Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

13 July 2018 *

(Economic and monetary policy — Prudential supervision of credit institutions — Article 4(1)(d) and (3) of Regulation (EU) No 1024/2013 — Calculation of the leverage ratio — ECB's refusal to authorise the applicant to exclude exposures meeting certain conditions from the calculation of the leverage ratio — Article 429(14) of Regulation (EU) No 575/2013 — ECB's discretion — Errors of law — Manifest errors of assessment)

In Case T-745/16,

**BPCE**, established in Paris (France), represented initially by A. Gosset-Grainville, C. Renner and P. Kupka, then by A. Gosset-Grainville, P. Kupka and M. Trabucchi, and last by A. Gosset-Grainville and M. Trabucchi, lawyers,

applicant,

v

**European Central Bank (ECB)**, represented by K. Lackhoff, R. Bax and G. Bassani, acting as Agents, and by H.-G. Kamann and F. Louis, lawyers,

defendant,

supported by

**Republic of Finland**, represented by S. Hartikainen, acting as Agent,

intervener,

APPLICATION under Article 263 TFEU for annulment of Decision ECB/SSM/2016-9695005MSX1OYEMGDF46/195 of the ECB of 24 August 2016, adopted in application of Article 4(1)(d) and Article 10 of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to prudential supervision of credit institutions (OJ 2013 L 287, p. 63), and of Article 429(14) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1, corrigenda OJ 2013 L 208, p. 68, and OJ 2013 L 321, p. 6),

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of M. Prek (Rapporteur), President, E. Buttigieg, F. Schalin, B. Berke and M.J. Costeira, Judges,

* Language of the case: French.

Registrar: M. Marescaux, Administrator,

having regard to the written part of the procedure and further to the hearing on 23 April 2018,

gives the following

## Judgment

### Background to the dispute

1 The applicant, the la BPCE, is a joint stock company governed by French law and is approved as a credit institution. As a significant entity within the meaning of Article 6(4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63), it comes under the direct prudential supervision of the European Central Bank (ECB).

2 On 4 March 2015, the applicant sought authorisation from the ECB, in application of Article 429(14) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1, corrigenda OJ 2013 L 208, p. 68, and OJ 2013 L 321, p. 6), to exclude from the calculation of the leverage ratio the exposures made up of the sums associated with regulated products taken out with the applicant, but which it was required to transfer to the Caisse des dépôts et consignations (CDC), a French public institution.

3 The products concerned are Livret A (Savings Passbook A), governed by Articles L.221-1 to L.221-9 of the French code monétaire et financier (Monetary and Financial Code; 'the CMF'), the Livret d'épargne Populaire (Popular Savings Passbook; 'the LEP'), governed by Articles L.221-13 to L.221-17-2 of the CMF, and the Livret de développement durable et solidaire (Sustainable and Socially Responsible Passbook) ('the LDD'), governed by Article L.221-27 of the CMF. Pursuant to Article L.221-5 of the CMF, a share of the total deposits collected on the basis of Livret A and the LDD is to be centralised in a savings fund managed by the CDC. The same applies to the LEP, pursuant to Article R.221-58 of the CMF.

4 On 8 June 2016, the ECB communicated to the applicant a draft decision refusing to grant the requested derogation.

5 On 8 July 2016, at the applicant's request, a teleconference was held with representatives of the ECB.

6 Le 24 August 2016, the ECB adopted Decision ECB/SSM/2016-9695005MSX1OYEMGDF46/195, adopted in application of Article 4(1)(d) and Article 10 of Regulation No 1024/2013 and of Article 429(14) of Regulation No 575/2013 ('the contested decision').

7 The ECB refused in the contested decision to exclude from the calculation of the applicant's leverage ratio the exposures to the CDC made up of the proportion of the sums deposited on the basis of Livret A, the LDD and the LEP which the applicant was required to transfer to it.

8 The ECB, in the first place, recognised that the conditions set out in Article 429(14)(a) to (c) of Regulation No 575/2013 were satisfied, on the grounds, first of all, that the CDC must be regarded as a public-sector entity; next, that the exposures to the CDC were treated for prudential purposes in accordance with Article 116(4) of that regulation; and, last, that the applicant was required to transfer a share of the savings deposited on the basis of Livret A, the LDD and the LEP to the CDC in order to

finance investments of general interest. The ECB, in essence, also emphasised that those conditions were not satisfied as regards the proportion of the regulated savings for which there is no obligation to transfer to the CDC, irrespective of the purposes for which it is used.

9 The ECB, in the second place, considered that it followed from the wording of Article 429(14) of Regulation No 575/2013 that it had a discretion that allowed it to exclude or not to exclude from the calculation of the leverage ratio exposures that met the conditions specified in that provision. In essence, it considered that, even where those conditions are satisfied, there may be prudential reasons that justify rejecting a request for a derogation under that provision. In that regard, it referred to the purpose of the introduction of the leverage ratio, which is to provide a simple, transparent vision of the level of exposure of a credit institution which is not weighted according to the risk presented by the various components of its exposures, in order to avoid an excessive increase in those exposures by comparison with its own funds.

10 The ECB, in the third place, considered that the sums transferred to the CDC by the applicant continued to be relevant exposures for the calculation of its leverage ratio. It relied on three grounds. The first ground, which it referred to as a 'first indication', is based on the accounting treatment of the savings collected. The ECB inferred from the fact that the regulated savings appeared on the liabilities side of the applicant's balance sheet and the sums transferred to the CDC on the assets side of its balance sheet that the applicant continued to be liable for the exposure consisting of the savings collected, including the sums transferred to the CDC. It added that the applicant was required to manage the operational risks associated with the regulated savings. The second ground consists *[confidential]*.[1] The third ground is based on the existence of a period between the adjustments of the applicant's positions and the CDC's positions for balancing purposes. The ECB considered that during that period the applicant might find it necessary to have recourse to a fire sale of assets while awaiting transfers of funds from the CDC. In conclusion, the ECB inferred from those grounds that the mechanism for the transfer of funds from the CDC to the applicant was imperfect, giving rise to prudential concerns that justified the rejection of its request.

