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Short note on the *Arkéa* judgments

1. Introduction

On 13 December 2017, the General Court gave two judgments in cases instituted by *Crédit Mutuel Arkéa* (*Arkéa*) against the European Central Bank (ECB). Both cases concerned a SREP decision adopted in respect of the *Crédit Mutuel* group, of which *Arkéa* forms a part, in recent times an unwilling part because of a dispute between it and the central body of this group of French cooperative banks, the *Confédération Nationale du Crédit Mutuel* (CNCM) and another group of mutual banks (the *CM11–CIC* group). It should be noted that several other judicial and administrative bodies have been involved in the on-going strife[1] within the *Crédit Mutuel* group: the *Autorité de la Concurrence* (the French national competition authority)[2], the *Tribunal Administratif de Rennes* and the French *Conseil d'État*[3], the *Tribunal de Grande Instance de Paris and* the *Cour d'Appel de Paris*[4]. Recent developments seem to imply an immediate rupture as *Arkéa* chairman Jean-Pierre Denis is reported to have proposed to the Board to leave the CNCM[5].

The existence of two, largely identical judgments derives from the fact that the applicant has acted against the ECB's SREP decision of 5 October 2015 (Case T-712/15), which was the result of review by the Administrative Board of Review (ABoR) of a SREP decision of 17 June 2015, and, subsequently, proceeded against a further ECB decision of 4 December 2015 (Case T-52/16). Textual differences of the two judgments reflect this but, by and large, the judgments are identical. In this note, references are to the judgment in Case T-712/15 (the numbers of paragraphs in Case T-712/15 jump with one digit to those in Case T-52/16). In its decision of 4 December 2015, the ECB lowered the own funds requirement imposed on the applicant from 11% to 10.75%. This summary of the judgments focuses on the judgment[6] in Case T-712/15 which, as said, largely coincides with the decision[7] in Case T-52/16. As of today, these judgments are available in French only. ***Disclosure***: I have been a voting member in the ABoR review proceedings.

[1] Called "La guerre des Crédits Mutuels" by a French information service on banking CBanque.
[2] See: *Décision n° 16-D-30 du 21 décembre 2016 relative à des pratiques de la Confédération Nationale du Crédit Mutuel dans le secteur bancaire.* The AdlC declared the complaint by *Arkéa* against the CNCM and the CM11-CIC group for allegedly entering into anti-competitive agreements and carving up markets inadmissible.
[3] In proceedings in which the CNCM requested, and was granted, an injunction against Arkéa to provide it with data for the establishment of a group-wide recovery and resolution plan.
[4] This appeals court is reported to have declared invalid the procedure by which the CNCM was to convert from an "*association*" into a cooperation and, then, to request authorisation from the ECB as a credit institution. However, the CNCM has a different reading of this recent (16 January 2018) judgment.
[5] *La Tribune on-line*, 17 January 2018: *Big bang en vue : Arkéa se prépare à quitter le Crédit Mutuel*.
[6] ECLI:EU:T:2017:900.
[7] ECLI:EU:T:2017:902.

First, here are the seven most important points I deduce from this case, which is under appeal.

1. The role of ABoR's Opinion in the assessment of the ECB's second decision confirmed

The Court strongly confirms the role of ABoR as it imputes to the ECB the reasoning in ABoR's Opinion when the second decision is in line with this Opinion, and assesses the ECB's motivation for this second decision also on the basis of the ABoR Opinion (paragraphs 49 and 50). The Court extensively quotes (paragraphs 9-11) and endorses (paragraphs 51; 70; 120; 130-131; 147-148; 157-158) ABoR's findings. Notably, when referring to the ECB's reasons to effect consolidated supervision of the *Crédit Mutuel* group through the CNCM, the Court notes: "that, if the reasons for which the ECB decided to organize consolidated supervision of the *Crédit Mutuel* group through the CNCM are not explicitly stated in the contested decision, the [ABoR] provided grounds on this point, which have been transcribed in paragraphs 8 to 10 above." (paragraph 51).

2. Objectives pursued by consolidated supervision identified

These ends are: to enable the ECB to understand the risks likely to affect a credit institution which does not originate from it, but from the group to which it belongs; and: to avoid a fragmentation of the prudential supervision of the entities who make up these groups by different supervisory authorities (paragraphs 59, 61 and 64).

3. A central body of a group in the sense of Article 10 CRR does not have to be a credit institution

Neither the SSM Regulation nor the CRR require that a central body qualifies as a credit institution (paragraphs 107 and 151).

4. Sanctioning power vis-à-vis a central body absent in the SSM Regulation

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The ECB does not have sanctioning powers vis-à-vis a central body under the SSM Regulation (paragraphs 89-92). The Court quotes ABoR's consideration that it is not necessary for the ECB to have the complete arsenal of supervisory or sanctioning powers over the parent entity of a group to exercise prudential supervision on a consolidated basis (paragraph 9).

