Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

3 October 2019*

(Reference for a preliminary ruling — Economic and monetary policy — European system of national and regional accounts in the European Union — Regulation (EU) No 549/2013 — General government sector — Captive financial institution — Concept — Company offering, under government control, mortgage loans to average-income and low-income households)

In Case C-632/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, Belgium), made by decision of 28 September 2018, received at the Court on 10 October 2018, in the proceedings

Fonds du Logement de la Région de Bruxelles-Capitale SCRL

v

Institut des Comptes nationaux (ICN),

THE COURT (Eighth Chamber),

composed of F. Biltgen, President of the Chamber, C.G. Fernlund and L.S. Rossi (Rapporteur), Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 13 May 2019,

after considering the observations submitted on behalf of:

– Fonds du Logement de la Région de Bruxelles-Capitale SCRL, by E. van Nuffel d'Heynsbroeck, K. Munungu and L. Bersou, avocats,

– the Institut des Comptes nationaux (ICN), by J.-F. De Bock and P. Michou, avocats,

– the European Commission, by J.-P. Keppenne and F. Simonetti, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: French.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union (OJ 2013 L 174, p. 1).

2 The request has been made in proceedings between Fonds du Logement de la Région de Bruxelles-Capitale SCRL ('the Fund') and the Institut des Comptes nationaux (ICN) (National Accounts Institute) concerning the latter's classification of the Fund in the general government sector under the revised European system of national accounts introduced by Regulation No 549/2013 ('the ESA 2010').

Legal context

EU law

3 The European System of Integrated Economic Accounts (ESA) is the statistical tool and legal instrument adopted by the European Union to ensure that comparable information exists on the structure of the Member States' economies and their development. An initial ESA, called 'the ESA 95', was established by Council Regulation (EC) No 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community (OJ 1996 L 310, p. 1). The ESA 2010, which was introduced by Regulation No 549/2013, succeeded the ESA 95.

4 Recital 3 of Regulation No 549/2013 reads as follows:

'Citizens of the Union need economic accounts as a basic tool for analysing the economic situation of a Member State or region. For the sake of comparability, such accounts should be drawn up on the basis of a single set of principles that are not open to differing interpretations. The information provided should be as precise, complete and timely as possible in order to ensure maximum transparency for all sectors.'

5 Recital 14 of that regulation states:

'The ESA 2010 is gradually to replace all other systems as a reference framework of common standards, definitions, classifications and accounting rules for drawing up the accounts of the Member States for the purposes of the Union, so that results that are comparable between the Member States can be obtained.'

6 Article 1(1) and (2) of the regulation is worded as follows:

'1. This Regulation sets up the [ESA 2010].

2. The ESA 2010 provides for:

(a) a methodology (Annex A) on common standards, definitions, classifications and accounting rules that shall be used for compiling accounts and tables on comparable bases for the purposes of the Union, together with results as required under Article 3;

(b) a programme (Annex B) setting out the time limits by which Member States shall transmit to the Commission (Eurostat) the accounts and tables to be compiled in accordance with the methodology referred to in point (a).'

7 Chapter 1 of Annex A to the regulation, which presents the general features and the basic principles of the ESA 2010, contains paragraphs 1.01, 1.19, 1.34, 1.35, 1.36 and 1.57 of that annex, which read as follows:

‘1.01 The [ESA 2010] is an internationally compatible accounting framework for a systematic and detailed description of a total economy (that is, a region, country or group of countries), its components and its relations with other total economies.

…

1.19 For the [European Union] and its Member States, the figures from the ESA framework play a major role in formulating and monitoring their social and economic policies.

…

1.34 Sector accounts are created by allocating units to sectors and this enables transactions and balancing items of the accounts to be presented by sector. The presentation by sector reveals many key measures for economic and fiscal policy purposes. The main sectors are households, government, corporations (financial and non-financial), non-profit institutions serving households (NPISHs) and the rest of the world.

