, we need to be in the position to safeguard the monetary policy transmission mechanism in all countries of the euro area. We aim to preserve the singleness of our monetary policy and to ensure the proper transmission of our policy stance to the real economy throughout the area. OMTs will enable us to address severe distortions in government bond markets which originate from, in particular, unfounded fears on the part of investors of the reversibility of the euro. Hence, under appropriate conditions, we will have a fully effective backstop to avoid destructive scenarios with potentially severe challenges for price stability in the euro area. Let me repeat what I said last month: we act strictly within our mandate to maintain price stability over the medium term; we act independently in determining monetary policy; and the euro is irreversible.”
[Emphasis added]

4.3 The purpose of the ECB’s decision on OMTs was also reiterated in a press release on OMTs dated 6th September 2012⁸ wherein the stated aim of OMTs was to:

“safeguard an appropriate monetary policy transmission and the singleness of the monetary policy”

4.4 The key features of the framework within which OMTs would be conducted by the ECB has been outlined in a number of statements and documents. In the press release on OMTs dated 6th September 2012⁹ the framework within which OMTs would be conducted by the ECB was set out as follows:

“Conditionality

A necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. Such programmes can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions

⁷ ECB Introductory Statement to the press conference Frankfurt am 6th September 2012

⁸ ECB Press Release 6th September 2012 on OMT

⁹ ECB Press Release 6th September 2012 on OMT

Credit Line), provided that they include the possibility of EFSF/ESM primary market purchases. The involvement of the IMF shall also be sought for the design of the country-specific conditionality and the monitoring of such a programme.

The Governing Council will consider Outright Monetary Transactions to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme.

Following a thorough assessment, the Governing Council will decide on the start, continuation and suspension of Outright Monetary Transactions in full discretion and acting in accordance with its monetary policy mandate.

Coverage

Outright Monetary Transactions will be considered for future cases of EFSF/ESM macroeconomic adjustment programmes or precautionary programmes as specified above. They may also be considered for Member States currently under a macroeconomic adjustment programme when they will be regaining bond market access.

Transactions will be focused on the shorter part of the yield curve, and in particular on sovereign bonds with a maturity of between one and three years.

No ex ante quantitative limits are set on the size of Outright Monetary Transactions.

Creditor treatment

The Eurosystem intends to clarify in the legal act concerning Outright Monetary Transactions that it accepts the same (pari passu) treatment as private or other creditors with respect to bonds issued by euro area countries and purchased by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds.

Sterilisation

The liquidity created through Outright Monetary Transactions will be fully sterilised.

Transparency

Aggregate Outright Monetary Transaction holdings and their market values will be published on a weekly basis. Publication of the average duration of Outright Monetary Transaction holdings and the breakdown by country will take place on a monthly basis.

Securities Markets Programme

Following today's decision on Outright Monetary Transactions, the Securities Markets Programme (SMP) is herewith terminated. The liquidity injected through the SMP will continue to be absorbed as in the past, and the existing securities in the SMP portfolio will be held to maturity."

4.5 In a speech to the Spanish lower house of Parliament in February 2013¹⁰ ECB President Draghi explained again the purpose of the OMT decision and how OMTs would work:

"OMTs are designed to focus on bonds with a remaining maturity of up to three years, aiming to keep medium-term inflation expectations stable by avoiding a highly damaging breakdown in the transmission of monetary policy.

The ECB can only consider OMTs if there are major problems in the transmission of monetary policy and if there is strict and effective conditionality attached to an appropriate European Stability Mechanism (ESM) programme.

There are two reasons for this conditionality framework. First, OMTs are a backstop against destructive speculation. They are not a subsidy for government financing. OMTs should remove only the part of the interest rate at which governments borrow that is due to unfounded expectations of destructive scenarios for the euro area. [Emphasis added]

But our interventions are conceivable only if the risk of fiscal dominance is firmly excluded. This requires certainty that governments will maintain fiscal discipline and that continuous reforms will correct underlying weaknesses. Only strict and effective conditionality can generate that kind of assurance.

The second reason for conditionality is that an ESM programme is a catalyst for reform. It can change the economic prospects of a country towards a higher growth potential, complementing monetary policy in its efforts to support the economy. [Emphasis added]

In the past few months, we have seen a gradual easing of financial conditions. Credit spreads on sovereign and corporate bonds have fallen. Equity prices have recovered. Banks have regained market access. And money has flowed back into European debt markets.

ECB policies have played a pivotal role in this improvement, as has resolute action by governments, parliaments and the private sector. All should persevere in these efforts with confidence. The ECB, for its part, will continue to safeguard price stability, as it has done over the past 13 years."

