Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

4 March 2015 *

(Economic and monetary policy — ECB — Action for annulment — Eurosystem Oversight Policy Framework — Challengeable act — Admissibility — Oversight of payment and securities settlement systems — Application to central counterparty clearing systems of a requirement to be located in a Member State party to the Eurosystem — Competence of the ECB)

In Case T-496/11,

United Kingdom of Great Britain and Northern Ireland, represented initially by S. Ossowski, S. Behzadi-Spencer and E. Jenkinson, subsequently by S. Behzadi-Spencer and E. Jenkinson, and finally by V. Kaye, acting as Agents, and by K. Beal QC and P. Saini QC,

applicant,

supported by

Kingdom of Sweden, represented by A. Falk, C. Meyer-Seitz, C. Stege, S. Johannesson, U. Persson and H. Karlsson, acting as Agents,

intervener,

v

European Central Bank (ECB), represented initially by A. Sáinz de Vicuña Barroso and K. Laurinavičius, subsequently by A. Sáinz de Vicuña Barroso and P. Papapaschalis and finally by P. Papapaschalis and P. Senkovic, acting as Agents, and by R. Subiotto QC, F.-C. Laprévote, lawyer, and P. Stuart, Barrister,

defendant,

supported by

Kingdom of Spain, represented by A. Rubio González, abogado del Estado,

and by

French Republic, represented by G. de Bergues, D. Colas and E. Ranaivoson, acting as Agents,

interveners,

* Language of the case: English.

ACTION for annulment of the Eurosystem Oversight Policy Framework published by the ECB on 5 July 2011, in so far as it sets a location requirement applicable to central counterparties established in Member States that are not party to the Eurosystem,

THE GENERAL COURT (Fourth Chamber),

composed of M. Prek (Rapporteur), President, I. Labucka and V. Kreuschitz, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 9 July 2014,

gives the following

Judgment

Background to the dispute

1 On 5 July 2011, the European Central Bank (ECB) published on its website the Eurosystem Oversight Policy Framework ('the Policy Framework'), which it presents as having the purpose of describing the role of the Eurosystem (that is to say, the European System of Central Banks limited to the ECB and the national central banks of the Member States that have adopted the euro as a common currency) in the oversight of 'payment, clearing and settlement systems'.

2 It is stated in the Policy Framework that the term 'payment, clearing and settlement systems' must be understood as a generic label for 'payment systems (including payment instruments), clearing systems (including central counterparties ["CCPs"]) and (securities) settlement systems' (Section 1 of the Policy Framework).

3 In order to explain the Eurosystem's interest in payment, clearing and settlement systems, it is noted that their infrastructures are exposed to numerous risks that are capable of being systemic and of affecting the financial system and the economy as a whole. In addition, reference is made to the negative externalities that may result from those systems, such as delays in the settlement of payments. The ECB also draws attention to fragmentation of the infrastructures present in the euro area and its adverse consequences, especially for cross-border transactions.

4 According to the ECB, the Eurosystem's interest in payment, clearing and settlement systems reflects the task assigned to it by Article 127(2) TFEU of promoting the smooth operation of payment systems. Ensuring that such systems are safe and efficient is an important precondition for contributing to financial stability and maintaining public confidence in the euro. For the purpose of promoting efficiency and safety, the Eurosystem applies three complementary approaches. First, as the owner and operator of a system, it is responsible for its safety and efficiency. Second, it has the task of oversight of the payment, clearing and settlement systems and infrastructure as a whole. Finally, the Eurosystem acts as facilitator and catalyst with a view to improving the overall efficiency of the euro area market infrastructure (Section 2 of the Policy Framework).

5 As regards more specifically the Eurosystem's oversight function, the ECB considers that its legal basis can be found in the fourth indent of Article 127(2) TFEU and Article 3.1 of Protocol No 4 to the FEU Treaty on the Statute of the ESCB and of the ECB ('the Statute'), which assign to the ESCB the basic task of promoting the smooth operation of payment systems. It is also mentioned that, in relation to

clearing and payment systems, Article 22 of the Statute provides that '[t]he ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries'.

6 The ECB adds that those legal bases should be interpreted in their historical context. The lack of explicit reference to a task of 'oversight' can be explained by the fact that, at the time when the Treaty on European Union was signed, such a function was not yet perceived as constituting an independent competence, but rather as a consequence of the central banks' functions in the field of payment systems, financial stability and monetary policy. Furthermore, at that time settlement and clearing systems did not have their current size or relevance, particularly for cross-border transactions. In this connection, it is pointed out in the Policy Framework that national central banks are often granted an explicit oversight function, including in respect of clearing and settlement systems. Finally, it is mentioned in the Policy Framework that the proper functioning of clearing and settlement systems is in the interest of the Eurosystem because of their importance for the smooth conduct of monetary policy, their close links to payment systems and their relevance for the stability of the financial system in general.

7 This oversight function has taken concrete form in the adoption of standards and requirements that payment systems are to meet. As regards securities clearing and settlement systems, it took concrete form in the participation of representatives of the ESCB and the Committee of European Securities Regulators in a joint working group that addressed non-binding recommendations to the public authorities (Section 3 of the Policy Framework).

8 It is explained in the Policy Framework that securities settlement systems and CCPs are key components of the financial system. A financial, legal or operational problem affecting them can be a source of systemic disturbance for the financial system. That is particularly true of CCPs in that they are a focal point for credit and liquidity risk. The ECB adds that, in so far as securities transactions involve a transfer of both securities and liquid assets, disturbances in the transfer of securities may lead to disruption of the payment systems (Section 4 of the Policy Framework).