The distinction between market and non-market activity is an important one. An entity controlled by government, which is shown to be a market corporation, is classified in the corporation sector, outside the general government sector. Thus, the deficit and debt levels of the corporation will not be part of the general government deficit and debt.

1.35 It is important that clear and robust criteria for allocating entities to sectors are set out.

The public sector consists of all institutional units resident in the economy that are controlled by government. The private sector consists of all other resident units.

Table 1.1 sets out the criteria used to distinguish between public and private sector, and in the public sector between the government sector and public corporations sector, and in the private sector between the NPISH sector and the private corporations sector.

Table 1.1

Criteria	Controlled by government (public sector)	Privately controlled (private sector)
Non-market output	General government	NPISH
Market output	Public corporations	Private corporations

1.36 Control is defined as the ability to determine the general policy or programme of an institutional unit. Further details in relation to the definition of control are given in paragraphs 2.35 to 2.39.

…

1.57 Institutional units are economic entities that are capable of owning goods and assets, of incurring liabilities and of engaging in economic activities and transactions with other units in their own right. For the purposes of the ESA 2010 system, the institutional units are grouped together into five mutually exclusive domestic institutional sectors:

(a) non-financial corporations;

(b) financial corporations;

(c) general government;

(d) households;

(e) [NPISHs].

The five sectors together make up the total domestic economy. Each sector is also divided into subsectors. The ESA 2010 system enables a complete set of flow accounts and balance sheets to be compiled for each sector, and subsector, as well as for the total economy. Non-resident units can interact with these five domestic sectors, and the interactions are shown between the five domestic sectors and a sixth institutional sector: the rest of the world sector.

…'

8 Chapter 2, which is entitled 'Units and groupings of units', of Annex A to Regulation No 549/2013 includes paragraphs 2.21 to 2.23, 2.27 and 2.28 of that annex, which read as follows:

'Captive financial institutions

2.21 A holding company that simply owns the assets of subsidiaries is one example of a captive financial institution. Examples of other units that are also treated as captive financial institutions are units with the characteristics of [special purpose entities (SPEs)] as described above, including investment and pension funds and units used for holding and managing wealth for individuals or families, issuing debt securities on behalf of related companies (such a company may be called a conduit), and carrying out other financial functions.

2.22 The degree of independence from its parent may be demonstrated by exercising some substantive control over its assets and liabilities to the extent of carrying the risks and reaping the rewards associated with the assets and liabilities. Such units are classified in the financial corporations sector.

2.23 An entity of this type that cannot act independently of its parent and is simply a passive holder of assets and liabilities (sometimes described as being on autopilot) is not treated as a separate institutional unit unless it is resident in an economy different from that of its parent. If it is resident in the same economy as its parent, it is treated as an artificial subsidiary as described below.

…

Special purpose units of general government

2.27 General government may also set up special purpose units, with characteristics and functions similar to the captive financial institutions and artificial subsidiaries. Such units do not have the power to act independently and are restricted in the range of transactions they can engage in. They do not carry the risks and rewards associated with the assets and liabilities they hold. Such

units, if they are resident, shall be treated as an integral part of general government and not as separate units. If they are non-resident, they shall be treated as separate units. Any transactions carried out by them abroad shall be reflected in corresponding transactions with government. Thus, a unit that borrows abroad is then regarded as lending the same amount to general government, and on the same terms, as the original borrowing.

2.28 In summary, the accounts of SPEs with no independent rights of action are consolidated with the parent corporation, unless they are resident in a different economy from that of the parent. There is one exception to this general rule, and that is when a non-resident SPE is set up by government.'

