Reports of Cases

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

9 September 2020*

(Economic and monetary policy – Prudential supervision of credit institutions – Contribution to the deposit guarantee scheme or the Single Resolution Fund through irrevocable payment commitments – Tasks conferred on the ECB – The ECB's specific supervisory powers – Article 4(1)(f) and Article 16(1)(c) and (2)(d) of Regulation (EU) No 1024/2013 – Measure imposing the deduction of the cumulative amount of outstanding irrevocable payment commitments from Common Equity Tier 1 capital – No individual examination)

In Cases T-150/18 and T-345/18,

BNP Paribas, established in Paris (France), represented by A. Gosset-Grainville, M. Trabucchi and M. Dalon, lawyers,

applicant,

v

European Central Bank (ECB), represented by E. Koupepidou, R. Bax and F. Bonnard, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU seeking the partial annulment of ECB Decision ECB/SSM/2017-R0MUWSFPU8MPRO8K5P83/248 of 19 December 2017, ECB Decision ECB-SSM-2018-FRBNP-17 of 26 April 2018 and ECB Decision ECB-SSM-2019-FRBNP-12 of 14 February 2019,

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of E. Buttigieg, acting as President, F. Schalin (Rapporteur), B. Berke, M.J. Costeira and C. Mac Eochaidh, Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written part of the procedure and further to the hearing on 11 September 2019,

gives the following

* Language of the case: French

Judgment

Legal framework

1 Following the 2008 financial crisis, which gave rise to the crisis in the euro area, a new regulatory framework aimed at ensuring the stability and safety of banking in the European Union and supplementing economic and monetary union and the internal market was put in place. That new framework is characterised by a single rulebook, which applies identically to credit institutions in all Member States concerned. The banking union is based on three pillars, in this instance a single supervisory mechanism, a single resolution mechanism and a European deposit insurance scheme.

2 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338) and 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) are part of the single rulebook mentioned in paragraph 1 above and together form the legal framework governing banking activities, the supervisory framework and the prudential rules for credit institutions and investment firms. Regulation No 575/2013 provides that credit institutions must hold a certain percentage of their own funds according to their risk profile. Those own funds include Common Equity Tier 1 (CET 1) capital, namely those funds intended to ensure continuity of the business of a credit institution and to prevent situations of insolvency.

3 The general prudential requirements set out in Regulation No 575/2013 are supplemented by individual arrangements in respect of which the competent authorities must adopt decisions as a result of their ongoing supervisory review of each individual credit institution and investment firm.

4 The aim of the single supervisory mechanism established by Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63) (the first pillar of the banking union referred to in paragraph 1 above) is to ensure the safety and soundness of credit institutions. That regulation confers competence on the European Central Bank (ECB) to carry out the prudential supervisory tasks referred to in Article 4(1) thereof. In accordance with Article 6 of that regulation, the ECB must carry out its tasks within a single supervisory mechanism composed of the ECB and national competent authorities. The ECB has competence, in particular, to ensure the prudential supervision of credit institutions in the euro area that are classified as ‘significant’.

5 In accordance with Article 4(3) of Regulation No 1024/2013, the ECB must apply all relevant Union law for the purpose of carrying out the tasks conferred on it. To that effect, the ECB’s decisions must comply with ‘any legislative and non-legislative act, including those referred to in Articles 290 and 291 TFEU’ and ‘it shall in particular be subject to binding regulatory and implementing technical standards developed by [the European Banking Authority (EBA)] and

adopted by the Commission in accordance with Article 10 to 15 of Regulation (EU) No 1093/2010, to Article 16 of that Regulation, and to the provisions of that Regulation on the European supervisory handbook developed by EBA in accordance with that Regulation'.

6 In accordance with Article 97 of Directive 2013/36, the competent authorities are required to put into place a supervisory review and evaluation process (SREP) in order, inter alia, to determine 'whether the arrangements, strategies, processes and mechanisms implemented by institutions and the own funds and liquidity held by them ensure a sound management and coverage of their risks'.

7 Moreover, in accordance with Article 107(3) of Directive 2013/36, the European Banking Authority (EBA), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ 2010 L 331, p. 12), established on 19 December 2014 the Guidelines on common procedures and methodologies for the SREP (ABE/GL/2014/13).