## Procedure and forms of order sought

11 By application lodged at the Court Registry on 28 October 2016, the applicant brought the present action.

12 By document lodged at the Court Registry on 1 March 2017, the Republic of Finland sought leave to intervene in support of the form of order sought by the ECB. By order of 2 May 2017, the President of the Second Chamber of the Court granted the Republic of Finland leave to intervene in support of the form of order sought by the ECB and granted the applicant's request for confidential treatment vis-à-vis the intervener.

13 On 13 June 2017, the Republic of Finland submitted its statement in intervention. The applicant lodged its observations on that statement within the prescribed period. The ECB did not lodge observations.

14 On a proposal from the Second Chamber, the Court decided, in application of Article 28 of the Rules of Procedure of the General Court, to refer the case to a formation of the Court with an extended composition.

15 On a proposal from the Judge-Rapporteur, the General Court (Second Chamber, Extended Composition), decided to open the oral part of the procedure.

1 Confidential data deleted.

16 The parties submitted oral argument and their answers to the questions put by the Court at the hearing on 23 April 2018.

17 The applicant claims that the Court should:

– annul the contested decision;

– order the applicant to pay the costs.

18 The ECB and the Republic of Finland contend that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

## Law

19 In support of its action, the applicant puts forward five pleas in law. In the context of its first plea, which is put forward as its main plea, it maintains that the contested decision is vitiated by lack of competence. In its second, third, fourth and fifth pleas, which are put forward in the alternative, it maintains that the contested decision is vitiated by, respectively, errors of law, manifest errors of assessment, breach of certain general principles of European Union law and failure to state sufficient reasons.

20 By its first plea, the applicant takes issue with the ECB for having assumed a discretion when applying Article 429(14) of Regulation No 575/2013, when it does not have such a discretion.

21 As regards the second, third and fourth pleas, it should be observed that they have in common that they dispute the legality of the ECB's use of that discretion, on the assumption that it has such a discretion. They should therefore be examined together.

### *First plea, alleging that the ECB did not have power to exercise a discretion when implementing Article 429(14) of Regulation No 575/2013*

22 The applicant maintains that the ECB, in breach of the rules on the separation of powers within the constitutional order of the European Union, exceeded the powers which Article 429(14) of Regulation No 575/2013 attributes to it by assuming a discretion when implementing that provision. It claims that the European Commission fixed in detail and unambiguously the criteria to be respected in order for the derogation provided for in Article 429(14) of Regulation No 575/2013 to be granted and thus made full use of its discretion. It emphasises that it was to the Commission that the legislature delegated the power to alter the total exposure measure for the calculation of the leverage ratio and that the Commission could not subdelegate its own discretion without infringing Article 290 TFEU or the case-law resulting from the judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7). The applicant infers that the wording of Article 429(14) of Regulation No 575/2013 cannot be interpreted as conferring on the ECB a discretion as to whether it is appropriate to grant or not to grant the derogation requested provided that the conditions required by that provision are met.

23 The ECB, supported by the Republic of Finland, disputes the applicant's arguments. As a preliminary point, it doubts whether the applicant has an interest in raising the present plea. In any event, it contends that the plea must be rejected on the substance.

24 As regards the ECB's challenge to the admissibility of the present plea, it is sufficient to state that it is based on the premiss that the applicant is pleading that Article 429(14) of Regulation No 575/2013, introduced by Commission Delegated Regulation (EU) 2015/62 of 10 October 2014 amending Regulation No 575/2013 with regard to the leverage ratio (OJ 2015 L 11, p. 37), is illegal. The ECB infers, in essence, that if such a plea were to be accepted, the applicant could not benefit from any derogation when calculating its leverage ratio.

25 That is not the sense of the applicant's argument. As the applicant confirmed at the hearing, in the context of this plea it merely maintains that Article 429(14) of Regulation No 575/2013 must be interpreted as imposing a strict obligation, and not conferring a discretion, on the ECB, but does not raise any plea of illegality in application of Article 277 TFEU against that provision. Accordingly, it does not dispute the validity of Article 429(14), but confines its argument solely to the interpretation of that provision.

26 As regards the examination of the substance of the present plea, it should be observed that the ECB's power for the purpose of adopting the decision arises under Regulation No 1024/2013 and that the extent of its powers is determined by Article 429(14) of Regulation No 575/2013.

27 As regards the ECB's power to adopt the contested decision, it should be borne in mind that, in application of Article 4(1)(d) of Regulation No 1024/2013, the ECB was given the task of 'ensur[ing] compliance with the acts referred to in the first subparagraph of Article 4(3), which impose prudential requirements on credit institutions in the areas of own funds requirements, securitisation, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters'. Furthermore, since the applicant is a significant entity for the purposes of Article 6(4) of Regulation No 1024/2013, that task falls to be implemented directly by the ECB and not by the national authorities in the context of the single supervisory mechanism (SSM) (judgment of 16 May 2017, *Landeskreditbank Baden-Württemberg* v *ECB*, T-122/15, under appeal, EU:T:2017:337, paragraph 63).

28 In application of Article 4(3) of Regulation No 1024/2013, 'for the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law'. Relevant Union law includes Regulation No 575/2013.