9 The Policy Framework presents the Eurosystem's method of oversight as involving a three-stage approach, namely, first, collecting relevant information, second, assessing the information against the Eurosystem's objectives, and third, if necessary inducing change in order to remedy any non-compliance. In order to induce such change, the Eurosystem uses moral persuasion, public statements, influence stemming from its participation in systems and cooperation with other authorities and also the possibility of adopting directly binding regulations within the euro area Member States. The ECB observes that it has thus far not made use of that last possibility.

10 So far as concerns allocation of roles within the Eurosystem, principal responsibility is assigned to the central bank that is best placed, be it a national central bank or the ECB. It is also mentioned that the rules and standards whose observance is overseen are the same for private sector systems and those managed by the Eurosystem (Section 5 of the Policy Framework).

11 So far as concerns the issue raised by the existence of infrastructures located outside the euro area that participate in the settlement or clearing of euro transactions, it is stated in the Policy Framework that malfunctioning on their part may have adverse effects on payment systems located in the euro area, whilst the euro area has no direct influence on such infrastructures. Cooperative oversight arrangements at international level can only mitigate that lack of direct influence and not offset it entirely. Therefore, in the light of the objective assigned to the Eurosystem of promoting the smooth operation of payment systems, the development of major market infrastructures outside the euro area is worrying.

12 The conclusion is drawn in the Policy Framework that, as a matter of principle, infrastructures that settle euro-denominated payment transactions should settle these transactions in 'central bank money' and be legally incorporated in the euro area with full managerial and operational control and responsibility, over all core functions, exercised from within that area.

13 So far as concerns CCPs, it is recalled first of all in the Policy Framework that '[t]he Eurosystem has also issued a statement on the location of [CCPs] which underlined the Eurosystem's interest in having the core infrastructure that is used for the euro located in the euro area' and that '[i]n applying this statement to the case of over-the-counter credit derivatives, the Eurosystem has stressed not only that there is "a need for at least one European CCP for credit derivatives", but also that, "given the potential systemic importance of securities clearing and settlement systems, this infrastructure should be located within the euro area"'. The ECB adds that '[t]he absolute and relative size of an offshore CCP's euro-denominated business provides a useful proxy for the potential implications of this CCP for the euro area'. The CCPs concerned are those that on average have a daily net credit exposure of more than EUR 5 billion in one of the main euro-denominated product categories. In addition, it is stated that '[t]he location policy is applied to all CCPs that hold on average more than 5% of the aggregated daily net credit exposure of all CCPs for one of the main euro-denominated product categories'. The ECB infers from the foregoing that 'CCPs that exceed these thresholds should be legally incorporated in the euro area with full managerial and operational control and responsibility over all core functions, exercised from within the euro area' (Section 6 of the Policy Framework).

Procedure and forms of order sought

14 By application lodged at the Court Registry on 15 September 2011, the United Kingdom of Great Britain and Northern Ireland brought the present action.

15 By document lodged at the Court Registry on 28 December 2012, the French Republic applied for leave to intervene in support of the form of order sought by the ECB.

16 By document lodged at the Court Registry on 17 January 2013, the Kingdom of Spain applied for leave to intervene in support of the form of order sought by the ECB.

17 By document lodged at the Court Registry on 7 February 2013, the Kingdom of Sweden applied for leave to intervene in support of the form of order sought by the United Kingdom.

18 By document lodged at the Court Registry on 28 March 2013, the Italian Republic applied for leave to intervene in support of the form of order sought by the ECB.

19 By order of 30 May 2013, the President of the Seventh Chamber of the General Court granted, first, the French Republic, the Kingdom of Spain and the Italian Republic leave to intervene in support of the form of order sought by the ECB and, second, the Kingdom of Sweden leave to intervene in support of the form of order sought by the United Kingdom.

20 On 7 November 2013 the Italian Republic withdrew its intervention.

21 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which the present case was consequently allocated.

22 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure.

23 On 26 November 2013, by way of a measure of organisation of procedure under Article 64(3)(a) of its Rules of Procedure, the Court put written questions to the United Kingdom and the ECB, to which they replied within the prescribed time-limit.

24 The parties presented oral argument and replied to the Court's oral questions at the hearing on 9 July 2014.

25 The United Kingdom claims that the Court should:

— annul the Policy Framework, in so far as it sets out a location policy for CCPs established in Member States that are not party to the Eurosystem;

— order the ECB to pay the costs.

26 The ECB contends that the Court should:

— dismiss the action;

— order the United Kingdom to pay the costs.

Law

Admissibility

27 Without formally raising an objection of inadmissibility by a separate document on the basis of Article 114 of the Rules of Procedure, the ECB, supported at the hearing by the Kingdom of Spain and the French Republic, puts forward, in essence, two pleas of inadmissibility, alleging that the Policy Framework is not a challengeable act and that the United Kingdom lacks standing to bring proceedings.

28 The United Kingdom, supported at the hearing by the Kingdom of Sweden, contends that the action is admissible.

Plea of inadmissibility alleging that the Policy Framework is not a challengeable act

29 In support of its contention that the Policy Framework does not constitute a challengeable act, the ECB submits, in essence, (i) that it is not an act having legal effects, (ii) that it merely restates a pre-existing location policy which was not challenged and, (iii) that it does not fall within one of the categories of binding acts which the ECB may adopt.