8 The single resolution mechanism (which comes under the second pillar mentioned in paragraph 1 above), as established by Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1) provides for the creation of a single resolution fund to which credit institutions must contribute. Furthermore, the relevant legal framework also includes Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190). That directive provides for a specific regime to prevent and manage bank failures. It requires, inter alia, the creation, in each Member State, of an arrangement to finance resolution at national level, namely the national resolution fund, to which the credit institutions of the Member State concerned must contribute.

9 The third pillar of the banking union (see paragraph 1 above), namely the European deposit insurance scheme, has not yet been completed. Nevertheless, Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ 2014 L 173, p. 149) has been adopted, which seeks to strengthen protection for depositors by introducing a pre-financed guarantee scheme in each Member State. That scheme ensures that each depositor's savings will be fully protected up to a maximum amount of EUR 100 000.

10 With regard to the financing of the Single Resolution Fund and the deposit guarantee schemes introduced under the second and third pillars, it is important to point out that the contributions which credit institutions are required to pay to the Single Resolution Fund and the deposit guarantee scheme may be paid by either an immediate payment or by means of an irrevocable payment commitment ('IPC').

11 Article 70(3) of Regulation No 806/2014 therefore provides that the credit institutions which choose to contribute using an IPC commit to pay the amount of the contribution to the Single Resolution Fund and the deposit guarantee scheme at the first request.

12 Under Article 70(3) of Regulation No 806/2014, IPCs must be fully backed by collateral of low-risk assets unencumbered by any third-party rights (at the free disposal of the resolution authorities or the deposit guarantee scheme) and can be liquidated within a short period of time. That requirement is also contained in Article 103(3) of Directive 2014/59 and Article 13(3) of Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59 with regard to ex ante contributions to resolution financing arrangements (OJ 2015 L 11, p. 44). In practice, the guarantee takes the form of a cash deposit of an amount equivalent to that of the IPC, at the free disposal of the resolution authorities or the deposit guarantee scheme, as is clear from a decision taken by the Single Resolution Board in 2016 and the French law transposing Directive 2014/49.

13 Finally, it should be mentioned that, on 11 September 2015, the EBA established guidelines on payment commitments under Directive 2014/49 (EBA/GL/2015/09) ('the guidelines on payment commitments').

14 The guidelines on payment commitments, to which the ECB has stated that it adheres, confirm that, in certain circumstances, IPCs may be subject to prudential measures. Paragraphs 31 to 33 of those guidelines state as follows:

'31. The prudential treatment of payment commitments should aim to ensure there is a level playing field and mitigate the procyclical effect of such commitments depending on their accounting treatment.

32. Where the accounting treatment results in the payment commitment being fully reflected on the balance sheet (as a liability), or results in the collateral arrangement being fully reflected in the profit and loss statement, there should be no need to apply an ad-hoc prudential treatment to mitigate the procyclical effects.

33. Where, in contrast, the accounting treatment results in the payment commitment and the collateral arrangement remaining off balance sheet, within the … (SREP), competent authorities should assess the risks to which the capital and liquidity positions of a credit institution would be exposed, should the [deposit guarantee scheme] call this institution to pay its commitment in cash, and exercise the appropriate powers to ensure that the procyclicality effect is mitigated by additional capital/liquidity requirements.'

Background to the dispute

15 The applicant, BNP Paribas, is a significant entity for the purposes of Article 6(4) of Regulation No 1024/2013 and has been under the direct prudential supervision of the ECB since 4 November 2014.

16 On 14 September 2017, the ECB sent the applicant a draft decision at the end of the SREP concerning, inter alia, the IPC. That draft contained, inter alia, the prudential requirement that the cumulative amount of outstanding IPCs was to be deducted from Common Equity Tier 1 capital. The applicant was asked to give its view on that draft.

17 By letter of 29 September 2017, the applicant submitted its observations.

18 On 19 December 2017, the ECB adopted Decision ECB/SSM/2017-R0MUWSFPU8MPRO8K5P83/248 ('the decision of 19 December 2017'), pursuant to Article 4(1)(f) and Article 16 of Regulation No 1024/2013, requiring that the cumulative amounts of IPCs subscribed to the deposit guarantee schemes or the resolution funds be deducted from the Common Equity Tier 1 capital.

19 The applicant brought an action against the decision of 19 December 2017 before the ECB's Administrative Board of Review, which delivered an opinion on 19 March 2018.

20 On 26 April 2018, following the opinion of the Administrative Board of Review, the ECB decided to replace the decision of 19 December 2017 with Decision ECB-SSM-2018-FRBNP-17 ('the decision of 26 April 2018'). The section of that decision relating to IPCs remained unchanged.