¹⁰ Introductory Statement at the Congreso de los Diputados de Espana 12th February 2013

4.6 The framework within which OMTs would be conducted has been re-iterated in the same terms in the ECB Annual Reports 2012 and 2013.¹¹ As regards the management of financial risk associated with OMTs the ECB has stated in its 2012 Annual Report¹² that:

“as is already the case for the existing monetary policy portfolios, the financial risks of the OMTs would also be closely monitored and measured. The OMTs also incorporate two important risk-mitigating features, namely the element of conditionality entailing that purchases would only be conducted during limited time periods, subject to a successful implementation of economic policies, and the focus of the purchases on instruments with a residual maturity of between one and three years.”

4.7 In its Introductory Statement before the German Constitutional Court¹³ the ECB once again set out the targeted framework within which OMTs would operate and highlighted how the OMT programme differed from the ECB’s Securities Markets Programme as follows:

“First, there is strict conditionality because the OMTs are attached to a European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme, thereby ensuring that the Member States concerned remain under considerable pressure to implement reforms and maintain fiscal discipline. The OMT programme seeks only to reduce unwarranted interest rate spikes. I would like to make it very clear at this point that the OMT programme was not aimed at harmonising the financing conditions of the Member States. The market mechanism will continue to operate.

Another important point in this regard is that an EFSF/ESM programme is a necessary – but not a sufficient – condition for OMTs. There is no automatic follow-on. The Governing Council of the ECB will decide independently in each individual case, looking exclusively at the necessity of OMTs from a monetary policy perspective.

¹¹ ECB Annual Report 2012 page 83, & ECB Annual Report 2013 page 89

¹² ECB Annual Report 2012 Chapter 2 page 89.

¹³ Introductory statement by the ECB in the proceedings before the Federal Constitutional Court, Jörg Asmussen, Member of the Executive Board of the ECB, Karlsruhe, 11 June 2013
<http://www.ecb.europa.eu/press/key/date/2013/html/sp130611.en.html>

Second, our OMT programme is limited to the short end of the yield curve – i.e. to maturities of between one and three years – as the Eurosystem’s other monetary policy instruments have also traditionally been aimed at this period.

The third distinction between the OMTs and the SMP is the transparency of our actions, through the publication of relevant information on OMT interventions.

A fourth way in which the programmes differ from one another is that, under the OMT programme, we are not only able to buy government bonds, but also to sell them again, and their valuation is based on market prices rather than on final maturity.

Fifth, we announced that our OMT interventions would be ex ante “unlimited”. We have no doubt that this strong signal was required in order to convince market participants of our seriousness and decisiveness in pursuing the objective of price stability. At the same time, however, the design of OMTs makes it clear to everyone that the programme is effectively limited, for one by the restriction to the shorter part of the yield curve and the resulting limited pool of bonds which may actually be purchased.

OMTs – in the event that they are conducted – will not give rise to any inflationary risks. For every euro that the Eurosystem spends on government bonds, one euro will be withdrawn from the money supply in the euro area. We already did the same successfully under the SMP, which has now come to an end.”

4.8 In the introductory statement by the ECB in the proceedings before the Federal Constitutional Court Jörg Asmussen, Member of the Executive Board of the ECB, Karlsruhe, 11 June 2013 makes the following point

“We therefore also interpret the prohibition of monetary financing as being comprehensive insofar as ways to circumvent it are addressed. It is not possible to purchase newly issued government bonds at certain times. Furthermore, the central banks of the Eurosystem observe the issuing behaviour of Member States, banks and market players for signs of collusion. If, for example, a country were to convert all its bond issues to a short maturity (of up to three years), we would react.” [emphasis added]

4.9 Thus the frame work within which OMTs would be conducted was set out in terms of conditionality, coverage, sterilisation and transparency. It was reiterated that the decision on use of OMTs, and qualification for it is a matter for the ECB Governing Council, acting in accordance with its monetary policy mandate. The ECB press

statement also notes that the ECB's Governing Council will decide on the start, continuation and suspension of OMT, following a thorough assessment, in full discretion and acting in accordance with its monetary policy mandate. A necessary condition for OMTs is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. This conditionality aims to ensure that governments will make the necessary reforms and maintain fiscal discipline. The Governing Council will consider OMTs to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected, and terminate them once their objectives have been achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme. OMTs will be considered for future cases of EFSF/ESM macroeconomic adjustment programmes or precautionary programmes (such as an enhanced conditions credit line). They may also be considered for Member States already under a macroeconomic adjustment programme as they regain bond market access. It was also stated that OMTs would not take place while a given programme is under review and would resume after the review period once programme compliance has been assured. Transactions would be focused on the shorter part of the yield curve, and in particular on sovereign bonds with a maturity of between one and three years. No ex ante quantitative limits are set on the size of OMTs. The Eurosystem intends to accept the same (pari passu) treatment as private or other creditors with respect to bonds issued by euro area countries and purchased by the Eurosystem through OMTs. The liquidity created through the OMTs would be fully sterilised, while the transparency of the OMT portfolio would be greater than that of the SMP portfolio.