5. Supervisory discretion to grant a waiver (or not) when Article 10(1) CRR's conditions are met

An individual waiver remains a discretionary power even when the conditions laid down in Article 10 CRR are fulfilled (paragraphs 67 and 100).

6. Even potential risks identified by the ECB may justify imposing an extra own funds requirement

Article 97 CRD IV grants supervisory authorities the power to impose extra guarantees in relation to "risks to which the institutions are *or might be* exposed"; this necessarily entails the possible taking into account of future events likely to alter their risk profile (paragraph 167).

7. Article 16 SSM Regulation: wide powers for the ECB

"(…) it follows from a joint reading of Article 16 (1) (c) and (2)(a) of the [SSM Regulation] that, in the event that prudential examinations carried out by the ECB show that the own funds and liquidity held by a credit institution do not ensure sound management and risk coverage, the ECB is entitled to require a credit institution to go beyond these minimum requirements" (paragraph 168).

"the purpose for which the powers referred to in Article 16 (2) of the [SSM Regulation] were conferred on the ECB, as stated in paragraph 168 above, can in particular be found in the need to remedy a situation in which the own funds and liquidity of a credit institution do not ensure sound management and risk coverage" (paragraph 212).

2. The General Court's judgment

Admissibility

The ECB's stance that the appeal is inadmissible is rejected (paras 26-41). The ECB had invoked no less than three grounds for the action's inadmissibility:

1) the appeal request had been signed by the *président du conseil d'administration* (chairman of the board) instead of by the *directeur général* (chief executive), a formal defect that has subsequently been remedied;
2) the applicant would only have standing to attack the part of the decision concerning itself, to which the Court answers that, as the ECB considers *Arkéa* to be "an entity belonging to the *Crédit Mutuel* group for which the ECB has decided to exercise prudential supervision on a consolidated basis through the CNCM, it must be considered as directly and individually concerned"; and
3) *Arkéa* had no interest in the proceedings as the decision it attacks had been replaced by a second decision, as the bank had a CET1 ratio above the level required by the SREP decision and as it had never contested supervision through the CNCM when previously supervised by the ACPR. The Court rejects these pleas of inadmissibility: the abrogation of a decision does not deprive an applicant from its right to challenge it in court as such abrogation only has effect for the future (works *ex nunc*) and not retroactively (*ex tunc*), as a quashing by the court itself might; any annulment of the second decision would place the applicant under the previous situation (that of the earlier decision), so that *Arkéa* has an interest in having the first decision judicially quashed; and, irrespective of its attitude vis-à-vis the ACPR in the past, *Arkéa* has an interest in acting against the decision which holds that *Arkéa* belongs to the *Crédit Mutuel* group and is to be supervised through the CNCM, as *Arkéa* considers that it needs to be supervised directly by the ECB.

Teleological and textual interpretation of Article 2(21)(c) SSM Framework Regulation

The Court finds that *Arkéa* actually attacks the lawfulness of Article 2(1) of, and Annex I to, the SREP decision by which the ECB organizes consolidated supervision of the *Crédit Mutuel* group through the CNCM. *Arkéa* argues that the CNCM is not a credit institution and cannot, therefore, be subject to prudential supervision by the ECB. Also, *Arkéa* argues that the ECB wrongly assumes the existence of a 'group' for prudential purposes. Furthermore, Arkéa challenges the imposition of an own funds requirement at 11% as going beyond the ECB's powers under Article 16(1)(c) and (2)(a) SSM Regulation.

The Court rejects the ECB's approach that the applicant's arguments constitute a recognition on the part of *Arkéa* that it should come under direct ECB supervision.

The role of ABoR's Opinion in the assessment of the ECB's second decision confirmed

The Court remarks that the ECB may not have included a motivation for the supervision of the *Crédit Mutuel* group through the CNCM but that the ABoR has provided reasoning which the Court summarised in paragraphs 9 and 10 of its judgment: The ABoR had recalled, first, that the ECB had qualified the *Crédit Mutuel* group as a significant group and had identified *Arkéa* as a member of this group of which the CNCM constituted the highest level of consolidation. It had further considered that the SSM Framework Regulation (468/2014; ECB/2014/17) and the Capital Requirements Regulation (575/2013; CRR) do not define the concept of a 'central body' and that such a body does not have to be a credit institution, referring to a CEBS Guideline[8]. As a third consideration, the ABoR had considered that it was not necessary for the ECB to have the complete arsenal of supervisory or sanctioning powers

[8] CEBS guidelines regarding revised Article 3 of Directive 2006/48/EC, 18 November 2010.

over the parent entity of a group to exercise prudential supervision on a consolidated basis. Fourthly, the ABoR recalled that the French supervisory authority had supervised the group on a consolidated basis through the CNCM. The ABoR considered the *Crédit Mutuel* group to meet the conditions of Article 10(1) CRR, to which the Framework Regulation refers. The ABoR found that the fact that the CNCM is an '*association*' does not prevent there to be joint and several liability with affiliated institutions; moreover, the annual accounts are drawn up on a consolidated basis and the ECB was right to assume that the CNCM can issue directions to affiliated institutions.