30 From the outset, the third argument put forward by the ECB, relating to the form of the Policy Framework, should be rejected as irrelevant. That argument is directly at odds with the settled case-law that an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (see, to this effect, judgments of 31 March 1971 in *Commission* v *Council*, 22/70, ECR, EU:C:1971:32, paragraph 39, and of 17 July 2008 in *Athinaïki Techniki* v *Commission*, C-521/06 P, ECR, EU:C:2008:422, paragraphs 43 and 45). That case-law is intended specifically to prevent the form or designation given to an act by its author from resulting in its escaping assessment of its legality in an action for annulment, even though it in fact has legal effects.

31 In the light of case-law, in order to determine whether an act is capable of having legal effects and, therefore, whether an action for annulment under Article 263 TFEU can be brought against it, it is necessary to examine its wording and context (see, to this effect, judgments of 20 March 1997 in *France* v *Commission*, C-57/95, ECR, EU:C:1997:164, paragraph 18, and of 1 December 2005 in *Italy* v *Commission*, C-301/03, ECR, EU:C:2005:727, paragraphs 21 to 23), its substance (judgments of 9 October 1990 in *France* v *Commission*, C-366/88, ECR, EU:C:1990:348, paragraph 23; of 26 January 2010 in *Internationaler Hilfsfonds* v *Commission*, C-362/08 P, ECR, EU:C:2010:40, paragraph 52; and in *Athinaïki Techniki* v *Commission*, paragraph 30 above, EU:C:2008:422, paragraph 42; see also, to this effect and by analogy, judgments of 13 November 1991 in *France* v *Commission*, C-303/90, ECR, EU:C:1991:424, paragraphs 18 to 24, and of 16 June 1993 in *France* v *Commission*, C-325/91, ECR, EU:C:1993:245, paragraphs 20 to 23) and the intention of its author (see, to this effect, judgments in *Internationaler Hilfsfonds* v *Commission*, EU:C:2010:40, paragraph 52, and in *Athinaïki Techniki* v *Commission*, paragraph 30 above, EU:C:2008:422, paragraph 42).

32 So far as concerns, in the first place, the wording and the context of the contested act, that examination enables the way in which the parties concerned could reasonably have perceived that act to be assessed (see, to this effect and by analogy, judgment of 15 September 1998 in *Oleifici Italiani and Fratelli Rubino* v *Commission*, T-54/96, ECR, EU:T:1998:204, paragraph 49). If the act is perceived as only proposing a course of conduct and, therefore, as being similar to a mere recommendation within the meaning of Article 288 TFEU or, in the case of the ECB, Article 132(1) TFEU, it should be concluded that the act does not have legal effects that are such as to render an action for annulment brought against it admissible. On the other hand, that examination may reveal that the parties concerned will perceive the contested act as an act which they must comply with, despite the form or designation favoured by its author.

33 In order to assess the way in which the parties concerned perceive the wording and context of the contested act, first, it should be examined whether the act was publicised outside the author itself. Whilst the existence of such publicity has no bearing on the act's classification (see, to this effect, judgment of 20 May 2010 in *Germany* v *Commission*, T-258/06, ECR, EU:T:2010:214, paragraphs 30 and 31), its absence tends to place the act in the category of acts internal to the institution, which in principle cannot be contested by means of an action for annulment (see, to this effect, judgment of 6 April 2000 in *Spain* v *Commission*, C-443/97, ECR, EU:C:2000:190, paragraphs 27 to 36).

34 In the present case, it is common ground that the Policy Framework was publicised outside the ECB itself, by being published on its website.

35 Second, from the point of view of the parties concerned, the wording of the act is also relevant, for the purpose of establishing whether it is couched in mandatory terms (see, to this effect, judgment in *France* v *Commission*, paragraph 31 above, EU:C:1997:164, paragraph 18) or, on the other hand, uses language tending to show that it is purely indicative in nature (see, to this effect, judgment in *Italy* v *Commission*, paragraph 31 above, EU:C:2005:727, paragraphs 21 and 22).

36 In the present case, it should be noted first of all that the introductory provisions of the Policy Framework present it as having the purpose of 'describ[ing] the role of the Eurosystem in the field of oversight'. Contrary to the ECB's contentions, the highlighting of a descriptive purpose of this kind does not rule out the possibility that its content is perceived by the parties concerned as mandatory in nature. It follows therefrom, rather, that the Policy Framework, far from being seen as a mere, expressly indicative, proposal, is presented as describing the Eurosystem's role, which could lead the parties to conclude that it restates the powers actually conferred by the Treaties on the ECB and the national central banks of the euro area Member States.

37 Next, the passage of the Policy Framework that is at issue, relating to the location of CCPs intended to clear transactions in respect of securities, uses wording of a mandatory nature:

'The absolute and relative size of an offshore CCP's euro-denominated business provides a useful proxy for the potential implications of this CCP for the euro area. The Eurosystem applies thresholds for application of the location policy to CCPs similar to those for payment systems. However, taking into account the specific nature of the CCP business, the threshold of [EUR] 5 billion applies to offshore CCPs that on average have a daily net credit exposure of more than [EUR] 5 billion in one of the main euro-denominated product categories ... The location policy is applied to all CCPs that hold on average more than 5% of the aggregated daily net credit exposure of all CCPs for one of the main euro-denominated product categories.

This means that CCPs that exceed these thresholds should be legally incorporated in the euro area with full managerial and operational control and responsibility over all core functions, exercised from within the euro area.'