Procedure and forms of order sought

21 By application lodged at the Registry of the General Court on 1 March 2018, the applicant brought an action for annulment of the decision of 19 December 2017, registered as Case T-150/18.

22 The defence, reply and rejoinder in Case T-150/18 were lodged at the Registry of the General Court on 30 May, 7 September and 24 October 2018 respectively.

23 By application lodged at the Registry of the General Court on 1 June 2018, the applicant brought an action for annulment of the decision of 26 April 2018, registered as Case T-345/18.

24 The defence, reply and rejoinder in Case T-345/18 were lodged at the Registry of the General Court on 26 July, 20 September and 5 November 2018 respectively.

25 On a proposal from the Second Chamber, the Court decided, in accordance with Article 28 of its Rules of Procedure, to refer Cases T-150/18 and T-345/18 to a formation sitting with a greater number of Judges.

26 On 23 April 2019, following the adoption of Decision ECB-SSM-2019-FRBNP-12 of the ECB of 14 February 2019 ('the decision of 14 February 2019'), which replaced the decision of 26 April 2018 as from 1 March 2019 and imposed the same deduction measure, the applicant submitted at the Registry of the General Court a statement of modification in which it also claims that the decision of 14 February 2019 should be annulled in part for the same reasons as those put forward in the application against the decision of 26 April 2018.

27 By decision of the President of the General Court of 23 April 2019, the present cases were assigned to a new Judge-Rapporteur, sitting in the Second Chamber.

28 By letter of 17 May 2019, the ECB submitted its observations on the statement of modification and contended that the action should be dismissed in its entirety.

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

30 By decision of 5 August 2019, the President of the Second Chamber, Extended Composition, decided to join the cases for the purposes of the oral part of the procedure.

31 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 11 September 2019.

32 In Case T-150/18, the applicant claims, in essence, that the Court should:

– annul paragraphs 9.1 to 9.3 of the decision of 19 December 2017;

– order the ECB to pay the costs.

33 In Case T-150/18, the ECB contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

34 In Case T-345/18, the applicant claims, in essence, that the Court should:

– annul paragraphs 9.1 to 9.3 of the decision of 26 April 2018;

– annul paragraphs 8.1 to 8.4 of the decision of 14 February 2019;

– order the ECB to pay the costs.

35 In Case T-345/18, the ECB contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Contested decisions

36 As is clear from paragraphs 18, 20 and 26 above, in the decisions of 19 December 2017, 26 April 2018 and 14 February 2019 (together, 'the contested decisions'), the ECB required the applicant to deduct an amount equivalent to that of IPCs subscribed to the deposit guarantee schemes or the resolution funds from Common Equity Tier 1 capital.

37 In the contested decisions, the ECB considered it necessary to ensure sound coverage of the risks to which the IPCs, treated as off-balance-sheet items, exposed the applicant. In paragraph 8.2 of the decision of 14 February 2019, it specified the amount of the deduction using the following formula: $CET1_{adj} = CET1_{unadj} – c$. In that formula, '$CET1_{adj}$' denoted the Common Equity Tier 1 capital of the relevant supervised entity after the adjustment, '$CET1_{unadj}$' denoted the Common Equity Tier 1 capital of the relevant supervised entity before the adjustment and 'c' denoted the lower of (i) the fair value of the assets encumbered or cash collateral posted in order to secure the cumulative amount of outstanding IPCs of the relevant supervised entity; or (ii) the nominal amount of the aggregate outstanding IPCs of the relevant supervised entity that they secured.

38 In that regard, as is clear from paragraph 8.3 of the decision of 14 February 2019, the ECB relied on the following reasons:

'The cash collateral posted in order to secure IPC are unavailable until payment is made upon request of the resolution authority or the deposit guarantee scheme:

– If such payment is made, the outstanding IPC shall be accounted as an expense with negative impact on the Common Equity Tier 1 capital. This means that the encumbered assets or the cash collateral will become available only when Common Equity Tier 1 capital has already been impacted by the cash payment.

– If such payment is not made, the resolution authority or the deposit guarantee scheme will use the encumbered assets or the posted collateral, with a direct negative impact on the Common Equity Tier 1 capital.

