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Judgment of the Court in Case C-389/21 P | ECB v Crédit lyonnais

### **The Court confirms the ECB's refusal 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**

*It annuls the contrary judgment of the General Court, which exceeded the scope of its 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 authorisation <sup>1</sup> to exclude for the purposes of calculating the leverage ratio the exposures to the Caisse des dépôts et consignations (Deposit and Loans Fund, France) (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 had refused to grant Crédit agricole the authorisation sought, was annulled by a judgment of the General Court. <sup>2</sup> Following that judgment, Crédit agricole again applied to the ECB for authorisation to exclude the exposures to the CDC. By decision of 3 May 2019, <sup>3</sup> 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 of their exposures to the CDC. By contrast, Crédit lyonnais was allowed to exclude only 66%. In the decision at issue, the ECB, noting that it had a discretion in the circumstances, 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.

The action of Crédit Lyonnais for the annulment of the decision at issue, in so far as that decision refused to authorise Crédit lyonnais to exclude all of its exposures to the CDC from the exposure measure, was upheld by the General Court. <sup>4</sup> Specifically, the General Court held 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 considered that two other elements of the

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<sup>1</sup> Provided for in 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).

<sup>2</sup> Judgment of 13 July 2018, *Crédit agricole v ECB*, [T-758/16](#) (see also [PR No 110/18](#)).

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

<sup>4</sup> Judgment of 14 April 2021, *Crédit Lyonnais v ECB*, [T-504/19](#) ('the judgment under appeal').

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 credit institution's exposures to the CDC.

Ruling on the appeal brought by the ECB, the Court annulled the judgment under appeal and, giving final judgment in the case, dismissed the action of Crédit lyonnais. By its judgment, the Court clarifies the level of review conducted by the Courts of the European Union when assessing the lawfulness of administrative decisions adopted by the ECB, where that institution 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 give authorisation to exclude for the purpose of calculating the leverage ratio 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 that 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, by making 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 doing so, in the first place, the General Court 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 of Crédit lyonnais having to make fire sales of assets. That is so, in particular, in respect of the ECB's findings concerning the high liquidity of the regulated savings in the absence of statutory rules limiting withdrawals of those savings and to Crédit lyonnais being under an obligation to reimburse depositors even during the deferred adjustment period between the positions of Crédit lyonnais and those of the CDC. Consequently, the General Court's reasoning does not call into question the material accuracy, reliability and consistency of the factors taken into account in that decision, or 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 conclusion that the information taken into account by the ECB was not capable of substantiating the conclusions drawn in the decision at issue follows from its own assessment of the level of risk of fire sales of assets. That assessment, which relies on the same factors as those taken into account by the ECB, departs from the assessment made by the ECB, whilst not 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, as regards 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.<sup>5</sup>

**The Court concludes 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 also erred in finding 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 gives final judgment on the action at first instance**. Analysing the arguments put forward by Crédit Lyonnais at first instance, **it finds that, having regard to the limited judicial review which is for it to conduct in the light of the ECB's broad discretion in the present case, Crédit Lyonnais is not able to demonstrate that that institution's assessments, set out in the decision at issue, concerning the risk of fire sales of assets and the creditworthiness of the French government are manifestly incorrect**. It therefore confirms the decision to refuse to exclude for the purposes of the calculation of Crédit Lyonnais's leverage ratio 34% of its exposures to the CDC.

**NOTE:** An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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<sup>5</sup> 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).