



Reports of Cases

Case C-389/21 P

European Central Bank (ECB)

v

Crédit lyonnais

Judgment of the Court (First Chamber), 4 May 2023

(Appeal – Economic and monetary policy – Prudential supervision of credit institutions – Regulation (EU) No 575/2013 – Calculation of the leverage ratio – Exposure measure – Article 429(14) – Exclusion of exposures meeting certain conditions – Partial refusal of authorisation – Discretion of the European Central Bank (ECB) – Action for annulment – Manifest error of assessment – Judicial review)

1. *Economic and monetary policy – Economic policy – Supervision of the EU financial sector – Prudential requirements applicable to credit institutions and investment firms – Liquidity requirements – Leverage ratio – Calculation – Possibility of excluding certain exposures to public sector entities – European Central Bank decision refusing to grant the derogation – Judicial review – Scope – Limits*
(European Parliament and Council Regulation No 575/2013, Art. 429(14))

(see paragraphs 55, 56, 65-75, 89)

2. *Economic and monetary policy – Economic policy – Supervision of the EU financial sector – Prudential requirements applicable to credit institutions and investment firms – Liquidity requirements – Leverage ratio – Calculation – Possibility of excluding certain exposures to public sector entities – Competent authorities' discretion – European Central Bank decision refusing in part to grant the derogation – Obligation to examine carefully and impartially all the elements of the individual case*
(European Parliament and Council Regulation No 575/2013, Art. 429(14))

(see paragraphs 57, 92-94, 100, 101, 106, 121-123)

3. *Appeal – Appeal upheld – Final judgment on the substance by the Court of Justice – Scope – Prior rejection of a plea for annulment in a judgment annulling a measure – Failure to challenge the grounds for that rejection by way of cross-appeal – Consequence – Exclusion of a new examination*
(Rules of Procedure of the Court of Justice, Arts 176 and 178(1))

(see paragraph 79)

Résumé

The Court of Justice upholds the refusal of the ECB to exclude for the purposes of the calculation of the leverage ratio of Crédit lyonnais 34% of its exposures to the Caisse des dépôts et consignations

The Court of Justice annuls the contrary decision of the General Court exceeding the limits of its power of judicial review substituting its own assessment of the risk of fire sales of assets to which Crédit lyonnais was exposed for that of the ECB

Crédit Lyonnais is a public limited company incorporated under French law and authorised as a credit institution. That credit institution is a subsidiary of Crédit agricole SA, and is, as such, subject to the direct prudential supervision of the European Central Bank (ECB).

On 5 May 2015, Crédit agricole, on its own behalf and on behalf of the entities forming part of the Crédit agricole group, including Crédit lyonnais, applied to the ECB for authorisation¹ to exclude for the purposes of the calculation of the leverage ratio the exposures to the Caisse des dépôts et consignations (CDC), a French public institution, resulting from deposits made on various savings passbooks, which must, under the applicable French legislation, be transferred to the CDC ('the regulated savings').

The decision of 24 August 2016, by which the ECB refused to grant Crédit agricole the authorisation that it had sought, was annulled by a judgment of the General Court.² Following that judgment, Crédit agricole resubmitted its application for authorisation to exclude the exposures to the CDC to the ECB. By decision of 3 May 2019,³ the ECB authorised Crédit agricole and the entities forming part of the Crédit agricole group, with the exception of Crédit lyonnais, to exclude from the calculation of the leverage ratio all their exposures to the CDC. By contrast, Crédit lyonnais was authorised to exclude only 66% of those exposures. In the decision at issue, the ECB, taking the view that it had a discretion in the present case, applied a methodology that took into account three factors, namely the creditworthiness of the French central government, the risk of fire sales of assets and the level of concentration of exposures to the CDC.

Crédit lyonnais's action, for annulment of the decision at issue in so far as it refused to authorise it to exclude from the calculation of its leverage ratio all of its exposures to the CDC, was upheld by the General Court.⁴ Specifically, the Court found that the ground of the decision at issue relating to the level of risk of fire sales of assets was vitiated by 'illegality'. Consequently, it concluded that the other two elements of the methodology applied by the ECB could not have led the ECB to refuse, in the decision at issue, to grant Crédit lyonnais the benefit of the exclusion for the entirety of that institution's exposures to the CDC.

¹ Under 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), as amended by Commission Delegated Regulation (EU) 2015/62 of 10 October 2014 (OJ 2015 L 11, p. 37).

² Judgment of 13 July 2018, *Crédit agricole v ECB* (T-758/16, EU:T:2018:472).