5. **Key features of OMT**

5.1 The OMT programme, as set out by the ECB, has a number of significant key features in the context of the issues to be determined by this Court. They are:

- (i) The purpose of the OMT Programme is for the maintenance of price stability and the safeguarding of the monetary policy transmission mechanism. The OMT programme only seeks to reduce unwarranted interest rate spikes – it is

not aimed at harmonising the financing conditions of the Member States. OMT is aimed at addressing systemic risks for the Euro area as a whole, so it is not country specific.

- (ii) The OMT programme will only cover secondary market purchases – the ECB will not purchase sovereign debt directly from governments.
- (iii) There is strict conditionality with OMTs, but an EFSF/ESM programme, while necessary is not of itself a sufficient condition for the use of OMTs.
- (iv) The decision on the use of OMTs and the qualification for the same is a matter to be decided independently by the Governing Council of the ECB alone looking exclusively at the necessity of OMTs from a monetary policy perspective.
- (v) The OMT programme is limited to the short end of the yield curve – bonds with maturities of between 1 and 3 years.
- (vi) There are no quantitative limits set. The unlimited nature of OMTs was of crucial importance given market concerns that existed at the time. Any public limit on the scale of interventions could have led to uncertainties regarding its success (the ECB had imposed limits on its purchases of sovereign debt under the Securities Markets Programme (SMP)). Its unlimited nature provided the appropriate backstop that markets deemed necessary to counter re-denomination risks. However as pointed out by the ECB in its presentation to the German Federal Constitutional Court, while the OMT interventions are “unlimited” the design of OMTs makes it clear that the programme is effectively limited by the restriction to the shorter part of the yield curve and the resulting limited pool of bonds which may actually be purchased.

- (vii) Under the OMT programme government bonds not only can be purchased on the secondary market, but also can be sold again with their valuation based on market prices rather than on final maturity.
- (viii) OMTs have no direct inflationary implications – any sovereign debt purchases will be fully sterilised so that there will be no increase in the money supply.
- (ix) The OMT programme is completely transparent as OMT holdings and their market values will be published on a weekly basis and the average duration of OMT transactions and the breakdown by country will be published on a monthly basis.
- (x) The OMT programme has never been called upon – its very existence means that the probability of it being called upon is minimal.

6. **The effect of the announcement of the OMT decision**

6.1 OMTs have not in fact been utilised by the ECB since the date of their announcement but the very fact of the announcement of the decision of the ECB on OMTs played a key role in fostering the process of normalising the euro area sovereign bond markets, enabling risk to be rationally evaluated across the different market segments. It has caused a dramatic reduction in the yields of all Euro area short dated bonds and consequential positive effects further out the respective yield curves. The spread between the yields on Spanish and German ten-year government bonds fell from more than 6 percentage points in July 2012 to just under 3 percentage points in May 2013. At the same time, the premium on Italian bond yields was halved, down from more than 5 percentage points. One further sign of the normalisation of developments is that yields on German government bonds increased by around one-quarter of a percentage point over the same period. TARGET balances (an important indicator of fragmentation within the euro area) are now back at the 2011 level - down by €285 billion (circa 25%) compared with their peak in 2012. Investors clearly regarded the announcement of OMT as removing the redenomination risk for the euro area

sovereign bond market as a whole. This contributed to stabilisation within the financial markets and helped improve the transmission of monetary policy.

7 EU Treaty provisions

7.1 The Treaties provide for the establishment of an economic and monetary union, and its currency – the euro (TEU Article 3 (4)). They also provide that the Union shall have a monetary policy (TFEU 119 (2)), assign responsibility for that policy to the ECB and provide that it shall have full independence in the conduct of this policy (TFEU Articles 127 and 130). It is important to recall the prohibition of monetary financing set out in Article 123 TFEU.

7.2 As an institution of the EU, the ECB has a responsibility to uphold its laws, aims and policies, in accordance with the Treaties. It is clearly stated that the currency of the Union is the euro. Responsibility for monetary policy is assigned to the European System of Central Banks (ESCB), governed by the decision making bodies of the ECB. In this context, the adoption by the ECB Governing Council, on its own initiative and in full independence, of policies to defend the monetary transmission mechanism of the euro can be seen as appropriate and in accordance with its mandate.

7.3 Ireland submits that the decision of the Governing Council of the ECB of 6th September 2012 on the Technical Features of OMTs is compatible with the Central Bank's mandate and Articles 119, 127(1) and 127(2) TFEU and Articles 17 to 24 of the Protocol on the Statute of the European System of Central Banks and the European Central Bank.

7.4 The fundamental objectives of the European Union are contained in Article 3 of the Treaty on European Union. Amongst those objectives are the promotion of the well-being of the peoples of the Union, the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy aiming at full employment and social progress, the promotion of economic,

social and territorial cohesion and solidarity among Member States and the establishment of an economic and monetary union whose currency is the euro.

7.5 Title VIII of the Treaty on the Functioning of the European Union deals with the economic and monetary policy of the European Union. Pursuant to Article 119 TFEU the primary responsibility for economic policy rests with the Member States and the Union, although the ESCB is given a secondary objective in Articles 127(1) and 282(2) TFEU of supporting the general economic policies of the Union as laid down in Article 3 TEU.