38 The above passage contains a reference to a footnote, in which it is stated that the total amount of average exposure 'can be approximated, for example, in the case of derivatives CCPs with their open interest, whereas for cash and repo CCPs their aggregate open position underlying the CCPs' margining is applied'.

39 That passage is particularly specific, facilitating its application. Not only does it lay down the amounts of the activity thresholds above which a CCP should be located in the euro area, but it also specifies, in unambiguous terms, the approach that should be followed depending on the nature of the securities in respect of which the CCP acts.

40 Third, the perception of the contested act's wording and context is liable to vary according to the nature of the parties concerned by that act.

41 In the ECB's submission, the Policy Framework is not designed to 'lay down a course of action binding on either the institutions or the Member States, or indeed on [national central banks] or CCPs', and constitutes, rather, merely a document providing the public with information.

42 It is true that the Policy Framework does not have the effect of directly requiring CCPs situated outside the euro area to cease their activity or transfer it to within that area. However, the ECB's line of argument fails to take into account the perception of the Policy Framework on the part of the euro area Member States' regulatory authorities, which are liable, in the exercise of their powers, to impede clearing services activity carried out by CCPs situated outside the euro area.

43 In this regard, it should be borne in mind that the role of CCPs in the processing chain for transactions in securities involves interaction with other financial infrastructures, which are subject to supervision by regulatory authorities and whose relations with a CCP not meeting the requirements laid down in the Policy Framework might be liable to be prevented or restricted by those authorities.

44 It is not in dispute that a CCP's function is to enable the multilateral clearing of transactions in securities, by taking the place of the buyer vis-à-vis any seller and of the seller vis-à-vis any buyer. Therefore, as the ECB itself points out in the Policy Framework, the clearing function performed by CCPs is carried out in relation to both the securities that are the subject-matter of the transactions and the liquid assets intended to pay for those transactions. This means that, in order to carry out its activity, a CCP must have access, first, to a payment system enabling liquid assets to be transferred, whether it is operated by a central bank or on a private basis, and, second, to a securities settlement system enabling transfer of ownership of the securities and their custody.

45 It follows that, if the regulatory authorities for payment or security settlement systems were to take the view that those systems should be required to comply with the location requirement set out in the Policy Framework, a CCP not meeting the criteria set out in that framework could be denied access to the other operators involved in the processing chain for transactions in securities.

46 Furthermore, the users of the CCPs' services, essentially consisting of regulated markets and, in the case of over-the-counter transactions, of investment firms and institutions running their own trading platform, are also subject to supervision by the regulatory authorities, who might be liable to prevent or restrict their relations with a CCP not meeting the requirements laid down in the Policy Framework. In this regard, it should be pointed out that, whilst Article 35(1) and Article 46(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1) lay down the principle of free access to CCPs situated in another Member State so far as concerns, respectively, first, investment firms and market operators operating their own trading platform and, second, regulated markets, the fact remains that Article 35(2) and Article 46(2) of that directive mean that the competent authorities of the Member States are able to oppose the use of a CCP if this is necessary in order to maintain the orderly functioning of a trading platform or regulated market.

47 For the purpose of assessing the way in which such regulatory authorities could reasonably perceive the Policy Framework, it should be noted that the ECB relies on a number of legal bases to support its assertion relating to the existence of Eurosystem competence to oversee and, as the case may be, regulate securities clearing systems, within which CCPs fall. Reference is thus made to Article 127(1) TFEU, inasmuch as it assigns to the Eurosystem the primary objective of maintaining price stability. The ECB contends, in essence, that default of a CCP could pose a systemic risk for the financial system as a whole and thus affect the attainment of that objective. Mention is also made of Article 127(2) TFEU, which lists promotion of the smooth operation of payment systems as one of the Eurosystem's basic tasks. In this context, the ECB underlines the particularly close links between payment systems and securities clearing and settlement systems, inasmuch as the latter involve transfer of the funds corresponding to the payment for the securities. It infers therefrom, in essence, that the failing of securities settlement systems could, indirectly, affect the smooth operation of payment systems. It also contends that the reference in Article 127(2) TFEU to payment systems must be understood as including securities clearing and settlement systems, in the light of the importance acquired by those systems since the EU Treaty was drawn up. In support of this interpretation of Article 127(2) TFEU, it refers also to the fact that Article 22 of the Statute grants it competence to make regulations to ensure efficient and sound 'clearing and payment' systems and not just payment systems.

48 Without prejudice to the examination of the substance of the present action, it must be stated that such arguments are not so clearly unfounded that it can be ruled out from the outset that the regulatory authorities of the euro area Member States will conclude that the Eurosystem has competence to regulate the activity of securities clearing and settlement systems and that, therefore, they are required to ensure that the location requirement set out in the Policy Framework is complied with.

49 Therefore, it is to be concluded that examination of the Policy Framework's wording and context, from the point of view of the regulatory authorities of the euro area Member States, tends to place that framework in the category of acts against which an action for annulment may be brought under Article 263 TFEU.

50 In the second place, the same conclusion must be drawn from the analysis of the substance of the Policy Framework, since formulation of a requirement that CCPs whose activity exceeds the thresholds that the Policy Framework specifies should be located within the euro area is equivalent to the addition of a new rule in the legal order, such a requirement not appearing in any pre-existing legal provision.