9 Chapter 2 of Annex A to the regulation also contains, under the heading 'The institutional sectors', paragraph 2.31 et seq. of that annex. Those paragraphs list the institutional sectors and subsectors within which institutional units that have a similar type of economic behaviour are to be classified. Diagram 2.1, which is contained in paragraph 2.32 of the annex, explains, in the form of a tree diagram, the process of allocating units to sectors. Those sectors include the general government sector (S. 13) and the financial corporations sector (S. 12). It is clear from, respectively, paragraphs 2.66 and 2.71 of the annex that the financial corporations sector is subdivided into the nine subsectors listed in that paragraph, and that each of those subsectors has to be further subdivided according to whether the financial corporation concerned is under public, national private or foreign control.

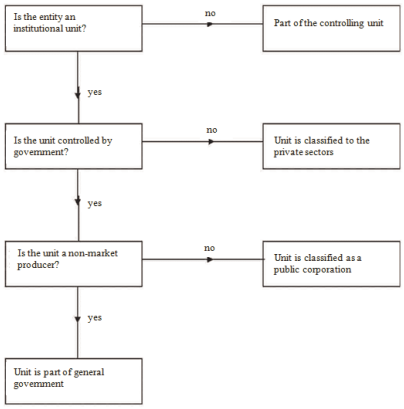
10 Chapter 20, which is entitled 'The government accounts', of Annex A to Regulation No 549/2013 defines inter alia what is to be understood by the 'general government sector'. In that chapter, paragraph 20.17 of Annex A is worded as follows:

'Other units of general government

20.17 It can be difficult to decide on the classification of producers of goods and services that operate under the influence of government units. The alternatives are to classify them as general government or, if they qualify as institutional units, as public corporations. For such cases, the following decision tree is used.

Diagram 20.1 — Decision tree

μ



'

11 Paragraph 20.19 et seq. of Annex A to Regulation No 549/2013 deal with the 'market/non-market delineation'. In particular, paragraph 20.29 establishes a 'market/non-market test', according to which, inter alia, in order to be regarded as a market producer, a public unit is to cover at least 50% of its costs by its sales over a sustained multi-year period.

12 Paragraphs 20.32 to 20.34 of Annex A to the regulation, which are grouped under the heading 'Financial intermediation and the government boundary', provide:

'20.32 The case of units engaged in financial activities needs special consideration. Financial intermediation is the activity in which units acquire financial assets and at the same time incur liabilities on their own account by engaging in financial transactions.

20.33 A financial intermediary places itself at risk by incurring liabilities on its own account. For instance, if a public financial unit manages assets but does not place itself at risk by incurring liabilities on its own account, it is not a financial intermediary and the unit is classified in the general government sector rather than in the financial corporations sector.

20.34 Applying the quantitative criterion of the market/non-market test to public corporations involved in financial intermediation or in managing assets is generally not relevant, because their earnings arise from both property income and holding gains.'

Belgian law

13 The ordonnance de la Région de Bruxelles-Capitale, du 17 juillet 2003, portant le code bruxellois du logement (Order of the Brussels-Capital Region of 17 July 2003 laying down the Brussels Housing Code) (*Moniteur belge* of 29 April 2004, p. 33501), as amended by the ordonnance de la Région de Bruxelles-Capitale, du 11 juillet 2013 (Order of the Brussels-Capital Region of 11 July 2013) (*Moniteur belge* of 18 July 2013, p. 45239, and corrigendum in *Moniteur belge* of 26 July 2013, p. 47151) ('the Brussels Housing Code'), contains Title IV, which is entitled 'Competent bodies in matters relating to housing'. Chapter VI of that title, which is devoted to the provisions applicable to the Fund, contains Articles 111 to 119 of that code.

14 Article 111 of the Brussels Housing Code provides:

'The [Fund] shall be established in the form of a limited liability cooperative.

…'

15 Article 112(1) of the Brussels Housing Code states:

'The Fund shall undertake tasks in the public interest and in particular:

1° provide persons on low or average incomes, through the grant of mortgage loans (the conditions of which shall be determined by the Government), with the means to renovate, redevelop, adapt, acquire (in full ownership or in the form of another principal right *in rem*), construct or retain housing intended, primarily, for personal occupation, or to improve the energy performance of such housing;

…

6° promote pilot schemes and debate in these areas and propose new policies to the Government.'