With a reference to the *L-Bank* judgment[9], the Court reaffirms the role of ABoR's Opinion in assessing the reasoning underlying the ECB's subsequent (second) decision: "Since, in so far as the ECB, in the contested decision, ruled in a manner consistent with that of the opinion of the ABoR, which is part of the context of the contested decision, it must be considered that the ECB has made the reasons given in that opinion its own and that the merits of the contested decision may be examined in the light of these grounds."[10]

The legislative intention behind provisions of SSM Framework Regulation and the CRR

The Court then quotes the provisions at issue here of the Framework Regulation[11] and the CRR[12] and recalls its settled case law that the law is to be interpreted on the basis of the wording, the context and the objectives pursued by the provisions at issue.

Consolidated supervision serves two ends, according to the Court: to enable the ECB to understand the risks likely to affect a credit institution which does not originate from it, but from the group to which it belongs[13]; and: to avoid a fragmentation of the prudential supervision of the entities who make up these groups by different supervisory authorities. In paragraph 64 of the judgment, the Court summarises this perspective as: "the intention of the legislator to allow the ECB to have a global view of all risks likely to affect a credit institution as well as to avoid a splitting of the prudential supervision between the ECB and the national authorities."

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[9] Judgment of 16 May 2017 in Case T-122/15 (**Landeskreditbank Baden-Württemberg — Förderbank v ECB**); ECLI:EU:T:2017:337.

[10] « *Or, dans la mesure où, dans la décision attaquée, la BCE a statué dans un sens conforme à celui de l'avis de la commission de réexamen, lequel fait partie du contexte de la décision attaquée, il doit être considéré que la BCE a fait siens les motifs figurant dans ledit avis et que le bien-fondé de la décision attaquée peut être examiné à la lumière desdits motifs.* » (paragraph 51)

[11] Article 2(21)(c): "(21) 'supervised group' means any of the following: (…) (c) supervised entities each having their head office in the same participating Member State provided that they are permanently affiliated to a central body which supervises them under the conditions laid down in Article 10 of Regulation (EU) No 575/2013 and which is established in the same participating Member State;"

[12] *Article 10* **Waiver for credit institutions permanently affiliated to a central body**

1. Competent authorities may, in accordance with national law, partially or fully waive the application of the requirements set out in Parts Two to Eight to one or more credit institutions situated in the same Member State and which are permanently affiliated to a central body which supervises them and which is established in the same Member State, if the following conditions are met:

(a) the commitments of the central body and affiliated institutions are joint and several liabilities or the commitments of its affiliated institutions are entirely guaranteed by the central body;

(b) the solvency and liquidity of the central body and of all the affiliated institutions are monitored as a whole on the basis of consolidated accounts of these institutions;

(c) the management of the central body is empowered to issue instructions to the management of the affiliated institutions. (…)"

[13] With a reference to recital 26 of the preamble to the SSM Regulation.

The intentions behind Article 10 CRR (**Waiver for credit institutions permanently affiliated to a central body**) are clear from its wording: to enable the supervisory authority to exempt credit institutions affiliated to a central body that supervises them (all within the same Member State) from all or certain requirements under the CRR (paragraph 1) or to exempt the central body itself therefrom (paragraph 2). In this case, it is not a waiver that is at issue (CRR) but the existence of a group (as the SSM Framework Regulation refers to Article 10(1) CRR): recognising the existence of a group under the SSM Framework Regulation does not imply granting a waiver under Article 10 CRR. The ECB is free to derive from the fulfilment of the conditions of Article 10(1) CRR that a group exists (Article 2(21)(c) SSM Framework Regulation) and that it should supervise it on a consolidated basis without granting a waiver from prudential standards on an individual basis to the group entities. Having thus concluded on the interplay between the CRR and the SSM Framework Regulation, the Court finds that only the objectives of the SSM Framework Regulation are relevant for interpreting this legal act (paragraph 70).

The Court then asks whether the CEBS Guideline to which the ABoR referred is a relevant element of the legal context for the interpretation of the SSM Regulation and the CRR conditions to which it refers. Recalling the CESB Guideline's origins (the legislator had requested it to provide guidance)[14] and the identity between Article 10 CRR and the preceding legal provision applicable on which CEBS had issued its Guideline, the Court finds that the Guideline can form part of the legal context for Article 2(21)(c) SSM Framework Regulation. But an administrative authority's interpretation cannot bind the Union judiciary. Moreover, the CEBS Guideline served the purposes of the predecessor to Article 10 CRR, which was to authorize a waiver from prudential requirements on an individual basis as long as they are respected within the group whereas, here, the objectives of the SSM Framework Regulation provision are determining. Even when the Union judiciary may take into account the CEBS Guideline, no authority can be attributed to the latter (paragraphs 77-78).