As a consequence, … the cash collateral will never be available to cover any losses that the relevant supervised entity may suffer on an ongoing basis. Moreover, both the resolution authority and the deposit guarantee scheme may enforce the IPC at a point in time when a particular credit institution is under resolution or liquidation and, at that time, a cash payment of the outstanding IPC shall be accounted as an expense with negative impact on the Common Equity Tier 1 capital. This may occur during a time of stress with possible pro-cyclical effects. The amount of the IPC in respect of which assets are encumbered or cash collateral posted should therefore be considered as not available to cover losses of the relevant credit institution. This is currently not reflected in the Common Equity Tier 1 capital of the relevant supervised entity which therefore does not give an accurate view of its actual financial soundness and of the risks to which the relevant supervised entity is exposed as regards the use of IPC.'

39 The parties agree that the decision of 14 February 2019 is essentially identical to the decisions of 19 December 2017 and 26 April 2018 as regards both the operative part and the reasons put forward in support.

40 The ECB therefore concluded that the use of IPCs gave rise to the problematic situation referred to in Article 16(1)(c) of Regulation No 1024/2013 and that, in order to address that problem, it could exercise the powers conferred on it by Article 16(2)(d) of that regulation to require any addressee of those decisions to apply a specific provisioning policy or treatment of assets in terms of own funds requirements.

Law

41 After hearing the views of the parties in that regard at the hearing, the Court has decided to join the present cases for the purposes of the decision closing the proceedings, in accordance with Article 68 of the Rules of Procedure.

42 In the context of the present actions, seeking the partial annulment of the contested decisions, the applicant raises four pleas in law. The first plea alleges a lack of legal basis in that the ECB is said to have imposed a prudential requirement of general scope whereas that power is reserved for the legislature. The second plea alleges an error of law resulting from a misinterpretation of the

provisions of EU law permitting the use of IPCs and those provisions being rendered ineffective. The third plea alleges infringement of the principle of proportionality. The fourth plea alleges an error of assessment and infringement of the principle of good administration.

43 The first plea in law, alleging a lack of legal basis, comprises two complaints. In the context of the first complaint, the applicant submits, in essence, that, in the light of the rules governing the implementation by the ECB of its task of prudential supervision, the contested decisions impose a new prudential requirement of general scope. The ECB did not carry out any assessment of the applicant's solvency and liquidity risks and did not assess the applicant's risk profile.

44 The second complaint is based on the fact that the ECB exceeded the powers provided for in Article 4(1)(f) and Article 16(1)(c) of Regulation No 1024/2013. In the first place, the applicant submits that Article 16(1)(c) of Regulation No 1024/2013 has been infringed on the ground that the ECB did not demonstrate how the arrangements, strategies, processes and mechanisms it had implemented and the liquidity and own funds it held ensured sound management and coverage of its risks, as the ECB merely drew up a list of general and vague considerations. In the second place, it submits that Article 4(1)(f) of Regulation No 1024/2013 provides that the ECB may impose on credit institutions specific additional own funds requirements only where the provisions of the regulations concerned and of Directive 2013/36 expressly allow the competent authorities to act. No provision permits the competent authorities to impose an additional capital requirement by means of a flat-rate deduction in respect of off-balance-sheet items. The full and permanent deduction of IPCs is not provided for by the applicable legislation. The deduction from own funds is provided for only in Article 36 of Regulation No 575/2013. In the third place and in any event, the deduction may be applied, under Article 104(1)(d) of Directive 2013/36 and Article 16(2)(d) of Regulation No 1024/2013, only to assets and not to off-balance-sheet items. The SREP Guidelines provide for the possibility of imposing an additional capital requirement either by means of an additional requirement for own funds or by the measures provided for in Article 104 of Directive 2013/36, namely the treatment of assets as on-balance-sheet items.

45 The ECB refutes that plea. With regard to the first complaint, it notes that it has not imposed any new and general rule and submits that the prudential treatment of IPCs falls outside the scope of the provisions which govern them (Directive 2014/49 and Regulation No 806/2014). The contested decisions were adopted within the framework of the supervisory review and evaluation process defined in Article 4(1)(f) of Regulation No 1024/2013 and in accordance with Article 16(1)(c) of the same regulation. In that context, it denies the absence of an individual examination, noting that the level of own funds does not influence the existence of the risk which justifies the contested decisions, that risk being that the Common Equity Tier 1 capital actually available does not put the applicant in a position to cover a level of risk equivalent to the risk which should be covered by the Common Equity Tier 1 capital as shown on its balance sheet.

46 Moreover, the contested decisions are merely a bundle of individual decisions which are enforceable against individual addressees, which lay down requirements that are specific to each entity and which have different effects for each entity. Furthermore, since credit institutions are exposed to identical risks, the measures should logically be formulated in the same way.