29 As regards the extent of the ECB's powers when it applies Article 429(14) of Regulation No 575/2013, which was inserted into that regulation by Delegated Regulation 2015/62, it is stated in that provision that 'competent authorities may permit an institution to exclude from the exposure measure exposures that meet all of the following conditions: (a) they are exposures to a public-sector entity; (b) they are treated in accordance with Article 116(4); (c) they arise from deposits that the institution is legally obliged to transfer to the public-sector entity referred to in point (a) for the purposes of funding general interest investments'.

30 The present plea therefore entails ascertaining whether Article 429(14) of Regulation No 575/2013 must be interpreted as conferring on the competent authorities — and therefore on the ECB — the discretion to refuse to grant a derogation even though the conditions set out in that provision are met or, on the contrary, as imposing a strict obligation on the ECB requiring it to grant the derogation if those conditions are met.

31 The applicant bases its interpretation of Article 429(14) of Regulation No 575/2013 on the premiss that the Commission was not entitled to provide for a discretion on the part of the competent authorities when they implement that provision, and maintains that that provision must be interpreted in a way that renders it consistent with the Treaty.

32 It is settled case-law that where it is necessary to interpret a provision of secondary European Union law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaty and the general principles of EU law (judgments of 4 October 2007, *Schutzverband der Spirituosen-Industrie*, C-457/05, EU:C:2007:576, paragraph 22; of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 174; and of 25 November 2009, *Germany* v *Commission*, T-376/07, EU:T:2009:467, paragraph 22).

33 However, as shown by the use in the case-law referred to in paragraph 32 above of the expression 'as far as possible', such case-law cannot be applied in the case of a provision whose meaning is clear and unambiguous and which therefore requires no interpretation (see, to that effect, judgment of 25 November 2009, *Germany* v *Commission*, T-376/07, EU:T:2009:467, paragraph 22). If that were so, the principle that secondary EU law must be interpreted in conformity with EU law would serve as the basis for an interpretation of that provision *contra legem*, which cannot be permitted (see, to that effect, order of 17 July 2015, *EEB* v *Commission*, T-685/14, not published, EU:T:2015:560, paragraph 31 and the case-law cited). In the case of a provision whose meaning is clear and unambiguous, it is for the Court alone, where a plea of illegality within the meaning of Article 277 TFEU is raised, to review its consistency with the provisions of the Treaty and the general provisions of EU law.

34 But, as already explained in paragraph 25 above, the applicant raises no plea of illegality against Article 429(14) of Regulation No 575/2013.

35 Accordingly, it is necessary to ascertain whether the meaning of Article 429(14) of Regulation No 575/2013 is clear and unambiguous or whether, on the contrary, it may lend itself to an interpretation consistent with the provisions of the Treaty and the general principles of EU law. Only in the latter hypothesis will it be necessary to ascertain whether, as the applicant maintains, the Commission was not entitled to confer a discretion on the competent authorities when they implement Article 429(14) of Regulation No 575/2013, which would imply that that article be interpreted as imposing a strict obligation on them.

36 In order to determine the precise scope of Article 429(14) of Regulation No 575/2013, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it forms part (see, to that effect, judgment of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 41 and the case-law cited).

37 As regards the literal interpretation of Article 429(14) of Regulation No 575/2013, it must be stated that the words 'competent authorities may permit an institution to exclude from the exposure measure exposures that meet all of the following conditions' necessarily mean that that provision, in part, imposes a strict obligation on the competent authorities and, in part, delegates a discretion to them.

38 First, Article 429(14) of Regulation No 575/2013 sets out three conditions that are binding on the competent authorities, which are therefore not entitled to grant a derogation if those conditions are not met. They are then bound by a strict obligation and must refuse to grant the benefit of that provision.

39 Second, in the event that those conditions are met, the competent authorities 'may' grant a derogation, that is to say they have the possibility of doing so. The reference to that possibility necessarily means that the competent authorities have the right to grant it or not to grant it. They therefore have a discretion in that respect.

40 Accordingly, it must be concluded that Article 429(14) of Regulation No 575/2013 presents clear and unambiguous wording, from which it follows that the competent authorities have a discretion when implementing that provision, provided that the conditions set out therein are met.

41 That conclusion is also consistent with the contextual and teleological interpretation of Article 429(14) of Regulation No 575/2013.

42 As regards the contextual interpretation of Article 429(14) of Regulation No 575/2013, it should be pointed out that the exercise of a discretion corresponds to one of the three methods of implementing the derogations found in that regulation.

43 It follows from the general structure of Regulation No 575/2013 that that regulation envisages at the same time derogations applicable by operation of law, that is to say, without the intervention of the competent authorities being necessary, such as that envisaged in Article 429(13) of that regulation; derogations entailing the intervention of the competent authorities in the context of the performance of a strict obligation, such as that envisaged in Article 78(1) of that regulation; or, again, derogations entailing the exercise of a discretion on the part of those authorities. Apart from Article 429(14) of Regulation No 575/2013, the derogations coming within that third category include Article 10(1) of that regulation (see, to that effect, judgment of 13 December 2017, *Crédit mutuel Arkéa* v *ECB*, T-712/15, EU:T:2017:900, under appeal, paragraphs 67 and 68).

44 As regards the teleological interpretation of Article 429(14) of Regulation No 575/2013, in so far as that provision concerns the possibility of certain exposures being excluded from the calculation of the credit institutions' leverage ratio, both the objectives pursued by the introduction of a leverage ratio and those to which Article 429(14) of Regulation No 575/2013 specifically responds are relevant.