7.6 There can be no dispute but that the primary objectives of the ESCB and ECB is the maintenance of price stability and one of its basic tasks in that regard is defining and implementing the monetary policy of the Union. The ESCB and ECB are also tasked “without prejudice to the objective of price stability” with supporting the general economic policies of the Union.

7.7 The European Central Bank , together with the national central banks of those Member States whose currency is the euro, is tasked, pursuant to Article 282(1) TFEU with conducting the monetary policy of the European Union. In doing so the ECB acts with full independence (Article 130 TFEU).

7.8 Article 282(2) TFEU tasks the European System of Central Banks (ESCB) with the primary objective of maintaining price stability. Article 282 (2) goes on without prejudice to that primary objective to task the ESCB with supporting the general economic policies of the Union so as to contribute to the achievement of the Union’s economic policy objectives.

7.9 This is reinforced by Article 127 TFEU which also sets the primary objective of the ESCB as being to maintain price stability and without prejudice to that objective to support the general economic policies in the Union with a view to contributing to achieving the Union’s objectives as laid down in Article 3 TEU.

7.10 Article 127(2) TFEU set out one of the basic tasks of the European System of Central Banks (comprising the European Central Bank and the national central banks of all Member States) as being to define and implement the monetary policy of the Union.

7.11 Article 129 TFEU provides for the governance of the ESCB including the ECB and provides for the Statute of the European System of Central Banks and of the European Central Bank as a Protocol to the Treaties.¹⁴

7.12 Article 132 TFEU provides that in order to carry out the tasks entrusted to the ESCB the ECB shall inter alia take decisions necessary for the carrying out of the tasks entrusted to the ESCB under the Treaties and the Statute of the European System of Central Banks and of the European Central Bank.

7.13 Article 2 of the Statute reiterates the primary objective of the ESCB as being the maintenance of price stability and the secondary objective of supporting the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 TEU. This includes the task of defining and implementing the monetary policy of the Union.

7.14 Article 18 of the Statute sets out the powers of the ECB to achieve the objectives of the ESCB and allows it to:

- (i) operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals;
- (ii) conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral.

¹⁴ Protocol No. 4 to the Treaty on European Union and to the Treaty on the Functioning of the European Union

7.15 Article 20 of the Statute also provides that the Governing Council of the ECB may by a two thirds majority decide on the use of other operational methods of monetary control as it sees fit.

7.16 Article 123 TFEU imposes a ban on credit facilities of the ECB and national central banks that favour Member States. According to Article 123(1) direct purchases of debt instruments from Member States by the ECB are also prohibited. Indirect purchases of bonds on the secondary market are not subject to this prohibition, although they may not be used to circumvent its objectives.¹⁵ Accordingly, the central banks may purchase government bonds on the secondary market at any time, subject to the latter proviso. The purpose for this limitation on the prohibition is to allow the ESCB to purchase bonds on the secondary market as an instrument of monetary policy, in particular, to influence interest rates and market liquidity. Where these types of secondary bond market purchases take place they should be undertaken with the intention of implementing monetary policy. They should not have the intention of directly financing the public sector. So for example, a normal monetary policy of lowering interest rates can benefit government finances but is not in contravention of Article 123 TFEU since the intention is related to monetary policy and is not related to government finance. The aim should not be that Member States benefit from refinancing through the ESCB. Article 123 endorses the same intention as the ban on bailouts set out in Article 125 TFEU: to use market-based bond spreads to maintain disciplinary pressure on Member States.¹⁶ Therefore, it is only where secondary market interventions are not focused on supporting the Eurosystem's monetary policy of price stability and are instead aimed at lowering the interest rates for bonds of financially distressed member states, these interventions can be considered to run contrary to the objective of Article 123.¹⁷ In the case of OMT, it should be emphasised that that intention and aim is to facilitate monetary policy and OMT is only for that purpose.

¹⁵ Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibition referred to in Articles 104 [now Article 123 of TFEU] and 104b(1) [now Article 124 of TFEU] of the Treaty (OJ L 332, 31.12.1993).

¹⁶ Steinbach, A. (2013), "The Legality of European Central Bank's Sovereign Bond Purchases", *Yale Journal of International Law*, vol. 39, pp.15-31.

¹⁷ Borger, V. (2013), "How the debt crisis exposes the development of solidarity in the euro area", *European Constitutional Law Review*, 7, pp.1-20.

7.17 It is clear from the foregoing that the ECB's independence in the area of monetary policy is legally entrenched and immune to interference from the Union's political institutions, national governments and interest groups. That said, the ECB's independence is not exempt from every rule of Union law. In the case of *Commission – v- European Central Bank (OLAF)*.¹⁸ the Court of Justice considered the ECB to have a limited functional independence that ensures the proper execution of its monetary tasks whilst also placing the ECB in the framework of EC law and thus, subjecting the ECB to all relevant primary and secondary Community law.