47 As to the second complaint, the ECB denies that it has exceeded the powers conferred on it by the legislation, stating that it used its powers correctly to enable the credit institution properly to cover the risks to which it was exposed. The measure at issue is based on Article 16(1)(c) of Regulation No 1024/2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions. According to the ECB, the examination of the

applicant's individual situation had revealed that certain risks to which it was exposed were not properly covered. Such a finding is sufficient to demonstrate that the applicant was in one of the situations covered by that article and justifies a measure being imposed in order to remedy that situation.

48 Moreover, Article 16(2)(d) of Regulation No 1024/2013 allows the ECB to require 'a specific … treatment of assets in terms of own funds jrequirements' and the deduction of IPCs constitutes such treatment. Therefore, since the deduction measure falls within the scope of the second pillar, the applicant's reference to Article 36 of Regulation No 575/2013 and to the list of deductions from Common Equity Tier 1 capital set out in that article is irrelevant. Finally, according to the ECB and contrary to the claims made by the applicant, as off-balance-sheet items, IPCs may be subject to prudential measures. It refers in that regard in particular to the EBA guidelines which require it to take appropriate measures to cover the procyclical risk if the payment commitment and the accompanying guarantee are not included in the balance sheet. According to the ECB, the EBA considers that no procyclical risk arises only in the event that the accounting treatment of IPCs is identical to the treatment of a cash contribution. The ECB also points out that the guarantee accompanying the IPC is an asset which is recorded on the institution's balance sheet. That commitment is therefore reflected in the accompanying guarantee, which means that they must be treated as an indivisible whole.

The first complaint, concerning a possible lack of legal basis

49 In terms of prudential requirements, like the parties to the present dispute have done, a distinction must be drawn between, on the one hand, regulatory obligations, which, in this context, are also called 'pillar 1' requirements and, on the other, additional supervisory measures, which, in this context, are called 'pillar 2' requirements.

50 Therefore, the general prudential minimum requirements are laid down by the legislature and appear principally in Regulation No 575/2013, in accordance with what has already been stated in paragraph 2 above. That regulation lays down requirements for own funds which apply to all credit institutions that are subject to supervision. It follows that, at all times, each institution must have a sufficient level of own funds. Moreover, with regard to Common Equity Tier 1 capital, Regulation No 575/2013 defines the instruments which may be classified as capital of that kind and stipulates that credit institutions must apply the prudential filters referred to in Articles 32 to 35 of that regulation, which consist inter alia in excluding certain elements, adjusting their value or deducting from Common Equity Tier 1 capital the items listed in Articles 36 to 47 of that regulation.

51 Specifically, the first subparagraph of Article 26(1) of Regulation No 575/2013 lists the Common Equity Tier 1 items as follows: '(a) capital instruments …; (b) share premium accounts related to the [capital] instruments …; (c) retained earnings; (d) accumulated other comprehensive income; (e) other reserves; (f) funds for general banking risk'. That Common Equity Tier 1 capital represents the most sound capital available to the credit institution and can be used immediately and without restriction.

52 Article 36 of Regulation No 575/2013 provides that several items must be deducted from Common Equity Tier 1 capital including, inter alia, losses for the current financial year, intangible assets, deferred tax assets that rely on future profitability and holdings in other credit or financial institutions.

53 Alongside those prudential adjustments which are generally applicable to all credit institutions, EU law authorises the supervisor, in this case the ECB, to impose other measures, on a case-by-case basis and taking into account the particular situation of each institution, in particular in connection with its task to carry out supervisory reviews in accordance with Article 4(1)(f) of Regulation No 1024/2013.

54 As regards the question whether the ECB exceeded its powers by imposing a prudential requirement of general scope, it should be noted that it has been established that the ECB has no regulatory powers under the first pillar, which concerns regulatory obligations, as that power falls exclusively within the competence of the EU legislature.

55 The ECB's powers, in the context of its supervisory tasks, and in particular the task it carries out under Article 4(1)(f) of Regulation No 1024/2013, are subject to an individual examination in order to verify the adequacy of the supervised entities' own funds directly in relation to the risks to which they are or might be exposed. Once it has carried out those checks, the ECB may impose corrective measures on the basis of the vulnerability and weaknesses identified.