16 As set out in the first paragraph of Article 113 of the Brussels Housing Code:

'The Fund shall perform its tasks in accordance with the priorities and guidelines laid down in the management contract which it concludes with the Government for a five-year term. If there is no management contract, the Government, following consultation with the Fund, shall lay down the specific conditions for the implementation of Article 114 for one financial year.'

17 Article 115 of the Brussels Housing Code is worded as follows:

'An annual report assessing the performance of the management contract shall be drawn up by the Fund and submitted to the Government, after consultation with the Government commissioner(s) referred to in Article 118 of this Code.'

18 The first subparagraph of Article 116(1) of the Brussels Housing Code provides:

'The Fund may be authorised by the Government to take out loans guaranteed by the Region, within the budgetary limits laid down by the Parliament of the Brussels-Capital Region. The guarantee shall also cover the financial management transactions relating to those loans.'

19 Article 118(1) of the Brussels Housing Code reads as follows:

'The Fund shall be subject to Government control. That control shall be exercised by two commissioners appointed by the Government who belong to different language groups.'

20 Article 1 of the arrêté du Gouvernement de la Région de Bruxelles-Capitale, du 2 mai 1996, déterminant les modalités de l'intervention à charge du budget de la Région de Bruxelles-Capitale auprès du Fonds du logement de la Région de Bruxelles-Capitale (Decree of the Government of the Brussels-Capital Region of 2 May 1996 laying down detailed rules governing the contribution from the budget of the Brussels-Capital Region to the Housing Fund of the Brussels-Capital Region) (*Moniteur belge* of 26 November 1996, p. 29725), as amended by the arrêté du Gouvernement de la Région de Bruxelles-Capitale, du 8 septembre 2011, modifiant plusieurs arrêtés relatifs au Fonds du Logement de la Région de Bruxelles-Capitale (Decree of the Government of the Brussels-Capital Region of 8 September 2011 amending a number of decrees relating to the Housing Fund of the Brussels-Capital Region) (*Moniteur belge* of 11 October 2011, p. 62442), provides:

'Within the limits of the appropriations entered for that purpose in the budget of the Brussels-Capital Region, the Minister or the State Secretary whose responsibilities include housing shall grant to the [Fund] capital payments intended to finance its investments with a view to performing its tasks in the public interest, as laid down in Article 80 [of the Brussels Housing Code].'

21 As set out in Article 2 of that decree:

'The Brussels-Capital Region shall guarantee, with regard to their subscribers, the servicing of the loan securities which the [Fund] issues, within the limits of the authorisation granted by the Government of the Brussels-Capital Region, per financial year. The amount of those loans and the detailed rules governing them shall be approved by the Ministers or State Secretaries with responsibility for the budget and housing.

…'

22 The specific conditions for the grant of loans are defined in the Arrêté du Gouvernement de la Région de Bruxelles-Capitale, du 22 mars 2008, relatif à l'utilisation par le Fonds du Logement de la Région de Bruxelles-Capitale, des capitaux provenant du fonds B2 pour ses opérations générales de crédits hypothécaires (Decree of the Government of the Brussels-Capital Region of 22 March 2008 on the use

by the Housing Fund of the Brussels-Capital Region of capital from the B2 fund for its general mortgage loan transactions) (*Moniteur belge* of 10 June 2008, p. 29122) and in the Arrêté du Gouvernement de la Région de Bruxelles-Capitale, du 22 mars 2008, relatif à l'utilisation, par le Fonds du Logement de la Région de Bruxelles-Capitale, des capitaux provenant du fonds B2, pour ses opérations de prêts hypothécaires complémentaires aux jeunes ménages (Decree of the Government of the Brussels-Capital Region of 22 March 2008 on the use by the Housing Fund of the Brussels-Capital Region of capital from the B2 fund for its supplementary mortgage loan transactions for young households) (*Moniteur belge* of 28 August 2008, p. 45028).