51 In the third place, the ECB's intention when adopting the Policy Framework must be assessed for the purpose of determining whether it was designed to have legal effects. It is apparent from settled case-law that it is in principle those measures which definitively determine the position of their author upon the conclusion of an administrative procedure, and which are intended to have binding legal effects capable of affecting the interests of the applicant, that are open to challenge and not, in particular, intermediate measures whose purpose is to prepare for the final decision, which do not have those effects, or measures which are mere confirmation of an earlier measure which was not challenged within the prescribed period (see, to this effect, judgments in *Internationaler Hilfsfonds* v *Commission*, paragraph 31 above, EU:C:2010:40, paragraph 52, and *Athinaïki Techniki* v *Commission*, paragraph 30 above, EU:C:2008:422, paragraph 42).

52 Therefore, it should be determined whether the objective pursued by adoption of the Policy Framework, as resulting in particular from its wording and substance, was to determine a definitive position of the ECB or, on the other hand, to prepare a subsequent act, which alone was intended to have legal effects.

53 As has been noted in paragraph 39 above, the statement of location policy in the Policy Framework is particularly specific, rendering it readily applicable. Thus, far from displaying the nature of a mere hypothetical statement, the Policy Framework is in fact intended to impose compliance with a location requirement for CCPs whose activity exceeds the thresholds that it sets and therefore, in the absence of indications to the contrary in the text of the Policy Framework, constitutes the ECB's definitive position.

54 In the light of all the foregoing, it is to be inferred from the analysis of the Policy Framework's wording and context, of its substance and of the intention of its author that it has legal effects and accordingly constitutes an act against which an action for annulment may be brought under Article 263 TFEU.

55 Doubt is not cast on this conclusion by the ECB's line of argument alleging that the Policy Framework is confirmatory in nature or regarding the existence of subsequent acts that refer to it.

56 In the first place, in the ECB's submission the Policy Framework merely restates a pre-existing location policy which was not challenged. In a policy statement as early as 2001, which gave rise to a press release on 27 September 2001, it observed that '[t]he natural geographical scope for any "domestic" market infrastructure (including [CCP] clearing) for securities and derivatives denominated in euro is the euro area' and that, 'given the potential systemic importance of securities clearing and settlement systems, this infrastructure should be located within the euro area'. The ECB adds that a policy statement in December 2008 relating to CCPs mentioned that 'the Governing Council confirmed that there was a need for at least one European CCP for credit derivatives' and that, 'given the potential systemic importance of securities clearing and settlement systems, this infrastructure should be located within the euro area'.

57 The ECB also points out that in February 2009 it published a Eurosystem Oversight Policy Framework in which it was stated, first, that 'infrastructures that settle euro-denominated payment transactions should settle these transactions in central bank money and be legally incorporated in the euro area with full operational responsibility for processing euro-denominated transactions' and, second, that '[t]he Eurosystem has also issued a statement on the location of [CCPs] which underlined the Eurosystem's interest in having the core infrastructure that is used for the euro located in the euro area'.

58 Consequently, the ECB maintains that its location policy in respect of CCPs precedes the Policy Framework contested in the present action. The ECB infers from this that the Policy Framework is confirmatory and, accordingly, that an action for annulment cannot be brought against it.

59 It is settled case-law that an action for the annulment of a decision which merely confirms a previous decision not contested within the time-limit for bringing proceedings is inadmissible (order of 21 November 1990 in *Infortec* v *Commission*, C-12/90, ECR, EU:C:1990:415, paragraph 10, and judgment of 11 January 1996 in *Zunis Holding and Others* v *Commission*, C-480/93 P, ECR, EU:C:1996:1, paragraph 14). The purpose of that case-law is to prevent an applicant from being able, indirectly, to challenge the legality of a decision which he did not contest in good time and which has accordingly become definitive.

60 However, according to that case-law, a decision is a mere confirmation of an earlier decision where it contains no new factors as compared with the earlier measure and is not preceded by any re-examination of the situation of the person to whom the earlier measure was addressed (judgment of 26 October 2000 in *Ripa di Meana and Others* v *Parliament*, T-83/99 to T-85/99, ECR, EU:T:2000:244, paragraph 33; see order of 7 December 2004 in *Internationaler Hilfsfonds* v *Commission*, C-521/03 P, EU:C:2004:778, paragraph 47 and the case-law cited).

61 Likewise, the Court of Justice has had occasion to point out, in respect of an action for annulment brought against a regulation amending an earlier regulation, that it is clear from the final paragraph of Article 263 TFEU — according to which an action for annulment must be brought within two months of the publication or notification of the contested measure or, in the absence thereof, of the date on which it came to the applicant's knowledge, as the case may be — that a measure which has not been challenged within that period becomes definitive and that that definitiveness concerns not only the measure itself, but also any later measure which is merely confirmatory. That approach, which is justified by the requirement of legal stability, applies to individual measures as well as those which have a legislative character, such as a regulation. The Court of Justice pointed out, however, that where a provision in a regulation is amended, a fresh right of action arises, not only against that provision alone, but also against all the provisions which, even if not amended, form a whole with it (judgment of 18 October 2007 in *Commission* v *Parliament and Council*, C-299/05, ECR, EU:C:2007:608, paragraphs 28 to 30).

62 Thus, the fact that the ECB may have expressed in earlier acts the principle of a location policy which could apply to CCPs does not mean that the Policy Framework must be classified as a confirmatory act, as long as the location policy at issue is set out there in an amended form.

63 It is clear that, on the issue of the location of CCPs, the Policy Framework contested in the present action is distinctly different from the acts preceding it.