Does consolidated supervision of establishments affiliated to a central body depend on the status of the central body as a credit institution?

No less than thirty paragraphs (79-109) are devoted to *Arkéa*'s argument that a central body needs to be a credit institution for the provisions at issue to be applied (i.e., for the group to be supervised on a consolidated basis by the ECB acting through the CNCM).

The Court remarks that, while *Arkéa* argues that Article 127(6) TFEU and the SSM Regulation concern the supervision of *credit institutions*, it failed to invoke the illegality of the SSM Framework Regulation in case this is interpreted as allowing the central body not to be a credit institution (paragraph 81).

Arkéa had argued that the restriction to credit institutions of Article 127(6) TFEU and the SSM Regulation implies that the SSM Framework Regulation's provision needs to be interpreted as requiring

[14] The Court refers to recital 2 of the preamble to Directive 2009/111/EC:
"Article 3 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions [OJ L 177, 30.6.2006, p. 1.] allows Member States to provide for special prudential regimes for credit institutions which are permanently affiliated to a central body since 15 December 1977, provided that those regimes were introduced into national law by 15 December 1979. Those time limits prevent Member States, especially those which acceded to the European Union since 1980, from introducing or maintaining such special prudential regimes for similarly affiliated credit institutions which were set up on their territories. It is therefore appropriate to remove the time limits set out in Article 3 of that Directive, in order to ensure equal conditions for competition between credit institutions in Member States. The Committee of European Banking Supervisors should provide for guidelines in order to enhance the convergence of supervisory practices in this regard."

a central body to be a credit institution. Taking the triple route of text, context and objectives again[15], the Court finds that Article 2(21)(c) does not mention the quality of a central body as a credit institution, contrary to Article 2(21)(a), which concerns a group whose parent is a credit institution.

As to the teleological interpretation, the Court refers to paragraph 64 of its judgment (summarised above). The closeness of institutions and the mutual solidarity which may imply risks for other affiliated institutions when one of them fails argue for the qualification as a "supervised group", irrespective of whether the central body is a credit institution. Following *Arkéa*'s analysis would imply that different institutions affiliated to a central body which does not have the status of a credit institution but which do satisfy the conditions of Article 10(1)CRR, would, depending on their individual importance, be either subject to ECB's sole supervision or fall under the direct supervision of the NCAs; this would lead to a splitting of prudential supervision contrary to the aims of both the SSM Regulation and the SSM Framework Regulation.

As for the context, the Court acknowledges that the SSM Regulation does not provide for the imposition of sanctions on a central body. The SSM Regulation makes the ECB competent to impose sanctions on credit institutions, financial holding companies, mixed financial holding companies and mixed-activity holding companies. Yet, consolidated supervision adds to but does not replace supervision on an individual basis. And, the Court concludes: "the impossibility for the ECB to exercise such powers vis-à-vis a central body lacking the quality of a credit institution does not constitute a barrier to prudential supervision, provided that the ECB is able to make use of its prerogatives vis-à-vis the entities affiliated with the central body" (paragraph 93). Thus, Article 2(21)(c) cannot be interpreted as implying, in itself, that a central body has the quality credit institution.

But: does this requirement (of a central body being a credit institution) derive from Article 10(1) CRR? *Arkéa* argued, based on Article 11(4) CRR[16] and on Article 10(1)(b) CRR[17] that the CRR requires a central body to be a credit institution? The Court rejects reading of Article 11(4) as an additional condition for the waiver of Article 10 since there is no reference in the former to the latter provision and because of the logic of the two: observance of Article 11(4) *follows* the application of Article 10(1) CRR. The Court recalls that it is not asked to assess the merits of a waiver but the existence of a group in the sense of Article 2(21)(c) SSM Framework Regulation – a provision that does not refer to Article 11 CRR. Even if the difficulty for a central body to observe the provisions mentioned in Article 11(4) CRR were a valid reason to deny a waiver under Article 10(1) (which the supervisory authority may refuse even when the conditions of Article 10 have been met), this does not affect the ECB's power to supervise a group. At this stage, the Court only needs to establish whether "the solvency and liquidity of the central body and of all the affiliated institutions are monitored as a whole on the basis of consolidated accounts of these institutions". For this, consolidated group accounts and the supervision of solvency and liquidity based thereon are needed. The Court endorses the CEBS Guideline, which said that a central body does not have to be a credit institution since the fulfilment of the two criteria suffice for prudential supervision of the group. Neither CRR provision invoked requires the central body to be a credit institution.