The dispute in the main proceedings and the questions referred for a preliminary ruling

23 It is apparent from the documents before the Court that the Fund, which was created in 1985, is a company governed by private law without any government participation in the company's capital or its decision-making bodies. It has its origins in the Fonds du logement de la Ligue des Familles nombreuses de Belgique (Housing Fund of the Belgian League of Large Families), the creation of which dates back to 1929. The purpose of the Fund is to promote access to housing and property for people on low or average incomes in the Brussels-Capital Region and, to that end, it is entrusted with tasks in the public interest consisting inter alia in the grant of loans to households for housing purposes (purchase and energy-efficiency improvements), the construction of housing with a view to providing rental assistance, the grant of rental assistance, and assistance in providing a rent guarantee. In order to perform its tasks, the Fund receives from the Brussels-Capital Region a grant, a guarantee covering the loans which the Fund takes out and recoverable advances granted by that region.

24 In Belgium, the ICN is responsible for compiling the statistical data required under the ESA 2010 and for classifying, to that end, the various economic players according to sector, in the categories laid down by Regulation No 549/2013, the main sectors being households, government, corporations (financial and non-financial), NPISHs and the rest of the world.

25 One of the many changes introduced by the ESA 2010 as compared with the ESC 95 is the addition of the new subsector 'Captive financial institutions and money lenders (S.127)' and of a series of rules laying down the conditions for an entity to be classified in that new subsector or, on the contrary, assigned to the same sector as its controlling body.

26 Following the entry into force of the ESA 2010, the ICN, like the national statistical offices of all other Member States, had to review the classification of numerous public entities, including the Fund, which were previously classified as financial institutions (S.12) under the ESA 95.

27 By decision of 30 March 2015, on the basis of the new principles introduced by the ESA 2010, and in particular of the decision tree contained in paragraph 20.17 of Annex A to Regulation No 549/2013, the ICN took the view that the Fund is a separate institutional unit controlled by regional government, namely by the Brussels-Capital Region, that that unit's activities are financial in nature and that it has the characteristics of a captive financial institution. Accordingly, the Fund, as a non-market unit, had to be classified in the general government sector at regional level (S.1312). The ICN stated that a unit under public control which has the characteristics of a captive financial institution is not regarded as being a financial intermediary and that analysis of the unit's exposure to economic risk, as provided for in paragraph 20.33 of Annex A to Regulation No 549/2013, is not relevant.

28 By application of 15 May 2015, the Fund brought an action for annulment of that classification decision before the referring court, the Conseil d'État (Council of State, Belgium). After establishing that it is not in dispute that the Fund is a separate institutional unit, that court upholds the ICN's

view that that institutional unit is under the control of the Brussels-Capital Region. The referring court points out that the Fund contests the legality of the grounds relied on by the ICN for regarding it as a 'captive financial institution', and it has doubts about the Fund being so classified.

29 In that context, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are paragraphs 2.22, 2.23, 2.27, 2.28 and 20.33 [of Annex A to] Regulation (EU) No 549/2013 to be interpreted as meaning that a separate institutional [unit] placed under government control must be regarded as being non-market and thus falls within the general government sector where it has the characteristics of a captive financial institution, without there being any need to examine its risk exposure?

(2) Can an entity operating under government control be regarded as being a captive financial institution within the meaning of paragraphs 2.21 to 2.23, 2.27 and 2.28 [of Annex A to] Regulation (EU) No 549/2013:

(a) on the ground that the regulation of its activity by the government removes from it control over its assets, even though it is afforded the capacity to decide to grant the mortgage loans which it provides, and to decide their duration, their amount and some of their conditions, whilst at the same time the government determines other factors, and in particular the interest rate applied to the loans;

(b) on the ground that, inter alia, the guarantee given by government in respect of the loans taken out by it removes from it control over its liabilities, without examining the purpose and the effects of such a guarantee in the light of its features in the present case and of the underlying economic reality?'