64 It is admittedly true that the earlier acts adopted by the ECB express the wish that the core infrastructure for the euro area should be located in that area. It is thus pointed out in the version of the Policy Framework made publicly available by the ECB in 2009 that '[t]he Eurosystem has also issued a statement on the location of [CCPs] which underlined the Eurosystem's interest in having the core infrastructure that is used for the euro located in the euro area' and that '[i]n applying this statement to the case of over-the-counter credit derivatives, the Eurosystem has stressed not only that there is "a need for at least one European CCP for credit derivatives", but also that, "given the potential systemic importance of securities clearing and settlement systems, this infrastructure should be located within the euro area"' (page 9 of the version of the Policy Framework made publicly available in 2009).

65 However, the contested version of the Policy Framework is distinctly different from the versions preceding it in that it sets specific thresholds above which that requirement to be located in the euro area applies, and which contribute to rendering it applicable. Merely on account of the presence of this additional passage, the Policy Framework cannot be considered to be confirmatory as contended by the ECB.

66 In the second place, the ECB's line of argument could be understood as a submission that, to the extent that other legal acts refer to the ECB's location policy as described in the Policy Framework, those acts alone would be capable of producing legal effects amenable to challenge.

67 Such a line of argument cannot, however, be followed, since it is based on confusion of the relations that may exist, on the one hand, between an intermediate measure and a final decision and, on the other, between an act of general application and decisions implementing it. Whilst the guideline of the ECB of 26 April 2007 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) (ECB/2007/2) (OJ 2007 L 237, p. 1) and the decision of the ECB of 24 July 2007 concerning the terms and conditions of TARGET2-ECB (ECB/2007/7) (OJ 2007 L 237, p. 71), referred to by the parties in their pleadings, were amended in order to include a reference to the location policy as expressed in the Policy Framework, that fact is not illustrative of an alleged lack of definitiveness of that framework. It shows only that the condition laid down therein has been implemented in the specific field concerned by the two acts in question.

68 In the light of all the foregoing, the first plea of inadmissibility, relating to the nature of the Policy Framework, must be dismissed.

Plea of inadmissibility alleging that the United Kingdom lacks standing to bring proceedings

69 The ECB contends that, even if it is concluded that the Policy Framework is a binding act, the United Kingdom does not have standing to bring an action against it, on the ground that it does not participate in certain aspects of economic and monetary union. The ECB refers, in this connection, to the fact that Protocol No 15 to the FEU Treaty on certain provisions relating to the United Kingdom excludes the application in the United Kingdom's regard of certain provisions of the FEU Treaty and the Statute, including Article 127(1) to (5) TFEU.

70 The United Kingdom submits that Protocol No 15 to the FEU Treaty does not have the effect of preventing it from challenging acts or omissions of the ECB which infringe EU law.

71 It is apparent from the first and second paragraphs of Article 263 TFEU and Article 35.1 of the Statute that a Member State may bring an action against acts adopted by the ECB.

72 Furthermore, whilst it is clear from Article 7 of Protocol No 15 to the FEU Treaty that certain articles of the Statute do not apply to the United Kingdom, Article 35 of the Statute is not included in that list.

73 It must be inferred that, as a Member State, the United Kingdom has standing to bring proceedings against acts of the ECB on the basis of the second paragraph of Article 263 TFEU and is not subject to the conditions in the fourth paragraph of Article 263 TFEU.

74 This conclusion is not affected by the fact that Articles 4 and 7 of Protocol No 15 to the FEU Treaty exclude the application in relation to the United Kingdom of Article 127(1) to (5) TFEU and Articles 3 and 22 of the Statute respectively. The question whether, in adopting the Policy Framework, the ECB remained within the framework of the powers that are conferred upon it by those provisions or, on the contrary, exceeded them falls within the assessment of the action's substance and does not concern its admissibility.

75 Therefore, whilst under Protocol No 15 to the FEU Treaty certain provisions of the FEU Treaty and the Statute do not apply in relation to the United Kingdom, the latter may still bring an action seeking review by the EU judicature of whether the ECB has exceeded its powers.

76 Consequently, the second plea of inadmissibility put forward by the ECB must be dismissed and the present action must be held admissible.

Substance

77 The United Kingdom relies on five pleas in law.

78 By the first plea, it submits that the ECB lacked competence to lay down a location requirement in respect of CCPs. In the second plea, it submits that the ECB's location policy infringes the provisions of the FEU Treaty relating to freedom of establishment, freedom to provide services and the free movement of capital. The third plea relates to an alleged breach of Articles 101 TFEU and 102 TFEU, read in conjunction with Article 13(2) TEU. By the fourth plea, the United Kingdom submits that the ECB's location requirement infringes the principle of non-discrimination in Article 18 TFEU. Finally, in the fifth plea, it submits that no justification can be put forward for the discriminatory nature of the Policy Framework in the absence of observance of the principle of proportionality.

79 In the first plea, the United Kingdom, supported at the hearing by the Kingdom of Sweden, contends that the ECB lacks competence to exercise oversight and regulatory control over CCPs.

80 The ECB, supported at the hearing by the Kingdom of Spain and the French Republic, considers that, even if the Policy Framework were classified as a binding act, it would have competence to adopt it.

81 In the first place, the ECB submits that the Policy Framework falls within the objective assigned to it by Article 127(1) TFEU of maintaining price stability and supporting the general economic policies in the European Union. More specifically, it falls within the basic task assigned to the ECB by Article 127(2) TFEU of promoting the smooth operation of payment systems. The ECB points out that since 2001 it has highlighted the implications that CCPs may have for the smooth operation of payment systems. It infers that, since the location policy in respect of CCPs set out in the Policy Framework is connected to promoting the smooth operation of payment systems, it could adopt it without Council authorisation.