³ Decision ECB SSM-2019-FRCAG-39 ('the decision at issue').

⁴ Judgment of 14 April 2021, *Crédit lyonnais v ECB* (T-504/19, EU:T:2021:185; 'the judgment under appeal').

On hearing the appeal brought by the ECB, the Court set aside the judgment under appeal; and, giving final judgment in the case, dismissed the action brought by *Crédit lyonnais*. By its judgment, the Court clarifies the level of review by the Courts of the European Union when assessing the lawfulness of administrative decisions adopted by the ECB, where the latter enjoys a broad discretion.

Findings of the Court

The Court notes that, in so far as the ECB has a broad discretion in deciding whether or not to authorise the exclusion for the purposes of calculating the leverage ratio of exposures meeting certain conditions, the judicial review which the Courts of the European Union must carry out of the merits of the grounds of the ECB's decision must not lead it to substitute its own assessment for that of the ECB. That review seeks to ascertain that such a decision is not based on materially incorrect facts and that it is not vitiated by a manifest error of assessment or misuse of powers. In that regard, the Courts of the European Union must, *inter alia*, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Where an institution enjoys broad discretion, observance of procedural guarantees is of fundamental importance, including the obligation for that institution to examine carefully and impartially all the relevant aspects of the situation in question.

The Court observes that, in carrying out its own assessment of the characteristics of the regulated savings and their cumulative effect, the General Court considered that the level of risk of fire sales of assets was not sufficiently high to justify the ECB's refusal to exclude from the calculation of the leverage ratio all *Crédit lyonnais*'s exposures to the CDC.

However, in so doing, the General Court, in the first place, did not call into question the ECB's findings concerning the characteristics of regulated savings which led the ECB to conclude that those characteristics did not make it possible to rule out completely any risk that *Crédit lyonnais* might be compelled to make fire sales of assets. That applies in particular to the ECB's findings concerning the high liquidity of the regulated savings in the absence of statutory rules limiting withdrawals of those savings and the obligation of *Crédit lyonnais* to reimburse depositors even during the deferred adjustment period between the positions of *Crédit lyonnais* and those of the CDC. Consequently, the reasoning of the General Court neither calls into question the material accuracy, reliability and consistency of the factors taken into account in the decision at issue, nor establishes that those factors do not constitute all the relevant information which had to be taken into consideration by the ECB.

In the second place, the General Court's finding that the information taken into account by the ECB was not capable of substantiating the conclusions drawn from it in the decision at issue follows from its own assessment of the level of risk of fire sales of assets. That assessment, which is based on the same factors as those taken into account by the ECB, departs from the assessment made by that institution without establishing that that assessment was manifestly incorrect.

By reasoning in that way, the General Court did not review the manifest error of assessment as was incumbent on it, but substituted its own assessment for that of the ECB in a situation in which, moreover, that institution enjoys a broad discretion.

Furthermore, concerning the General Court's assessment of the ECB's reasoning based on the experience of recent banking crises, the General Court did not establish how the considerations that regulated savings deposits cannot be invested, unlike sight deposits, in risky or illiquid assets are such as to demonstrate that the ECB's assessment of the possible risk of massive withdrawals, which had to be used to analyse the risk of fire sales of assets to which Crédit lyonnais was exposed, was manifestly incorrect. The same is true of the considerations based on the difference between the dual guarantee of the French Republic enjoyed by regulated savings passbooks and the guarantee mechanism under Directive 2014/49.⁵

The Court concluded from this that the General Court annulled the decision at issue, substituting its own assessment of the risk of fire sales of assets to which Crédit lyonnais was exposed, without establishing how the ECB's assessment set out in that decision was, in that regard, vitiated by a manifest error of assessment. In so doing, it exceeded the scope of its judicial review. In addition, it was also wrong to find that the ECB had failed to fulfil its obligation to examine carefully and impartially all the relevant aspects of the situation in question.

Following the partial annulment of the judgment under appeal, the Court ruled definitively on the action at first instance. Analysing the arguments raised by Crédit lyonnais at first instance, it finds that, having regard to the limited judicial review which is for it to carry out in the light of the ECB's wide discretion in the present case, Crédit lyonnais is not able to demonstrate that that institution's assessment, set out in the decision at issue, concerning the risk of fire sales of assets and the creditworthiness of the French government is manifestly incorrect. The Court thus upholds the decision to refuse to exclude for the purposes of the calculation of the leverage ratio of Crédit lyonnais 34% of its exposures to the CDC.

⁵ 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).