45 As regards, in the first place, the objectives pursued by the introduction of a leverage ratio, with an obligation being imposed on the credit institutions to publish their leverage ratios and, possibly, ultimately, to comply with certain leverage ratio levels, it follows from recital 90 of Regulation No 575/2013 that the legislature's intention was to discourage the credit institutions from building up excessive leverages. It follows from that recital and also from the definitions in Article 4(1)(93) and (94) of that regulation that excessive leverage refers to a situation in which a credit institution finances too great a proportion of its investments by debt rather than from its own funds. The risk is then that the credit institution does not have sufficient own funds to meet requests for repayment of its debts and must sell some of its assets as a matter of emergency. The negative consequences of that emergency reduction of the leverage level during the financial crisis were explained as follows in recital 90 of Regulation No 575/2013: 'this amplified downward pressures on asset prices, causing further losses for institutions which in turn led to further declines in their own funds[;] the ultimate results of this negative spiral were a reduction in the availability of credit to the real economy and a deeper and longer crisis'.

46 In that context, the leverage ratio aims to provide an assessment of the level of a credit institution's own funds by comparison with its exposures, without consideration of the level of risk involved in each of those exposures. That is apparent from recital 91 of Regulation No 575/2013, which states that 'risk-based own funds … are not sufficient to prevent institutions from taking on excessive and unsustainable leverage risk', and from the work of the Basel Committee to which recitals 92 and 93 of Regulation No 575/2013 refer. In the Basel Committee's publication on the Basel III Agreements, which is produced in an annex to the defence, the leverage ratio is envisaged as a 'simple, transparent, non-risk based … ratio to act as a credible supplementary measure to the risk-based capital requirements'. The non-risk-weighted nature of the leverage ratio is again found in the description of the calculation method, as set out in Article 429(2) of Regulation No 575/2013, where it is stated that the leverage ratio is to be calculated 'as an institution's capital measure divided by that institution's total exposure measure and [is to be] expressed as a percentage'. There is no mention of any weighting according to the risk level of the exposures.

47 However, it must be pointed out that that objective is not absolute, since Regulation No 575/2013 envisages the possibility that the particularly low level of certain exposures will be reflected in the calculation of the leverage ratio of the credit institutions concerned.

48 That is shown, first, in recital 95 of Regulation No 575/2013, which states that 'when reviewing the impact of the leverage ratio on different business models, particular attention should be paid to business models which are considered to entail low risk, such as mortgage lending and specialised lending with regional governments, local authorities or public-sector entities'. That intention is transcribed in Article 511 of that regulation, entitled 'Leverage', from which it follows, in essence, that the report which the European Banking Authority (EBA) is required to submit to the Commission to enable it to decide, if necessary, to propose that the legislature make certain appropriate leverage ratio levels mandatory must, inter alia, '[identify] business models that reflect the overall risk profiles of the institutions and … [introduce] differentiated levels of the leverage ratio for those business models'.

49 That is shown, second, by the insertion by Delegated Regulation 2015/62, adopted in application of Article 456(1)(j) of Regulation No 575/2013, into the latter regulation of Article 429(14), which provides that certain exposures may be excluded from the calculation of the leverage ratio.

50 As regards, in the second place, the aims which the insertion of Article 429(14) of Regulation No 575/2013 into that regulation sought to achieve, it should be observed that, according to recital 12 of Delegated Regulation 2015/62, the changes introduced by that regulation 'should lead to better comparability of the leverage ratio disclosed by institutions and should help to avoid misleading market participants as to the real leverage of institutions'.

51 It is apparent from the wording of Article 429(14) of Regulation No 575/2013, which is set out in paragraph 29 above, that that provision can be applied only if three conditions are met. First of all, the exposures that may be excluded from the calculation of the leverage ratio must be exposures to a public-sector entity. Next, they must be treated in accordance with Article 116(4) of Regulation No 575/2013. Last, they must arise from deposits that the institution is legally obliged to transfer to the public-sector entity in question for the purposes of funding general interest investments.

52 It must be stated that, by that derogation, the Commission, with the prior authorisation of the legislature, envisaged the possibility that a credit institution's exposures to public-sector entities which, because of a State guarantee, present the same low risk level as exposures to that State and which do not correspond to an investment choice by the credit institution — in that the credit institution is under an obligation to transfer the sums concerned — are not relevant for the calculation of the leverage ratio and may therefore be excluded.

53 In fact, Article 116(4) of Regulation No 575/2013 provides that 'in exceptional circumstances, exposures to public-sector entities may be treated as exposures to the central government, regional government or local authority in whose jurisdiction they are established where in the opinion of the competent authorities of this jurisdiction there is no difference in risk between such exposures because of the existence of an appropriate guarantee by the central government, regional government or local authority'. That provision must be read in conjunction with Article 114(4) of that regulation, which states that 'exposures to Member States' central governments, and central banks denominated and funded in the domestic currency of that central government and central bank shall be assigned a risk weight of 0%'. Accordingly, the only exposures affected by Article 429(14) of Regulation No 575/2013 are those which, in application of the standard approach to the calculation of minimum own funds requirements, would be assigned a risk weight of 0%.

54 Consequently, the implementation of Article 429(14) of Regulation No 575/2013 entails the reconciliation of two objectives: first, compliance with the logic of the leverage ratio, which requires that the calculation of that ratio include the overall exposure measure of a credit institution, without weighting by reference to the risk, and, second, consideration of the objective of the Commission, authorised in advance by the legislature, that, if necessary, certain exposures with a particularly low risk profile which are not the result of an investment choice made by the credit institutions are not relevant for the calculation of the leverage ratio and may therefore be excluded.

55 It must be stated that the recognition in favour of the competent authorities of a discretion when they implement Article 429(14) of Regulation No 575/2013 allows them to decide between those two objectives in the light of the particular characteristics of each individual case.

56 In the light of all of the foregoing, it must be concluded that Article 429(14) of Regulation No 575/2013 must be interpreted as conferring on the competent authorities a discretion to refuse to grant the derogation which it establishes even when the conditions set out in that provision are met.