Consideration of the questions referred

The first question

30 By its first question, the referring court asks, in essence, whether Annex A to Regulation No 549/2013 must be interpreted as meaning that a separate institutional unit, such as that at issue in the main proceedings, placed under government control must be regarded as being non-market and thus falls within the general government sector, within the meaning of the ESA 2010, where it has the characteristics of a captive financial institution, without there being any need to examine the criterion of its exposure to economic risk in the exercise of its activity.

31 In the present case, that court is seeking to ascertain whether the ICN was right to interpret paragraphs 2.22, 2.23, 2.27, 2.28 and 20.33 of Annex A as meaning that a captive financial institution, such as the Fund, which is controlled by the Government of the Brussels-Capital Region is to be classified, under the ESA 2010, in the general government sector, without having, to that end, specific regard to its exposure to economic risk.

32 In order to answer that question, it must be recalled, as a preliminary point, that it is clear from recital 14 of Regulation No 549/2013 that, for the purposes of the European Union, and in particular for the formulation and monitoring of its economic and social policies, the ESA 2010 establishes a reference framework intended for the drawing up of the accounts of the Member States. In that regard, as stated in recital 3 of that regulation, those accounts should be drawn up on the basis of a single set of principles that are not open to differing interpretations, so that comparable results can be obtained.

33 For ESA 2010 accounting purposes, in accordance with paragraph 1.57 of Chapter 1 of Annex A to Regulation No 549/2013, every institutional unit — which is defined as an economic entity that is capable of owning goods and assets, of incurring liabilities and of engaging in economic activities and transactions with other units in its own right — must be allocated to one of the six main sectors identified by the ESA 2010, that is to say, non-financial corporations, financial corporations, general government, households, NPISHs and the rest of the world.

34 The main proceedings are concerned with determining the classification of an institutional unit, such as the Fund, which is placed under government control (here, the control of the Brussels-Capital Region) and has the characteristics of a captive financial institution.

35 In this regard, it should be observed that, as became apparent at the hearing before the Court, the parties to the main proceedings do not dispute that the Fund has the characteristics of a captive financial institution within the meaning of paragraphs 2.21 to 2.23 of Annex A to Regulation No 549/2013.

36 On the other hand, there are differences of opinion between the parties to the main proceedings as regards whether the Fund is sufficiently independent to be classified in the financial corporations sector or whether it must be allocated to the sector of the controlling entity, in the present case the Brussels-Capital Region, namely the general government sector.

37 In the present case, in order to determine the rules in accordance with which an institutional unit with the characteristics of a captive financial institution must be classified, regard must be had to paragraphs 2.19 to 2.21 and 2.23 of Annex A to Regulation No 549/2013 on 'Captive financial institutions'.

38 As is set out in paragraph 2.19 of Annex A to that regulation, an institutional entity is allocated to a sector and an industry according to its principal activity 'unless [it] has no independent rights of action'. Paragraph 2.20 of Annex A to the regulation goes on to provide that captive financial institutions with no independence of action are allocated to the sector of their controlling body.

39 In addition, in accordance with the wording of paragraph 2.22 of Annex A to Regulation No 549/2013, the degree of independence of captive financial units from their parent may be demonstrated by exercising some substantive control over their assets and liabilities to the extent of carrying the risks and reaping the rewards associated with the assets and liabilities.

40 Thus, in order to determine whether an institutional unit with the characteristics of a captive financial institution, placed under the control of another entity, must be classified in the general government sector, paragraph 2.22 of Annex A to the regulation requires that two conditions be examined: first, control over that unit's assets and liabilities and, second, assumption of the economic risk of its activity.