[15] « *une interprétation littérale, téléologique et contextuelle* » : paragraph 85.

[16] "4. Where Article 10 is applied, the central body referred to in that Article shall comply with the requirements of Parts Two to Eight [i.e., the provisions on Own Funds, Capital Requirements, Large Exposures, Exposures to Transferred Credit Risk, Liquidity, Leverage, and Disclosure by Institutions, RS] on the basis of the consolidated situation of the whole as constituted by the central body together with its affiliated institutions."

[17] One of the three conditions for a waiver: "(b) the solvency and liquidity of the central body and of all the affiliated institutions are monitored as a whole on the basis of consolidated accounts of these institutions;".

Is Crédit Mutuel a group in the sense of Article 2(21)(c) or Article 10(1)? – Article 10(1)(a) CRR[18]

First, Arkéa invokes the absence of own funds at the CNCM and its inability to be jointly and severally liable with the affiliated institutions to claim that the first condition[19] of Article 10(1) CRR has not been met. Provisions of French law (*Code civil français*, *Code monétaire et financier*) are invoked to substantiate this claim. Settled case law implies, for reasons of the uniform application of EU law and the principle of equality, that Union law, in so far as it does not refer to national law, is to be interpreted autonomously and uniformly. Since the CRR does not define the concepts of "joint and several liability" and "guarantee" by reference to the laws of the Member States, it must be considered that they are autonomous concepts of Union law.

ABoR's reference to the CEBS Guideline is again invoked: CEBS rightly considered that different types of guarantees could be envisaged and that there should be no obstacles to the speedy transfer of own funds or liquidity within the group so that the commitments vis-à-vis creditors of the central body and the affiliated institutions would be met and the group as a whole should be able to provide the necessary support. The Court does not endorse the second element of the CEBS Guideline as it is considered to mix up the requirements of [currently] Article 10(1)(a) (**Waiver for credit institutions permanently affiliated to a central body**) and Article 7(1)(a) CRR (**Derogation from the application of prudential requirements on an individual basis**)[20]. *Arkéa*'s interpretation would run counter to the objectives of Article 2(21)(c) SSM Framework Regulation: the Court recalls that the ECB should be able to address risks for a credit institution that do not emanate from itself but from the group to which it belongs – whichever form the mutual support takes, the transfer of own funds and liquidity within a group to support a failing establishment affect the credit institution so that the ECB should be able to apply consolidated supervision. The objectives underlying Article 2(21)(c) SSM Framework Regulation and the text of Article 10(1) sub a) CRR allow the Court to conclude that the condition of the latter provision is met when there is an obligation to transfer own funds and liquidity within the group to ensure that obligations towards creditors are fulfilled.

For the application of these findings in this specific case, the Court refers to the ABoR's five findings[21]. As for the ABoR's reference to the *Code Monétaire et Financier*, the Court recalls that national law is to be interpreted in accordance with national jurisprudence but that, in the absence thereof, the Court itself needs to interpret it. The text of the relevant French provision (Article L.511–31)[22] is found to be

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[18] Paragraphs 111-140 of the judgment.

[19] "(a) the commitments of the central body and affiliated institutions are joint and several liabilities or the commitments of its affiliated institutions are entirely guaranteed by the central body;" (Article 10(1) CRR).

[20] "(a) there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by its parent undertaking;" (Article 7(1) CRR).

[21] First, the wording of Article L.511-31 of the *Code Monétaire et Financier*; secondly, the unconditional obligation of intervention of the CNCM for the benefit of the *caisses* in difficulty from the CNCM Decision No 1-1992 of 10 March 1992; thirdly, the availability of resources from the CNCM and the CCCM that could be mobilize; fourthly, the CCCM Statutes; and, fifthly, the fact that in the past exceptional assistance has been provided to troubled entities (paragraph 131).

[22] *« Les organes centraux représentent les établissements de crédit et les sociétés de financement qui leur sont affiliés auprès de la Banque de France et de l'Autorité de contrôle prudentiel et de résolution.*
Ils sont chargés de veiller à la cohésion de leur réseau et de s'assurer du bon fonctionnement des établissements et sociétés qui leur sont affiliés. À cette fin, ils prennent toutes mesures nécessaires, notamment pour garantir la liquidité et la solvabilité de chacun de ces établissements et sociétés comme de l'ensemble du réseau. (…) »
"The central bodies represent the credit institutions and finance companies affiliated with them at the *Banque de France* and the ACPR. They are responsible for ensuring the cohesion of their network and for ensuring the proper functioning of the institutions and companies affiliated with them. To this end, they take all necessary measures, in particular to guarantee the liquidity and solvency of each of these institutions and companies as well as the entire network. (…)" (my translation, RS)

insufficient: it is too general to infer the obligation to transfer own funds and liquidity within the group to satisfy creditors' claims. The Court finds the joint and several liability mechanism, adopted in the *Crédit Mutuel* group by a decision of the CNCM of 10 March 1992, to comply with the CRR condition at issue; even while the ECB may highlight weaknesses in this mechanism in its SREP decision, it could validly conclude that the mechanism fulfils this condition for considering *Crédit Mutuel* a group.