82 In the rejoinder, the ECB states that recital 11 in the preamble to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, [CCPs] and trade repositories (OJ 2012 L 201, p. 1) recognises that, pursuant to the ESCB's task of promoting the smooth operation of payment systems, the members of the ESCB execute oversight by ensuring efficient and sound clearing and payment systems, including CCPs.

83 In the second place, the ECB contests the idea put forward by the United Kingdom that it would have been required to adopt a binding act in order to adopt a policy in the field in question. In essence, it contends that it is entitled to adopt a policy statement for the purpose of setting out its policy concerning the location of CCPs dealing in euro-denominated assets, even if the Council had to grant it specific powers under Article 127(6) TFEU.

84 First of all, it should be pointed out that the matter at issue is the ECB's competence to impose, on behalf of the Eurosystem, a requirement to be located within the euro area that is applicable to CCPs providing clearing services for euro-denominated securities beyond certain thresholds. It is clear that creation of such a requirement goes beyond mere oversight of the infrastructures of securities clearing systems, and partakes of regulation of their activity.

85 It must, therefore, be established whether the ECB has competence to regulate the activity of infrastructures, such as CCPs, which are involved in the clearing of securities.

86 In its pleadings, the ECB bases the existence of such competence on Article 127(1) TFEU and the fourth indent of Article 127(2) TFEU. Reference is also made, in the context of oversight, to Article 22 of the Statute.

87 Under Article 127(1) TFEU, the primary objective of the ESCB is to maintain price stability. The fourth indent of Article 127(2) TFEU provides that '[t]he basic tasks to be carried out through the ESCB shall be … to promote the smooth operation of payment systems'. This task is recalled in the fourth indent of Article 3.1 of the Statute.

88 Article 22 of the Statute, headed 'Clearing and payment systems', provides that [t]he ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries'.

89 These various legal bases have a complementary relationship. The power to adopt regulations pursuant to Article 22 of the Statute is one of the means available to the ECB for performing the task, entrusted to the Eurosystem by Article 127(2) TFEU, of promoting the smooth operation of payment systems. That task itself serves the primary objective set out in Article 127(1) TFEU.

90 It necessarily follows that the term 'clearing systems' in Article 22 of the Statute must be read in conjunction with the 'payment systems' to which reference is made in the same article and the smooth operation of which constitutes one of the Eurosystem's tasks.

91 It must accordingly be determined whether the task of promoting the smooth operation of payment systems which has been assigned to the Eurosystem, and for which the ECB has competence to adopt regulations, may be regarded as including securities clearing systems and, therefore, the activity of CCPs when they act in that context.

92 As has already been pointed out in paragraph 44 above, a CCP has the function of taking the place of the buyer vis-à-vis any seller and of the seller vis-à-vis any buyer. It follows that its clearing activity is carried out in respect of not only the liquid assets intended for purchase of the securities in question, but also the securities that are the subject-matter of the transactions. This is pointed out by the ECB itself in the Policy Framework when it refers to the existence of the 'cash' leg and the 'securities' leg of a CCP's activity.

93 Therefore, it is necessary, in the first place, to interpret the terms 'payment systems' and 'clearing and payment systems', used in the fourth indent of Article 127(2) TFEU and Article 22 of the Statute respectively, in order to determine whether they may include the activity of clearing securities.

94 First, it may be observed that the term 'payment system' has been defined by the legislature in Article 4(6) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1) as designating 'a funds transfer system with formal and standardised arrangements and common rules for the processing, clearing and/or settlement of payment transactions'.

95 It should also be noted that, whilst Article 3(h) of Directive 2007/64 excludes from the directive's scope 'payment transactions carried out within a payment or securities settlement system between settlement agents, [CCPs], clearing houses and/or central banks and other participants of the system, and payment service providers, without prejudice to Article 28', the definition provided in Article 4(6) of the

directive none the less remains relevant as regards definition of a payment system, including when the payment system is used by financial infrastructures such as CCPs, as is demonstrated by the reference to Article 28 of the directive, which covers '[a]ccess to payment systems'.

96 Second, it must also be noted that the Court of Justice has had occasion to interpret the concept of 'payments', when it is used in the context of Article 63(2) TFEU, as designating transfers of funds intended to provide consideration for a transaction (see, to this effect, judgments of 31 January 1984 in *Luisi and Carbone*, 286/82 and 26/83, ECR, EU:C:1984:35, paragraph 20; of 14 July 1988 in *Lambert*, 308/86, ECR, EU:C:1988:405, paragraph 10; and of 14 December 1995 in *Sanz de Lera and Others*, C-163/94, C-165/94 and C-250/94, ECR, EU:C:1995:451, paragraph 17).

97 It follows from the foregoing that a 'payment system' within the meaning of Article 127(2) TFEU falls within the field of the transfer of funds. Therefore, whilst such a definition may include the 'cash' leg of clearing operations, that is not true of the 'securities' leg of the clearing operations of a CCP, since while such securities may be regarded as being the subject-matter of a transaction giving rise to the transfer of funds, they do not, however, in themselves constitute payments.

98 A similar conclusion is also required in respect of the term 'clearing and payment systems' that is used in Article 22 of the Statute.