57 Given the clear and unambiguous meaning of Article 429(14) of Regulation No 575/2013, it must be concluded that that provision cannot lend itself to the consistent interpretation sought by the applicant. It follows that the arguments whereby the applicant claims that the Commission was not entitled to confer a discretion on the competent authorities — and consequently on the ECB — cannot be taken into account for the purposes of the interpretation of that provision and would have been relevant only in support of a plea of illegality within the meaning of Article 277 TFEU raised against Article 429(14) of Regulation No 575/2013.

58 The first plea must therefore be rejected.

***Second, third and fourth pleas, disputing the legality of the ECB's use of its discretion***

59 By its second plea, the applicant maintains that the contested decision is vitiated by errors of law. In particular, in the third part of this plea, it maintains that the ECB deprived Article 429(14) of Regulation No 575/2013 of its practical effect, since the reasoning followed in the contested decision results, in principle, in the exposures to the CDC in respect of regulated savings being excluded from the benefit of Article 429(14) of Regulation No 575/2013. By its third plea, the applicant maintains that the contested decision is vitiated by manifest errors of assessment. More specifically, in the third part of the plea it claims that the ground based on the existence of an adjustment period between the applicant's positions and those of the CDC is manifestly incorrect. By its fourth plea, the applicant takes issue with the ECB for having breached certain general principles of EU law when it adopted the contested decision. Thus, in the third part of the plea, it claims that the contested decision fails to have regard to the principle of sound administration.

60 The ECB, supported by the Republic of Finland, submits that these three pleas must be rejected. It refers to the limits of the review that the Court may carry out of the exercise of a discretion and adds that Article 429(14) of Regulation No 575/2013, as an exception, must be given a strict interpretation. The ECB infers, in essence, that it is the general aims of that regulation concerning the leverage ratio and not the objectives specific to Article 429(14) of that regulation that are relevant to the interpretation of that provision. It emphasises, in that regard, that the aim of the leverage ratio requires that it be determined independently of any risk weighting.

61 In answer to the third part of the second plea, the ECB contends that it did not deprive the derogation envisaged in Article 429(14) of Regulation No 575/2013 of its practical effect, since it remained within the bounds of its discretion. It adds that that provision does not cover only French regulated savings and that it is not precluded that it will apply in other circumstances. Last, it claims that it follows from recital 95 of Regulation No 575/2013 that the legislature intended to pay particular attention to banks having a particular business model and not to exclude certain products.

62 In answer to the third part of the third plea, the ECB claims, in particular, that the period for the adjustment of the applicant's and the CDC's respective positions gives rise to a risk of additional leverage. As the applicant is unable to call upon the CDC during that period, it might be led, when faced with withdrawals of the savings collected, to reduce its leverage by means of potential forced sales, sources of significant losses for it. The ECB adds that, although that risk of excessive leverage begins with a liquidity shortage, it is distinguished from a liquidity shortage in that it is based on the

relative significance of the debt-funded exposures by comparison with a credit institution's own funds. The ECB therefore did not confuse liquidity risk and excessive leverage risk in the contested decision and that decision does not contradict the assessment of that adjustment period on the basis of the liquidity risk. It denies, in that regard, that there is any inconsistency between the contested decision *[confidential]*. It adds that the leverage ratio aims to avoid a credit institution's financial sources being excessively debt-oriented and constitutes the 'ultimate prudential safety net'.

63 In answer to the third part of the fourth plea, alleging failure to have regard to the principle of sound administration, the ECB observes that the applicant does not maintain that the contested decision is based on inaccurate or incomplete facts. It adds that the applicant's argument seems to stem from confusion between breach of the principle of sound administration and errors of assessment and refers to its argument that the contested decision is not vitiated by any manifest error of assessment. In that context, it maintains, in particular, that the fact that the exposures to the CDC are treated as equivalent to exposures to the French State and weighted at 0% risk for own funds requirements is not relevant so far as the calculation of the leverage ratio is concerned and explains that it merely drew attention to the fact that the exposures to the CDC were no different from the other exposures to public sector entities and the central administrations and that from that aspect there was nothing to justify their exclusion from the calculation of that ratio. It also submits that the assertion that regulated savings constitute a 'safe investment' in the event of tension or crisis is irrelevant, since the States are exposed to the solvency risk and the markets may lose confidence in investments that are normally deemed to be very safe.

64 As stated in paragraphs 8 to 10 above, in the contested decision the ECB refused to grant the derogation sought in application of Article 429(14) of Regulation No 575/2013. It emphasised that the sums transferred to the CDC by the applicant continued to be relevant exposures for the calculation of its leverage ratio in that the regulated savings were based on an imperfect transfer mechanism that left the applicant to bear the risk associated with the leverage ratio. In order to arrive at that conclusion, the ECB relied on three grounds, based, first, on the accounting treatment of the regulated savings, which shows that the applicant remains liable for the entire exposure consisting of the regulated savings, including the sums transferred to the CDC; second, *[confidential]*; and, third, on the existence of a period between the adjustments of the applicant's positions and the CDC's positions.

65 In the context of the second, third and fourth pleas, the applicant disputes the legality of those grounds.

66 In so far as, for the reasons explained in the context of the examination of the first plea, the ECB has a discretion and, consequently, a wide power of assessment in choosing whether or not to grant the benefit of Article 429(14) of Regulation No 575/2013, the judicial review which the Court must carry out of the merits of the grounds of the contested decision must not lead it to substitute its own assessment for that of the ECB, but focuses on whether the contested decision is based on materially incorrect facts, or is vitiated by an error of law, manifest error of assessment or misuse of powers (see, to that effect and by analogy, judgment of 6 February 2014, *CEEES and Asociación de Gestores de Estaciones de Servicio* v *Commission*, T-342/11, EU:T:2014:60, paragraph 70 and the case-law cited).