Is Crédit Mutuel a group in the sense of Article 2(21)(c) or Article 10(1)? – Article 10(1)(b) CRR[23]

According to *Arkéa* the second condition[24] of Article 10(1) CRR to consider *Crédit Mutuel* a group has not been satisfied either. Among its arguments is that the ABoR wrongly concluded from Article L.511–20 of the *Code Monétair et Financier*[25] that this provision only applies within the CMF context and does not extend to application of the CRR. As the Court already found, this second condition hinges on the existence of consolidated account and the consolidated supervision of the group on the basis of these accounts. Again, the Court refers to the ABoR's findings and endorses these. ABoR had relied on L.511–31 of the *Code Monétaire et Financier* and on the articles of association of the CNCM. The Court itself examines these points and finds that condition b) is fulfilled, even if the CNCM is not a credit institution.

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Is Crédit Mutuel a group in the sense of Article 2(21)(c) or Article 10(1)? – Article 10(1)(c) CRR[26]

Arkéa argued that the CNCM cannot give instructions to affiliated institutions and, hence, the third condition[27] of Article 10(1) CRR is not fulfilled, drawing on its reading of the *Code Monétair et Financier*. The Court, again, extensively quotes the ABoR's findings. In paragraph 158, it quotes the ABoR finding that, under Article L.511-31 of the *Code Monétair et Financier*, the CNCM may "they take all necessary measures, in particular to guarantee the liquidity and solvency of each of these institutions and companies as well as the entire network"; and ABoR's finding that the CNCM is "to ensure the application of the laws and regulations specific to these institutions and companies and to exercise administrative, technical and financial control over their organization and management"[28]. The ABoR also referred to the obligation to follow instructions from the CNCM[29], again based on the *Code Monétaire et Financier*, and on the latter's sanctioning powers[30]. In the next paragraph, the Court

[23] Paragraphs 141-153 of the judgment.

[24] "(b) the solvency and liquidity of the central body and of all the affiliated institutions are monitored as a whole on the basis of consolidated accounts of these institutions;"

[25] « *Les établissements et sociétés de financement affiliés à un réseau et l'organe central au sens de l'article L. 511-31 sont considérés comme faisant partie d'un même groupe pour l'application du présent code.* »
"The institutions and finance companies affiliated to a network and the central body within the meaning of Article L. 511-31 are considered to be part of the same group for the purposes of this Code." (my translation, RS)

[26] Paragraphs 154-161 of the judgment.

[27] "(c) the management of the central body is empowered to issue instructions to the management of the affiliated institutions."

[28] Article L.511-31 *Code Monétaire et Financier* : « (…) *Ils veillent à l'application des dispositions législatives et réglementaires propres à ces établissements et sociétés et exercent un contrôle administratif, technique et financier sur leur organisation et leur gestion. Les contrôles sur place des organes centraux peuvent être étendus à leurs filiales directes ou indirectes, ainsi qu'à celles des établissements et sociétés qui leur sont affiliés.* (…) »

[29] Article R.512–20 *Code Monétaire et Financier* : *« [Les caisses de crédit mutuel (…)] doivent s'engager à respecter les statuts, règlements intérieurs, instructions et décisions de la Confédération nationale du crédit mutuel et de la fédération régionale à laquelle elles doivent adhérer conformément aux dispositions de l'article L. 512-56.* »
"[Mutual credit unions (...)] must undertake to respect the articles of association, by-laws, instructions and decisions of the National Confederation of Mutual Credit and of the regional federation to which they must adhere in accordance with the provisions of Article L. 512-56." (my translation, RS)

[30] Article R.512–24 *Code Monétaire et Financier* : *« Le conseil d'administration de la Confédération nationale du crédit mutuel peut prendre à l'égard d'une caisse qui enfreindrait la réglementation en vigueur l'une des sanctions suivantes : 1° L'avertissement ; 2° Le blâme ; 3° La radiation de la liste des caisses de crédit mutuel. »*

summarises these ABoR findings as follows: (1) the obligation of the CNCM to ensure, in particular, the liquidity and solvency of the group and the entities that make up the group, and compliance with legislative and regulatory requirements; (2) an obligation for affiliated institutions to respect the instructions of the CNCM; and (3) a sanctioning power of the CNCM with regard to these entities. The Court concludes that the third condition of Article 10(1)CRR "must therefore be regarded to be fulfilled". In the following paragraph, the Court refers to the interpretation of Article R.512–20 of the *Code Monétaire et Financier* in a decision[31] of the French *Conseil d'État*.