99 For the reasons set out in paragraph 89 above, this term must be interpreted in the light of the task, conferred on the Eurosystem by the fourth indent of Article 127(2) TFEU, of promoting the 'smooth operation of payment systems'. It necessarily follows that the ability which the ECB is granted by Article 22 of the Statute to adopt regulations 'to ensure efficient and sound clearing and payment systems' cannot be understood as according it such a power in respect of all clearing systems, including those relating to transactions in securities.

100 That option granted to the ECB by Article 22 of the Statute must rather be regarded as limited to payment clearing systems alone. In this regard, it should be noted that a clearing stage may be included in payment systems, such as net settlement payment systems as opposed to a gross settlement payment system.

101 Consequently, in the absence of an explicit reference to the clearing of securities in Article 22 of the Statute, it must be concluded that the choice of the term 'clearing and payment system' is intended to make it clear that the ECB has competence to adopt regulations to ensure efficiency and safety of payment systems, including those with a clearing stage, rather than granting it an autonomous regulatory competence in respect of all clearing systems.

102 Doubt is not cast on this conclusion by the reference made by the ECB to recital 11 in the preamble to Regulation No 648/2012 — a regulation which, moreover, was not in force on the date when the Policy Framework was adopted — according to which 'the members of the ESCB execute oversight by ensuring efficient and sound clearing and payment systems, including CCPs'. All that is apparent upon reading the recital in question in its entirety is that it constitutes a simple reminder on the part of the legislature of the close links between clearing and payment systems and CCPs and of its wish that the ECB and the national central banks be involved in the procedure for authorisation of CCPs and in the setting of the regulatory technical standards to which they are subject. It in no way shows that, in the context of Regulation No 648/2012, the legislature intended to acknowledge that the ECB and the national central banks have competence to regulate the activity of CCPs, when by that regulation the legislature seeks itself to regulate the activity of CCPs by imposing uniform requirements upon them.

103 It is necessary, in the second place, to reject the ECB's line of argument to the effect, in essence, that the carrying out of the task consisting in promotion of the sound operation of payment systems pursuant to the fourth indent of Article 127(2) TFEU means that it necessarily has the power to regulate the activity of securities clearing infrastructures, in the light of the effect that their default could have on payment systems.

104 It is true that the Court of Justice has acknowledged that powers not expressly provided for by the provisions of the Treaties may be used if they are necessary to achieve the objectives set by the Treaties (see, to this effect, judgment in *Commission* v *Council*, paragraph 30 above, EU:C:1971:32, paragraph 28). Thus, when an article of the Treaty confers a specific task on an institution, it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on that institution necessarily and per se the powers which are indispensable in order to carry out that task (see, by analogy, judgments of 9 July 1987 in *Germany and Others* v *Commission*, 281/85, 283/85 to 285/85 and 287/85, ECR, EU:C:1987:351, paragraph 28, and of 17 September 2007 in *France* v *Commission*, T-240/04, ECR, EU:T:2007:290, paragraph 36).

105 Nevertheless, the existence of an implicit regulatory power, which constitutes a derogation from the principle of conferral laid down by Article 13(2) TEU, must be appraised strictly. It is only exceptionally that such implicit powers are recognised by case-law and, in order to be so recognised, they must be necessary to ensure the practical effect of the provisions of the Treaty or the basic regulation at issue (see, by analogy, judgment in *France* v *Commission*, paragraph 104 above, EU:T:2007:290, paragraph 37).

106 In the present case, the existence of very close links between payment systems and securities clearing systems cannot be denied, nor can the possibility that disturbances affecting securities clearing infrastructures will have repercussions for payment systems and be injurious to their smooth operation.

107 Nevertheless, the existence of those links cannot be sufficient to justify accepting that the ECB has implicit powers to regulate securities clearing systems, since the FEU Treaty envisages the possibility of such powers being conferred explicitly upon the ECB.

108 Indeed, it must be pointed out that Article 129(3) TFEU provides for a simplified amendment mechanism — derogating from the mechanism in Article 48 TEU — in respect of certain provisions of the Statute, including Article 22. It enables the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and on a recommendation from the ECB or a proposal from the Commission, to amend those provisions.

109 Therefore, it would be for the ECB, should it consider that the grant to it of a power to regulate infrastructures clearing transactions in securities is necessary for proper performance of the task referred to in the fourth indent of Article 127(2) TFEU, to request the EU legislature to amend Article 22 of the Statute, by the addition of an explicit reference to securities clearing systems.

110 In the light of all the foregoing, the first plea relied upon by the United Kingdom must be upheld and, without it being necessary to examine the other four pleas, it must be concluded that the ECB does not have the competence necessary to regulate the activity of securities clearing systems, so that, in so far as the Policy Framework imposes on CCPs involved in the clearing of securities a requirement to be located within the euro area, it must be annulled for lack of competence.

Costs

111 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the ECB has been unsuccessful, it must be ordered to pay the United Kingdom's costs, in accordance with the form of order sought by the United Kingdom.

112 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. The Kingdom of Spain, the French Republic and the Kingdom of Sweden must therefore bear their own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls the Eurosystem Oversight Policy Framework, published by the European Central Bank (ECB) on 5 July 2011, in so far as it sets a requirement to be located within a Member State party to the Eurosystem for central counterparties involved in the clearing of securities;**

2. **Orders the ECB to bear its own costs and to pay those incurred by the United Kingdom of Great Britain and Northern Ireland;**

3. **Orders the Kingdom of Spain, the French Republic and the Kingdom of Sweden to bear their own costs.**

Prek Labucka Kreuschitz

Delivered in open court in Luxembourg on 4 March 2015.

[Signatures]