67 However, it follows from consistent case-law that when the institutions have such a power of assessment respect for the guarantees conferred by the European Union legal order in administrative proceedings assumes even more fundamental significance. Among those guarantees conferred by the European Union legal order in administrative proceedings is, in particular, the principle of sound administration, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (judgments of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14, and of 29 March 2012, *Commission* v *Estonia*, C-505/09 P, EU:C:2012:179, paragraph 95).

*The legality of the grounds stated in point 2.3.3(i) and (ii) of the contested decision*

68 In point 2.3.3(i) of the contested decision, the ECB justified its decision to refuse the requested derogation on the ground that the accounting treatment of the regulated savings is a first indication that the exposures to the CDC continue to be supported by the applicant. It emphasised in that regard that the regulated savings are on the liabilities side of the applicant's balance sheet and that the CDC's exposures are on the assets side of that balance sheet. The ECB also observed that the applicant was liable for managing the operational risks associated with collecting the regulated savings.

69 In its written pleadings, the ECB observes that the accounting treatment of the regulated saving was put forward in the contested decision only as a 'first indication' that the exposures to the CDC continue to be supported by the applicant and maintains that it did not rely on that circumstance in order to refuse the requested derogation. It is apparent from the structure of the contested decision, however, that the developments set out in point 2.3.3(i) of that decision constitute one of the grounds on which the ECB relied in order to conclude that the sums transferred to the CDC by the applicant continued to be relevant exposures for the calculation of its leverage ratio. It is therefore appropriate to examine the legality of that ground.

70 In point 2.3.3(ii) of the contested decision, the ECB emphasised that the applicant was *[confidential]*. It added that both the volume of exposures to the CDC and the fact that those exposures cannot be taken into account in respect of other prudential requirements justified their inclusion in the calculation of the leverage ratio.

71 Thus, by that ground, the ECB considered that the exposures to the CDC were relevant for the purposes of the calculation of the applicant's leverage ratio, since *[confidential]*.

72 It must be stated that the only illustration provided in the contested decision of a situation in which the CDC would not be in a position to repay those sums is that of payment default by the French State. When questioned at the hearing, the ECB confirmed that that was the only situation which it had envisaged.

73 In the context of the third part of its second plea, the applicant takes issue with the ECB for having erred in law in depriving Article 429(14) of Regulation No 575/2013 of its practical effect.

74 In that regard, it should be observed that, although the ECB is free within the framework of the exercise of the discretion recognised to it under Article 429(14) of Regulation No 575/2013 to grant or not to grant the derogation envisaged in that provision, the exercise of that freedom must not disregard the objectives pursued by that derogation and must not deprive it of its practical effect (see, to that effect and by analogy, judgment of 15 December 2016, *Nemec*, C-256/15, EU:C:2016:954, paragraphs 48 and 49 and the case-law cited).

75 For the reasons set out in paragraphs 44 to 55 above, it must be considered that the objective of Article 429(14) of Regulation No 575/2013 consists in allowing the competent authorities to decide between, on the one hand, the rationale of the leverage ratio, which requires that when the exposure level of a credit institution is measured the risk presented by its exposures is disregarded and, on the other hand, the possibility that certain exposures with a particularly low risk profile which are not the result of an investment choice by the credit institution are not relevant for the calculation of the leverage ratio and may be excluded from it.

76 It necessarily follows that the ECB cannot rely on grounds that would make the possibility offered by Article 429(14) of Regulation No 575/2013 virtually inapplicable in practice, without depriving that provision of practical effect and disregarding the objectives that led to its introduction (see, to that effect and by analogy, judgment of 11 December 2008, *Stichting Centraal Begeleidingsorgaan voor de Intercollegiale Toetsing*, C-407/07, EU:C:2008:713, paragraph 30 and the case-law cited).

77 As regards the ground set out in point 2.3.3(i) of the contested decision, it must be stated that by that ground the ECB excluded the applicant's exposures to the CDC from the benefit of Article 429(14) of Regulation No 575/2013 on the basis of considerations which are inherent in the exposures concerned by that provision.

78 That is the case, in the first place, of the consideration based on the fact that the applicant's exposures to the CDC appear on the assets side of its balance sheet.

79 An exposure is defined in Article 5(1) of Regulation No 575/2013 as 'an asset or off-balance sheet item'. Accordingly, that definition necessarily includes the items on the assets side of a credit institution's balance sheet. Furthermore, since Article 429(14)(c) of Regulation No 575/2013 is concerned with exposures arising from deposits that the institution is legally obliged to transfer to a public-sector entity for the purposes of funding general interest investments, exposures which, by their nature, must appear on a credit institution's balance sheet rather than constituting off-balance sheet items are involved.

80 In that regard, the reference which the ECB makes in its pleadings to the fact that the exposures to the CDC in respect of the regulated savings are distinguished from fiduciary assets, which may possibly be derecognised and excluded from the calculation of the leverage ratio in application of Article 429(13) of Regulation No 575/2013 is irrelevant, since only the interpretation and application of Article 429(14) of Regulation No 575/2013 are at issue.

81 Accordingly, in so far as the exposures in respect of which Article 429(14) of Regulation No 575/2013 envisages the possibility that they will not be taken into account in the calculation of the leverage ratio of a credit institution must by their nature appear on the assets side of that institution's balance sheet, the consideration based on the fact that the exposures to the CDC shown on the assets side of the applicant's balance sheet cannot validly justify the refusal to grant the requested derogation.

82 The same applies, in the second place, and for similar reasons, to the consideration based on the fact that those exposures constitute a proportion of the sums deposited with the applicant as regulated savings, which remain on the liabilities side of its balance sheet. It is sufficient in that regard to observe that, in the light of the words used by Article 429(14)(c) of Regulation No 575/2013, that fact, far from opposing the application of that provision, is a condition of its implementation.

