

Crédit Agricole Cases Summary

In its [judgment](#) of 24 April 2018 in Joined Cases T-133/16 to T-136/16 (*Crédit Agricole v. ECB*), the General Court gave an interpretation of core elements of the governance requirements for credit institutions, i.e. the separation of the exercise of executive and non-executive functions within a bank's management body.

Four regional banks of the 'non-centralised' (i.e., cooperative) *Crédit Agricole* group in France challenged decisions of the [European Central Bank](#) (ECB) concerning the combination of the positions of chair of the board (*présidents des conseils d'administration*) and effective director (*dirigeants effectifs*). *Crédit Agricole* (CA) is a significant supervised group, so members of the 'management body' (*organe de direction*) of CA credit institutions need ECB approval as Fit & Proper ([FAP](#)). The terms used here are employed in the [CRD IV](#) (Articles 88-96). This [directive](#)¹ has been implemented in France in the [Code Monétaire et Financier](#) (CMF).

The applicants alleged that the ECB was wrong to rely on a [position](#) of the French National Competent Authority (NCA), the *Autorité de contrôle prudentiel et de résolution* ([ACPR](#)), on the interpretation of the CMF articles which implement the CRDIV's provisions on the governance of credit institutions, a 'position' which CA had disputed before the French [Conseil d'État](#) ([Council of State](#), France's highest administrative court and advisory body on draft laws and legal questions).

On 7 October 2015, the ECB had approved the four candidates as chairmen of the boards of the four regional banks but opposed their appointment as 'effective director', relying on [Article 88\(1\)\(e\) CRDIV](#) as prohibiting the chair of the supervisory board simultaneously functioning as chief executive officer (CEO)².

Before resorting to court proceedings, the ECB's refusals had been challenged before the Administrative Board of Review (ABoR) of the ECB. The General Court cites the ABoR Opinion of 17 December 2015, which found the ECB decisions lawful and which interpreted the relevant provisions of the CMF³ as implying that an 'effective director' has an executive mandate (like that of a [deputy] CEO), while the chairman of the board of directors is a non-executive director. The ABoR also relied on the prohibition of combining the function of chair of the management body and CEO⁴. Answering

¹ Capital Requirements Directive IV: 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, Official Journal (OJ) L 176/338, 27 June 2013.

² The relevant provision reads as follows:

Article 88 Governance arrangements

1. Member States shall ensure that the management body defines, oversees and is accountable for the implementation of the governance arrangements that ensure effective and prudent management of an institution, including the segregation of duties in the organisation and the prevention of conflicts of interest.

Those arrangements shall comply with the following principles:

(...)

(e) the chairman of the management body in its supervisory function of an institution must not exercise simultaneously the functions of a chief executive officer within the same institution, unless justified by the institution and authorised by competent authorities.

(...)

³ [Article L. 511-13](#) in conjunction with [Article L. 511-52 CMF](#).

⁴ Article 88(1)(e) CRD IV and [Article L. 511-58 CMF](#).

to the applicants' argument that French law on the status as a cooperative does not provide for the functional separation between executive mandate and oversight, the ABoR had found that such separation was required by French law, implementing CRD IV, notably [Article L. 511-58 CMF](#). As to CA's argument that having the chair of the board as 'effective director' facilitated the 'four eyes principle' (which requires at least two persons effectively managing a bank), the ABoR had insisted on the separation of supervisory and executive functions. With ABoR concluding that the four decisions should be replaced by identical ones, the ECB adopted identical decisions on 29 January 2016, which CA challenged before the Court. On 30 June 2016, the *Conseil d'État* [held](#) the ACPR's [position](#) to be lawful and interpreted the relevant provisions of the CMF.

After summarising the four pleas⁵ of CA, the Court proceeds to examine the first three together as they concern the concept of 'effective director'. The arguments of the Commission (who had intervened in support of the ECB) that these pleas were ineffective, as they assumed that the ECB had decided on the basis of a premiss that 'effective direction' in the four eyes principle provision⁶ equals 'executive functions', are rejected. The Court focuses on the ECB's interpretation of [Article 13\(1\) CRD IV](#). It recalls the ECB's tasks under Article 4 of the [SSM Regulation](#), which mandates the ECB to apply relevant Union law and, where this is composed of directives, national legislation transposing these so as to conclude that it should assess the contested decisions in the light of both [Article 13\(1\) CRD IV](#) and the second paragraph of [Article L. 511-13 CMF](#).

As to CRD IV, the Court finds no definition of 'persons who effectively direct the business of the institution' and resorts to a textual and historical interpretation (paragraphs 56-68) and a teleological and contextual interpretation (paragraphs 69-83).