56 In that regard it must be noted that, when it adopted the contested decisions, the ECB was acting within the context of the supervisory reviews and evaluations under the second pillar. First, in the introductory part of the contested decisions, the ECB stated that it had conducted a supervisory review, pursuant to Article 4(1)(f) of Regulation No 1024/2013. Under that provision, the ECB was granted exclusive competence to perform the task of carrying out supervisory reviews in order to determine whether the arrangements, strategies, processes and mechanisms put in place by credit institutions and the own funds held by those institutions ensure a sound management and coverage of their risks and, on the basis of that supervisory review, to impose on credit institutions inter alia specific additional own funds requirements, specific liquidity requirements and other measures, where specifically made available to competent authorities by relevant Union law.

57 Secondly, it is clear from the paragraphs of the contested decisions which address IPCs and which are covered by the application for partial annulment, namely paragraph 9 of the decision of 19 December 2017, paragraph 9 of the decision of 26 April 2018 and paragraph 8 of the decision of 14 February 2019, that the ECB relied on two provisions in order to impose the deduction of IPCs from Common Equity Tier 1 capital.

58 This was, first, Article 16(1)(c) of Regulation No 1024/2013. In accordance with that provision, for the purpose of carrying out its tasks referred to in Article 4(1) of Regulation No 1024/2013, the ECB is to have the powers, as set out in Article 16(2) thereof, to require any credit institution to take the necessary measures to address relevant problems in certain situations. Those situations include where, in the framework of a supervisory review carried out in accordance with Article 4(1)(f) of Regulation No 1024/2013, the ECB finds that the arrangements, strategies, processes and mechanisms implemented by the credit institution and the own funds and liquidity held by it do not ensure a sound management and coverage of its risks.

59 And secondly, this was Article 16(2)(d) of Regulation No 1024/2013, which serves as the basis for paragraph 9 of the decisions of 19 December 2019 and 26 April 2018 and paragraph 8 of the decision of 14 February 2019. Pursuant to that provision, the ECB has, inter alia, the power to require institutions to apply a specific provisioning policy or treatment of assets in terms of own funds requirements.

60 It follows that the ECB's approach fell within the scope of its supervisory powers under the second pillar. Consequently, the measure adopted by the ECB does not lack a legal basis. Accordingly, in so far as the applicant challenged the lack of a legal basis in the first complaint of the first plea in law, that complaint must be rejected.

The second complaint, concerning a possible failure to carry out an individual examination

61 With regard to the second complaint, it must be determined whether, in the present case, the ECB correctly exercised the powers conferred on it under the second pillar. In that regard, as is clear from paragraphs 58 and 59 above, in order to exercise its powers under Article 16(2)(d) of Regulation No 1024/2013, the ECB must carry out an individual examination of the situation of each credit institution in order to be able to determine whether 'the arrangements, strategies, processes and mechanisms implemented by the credit institution and the own funds and liquidity held by it do not ensure a sound management and coverage of its risks'.

62 In that regard, it is necessary to examine, relying on the reasoning set out in the contested decisions, how the ECB exercised its powers of supervisory review and evaluation in the present case in respect of the applicant.

63 It is clear from the reasoning followed by the ECB in the present case, as reproduced in paragraph 38 above, that the risk it identified was the overvaluation of Common Equity Tier 1 capital, a risk arising from the fact that IPCs are treated as an off-balance-sheet item, that they are therefore not recorded on that credit institution's balance sheet and that the guarantee attached to IPCs is unavailable until the IPCs have been paid.

64 When a credit institution subscribes to an IPC, the level of that institution's Common Equity Tier 1 capital remains unchanged. However, the amounts transferred under the guarantee can no longer be accessed to cover on a continuous basis potential losses in business.

65 Since, according to the ECB, the risk arises from the difference between the amount of Common Equity Tier 1 capital declared by the institution in question and the actual amount of the losses it is able to bear, the ECB, in its role as prudential supervisor, took the view, as is clear from the contested decisions summarised in paragraphs 38 and 40 above, that such a situation did not give an accurate view of the actual financial soundness of the relevant credit institution, or of the risks to which it was exposed as regards the use of IPCs.

66 It must be held that the reasoning adopted by the ECB is not purely abstract since it is based on the finding that the applicant has used IPCs and treats those IPCs as off-balance-sheet items.

67 In view, in particular, of the importance of Common Equity Tier 1 capital for the financial soundness of institutions and, more generally, the stability of the financial sector, the existence of the risk identified by the ECB cannot be denied, and that risk is also confirmed by the EBA guidelines on payment commitments. It is clear from those guidelines (see paragraph 14 above) that the competent authorities, including the ECB, must assess, within the SREP, the risks to which the capital and liquidity positions of a credit institution which treats its IPCs as off-balance-sheet items would be exposed.