83 The same conclusion applies, in the third place, to the ECB's assertion that the applicant bears the operational risk associated with the regulated savings. Operational risk is defined in Article 4(1)(52) of Regulation No 575/2013 as 'the risk of loss resulting from inadequate or failed internal processes, people and systems or from external events, and includes legal risk'. Since Article 429(14) of Regulation No 575/2013 is concerned with exposures which constitute a proportion of deposits with the credit institution concerned, it is inherent in the logic of that provision that the applicant bears the operational risk attaching to the savings in question.

84 As regards the ground set out in point 2.3.3(ii) of the contested decision, it should be recalled that, according to Article 429(14)(a) and (b) of Regulation No 575/2013, 'competent authorities may permit an institution to exclude from the exposure measure exposures that meet all of the following conditions: (a) they are exposures to a public-sector entity; (b) they are treated in accordance with Article 116(4)'.

85 As is apparent from paragraphs 51 to 53 above, the reference in Article 429(14) of Regulation No 575/2013 to Article 116(4) of that regulation, read in conjunction with Article 114(4) of that regulation, shows the legislature's intention that exposures to public-sector entities which, because of a State guarantee, present the same level of risk as exposures to that State may possibly not be taken into account in the calculation of the leverage ratio.

86 Since Article 429(14) of Regulation No 575/2013 concerns only exposures to public service entities having a State guarantee, a refusal given on the theoretical ground that a State may be in a payment default situation, without consideration of the likelihood of such a possibility in the case of the State concerned, would amount to rendering the possibility envisaged by Article 429(14) of Regulation No 575/2013 virtually inapplicable in practice.

87 However, it must be stated that, for the purposes of concluding that the applicant *[confidential]*, it is apparent from the contested decision that the ECB simply drew attention to the mere possibility of a payment default by the French State without examining the likelihood of such a default.

88 Nor, consequently, in so far as the ECB did not examine the likelihood of a payment default by the French State, can the reference in point 2.3.3(ii) of the contested decision to the volume of the applicant's exposures to the CDC justify in itself those exposures being taken into account in the calculation of the leverage ratio. That volume might be relevant only if, as a result of a payment default by the French State, the applicant could not obtain from the CDC the sums transferred as regulated savings and would have to have recourse to forced sales of assets.

89 In the light of the foregoing, is should be stated that the grounds set out in point 2.3.3(i) and (ii) of the contested decision ultimately deprive the derogation in Article 429(14) of Regulation No 575/2013 of its practical effect since they preclude the application of that derogation on the basis of factors which are inherent in the exposures envisaged by that article.

90 That conclusion is not undermined by the ECB's arguments, and in particular by the reference to the fact that the exposures to the CDC would not be fundamentally different from the exposures giving rise to leverage, since those assets are funded by a debt to savers which the applicant is required to repay to them on demand. In that regard, it is sufficient to emphasise that, unlike other exposures, the legislature envisaged that exposures meeting the conditions laid down in Article 429(14) of Regulation No 575/2013 would not be included in the calculation of the leverage ratio, a possibility which the ECB cannot preclude from the outset.

91 The same applies to the assertion that the State guarantee associated with the exposures to the CDC does not render them irrelevant as regards the calculation of the applicant's leverage ratio, since that ratio is intended to provide an assessment that is not based on the risk level represented by each of the applicant's exposures and since, moreover, the States may be exposed to solvency risks. Since the legislature intended that exposures to public-sector entities that meet the conditions laid down in Article 429(14) of Regulation No 575/2013 may possibly not be taken into account in the calculation of the leverage ratio, it was for the ECB, when exercising its discretion, to reconcile the objectives that led to the introduction of the leverage ratio and the objectives of Article 429(14) of Regulation No 575/2013. For the reasons stated in paragraphs 85 to 87 above, that was not done, as the ECB did not rely on an assessment of the likelihood of a risk of payment default by the French State, but adopted reasoning which de facto precluded any possibility that a requested based on Article 429(14) of Regulation No 575/2013 would be granted.

92 It follows from the foregoing that the grounds set out in point 2.3.3(i) and (ii) of the contested decision are vitiated by an error of law.

*The legality of the ground stated in point 2.3.3(iii) of the contested decision*

93 In point 2.3.3(iii) of the contested decision, the ECB referred to the period between the adjustments of the applicant's and the CDC's respective positions. The ECB inferred, in essence, that the applicant might be led to have recourse to fire sales of assets while awaiting transfer of funds from the CDC.

94 By the third part of its third plea, the applicant maintains that this ground is manifestly incorrect. In addition, in the context of the third part of its fourth plea, it maintains that the ECB failed to fulfil its obligations under the principle of sound administration, in particular, by not carrying out a sufficiently thorough analysis of the characteristics of regulated savings.

95 It should be pointed out that, according to the definition in Article 4(1)(94) of Regulation No 575/2013, risk of excessive leverage means 'the risk resulting from an institution's vulnerability due to leverage or contingent leverage that may require unintended corrective measures to its business plan, including distressed selling of assets which might result in losses or in valuation adjustments to its remaining assets'.

96 It follows that the risks envisaged in respect of excessive leverage materialise in a situation of insufficient liquidity. It is in order to obtain liquidity that a credit institution may find it necessary to take unintended measures to its business plan, including distressed selling of assets having the consequences explained in Article 4(1)(94) of Regulation No 575/2013, as stated in recital 90 of that regulation.

97 Since the negative consequences of excessive leverage are revealed in the case of insufficient liquidity, the applicant's assertion that the period for the adjustment of its positions with those of the CDC is concerned with liquidity does not deprive that period of relevance to the assessment of the risk associated with its leverage ratio.