41 It follows that the classification of such an institutional unit in the general government sector depends on a specific analysis of its economic operation, which requires examination, inter alia, of its exposure to economic risk in the exercise of its activity.

42 Consequently, the answer to the first question is that Annex A to Regulation No 549/2013 must be interpreted as meaning that, in order to determine whether a separate institutional unit placed under government control falls within the general government sector, within the meaning of the ESA 2010, where it has the characteristics of a captive financial institution, it is necessary to examine the criterion of that unit's exposure to economic risk in the exercise of its activity.

The second question

43 By its second question, the referring court asks, in essence, whether an institutional unit, such as that at issue in the main proceedings, whose degree of independence from government is limited by national legislation, under which that institutional unit does not have complete control of the management of its assets and liabilities since, first, control is exercised by government over its assets and, second, some of the risk associated with its liabilities is assumed by government, may be regarded as being a 'captive financial institution' within the meaning of paragraphs 2.21 to 2.23 of Annex A to Regulation No 549/2013.

44 In the present case, first, the measures which limit the Fund's control over its assets take the form of the power of the Brussels-Capital Region to lay down certain rules governing the mortgage loans which the Fund is tasked with granting, inter alia as regards the applicable interest rate, whilst leaving to the Fund the capacity to decide on the grant of those loans, their duration, their amount and some of their conditions.

45 Second, the measures limiting the Fund's control as regards its liabilities take the form inter alia of guarantees provided by the Brussels-Capital Region covering the loans taken out by the Fund. In this respect, the referring court is uncertain whether, in the present case, the ICN could legitimately regard the Fund as being a 'captive financial institution' without having examined 'the purpose and the effects of such a guarantee in the light of its features in the present case and of the underlying economic reality'.

46 It must be noted, as a preliminary point, that, as inter alia the ICN contends in its written observations, by this question the referring court is essentially asking the Court to examine the scope and the extent of certain measures for the control of assets and liabilities to which the Fund is subject pursuant to the applicable national legislation and to decide whether that control is the decisive factor for it to be regarded as being captive, in the light of the necessary criteria and indicators under the ESA 2010.

47 The Court is thereby in fact being asked to examine the applicable national legislation in so far as it prescribes both the detailed rules governing the control of a financial institution (control of assets) and the extent of the guarantees provided by government and the overall economic reality of its situation (control of liabilities).

48 In that regard, it should be recalled that, in accordance with settled case-law of the Court, in the context of the procedure provided for in Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, the latter does not have jurisdiction to interpret national law and only the national courts may establish and assess the facts of the dispute in the main proceedings and determine the exact scope of national laws, regulations or administrative provisions (see, to that effect, judgments of 13 April 2010, *Bressol and Others*, C-73/08, EU:C:2010:181, paragraph 64, and of 21 June 2017, *W and Others*, C-621/15, EU:C:2017:484, paragraph 49).

49 However, the Court, which is called on to provide answers of use to the national court, may provide guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (judgment of 13 April 2010, *Bressol and Others*, C-73/08, EU:C:2010:181, paragraph 65 and the case-law cited).

50 In the present case, in order to assess whether an institutional unit, such as the Fund, enjoys independence in the management of its activity, for the purposes of paragraph 2.22 of Annex A to Regulation No 549/2013, from the government controlling it (here, the Brussels-Capital Region), it is necessary to determine the rules governing, and the extent of, the control which such an institutional unit exercises over the management of its assets and liabilities. Also, it is necessary to examine which

regulatory or contractual constraints are imposed by the controlling body on that management. This necessarily involves examination on a case-by-case basis, so that it is impossible to draw up a universally applicable list of the relevant criteria to be taken into consideration for the purposes of such an analysis. However, generally speaking, the view may be taken, as the European Commission notes in its written observations, that the controlling body exercises substantial control over an institutional unit if it imposes the conditions under which that unit is required to act, without the latter being able to make substantial amendments to those conditions on its own initiative.