8 The ESM Treaty and the Decision in Pringle¹⁹

8.1 The ECB has stated that it is a necessary but not sufficient, precondition for OMT that a country should be either in an EFSF/ESM programme, emerging from one, or availing of a precautionary facility such as the ESM's Enhanced Conditions Credit Line (ECCL). As the EFSF has ceased new lending from 1 July 2013, the ESM precondition is the relevant one.

8.2 The following provisions of the ESM Treaty should therefore be considered.

8.3 Article 3 of the ESM Treaty states 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."

8.4 Article 12(1) ESM provides:

"If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an

¹⁸ (C-11/00) [2003 ECR I-7147.

¹⁹ *Thomas Pringle –v- Government of Ireland, Ireland and the Attorney General* (C-370/12) [2013] 2 C.M.L.R. 2.

ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions."

8.5 Article 13(1) ESM provides:

"An ESM Member may address a request for stability support to the Chairperson of the Board of Governors. Such a request shall indicate the financial assistance instrument(s) to be considered. On receipt of such a request, the Chairperson of the Board of Governors shall entrust the European Commission, in liaison with the ECB, with the following tasks:

- (a) to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis under Article 18(2);*
- (b) to assess whether public debt is sustainable. Wherever appropriate and possible, such an assessment is expected to be conducted together with the IMF;*
- (c) to assess the actual or potential financing needs of the ESM Member concerned."*

8.6 Article 13(3) ESM provides:

- "3. If a decision pursuant to paragraph 2 is adopted, the Board of Governors shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding ("MoU") detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. In parallel, the Managing Director of the ESM shall prepare a proposal for a financial assistance facility agreement, including the financial terms and conditions and the choice of instruments, to be adopted by the Board of Governors.*

The MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned."

- 8.7 Article 14 ESM provides for precautionary financial assistance under either a precautionary conditioned credit line (PCCL) or an enhanced conditions credit line (ECCL). For OMT purposes, the ECB has stated that the ECCL is the relevant one. Either of these precautionary lines are provided in accordance with ESM Treaty Article 12 (1) and the conditionality is determined in accordance with ESM Treaty Article 13(3).
- 8.8 The modalities for granting a PCCL or an ECCL are set out in guidelines adopted by the ESM Board of Directors. For these purposes, it is sufficient to note that the ECCL is the more restrictive form of credit line, and can have conditions requiring identified weaknesses to be addressed.
- 8.9 It is therefore clear that ESM funding can only be provided where there is a threat to the stability of the euro area or of its member states. The ECB has a key role in the determination of the existence of a problem of this magnitude, as it does in the determination of the appropriate conditionality. On this basis, the existence of an ESM programme is already indicative of unusual conditions. The ECB's involvement in the determination process is a further safeguard in this respect.
- 8.10 Paragraph 2 of Article 13(3) ESM ensures that any conditionality established is consistent with existing EU Treaties, laws, regulations, recommendations or decisions addressed to the Member State.
- 8.11 The stipulation of the ECCL as the precautionary credit line which could enable application of OMTs is important, as it is the more restrictive and can involve detailed conditionality.
- 8.12 In *Pringle* the Court of Justice drew a distinction between provisions relating to economic policy (Articles 120 to 126 TFEU) and those governing monetary policy (Articles 127 to 133 TFEU). The Court emphasised that the TFEU "contains no definition of monetary policy" and in addition refers "in its provisions relating to that policy, to the objectives, rather than to the instruments, of monetary policy". The Court further stressed that the "primary objective of the Union's monetary policy is to

maintain price stability" while the objective pursued by the ESM "is to safeguard the stability of the euro area as a whole", which must be regarded as "clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy". For this reason, the Court concluded that the ESM "clearly" falls within the economic policy and not the monetary policy of the Union notwithstanding the fact that "the stability of the euro area may have repercussions on the stability of the currency used within that area", yet "an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro" (see paragraphs 53 to 56 *Pringle* judgment). In relation to the objective of the ESM – it is in fact more narrow than "to safeguard the stability of the euro area as a whole" (See Article 3 ESM).

8.13 The OMT decision has been effective in its monetary effect on the euro. The OMT decision is not a formal decision as such of the ECB directed to a member state or to a financial entity within the EU. As such the precise legal status of the OMT decision may be the subject of debate. It is submitted that the legality of the OMT decision must, because of its content and potential economic and monetary effect, be capable of review under the TFEU as an act of an institution of the EU. However, since the OMT decision made by the ECB falls within the exclusive monetary policy competence of the ECB it is submitted that it is not reviewable by the CJEU. The inter-governmental nature of the ESM, as described in *Pringle*, is to be distinguished from the OMT decision which is a decision taken within the framework of TFEU by the ECB.