98 However, it should be observed that the ECB itself acknowledges that that adjustment period is not at the origin of a liquidity risk for the purposes of the assessment of the liquidity coverage requirements set out in Article 412 of Regulation No 575/2013 and in Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation No 575/2013 with regard to liquidity coverage requirement for Credit Institutions (OJ 2015 L 11, p. 1).

99 In that regard, the applicant refers *[confidential]*.

100 It should be emphasised that Delegated Regulation 2015/61 was adopted in order to supplement Regulation No 575/2013, which states in Article 412(1) that 'institutions shall hold liquid assets, the sum of the values of which covers the liquidity outflows less the liquidity inflows under stressed conditions so as to ensure that institutions maintain levels of liquidity buffers which are adequate to face any possible imbalance between liquidity inflows and outflows under gravely stressed conditions over a period of 30 days [and that,] during times of stress, institutions may use their liquid assets to cover their net liquidity outflows'.

101 According to Article 26 of Delegated Regulation 2015/61, entitled 'Outflows with interdependent inflows', 'subject to prior approval of the competent authority, credit institutions may calculate the liquidity outflow net of an interdependent inflow which meets all the following conditions: (a) the interdependent inflow is directly linked to the outflow and is not considered in the calculation of liquidity inflows in Chapter 3; (b) the interdependent inflow is required pursuant to a legal, regulatory or contractual commitment; (c) the interdependent inflow meets one of the following conditions: (i) it arises compulsorily before the outflow; (ii) it is received within 10 days and is guaranteed by the central government of a Member State'.

102 It must be stated that that provision allows the competent authorities — and thus the ECB in the context of the task of prudential supervision conferred on it by Article 4(1)(d) of Regulation 1024/2013 — to offset interdependent outflows and inflows if, owing to the existence of a guarantee by the central government of a Member State and the short duration of the period between the outflows and inflows, it considers that that period does not give rise to a liquidity risk.

103 The logical inference is that the grant of the benefit of Article 26 of Delegated Regulation 2015/61 by the ECB to inflows and outflows linked with exposures to the CDC is tantamount to recognition by the ECB that the period that may separate those inflows and outflows does not give rise to a liquidity risk.

104 In so far as, for the reasons set out in paragraph 96 above, the risks linked with an excessive leverage situation materialise in the event of insufficient liquidity, the ECB's position of principle that the adjustment period in question might favour the occurrence of risks linked with excessive leverage although it does not constitute a liquidity risk, owing to its general nature, must be considered to be manifestly incorrect.

105 In fact, the adjustment period in question could be relevant for the leverage risk, even though it is not relevant for the liquidity risk, only where withdrawals of deposits linked with regulated savings were sufficiently large for those savings to exceed the 'gravely stressed conditions' envisaged in the context of the calculation of the liquidity ratio under Article 412(1) of Regulation No 575/2013.

106 However, such a possibility could not be taken into account for the purposes of rejecting the applicant's request without a thorough examination of the characteristics of the regulated savings being carried out by the ECB. That examination ought, in particular, to have led the ECB to consider whether, in the light of their characteristics — and in particular the State guarantee associated with regulated savings — it might be envisaged that withdrawals of regulated savings would be sufficiently large and sudden for the applicant to find it necessary to have recourse to the measures envisaged in Article 4(1)(94) of Regulation No 575/2013 without being able to await the transfers of funds from the CDC on the basis of the adjustment of the positions.

107 In fact, for the reasons set out in paragraphs 54 and 55 above, it is by reference to the particular characteristics of each individual case that the ECB, when implementing Article 429(14) of Regulation No 575/2013, was required to arbitrate between the objectives of the leverage ratio and the possibility that certain exposures that meet the conditions laid down in that provision might be excluded from the calculation of the leverage ratio. That obligation to examine the particular characteristics of regulated savings also arose in application of the case-law referred to in paragraph 67 above.

108 However, it must be stated that in the contested decision the ECB did not carry out a detailed examination of the characteristics of regulated savings, but merely drew attention in the abstract to the risks entailed in the adjustment period of the positions between the applicant's positions and the CDC's positions.

109 Accordingly, by proceeding in that way, the ECB failed to fulfil its obligation under the case-law cited in paragraph 67 above to examine, carefully and impartially, all the relevant aspects of the individual case.

110 That conclusion is not undermined by the ECB's argument that the leverage ratio is a non-risk-based prudential requirement and that the markets may suddenly lose confidence in investments normally deemed to be very safe. Such an assertion, based solely on the objectives pursued by the introduction of the leverage ratio by Regulation No 575/2013, disregards the objectives pursued by the insertion of Article 429(14) into that regulation.

111 It follows from the foregoing that all of the grounds put forward by the ECB to substantiate its conclusion that there was an imperfect transfer mechanism that left the applicant to bear the risk linked with the leverage ratio and, accordingly, its rejection of the applicant's request that the exposures to the CDC consisting in the sums which it is required to transfer to it be excluded from the calculation of its leverage ratio are vitiated by illegality.

112 The applicant's second, third and fourth pleas must therefore be upheld and the contested decision annulled, without there being any need to examine the fifth plea.

## Costs

113 Under Article 134(1) 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. As the ECB has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

114 Under Article 138(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. It follows that the Republic of Finland will bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Annuls Decision ECB/SSM/2016-9695005MSX1OYEMGDF46/195 of the European Central Bank (ECB) of 24 August 2016;**

2. **Orders the ECB to pay the costs;**

3. **Orders the Republic of Finland to bear its own costs.**

Prek Buttigieg Schalin

Berke Costeira

Delivered in open court in Luxembourg on 13 July 2018.

[Signatures]