The lawfulness of the imposition of additional own funds requirements

Before examining the arguments put forward by the applicant, the Court recalls the relevant provisions, including Articles 97 (**Supervisory review and evaluation**) and 129 (**Requirement to maintain a capital conservation buffer**) CRD IV. Specifically, the Court gives an interpretation of Article 16 (1) (c) and (2) (a) of the SSM Regulation. The Court states "(…) it follows from a joint reading of Article 16 (1) (c) and (2)(a) of the [SSM Regulation] that, in the event that prudential examinations carried out by the ECB show that the own funds and liquidity held by a credit institution do not ensure sound management and risk coverage, the ECB is entitled to require a credit institution to go beyond these minimum requirements."

Additionally, the Court makes mention of the ECB's concerns for *Arkéa* which led it to impose additional capital requirements – these concerns mainly relate to a possible exit from the *Crédit Mutuel* group. *Arkéa* contested the imposition of additional own funds as unlawful because of the improbability of an exit from the group, as disproportionate in relation to this eventuality and as a sanction in disguise.

The Court makes short shrift with the first argument, relying on the text of Article 97 CRDIV which tasks competent authorities with the evaluation of "risks to which the institutions are *or might be* exposed". Therefore, basing the imposition of extra requirements on the possible occurrence of a future event, the ECB has not committed an error at law. Whether the ECB made an error of assessment in taking into account the, according to *Arkéa*, very improbable split in the *Crédit Mutuel* group, is judged by the Court applying the usual deference to EU institutions faced with complex appraisals. Judicial control then focuses on "whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the 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"[32]. In particular, the motivation of the decision is to scrutinised. The Court sides with *Arkéa* in finding that its leaving the *Crédit Mutuel* group requires amending provisions of the *Code Monétaire et Financier*. But these very provisions permit the expulsion of the applicant from the group and its striking off from the list of *caisses de credit mutuel*. Also, the applicant did not contest that there has been a long-time dispute which pits it against the CM11–CIC group and the CNCM. In view of "this situation of particular discord between the applicant, the CNCM et the CM11–CIC group"[33], the occurrence of *Arkéa* quitting is not so unlikely that taking it into account amounts to a manifest error on the part of the ECB[34].

"The Board of directors of the National Confederation of *Crédit Mutuel* may take against any *caisse* that contravenes the regulations in force any of the following sanctioning measures: (1) a warning; (2) a reprimand; (3) deletion from the register of *Crédit Mutuel* credit unions."

[31] Decision 13 December 2016.

[32] Paragraph 179, referring to paragraph 55 of the judgment of 6 November 2008 in Case C-405/07 P (*Netherlands v Commission*), from which this English translation is taken.

[33] « *cette situation particulièrement conflictuelle entre le requérant, la CNCM et le groupe CM11–CIC* ».

[34] Paragraphs 176-189 of the judgment.

The Court[35] only assesses two of the three reasons the ECB has invoked for requiring *Arkéa* to hold more own funds: (1) the change in its liquidity risk profile and (2) the calculation of own funds that an exit from the *Crédit Mutuel* group would entail. Leaving the group would not entail loss of the group guarantees since there is no joint and several liability mechanism, according to the applicant, an argument that the Court rejects with reference to its finding that there *is* such a mechanism. *Arkéa*'s claim that any deterioration in its credit rating would hardly affect it because of it is intrinsically sound is rejected on the basis of a credit rating agency report on *Arkéa* that the ECB brought into the proceedings which links *Arkéa*'s standing to that of the group and which attaches importance to the group solidarity mechanism. Again, the ECB has not made a manifest error of assessment.

As to the transition from an Internal Ratings Based (IRB) approach (Articles 142-191 CRR) to a standardised approach (Articles 111-141 CRR) that an exit from the group would entail, the effect of
10 which the applicant had sought to play down, the Court notes that a credit institution needs supervisory permission to apply the IRB approach and, then, discusses the proportionality of the ECB's measure. Referring to standard case law on the proportionality test[36] and to case law on the balancing of the proportionality test with the discretion accorded to an EU institution[37], the Court applies the tests to the ECB requirement of more own funds for *Arkéa*. Uncontested between the parties is that applying the standard approach to the solvency calculation would reduce its level of own funds. The Court finds that imposing additional own funds to deal with such an event is not the result of a manifest error nor is it manifestly disproportionate.

Finally, the argument that the SREP decision contained a sanction in disguise is dealt with[38]. *Arkeá* accuses the ECB of "*détournement de pouvoir*" (misuse of powers). Citing settled case law[39] and very

[35] In paragraphs 190-207 of the judgment.