The expression 'two persons [who] effectively direct the business of the ... institution' of [Article 13\(1\) CRD IV](#) is dissected into three elements: the concept of 'direction'; its qualification: 'effectively'; and the subject of the direction: the institution's business (paragraph 56). The appurtenance of directors to the management body does not enable the scope of 'direction' to be defined, as the management body consists of all directors, with supervisory or executive tasks (paragraphs 57-58). 'Effectively' may be interpreted as permanent and involved in the day-to-day business, which the Court interprets as covering non-executive directors, or as referring to the executive management of a credit institution. In paragraph 61, the Court finds:

"The reference to the '[effective direction] of the business of the institution' seems conceptually closer to 'executive functions' and the responsibility for the 'day-to-day management' of the credit institution, referred to in Article 3(1)(9) of Directive 2013/36 in connection with senior management, than with the 'oversee[ing] and monitor[ing] [of] management decision-making', which Article 3(1)(8) of the directive entrusts to the management body in its supervisory function."

Turning to the legislative history, the Court notes that the four eyes principle had been an authorisation requirement since the First Banking Directive (FBD) of 1977 but CRDIV has changed.

⁵ First plea: by equating 'effective direction' with 'senior management', the ECB had altered the meaning of legislative provisions; second plea: erroneous interpretation of which functions qualify as 'effective director'; third plea; the separation of supervisory and executive functions does not restrict 'effective direction' to executive functions; alternative, fourth plea: a board's chairman may exercise other executive functions than the CEO function; summarised in paragraph 31 and elaborated in paragraphs 41-43 and 95 of the judgment.

⁶ [Article 13\(1\) CRD IV](#) and [Article L. 511-13 CMF](#).

For the Court, “the structure of the wording of Article 13(1) of [CRD IV] develops moving from a reference which can apply to all the members of the management body to a reference intended to designate only the members involved in the institution’s senior management” (paragraph 66), concluding (in paragraph 67) “that the textual and historical interpretations of Article 13(1) of CRD IV tend rather to imply that the expression ‘two people who effectively direct the business of the institution’ must be understood as referring to the members of the management body who are also part of the senior management of the credit institution.”

As the textual and historical interpretation is insufficient, a teleological and contextual interpretation is needed. Here, the Court finds no support in the recitals of CRD IV or its predecessors for the objective of the four eyes principle. Wider governance issues are, however, alluded to in the preamble to CRD IV, notably recitals 53, 54 and 57. These refer to weaknesses in corporate governance and to the need for checks and balances and oversight of management decision-making. Non-executive directors are called upon to constructively challenge the strategy of the institution and to scrutinising the performance of management. The silence on the objective of Article 13 is countered by explicit intentions on corporate governance, notably in [Article 88 CRD IV](#). In paragraph 79, the Court sides with the ECB and the Commission:

It necessarily follows that, in the general scheme of Directive 2013/36, the objective relating to good governance of credit institutions on which the applicants attempt to pin their interpretation of Article 13(1) of that directive requires effective oversight of the senior management by the non-executive members of the management body, which necessitates checks and balances within the management body. It is clear that the effectiveness of such oversight may be jeopardised if the chairman of the management body in its supervisory function, while not formally acting as chief executive officer, is also responsible for the effective direction of the business of the credit institution.

Thus where, in the past, the FBD and the CRDs of 2000 and 2006, “may be understood as authorising the joint appointment as ‘effective directors’ of the chief executive officer and the chairman of the management body in its supervisory function, for the purpose of allowing a ‘second pair of eyes’ in the management of the credit institution, such an interpretation cannot be followed in respect of [CRD IV], as that directive lays down specific rules concerning good governance of credit institutions, which preclude, in principle, the chairman of the management body in its supervisory function from being also responsible for the effective direction of the business of the credit institution.” (paragraph 80) The different governance structures between Member States, with unitary or dual board structures, do not undermine this conclusion. In paragraph 83, the Court concludes that “the expression ‘two persons [who] effectively direct the business of the ... institution’ refers to the members of the management body who are also part of the senior management of the credit institution.”

The Court then turns to Article L. 511-13 CMF (paragraphs 84-92). Here, following established case law, the national courts are followed, notably the *Conseil d’État* in its ruling on the ACPR Position. Only when expressly authorised to have responsibility for the general management can the chairman of the board be an ‘effective director’ but not in normal circumstances. Thus, the ECB was right in reading ‘effective director’ as directors with executive functions, like the (deputy) CEO, the members of the executive board or the sole managing director (paragraph 90). Only members of the

management body who are also part of the senior management may be appointed as ‘persons [who] effectively direct the business of the institution’ in the meaning of Article 13 CRD IV or the second paragraph of Article L. 511-13 CMF.

Finally, the fourth plea by applicants, alleging that the ECB erred in its interpretation of Article L. 511-58 CMF, is rejected. The French legal provision is slightly broader in scope than its EU counterpart but not incompatible with it. The ECB thus adopted a decision that was consistent with Article 88(1)(e) CRDIV.

RS, 17 May 2018