9 **The German Constitutional Court's Decision**

Section A

9.1 In relation to the challenge to the OMT decision as being in violation of Articles 119 & 127 TFEU, the referring court has advanced five arguments or statements of fact to support or substantiate its conclusion that the OMT decision was likely to exceed the ECB's mandate and was in violation of both the primary objective (price stability) and

the secondary objective (supporting the general economic policies of the union) of the ECB.

Argument 1: The objective of the OMT decision

Issue:

9.2 The referring court takes the view that the immediate objective of the OMT decision was the neutralisation of spreads on government bonds of selected Member States that adversely affected the refinancing of these State. In neutralising these spreads, the ECB was accordingly acting in breach of its mandate and thus in breach of the Treaty since such OMTs did not constitute acts of monetary policy but economic policy. Safeguarding the current composition of the euro area was not a task of monetary policy but one of economic policy which remains within the remit of the Member States. See Articles 139 and 140 TFEU. The referring court took the view that it was for Member States to prevent the reversibility of the euro through measures such as EFSM and ESM.

Response:

9.3 When addressing this issue, it is important to note that safeguarding the currency is not exclusively an economic task, but may also be a legitimate objective of the ECB acting within its mandate.

9.4 It is not unusual for countries to experience both economic and monetary policy difficulties at the same time. In such situations, economic policy measures can be complemented by appropriate monetary policy measures, and vice versa. The ECB's OMT programme addresses a specific characteristic of financial markets whereby adverse conditions not supported by fundamentals can develop very quickly. There is a precondition, which is necessary but not sufficient, that any Member State wishing to avail of OMT should be in a full or precautionary EFSF or ESM programme with appropriate conditionality set out in an MoU. Such a programme would address the

economic policy defects, if any, that may exist. OMT by contrast seeks only to address the monetary policy issues that may arise.

9.5 Further, the objective of the OMT programme is to "safeguard an appropriate monetary policy transmission and the singleness of monetary policy". Contrary to view of the referring court, the objective is not to neutralise spreads on government bond yields in the euro area. The focus, in introducing OMT, was on reducing yields where they were far beyond what was merited given the underlying macroeconomic conditions. It is not reasonable to characterise this as neutralising yields. Given the important role of government bonds in the monetary transmission mechanism, it was incumbent upon policymakers to address the breakdown in transmission which was already manifesting itself in the cost of finance to the real economy.

Argument 2: The selectivity of the OMT

Issue:

9.6 The referring court argues that the conclusion that the OMT decision has no monetary policy objective is further suggested by its selectivity. It states that under the guidelines adopted by the European Central Bank, the monetary policy framework of the European System of Central Banks does generally not have a targeted approach, which would necessarily differentiate between individual Member States. It points out that monetary measures such as the fixing of key interest rates or the reserve ratio are applicable to all Member States and the resident commercial banks alike. Different effects that derive from these measures are a consequence of the open market economy, which Union law presupposes (Article 127(1) sentence 3 TFEU), and an indirect effect that can be controlled by the European System of Central Banks only to a limited degree. The Court takes the view that because the OMT decision envisages a targeted purchase of government bonds of selected Member States, however, the spreads on government bonds issued by these states are levelled by changes in market conditions, and the government bonds of other Member States are eventually placed at a disadvantage.

Response:

9.7 The aim of OMT is to ensure appropriate monetary policy transmission and the singleness of the monetary policy, which clearly represents a monetary policy objective.

9.8 The ECB has full independent discretion over the programme. Many standard monetary policy measures have differing effects on Member States. For instance, the effect of changes in interest rates are different across Member States. Also, changes in the ECB collateral framework, which apply to all, clearly can be more relevant to some Member States than others.

9.9 OMTs, if they occur, will take place on the secondary market and not directly with sovereign borrowers. As such, they would not add to the sum of credit already extended to national governments by the private and public sector (relevant for those countries that were in a financial assistance programme).

Argument 3: The parallelism of the OMT with assistance programmes agreed with Member States

Issue:

9.10 According to the referring court, OMT is the functional equivalent to an assistance measure such as the EFSF or ESM assistance programmes. The referring court takes the view that since the OMT decision links the purchase of bonds to the economic policy conditionality of assistance programmes of the EFSF or the ESM (parallelism) this points against counting the OMT decision among the powers assigned to the ESCB by Article 119(2) and Article 127(1) and (2). The referring court points out that pursuant to the OMT decision, a purchase of government bonds shall only be undertaken under the condition that the Member State that benefits, fully complies with the obligations of an assistance programme of the EFSF or the ESM, which envisages the purchase of government bonds of that Member State on the primary market. The respective

obligations of the assistance programme relate not only to the general economic and social policy, but especially to the fiscal policy of the Member States which is the remit of the Council and Commission.

9.11 The referring court also makes the point that the ECB plans to engage, with the intended purchases by way of OMT, in an activity which both the EFSF and the ESM perform and which is, as the Court of Justice has held in *Pringle*, an activity that belongs to the field of economic policy. The Court takes the view that by tying the purchase of government bonds of selected Member States to full compliance with the requirements of the assistance programmes of the EFSF and the ESM and thus retaining its own conscientious examination, the ECB makes the purchase of government bonds on the basis of the OMT decision an instrument of economic policy.