[36] Paragraph 165 of the judgment of 4 May 2016 in Case C-547/14 (*Philip Morris Brands and Others – Tobacco Directive*): "According to settled case-law, that principle requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

[37] Paragraph 145 of the judgment of 12 December 2006 in Case C-380/03 (*Germany v Parliament and Council – Tobacco Advertising II*), which partially reads as follows: "(…) the Community legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue (…)"

[38] In paragraphs 208-214 of the judgment.

[39] Paragraph 24 of the judgment of 13 November 1990 in Case C-331/88 (*Fedesa*), which partially reads as follows: "a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.", and paragraph 38 of the judgment of 10 May 2005 in Case C-400/99 (*Italy v Commission*): "The concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it (see, in particular, Case 817/79 *Buyl and Others v Commission* [1982] ECR 245, paragraph 28). A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent facts, to have been taken for purposes other than those stated (see, in particular, Joined Cases 18/65 and 35/65 *Guttmann* [1966] ECR 103, at 117)."

old case law (1954)[40], more recently confirmed[41], the Court refers, again, to Article 16(2) SSM Regulation as having as legislative objective the need to remedy a situation in which the own funds and the liquidity of a credit institution do not ensure sound management and risk coverage. The Court finds that the ECB has used its powers for these ends. Arkéa failed to bring in objective, relevant and consistent indications of an intention to impose the level of own funds in order to sanction it.

3. Appeal

The applicant indicated that it intends to lodge an appeal against the judgment[42], arguing that the ECB is not competent to supervise *Arkéa* through the CNCM[43] as this is only an association. *Arkéa* refers to the ECB's insistence vis-à-vis CNCM to transform itself into a credit institution and refers to on-going litigation before the Paris Appeal Court. The press release insists on *Arkéa*'s right to leave the *Crédit Mutuel* group. No information on an appeal against the General Court's judgment before the Court of Justice is as yet available on the *Curia* website.

René Smits, 19 January 2018

[40] Case 2/54 (*Italy* v *High Authority*), [1954] ECR 37, page 54.

[41] Paragraph 87 of the judgment of 21 September 2005 in Case T-87/05 (*EDP v Commission*), which partially reads as follows: "Where more than one aim is pursued, even if the grounds of a decision include, in addition to proper grounds, an improper one, that would not make the decision invalid for misuse of powers, since it does not nullify the main aim (Case 2/54 *Italy* v *High Authority* [1954] ECR 37, 54, and, to that effect, Case T-266/97 *Vlaamse Televisie Maatschappij* v *Commission* [1999] ECR II-2329, paragraph 131)."

[42] In its press release of the same day of the judgment: « *Le Crédit Mutuel Arkéa conteste l'interprétation des textes européens faite par le Tribunal de l'Union Européenne et va se pourvoir devant la Cour de Justice de l'Union Européenne, considérant que : 1. La BCE n'est pas fondée à superviser le Crédit Mutuel Arkéa via la CNCM qui n'est qu'une association. 2. Le Crédit Mutuel n'est pas un groupe au sens des règles européennes applicables. La BCE a d'ailleurs récemment, et à plusieurs reprises, rappelé à la CNCM la nécessité de se transformer en établissement de crédit. Sur ce point essentiel, le Crédit Mutuel Arkéa a obtenu en première instance une décision favorable confirmant l'impossibilité pour la CNCM de se transformer en société ayant vocation à devenir établissement de crédit sans l'accord du Crédit Mutuel Arkéa. La Cour d'Appel de Paris saisie d'un recours formé par la CNCM, contre ce jugement, devrait rendre sa décision dans les prochaines semaines.* » ("*Crédit Mutuel Arkéa* disputes the European Court's interpretation of European texts and will appeal to the Court of Justice of the European Union, considering that: 1. The ECB is not justified in supervising *Crédit Mutuel Arkéa* via the CNCM which is only an association. 2. *Crédit Mutuel* is not a group within the meaning of the applicable European rules. All the while the ECB has recently, and on several occasions, reminded the CNCM of the need to transform itself into a credit institution. On this essential point, *Crédit Mutuel Arkéa* obtained at first instance a favorable decision confirming the impossibility for the CNCM to transform itself into a company with the purpose of becoming a credit institution without the agreement of *Crédit Mutuel Arkéa*. The Paris Court of Appeal, before which an appeal lodged by the CNCM against this judgment is pending, should take a decision in the coming weeks").

[43] The CNCM itself issued a press release on the occasion of the General Court judgments, calling out that « *L'organe central du Crédit Mutuel confirmé, dans sa forme juridique et dans l'ensemble de ses prérogatives, par la justice européenne* » ("The central body of *Crédit Mutuel* confirmed, in its legal form and in all its powers, by the European judiciary").