Summary of *ECB v Crédit Lyonnais*

At Issue: Whether the ECB decision to exclude certain exposures from the calculation of Crédit Lyonnais' leverage ratio was vitiated by a manifest error of assessment and should be annulled. The Court of Justice of the EU (hereinafter Court of Justice) also rules on the standard of judicial review of the EU courts and the scope of discretion of the EU institutions.

1. Background of the dispute

Crédit Lyonnais is a subsidiary of Crédit Agricole S.A. and is subject to the direct prudential supervision of the ECB. In 2015, Crédit Lyonnais applied to the ECB for authorisation to exclude certain exposures to the Deposit and Loans Fund (*Caisse des dépôts et consignations*, CDC).[1]

In 2016, the ECB refused to grant Crédit Agricole the authorisation. The General Court of the EU (General Court) annulled the refusal decision.[2] As a result, in 2018, Crédit Agricole again applied to the ECB for authorisation to exclude the exposures to the CDC.[3]

By decision of 3 May 2019, 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.[4] By contrast, Crédit Lyonnais was allowed to exclude only 66% (hereinafter the ECB decision).

The main reason the ECB put forward for limiting the authorisation was that the exposures to the CDC of entities subject to its prudential supervision pose a low risk. However, the ECB held that, in the case of Crédit Lyonnais, there was still a prudential risk which had to be taken into consideration by limiting to 66% the exclusion of those exposures from the exposure measure for the purposes of calculating Crédit Lyonnais's leverage ratio.[5]

In reviewing the request for an exemption, the ECB, on the basis of the discretion it enjoyed under Article 429(14) of the Capital Requirements Regulation (CRR)[6] to grant the exemption, applied a methodology including three elements:

(1) There was a risk of fire sales of assets;

(2) There was a high and increasing concentration of the exposures of Crédit Lyonnais to the CDC linked to regulated savings; and

(3) The creditworthiness of the French central government,[7] which was, in the ECB's view, of relevance to determine whether, in the event of the CDC's default and withdrawals made by depositors of regulated savings passbooks, the French government would be in a good position to repay to the entities under prudential supervision the amounts transferred to the CDC corresponding to such deposits.[8]

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[1] *Caisse des dépôts et consignations* (Deposit and Loans Fund, France) (CDC).
[2] T-758/16 Crédit Agricole v ECB, 13 July 2018, ECLI:EU:T:2018:472.
[3] C-389/21 P European Central Bank v Crédit lyonnais, 4 May 2023, ECLI:EU:C:2023:368 (hereinafter Court of Justice judgement), para 14.
[4] ECB (2019). Decision ECB-SSM-2019-FRCAG-39 of the European Central Bank (ECB) of 3 May 2019 (hereinafter ECB Decision).
[5] Court of Justice judgement, para 90.
[6] 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 (L 176/1) (hereinafter Capital Requirements Regulation or CRR).
[7] Court of Justice judgement, para 17.
[8] Court of Justice judgement, para 17.

The ECB, taking into account the three above-mentioned elements and the fact that the credit institution is not covered by the joint and several liability mechanisms existing at the group level,[9] concluded that a balance between the interest in applying a risk-neutral leverage ratio and the interest in exempting certain low-risk exposures justified granting only the 66% of the bank's exposures.[10]

1. Legal proceedings before the General Court

Crédit Lyonnais brought an action for annulment of the ECB Decision in 2019. The credit institution alleged three pleas:

(1) The ECB failed to meet the judgment of the General Court,[11] thereby infringing Article 266 TFEU;[12]

(2) The ECB infringed Article 429(14) and Article 400(1)(a) of the CRR;[13] and

(3) There was a manifest error of assessment on the part of the ECB in refusing Crédit Lyonnais' request to exclude the 100% of its exposure to CDC from the calculation of its leverage ratio.