Response:

9.12 The OMT is not an assistance measure and is based purely on monetary policy considerations. The Governing Council of the ECB has full discretion in acting in accordance with its mandate, regardless of EFSF or ESM. The ESM Treaty is not being bypassed. The ECB has stated that an ESM programme or precautionary facility, with appropriate conditionality, is a precondition of OMT. The ECB has a role, set out in the ESM Treaty, in the process of determining if ESM assistance is warranted, and also in the design of conditionality. In relation to the conditionality attaching to ESM programmes, it must be fully consistent with EU law (Article 13(3) ESM Treaty). In addition, the programme must be approved by the ESM Board of Governors. The requirement for a programme can be seen in this context as a safeguard.

Argument 4: The by-passing of the narrow limits that the ESM imposed on the purchase of bonds (circumvention)

Issue:

9.13 The argument put forward by the referring court is effectively that the ECB's OMT approach is likely to bypass the conditions and conditionality of the EFSF and ESM.

Secondary market purchases are envisaged by the ESM Treaty but only in the case of “exceptional financial market circumstances and risks to financial stability.” Therefore purchases under OMT may be possible under a wider scope of circumstances than under the ESM Treaty resulting in the by-passing of the latter facility. This, according to the referring court, shows that the OMT programme is an instrument of economic policy.

Response:

9.14 OMT is not assistance. It is a measure to ensure the effectiveness of monetary policy. The Governing Council of the ECB has full discretion in acting in accordance with its mandate, regardless of EFSF or ESM. It can be considered that setting an ESM programme as a necessary, but not sufficient, precondition for OMT ensures the ESM is not bypassed.

Argument 5:

In relation to the secondary objective of supporting the general economic policies of the Union, OMT does not qualify because:

The volume of financial assistance through OMT could potentially multiply the assistance provided for by ESM and thus thwart the agreed upon volume and imposed conditions. The ECB declared it would decide the continuation and suspension of OMT in full discretion.

9.15 In relation to the volume issue, the referring court argues that the volume of assistance measures, could *de facto* be considerably broadened, and potentially even multiplied, through parallel purchases of government bonds by the Eurosystem. If the members of the ESM agree on a certain volume of assistance and its conditions, this decision could be thwarted if the Eurosystem unilaterally increased the assistance volume significantly through OMT and this cannot be qualified as “support”.

9.16 In relation to the second argument, the referring court points out that the ECB must act independently in deciding on the start and duration of OMTs.

Response:

9.17 The ECB has the right to purchase in the secondary market under the TFEU and it is fully independent in its decision making. Both of these powers are set out under the TFEU, and apply whether the EFSF or ESM exist or not. It is not clear how the existence of the ESM affects the ECB. In relation to OMT multiplying ESM assistance it should be noted that the ESM has decision procedures in place in relation to disbursement of assistance. Further, the aim of OMT is monetary policy, not assistance.

Section B

9.18 The referring court sets out seven aspects of the OMT decision which it says suggest that the OMT decision violates Article 123 TFEU. It is proposed to address each aspect separately.

(1) Neutralisation of interest rate spreads

9.19 The referring court argues that by attempting to neutralise interest rate spreads the ECB is violating the prohibition on monetary financing.

Response

9.20 The aim of OMT is to safeguard the appropriate monetary policy transmission and not to neutralise spreads. The ECB has stated that it was necessary to react to misalignments with fundamentals that were severely disrupting transmission of monetary policy. The ECB has stated clearly, in public statements (e.g., Draghi, January 2013) and in its submission to the referring court, that the focus

of OMT would be on reducing yields where they were far beyond what was merited given the underlying macroeconomic conditions. It is submitted that it is not reasonable to characterise this as neutralisation.

(2) The selectivity of purchases

9.21 The referring court appears to be making the point that market interventions by way of OMTs are likely to amount in practical terms to the extension of credit by the ECB to national governments, contrary to Article 123.

Response

9.22 No primary market purchases are permitted. Full ECB discretion and strict conditionality is applied to avoid monetary financing concerns.

9.23 The ECB has clearly stated that OMT will take place on the secondary market and not directly with sovereign borrowers. As such, it will not add to the sum of credit already extended to national governments by the private and public sector. Secondary market purchases of government and other bonds are a common practice among central banks.

(3) The risk of OMT running in parallel with and undermining ESM and EFSF programmes.

Response

9.24 It is not clear from the Judgment how the referring court sees this as contrary to Article 123.

9.25 In any event, the Governing Council of the ECB has full discretion in acting in accordance with its monetary policy mandate, regardless of EFSF or ESM.

Previous comments on the ECB's role in the ESM are relevant also. Further, the ESM has clearly defined decision making processes which it would be expected, would address any such risk, were it to arise.

