

Judgments of the General Court of 13 July 2018 in Cases T-733/16,T-745/16,T-751/16,T-757/16,T-758/16,T-768/16 [not yet available in English]; [ECLI:EU:T:2018:476](https://eur-lex.europa.eu/eli/tj/2018/476)

On the eve of *quatorze juillet* 2018, the French public holiday, the General Court gave judgment in six cases which the French banking industry had instituted against the ECB. It found that the ECB had misused its discretion in the application of a CRR provision permitting a zero-weighting for certain assets in the calculation of the leverage ratio.

At issue were the so-called *Livret A* and *Livret de Développement Durable et solidaire* (LDD) accounts, special tax-exempt savings accounts regulated by [Articles L-221-1 to 221-9](#) of the *Code Monétaire et financier* (CMF), the French legislation in the field of money and finance. The amounts received by banks on such savings accounts need to be held at the [Caisse des dépôts et consignations](#) (CDC), a French public financial institution. Each of the banks had requested the ECB to authorise them to exclude from the calculation of the leverage ratio the exposures consisting of the sums pertaining to these special regulated products held with it, which they were required to transfer to the CDC pursuant to Article L-221-7 of the CMF. The discretionary power of the ECB, as the supervisor of the French banks contesting its decision, is contained in [Article 429\(14\) CRR](#)¹.

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Five pleas were brought against the ECB's refusal to authorise the deduction of the amounts in question from the calculation of the leverage ratio: the banks submitted that the contested decision was vitiated by lack of competence and, in the alternative, it was vitiated, respectively, by errors of law, manifest errors of assessment, a breach of certain general principles of the EU law and lack of motivation.

Please, note that references in this summary are to the paragraphs in the judgment in Case T-745/16; other judgments have slightly different numbering, as indicated below.

After an examination of the history of the provision and its literal, contextual and teleological meaning, the Court rejects the plea of lack of competence. However, it finds for the plaintiffs when assessing the reasoning by the ECB for its refusal to allow non-deduction of the sums deposited with the CDC. During the proceedings, the ECB had confirmed that the sole situation in which the CDC would not be able to pay back the relevant sums that it had contemplated in its decision, was the

¹ Article 429(14) CRR reads as follows:

“14. Competent authorities may permit an institution to exclude from the exposure measure exposures that meet all of the following conditions:

(a) they are exposures to a public sector entity;
(b) they are treated in accordance with Article 116(4);
(c) they arise from deposits that the institution is legally obliged to transfer to the public sector entity referred to in point (a) for the purposes of funding general interest investments.”

default of the French State. The Court found that “the ECB cannot rely on grounds rendering practically inapplicable in practice the possibility offered by Article 429(14) [CRR], without depriving that provision of any useful effect and misunderstanding the objectives that led to its introduction” (paragraph 76). By so deciding, the ECB had excluded from the benefit of Article 429 (14) the very exposures to the CDC covered by this provision. Moreover, it was clear to the Court “that the ECB merely pointed out the mere possibility of a default by the French State without examining the plausibility thereof” (paragraph 87). “[T]o the extent that the ECB has not examined the likelihood of a default by the French State, the emphasis in [its decision] on the [banks’] volume of exposures to the CDC cannot, in itself, justify the inclusion of those exposures in the calculation of the leverage ratio”, since “[t]hat volume can only be relevant in the event that, by reason of a default by the French State, the [banks] cannot obtain from the CDC the sums transferred in respect of the regulated savings and should resort to forced sales of assets” (paragraph 88). The ECB’s “reasoning that excludes, in fact, any possibility of granting a request based on Article 429 (14) [CRR]” (paragraph 91) makes the decision vitiated by an error of law.

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The Court then analyses the risk against which the leverage ratio seeks to protect, namely a shortage of liquidity which would lead a bank to fire sales of its assets. In the context of the different approach between the applicants and the ECB of the diverse periods of repayment of the funds (by the CDC to a French bank, and by a French bank to a saver), the Court refers to the [Commission’s Delegated Regulation on the Liquidity Coverage Ratio](#) (LCR)². This legal act permits banks, with supervisory approval, to exclude from the LCR “interdependent inflows” that are received within 10 days and have been guaranteed by the central government of a Member State (Article 26). The ECB’s apparent “grant of the benefit of Article 26 of [Delegated Regulation 2015/61] to the cash inflows and outflows related to CDC exposures is equivalent to an acknowledgment by the ECB that the period likely to separate them is not at the origin of a liquidity risk”. Once the ECB recognizes that the period of time that separates these flows does not involve a liquidity risk, this undermines the ECB’s reliance on this very element in its approach to the leverage ratio. The ECB has committed a manifest error and, moreover, has failed as good administrator (the principle of good administration)³ since, as the Court sets out in paragraphs 105-109, “the ECB, in the contested decision, did not carry out a detailed examination of the characteristics of regulated savings products, but merely indicated in an abstract manner the risks involved in the period for adjusting

² Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 to supplement Regulation (EU) No 575/2013 of the European Parliament and the Council with regard to liquidity coverage requirement for Credit Institutions, OJ L 11/1, 17.1.2015.

³ Guaranteed by Article 41 of the [Charter of Fundamental Rights of the European Union](#), not relied on by parties in this case or referred to by the Court.

the positions of the applicant and of the CDC". The contested decision is declared unlawful and annulled (paragraphs 111 and 112).

The above summary is based on the French text of the decision as, at the time of writing (3 January 2019), an English translation was not yet available. It should be noted that, in seven instances, the decision has been redacted for confidential information, which makes an assessment of the judgment harder to make. In this very French case, Finland has intervened.

René Smits, 3 January 2019

European Case Law Identifier	Case number	No. of paras	Applicant
ECLI:EU:T:2018:471	T-768/16	89	<i>BNP Paribas</i>
ECLI:EU:T:2018:472	T-758/16	89	<i>Crédit agricole SA</i>
ECLI:EU:T:2018:473	T-757/16	113	<i>Société générale</i>
ECLI:EU:T:2018:475	T-751/16	120	<i>Confédération nationale du Crédit mutuel</i>
ECLI:EU:T:2018:476	T-745/16	114	<i>BPCE</i>
ECLI:EU:T:2018:477	T-733/16	120	<i>La Banque postale</i>