51 In this regard, it is apparent from the documents before the Court, in the first place, that the national legislation applicable to the Fund (i) specifies the rules and conditions for the loans granted by the Fund, in particular the maximum amount of the mortgage loan, the eligibility requirements for borrowers, the interest rate and the repayment arrangements, (ii) establishes that any amendment to the conditions governing the loan activity must be requested and authorised by the controlling authority, namely the Brussels-Capital Region, (iii) lays down the conditions for the grant of home guarantee insurance to the tenant beneficiaries, (iv) limits restrictive conditions on the free disposal of the right transferred and (v) determines the conditions governing the provision of the rent guarantee for certain tenants.

52 In the second place, as is clear in particular from the Brussels Housing Code, the Fund receives resources from, in essence, subsidies paid by public authorities, loans granted by public authorities and borrowing guaranteed almost in its entirety by public authorities.

53 In the third place, account should be taken of the fact that the Fund receives a guarantee from the Brussels-Capital Region which releases it from any risk where it has recourse to borrowing in the exercise of its activity. In particular, it is apparent that, if the Fund does not make a repayment, the creditor is entitled to pursue remedies against the Brussels-Capital Region, which then has 15 working days to make payment instead of the Fund. Thus, it seems that that Region unconditionally and irrevocably undertakes to pay to the creditor the amount due which the Fund has not paid, together, where applicable, with default interest.

54 In addition, even though it is apparent that such a guarantee is only a last resort covering any default by the Fund on its loans, a situation which has never arisen for the Fund, so that the Brussels-Capital Region has never had to act in this respect, the fact remains that it is apparent, through that guarantee, that it is, in practice, the Region which bears the risks associated with the exercise of the Fund's activity.

55 Accordingly, it cannot be ruled out, in the light of the factors referred to in paragraphs 51 to 54 of this judgment, that the constraints to which the Fund's management of its assets and liabilities is subjected by the Brussels-Capital Region are sufficiently significant to justify the Fund being regarded as a captive financial unit, for the purposes of the ESA 2010, falling within the general government sector. However, it is for the referring court to verify whether that is the case here, taking into account all the circumstances of the main proceedings.

56 Consequently, the answer to the second question is that an institutional unit, such as that at issue in the main proceedings, whose degree of independence from government is limited by national legislation, under which that institutional unit does not have complete control of the management of its assets and liabilities since, first, control is exercised by government over its assets and, second, some of the risk associated with its liabilities is assumed by government, may be regarded as being a 'captive financial institution' within the meaning of paragraphs 2.21 to 2.23 of Annex A to Regulation No 549/2013, in so far as the control measures prescribed by that national legislation may be interpreted by the national courts as having the effect that the institutional unit concerned cannot act independently of government, since the government imposes upon it the conditions under which it is required to act, without it being able to make substantial amendments to those conditions on its own initiative.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **Annex A to Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2003 on the European system of national and regional accounts in the European Union must be interpreted as meaning that, in order to determine whether a separate institutional unit placed under government control falls within the general government sector, within the meaning of the revised European system of national accounts introduced by that regulation, where it has the characteristics of a captive financial institution, it is necessary to examine the criterion of that unit's exposure to economic risk in the exercise of its activity.**

2. **An institutional unit, such as that at issue in the main proceedings, whose degree of independence from government is limited by national legislation, under which that institutional unit does not have complete control of the management of its assets and liabilities since, first, control is exercised by government over its assets and, second, some of the risk associated with its liabilities is assumed by government, may be regarded as being a 'captive financial institution' within the meaning of paragraphs 2.21 to 2.23 of Annex A to Regulation No 549/2013, in so far as the control measures prescribed by that national legislation may be interpreted by the national courts as having the effect that the institutional unit concerned cannot act independently of government, since the government imposes upon it the conditions under which it is required to act, without it being able to make substantial amendments to those conditions on its own initiative.**

[Signatures]