(4) The lack of a preferred creditor status for the ECB in relation to the bonds purchased and the increased risk of sovereign default of the Euro Zone countries in question

9.26 The referring court suggests that purchases of bonds on the basis of the OMT decision amounts to monetary financing because of the failure of the ECB to maintain preferred creditor status and this includes the participation in a haircut on debt in the event of a sovereign default. In the referring court's opinion this is unlikely to be compatible with Article 123. The argument appears to be that taking large risks in respect of losses is tantamount to waiving repayment obligations which amounts to monetary financing or alternatively advancing funds without any real repayment obligation amounts to monetary financing.

Response

9.27 The ECB does not have preferred creditor status. A distinction needs to be made between i) the ECB voluntarily accepting a write-down and ii) a write-down that occurs as a result of a vote by general bond holders.

(5) The possibility for the ECB to hold the government bonds to maturity

The referring court argues that holding bonds to maturity prevents a market based price determination for these bonds and if a substantial amount of government bonds issued by selective Member States were permanently removed from the market this would contribute to the financing of the budgets of the Member States in question and thus would amount to monetary financing. Furthermore holding

such bonds to maturity would result in a shortage in the secondary market which may amount to a circumvention of Article 123.

Response

9.28 Under the TFEU, the Eurosystem is allowed to purchase in the secondary market and is therefore entitled to hold these bonds to maturity.

9.29 Many investors hold bonds to maturity for mandate or liability-matching purposes – it is not unusual and does not prevent an active secondary market continuing.

(6) The interference with market price formation

9.30 The referring court argues that if the Eurosystem were to purchase government bonds on the secondary market on a large scale and a short time after their issue this would be tantamount to direct acquisition of government bonds and as such would be a circumvention of the prohibition on monetary financing.

Response

9.31 Secondary market purchases are permitted. Further, it is clear from the ECB's statements that OMT will be carried out strictly within its Treaty mandated role on monetary policy.

10 Conclusion

10.1 In order to fulfil its primary objective of price stability (under, inter alia, Articles 119 and 127 TFEU) the ECB has stated and demonstrated that it had to take further action to restore the effectiveness of the monetary transmission mechanism (MTM). The effects of the announcement of OMT contributed to

stabilisation within financial markets and repaired some of the damage to the MTM. The OMT, as was the case with the ESM, is indispensable to safeguard financial stability of the euro area as a whole, within the monetary policy mandate of the ECB.

10.2 Activation of OMTs is strictly conditional on the implementation of an EFSF/ESM programme. Any decision on such programmes is decided by the Board of Governors of these facilities on the basis of mutual agreement. The ESM Governors will make such decision in accordance with national procedures – including parliamentary approval where required. Furthermore, the ECB Governing Council has stated that it will independently consider conducting OMTs to the extent that they are warranted from a monetary policy perspective in the event of market fragmentation and a threat to the singleness of monetary policy.

10.3 According to primary EU law, the ECB and the national central banks of the Eurosystem are already permitted to purchase government bonds in the financial markets in the context of their monetary policy tasks (Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank).

10.4 The decision of the ECB on OMT falls within the monetary policy mandate of the ECB under Article 119 and Article 127(1) of TFEU and the ESCB Protocol for reasons already set out by the ECB and described in the submission.

10.5 The decision of the ECB on OMT which on its face may be unlimited in nature contains limits in the announced information made available by the ECB concerning the OMT programme and how the ECB may operate the OMT programme contained inter alia in its press release dated 6 September 2012 and in its annual reports for 2012 and 2013. It is not incompatible with the prohibition of monetary financing in Article 123 TFEU.

11 Suggested responses to the questions asked by the referring court

- 1(a) The OMT decision made by the ECB falls within the exclusive monetary policy mandate of the ECB and is therefore not reviewable by the CJEU. The decision of the ECB on OMT falls within the monetary policy mandate of the ECB under Articles 119 and Article 127(1) of the TFEU and the ESCB Protocol.
- 1(b) The decision of the ECB on OMT which is unlimited in nature but also contains limits announced in information made available by the ECB concerning the OMT programme and how the ECB may operate the OMT programme *inter alia* in its press release dated 6 September 2012 and in its annual reports for 2012 and 2013, is not incompatible with the prohibition of monetary financing in Article 123 TFEU.
- 2(a) The OMT decision of the ECB is not a reviewable act of an EU institution under Article 267 point (b) first paragraph. Should the Court find that the OMT decision is not an act of an EU institution or is not reviewable by the CJEU, Articles 119 and 127 TFEU, and Articles 17 to 24 of the ESCB Protocol do permit the ECB to provide the OMT programme.
- 2(b) The OMT programme does not involve the ECB in a breach of the prohibition on monetary financing in Article 123 TFEU.

Dated: 9 June 2014

Signed: Gemma Hodge

Agent for Ireland

on behalf of Eileen Creedon, Chief State Solicitor

Signed: Tony Joyce

Agent for Ireland

on behalf of Eileen Creedon, Chief State Solicitor