68 Moreover, in that regard, it must be pointed out that the parties agree that, in terms of accounting treatment, IPCs are generally accounted for, as in the present case, as off-balance-sheet items and will not be recorded on the balance sheet as a loss, thereby reducing Common Equity Tier 1 capital, until the credit institution is required to pay the amount to one of the funds concerned.

69 Furthermore, it should be noted that it is not the IPCs as such which are the subject of the deduction measure at issue, but the sums put up as collateral, as is also apparent from paragraph 8.2 of the decision of 14 February 2019. The sums put up as collateral are generally an asset which is recorded on the credit institution's balance sheet. IPC guarantees are necessarily low-risk liquid assets. In practice, they take the form of a cash deposit of an amount equivalent to that of the IPCs, at the free disposal of the resolution authorities or the deposit guarantee scheme. In other words, the IPCs are reflected in its guarantee and those two elements are inextricably linked and cannot therefore be considered separately.

70 Therefore, contrary to the applicant's claims, the ECB was entitled to take the view, without erring in law in that regard, that the prudential treatment of IPCs, and therefore the guarantee which is inextricably linked to them, could give rise to the implementation of one of the measures provided for in Article 16(2)(d) of Regulation No 1024/2013, notwithstanding the fact that, for accounting purposes, IPCs as such are accounted for as off-balance-sheet items.

71 Therefore, the applicant's argument that, since IPCs are treated as off-balance-sheet items, they cannot, accordingly, be covered by the specific policy provided for in Article 16(2)(d) of Regulation No 1024/2013, must be dismissed.

72 That said, it must be examined whether, in the present case, the ECB carried out the individual review incumbent on it pursuant to Article 16(1)(c) of Regulation No 1024/2013 (see paragraph 61 above) of the applicant's risk profile and, more specifically, whether the arrangements, strategies, processes and mechanisms implemented by applicant and the own funds and liquidity held by it enabled the applicant to address the risk identified, resulting from the treatment of IPCs for accounting purposes as off-balance-sheet items and the unavailability of the guarantee attached to them.

73 In that regard, the applicant and the ECB take opposing views in respect of the examination carried out by the ECB.

74 The ECB submits that it examined all the relevant circumstances. By contrast, the applicant considers that the ECB's reasoning is based solely on general considerations and not on any specific examination the purpose of which would have been, inter alia, to assess the risk profile of a particular institution. According to the applicant, an examination of that kind, if it had been carried out, would have demonstrated that the amount of Common Equity Tier 1 capital available to it was sufficient to cover any losses which it might have incurred if the IPCs to which it had subscribed had to be called upon.

75 In the present case, it is clear from the contested decisions that the ECB found that the applicant had used the IPC arrangement and that it treated the IPC as an off-balance-sheet item whereas the guarantee relating to it appeared as an asset on the balance sheet. In the decision of 14 February 2019, the ECB set out the total amount of outstanding IPCs in respect of which cash collateral had been provided by the applicant, both at a consolidated level and by the applicant's institution. It then calculated the percentage of the risk exposure amount pursuant to Article 92(3) of Regulation No 575/2013. In so doing, the ECB established the level of the

applicant's exposure to the risk arising from having subscribed to IPCs. It is also apparent from the case file before the court that, although such a calculation exercise was not contained in the decisions of 19 December 2017 and 26 April 2018, at the time when those decisions were adopted, the ECB had the relevant information in order to make an assessment.

76 The ECB's reasoning amounts to considering that the treatment of IPCs for accounting purposes as off-balance-sheet items is, in itself, problematic, since that treatment implies by definition an overvaluation of Common Equity Tier 1 capital. The ECB's position can be seen inter alia from its pleadings before the Court and its submissions at the hearing. It has stated that the risk which the measure at issue was to address arose from the fact that the treatment of IPCs for accounting purposes did not reflect that the sums mobilised in that regard were not available in the Common Equity Tier 1 capital ratio of the contributing institution. According to the ECB, that situation enabled it to make proportionate use of its powers under Article 16(2) of Regulation No 1024/2013. Although that line of reasoning has been applied in practice to the applicant, it nevertheless forms part of findings of a general nature which may apply to any credit institution which opts for IPCs to be treated as off-balance-sheet items without taking into account any circumstances specific to the institution concerned.

77 However, the contested decisions do not refer to any individual examination by the ECB aimed at verifying whether the applicant had implemented arrangements, strategies, processes and mechanisms within the meaning of Article 4(1)(f) and Article 16(1)(c) of Regulation No 1024/2013 in order to address the prudential risks associated with the treatment of IPCs as off-balance-sheet items and, where appropriate, satisfying itself of their relevance in the light of such risks.

78 In that regard, it should be noted that the use of IPCs is expressly permitted and regulated by the legislature. Admittedly, as the ECB submits, Regulation No 806/2014 and Directive 2014/49 do not address the subject of the treatment of IPCs for accounting purposes. Moreover, the possibility, provided for by the legislature, of using IPCs for a limited percentage in order to finance funds and guarantee schemes does not prevent there being a prudential risk. The possibility of such a risk arising may also be inferred from the guidelines on payment commitments. However, and without there being any need to rule on the accuracy of the ECB's interpretation of the guidelines on payment commitments, namely that the only way to rule out a procyclical risk is to treat IPCs in the same way as a cash contribution for accounting purposes, the fact remains that it follows from Article 16 of Regulation No 1024/2013, and the guidelines on payment commitments in so far as they refer to the examination carried out as part of the SREP, that a case-by-case examination is required.

79 As has already been pointed out (see paragraph 76 above), it follows from the approach taken by the ECB that it considered that, where an institution opted to use IPCs and to treat them as off-balance-sheet items, a risk arose, rendering unnecessary any further detailed examination of the situation specific to that institution.

80 Moreover, the ECB's argument that the measure at issue was adopted within the framework of the SREP, and therefore each decision adopted within that framework is an individual decision the scope of which does not extend beyond its addressee, is irrelevant. It is true that, as the ECB submits, identical risks may be covered by identical measures. However, the fact that the measure at issue was adopted in the framework of the exercise resulting from the

implementation of the SREP does not mean that the prudential measure taken in that context is necessarily a decision adopted following an individual examination which takes into account the applicant's specific circumstances.

81 Furthermore, the ECB's argument that it carried out an individual examination prior to the adoption of the contested decisions in the impact assessment cannot succeed either. The purpose of such an examination is, at most, to assess the consequences of adopting a measure in the light of the objectives pursued. Admittedly, an impact assessment may be useful for the purposes of assessing the proportionality of the measure at issue, as is clear, in essence, from the ECB's line of argument when it submits that that assessment demonstrates that the measure would have only a minimal impact in terms of additional own funds and should not therefore place a disproportionate burden on the applicant. However, that assessment pursues a different objective and is based on a different logic from that underlying the analysis entrusted to the ECB under Article 4(1)(f) and Article 16(1)(c) and (2)(d) of Regulation No 1024/2013. Under those provisions, the ECB is responsible for assessing the need to adopt the measure at issue in the light of the individual situation of the institution concerned by taking account, in particular, of possible arrangements, strategies, processes or mechanisms implemented by that institution.

82 Therefore, it must be held that, by failing to pursue its examination beyond the mere finding that the IPC gave rise to a potential risk as it was treated as an off-balance-sheet item, by failing to examine the applicant's specific situation, and in particular its risk profile and level of liquidity, and by failing to take into account possible factors to mitigate the potential risk, the ECB did not carry out the individual supervisory review of the applicant, as required by Article 4(1)(f) and Article 16(1)(c) and (2)(d) of Regulation No 1024/2013, and, therefore, those provisions have been infringed.

83 In so far as the complaint that there was no individual examination is well founded, the first plea in law must be upheld.

84 It follows that, in so far as the present action seeks the partial annulment of the contested decisions, it must be declared well founded, without there being any need to examine the other pleas in law raised by the applicant.

Costs

85 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. Since the ECB has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. Joins Cases T-150/18 and T-345/18 for the purposes of the judgment;

2. **Annuls paragraphs 9.1 to 9.3 of Decision ECB/SSM/2017-R0MUWSFPU8MPRO8K5P83/248 of the European Central Bank (ECB) of 19 December 2017, paragraphs 9.1 to 9.3 of Decision ECB-SSM-2018-FRBNP-17 of the ECB of 26 April 2018 and paragraphs 8.1 to 8.4 of Decision ECB-SSM-2019-FRBNP-12 of the ECB of 14 February 2019;**

3. **Orders the ECB to pay the costs.**

Buttigieg Schalin Berke

Costeira Mac Eochaidh

Delivered in open court in Luxembourg on 9 September 2020.

[Signatures]