The General Court agreed with Crédit Lyonnais that the ECB had committed a manifest error of assessment in not accepting the exclusion of the entirety of Crédit Lyonnais' exposure to CDC form the calculation of its leverage ratio and annulled the ECB decision.[14]

In its ruling, the General Court examined the methodology applied by the ECB and the ECB's reasoning as to the assessment of the risk of fire sales of assets. First, the General Court held that the ECB did not take into account, when assessing the risk of fire sales, the special qualities of regulating savings passbooks in line with well-established case-law.[15] For that reason, the General Court ruled that the ECB decision was vitiated by "illegality" and should be annulled.

Second, the General Court held that, "assuming they are not unlawful", the concentration of exposures to the CDC and the creditworthiness of the French central government are two aspects of the methodology applied by the ECB that could not have led the ECB to refuse to grant Crédit Lyonnais the benefit of the exclusion for the entirety of that credit institution's exposures to the CDC.[16]

2. Appeal before the Court of Justice

The ECB appealed the General Court's ruling and raised four grounds of appeal:

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[9] Court of Justice judgement, para 18.
[10] T-504/19 *Crédit Lyonnais v European Central Bank* 14 April 2021 ECLI:EU:T:2021:185 (hereafter General Court judgement), para 90.
[11] General Court judgement T-758/16 *Crédit Agricole* v *ECB* (13 July 2018, EUEU:T:2018:472.
[12] Article 266 of the TFEU reads "The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union."
[13] Article 400(1)(a) states that: "asset items constituting claims on central governments, central banks or public sector entities which, unsecured, would be assigned a 0 % risk weight under Part Three, Title II, Chapter 2".
[14] General Court judgement, paras 123-125.
[15] The General Court explictly mentioned T-758/16 *Crédit agricole* v *ECB,* EU:T:2018:472, para 81.
[16] General Court judgement, para 126, citing points 2.2.1 and 2.2.3 of the ECB decision.

(1) The General Court exceeded its authority in the exercise of judicial review when assessing the lawfulness of the ECB decision;

(2) The adequacy of the statement of reasons of the General Court judgement;

(3) The EUCG distorted the evidence that the ECB submitted to the course of the legal proceedings; and

(4) The General Court misinterpreted articles 4(1)(94) and 429(14) of the CRR.

3. The AG's Opinion

The AG's Opinion analyses the four grounds of appeal submitted by the ECB to the Court of Justice:

(1) Whether the standard of judicial review applied by the General Court when assessing the ECB decision to set the level of exposures to CDC in the calculation of Crédit Lyonnais's leverage ratio at 34% exceeded the limits of its judicial review;[17]

(2) Whether the General Court breached its duty to state reasons as it did not properly explain why the ECB's assessment on the dual State guarantee over regulated savings;

(3) The alleged distortion of the evidence that the ECB had been submitted to the General Court in the course of the legal proceedings; and

(4) The General Court's interpretation of Articles 4(1)(94) and 429(14) of the CRR.

The Advocate General places value on the first plead submitted by the ECB.

The ECB argued that the General Court's ex-novo assessment of the characteristics of regulated savings breaches the standard of judicial review set out in well-established case-law. In particular, the ECB argued that it enjoys "broad leeway" to assess complex economic situations and article 429(14) of the CRR grants to the ECB such as discretionary power to exclude certain exposures from the calculation of the leverage ratio. Consequently, acts adopted in the exercise of discretionary power are subject to limited judicial review.[18]

3.1 Preliminary remarks: EU institutional framework, ECB prudential supervision, discretion, standard of review, and manifest error of assessment

According to the AG, one of the main issues to be resolved in the instant legal proceedings is the standard of judicial review of EU courts. In the AG's view, the standard of judicial review of EU courts raises an important issue of a constitutional nature.

The AG held that the proper intensity of judicial review can be determined by examining the margin of discretion enjoyed by the ECB on prudential matters.[19] To establish this, the AG considered that some guidance may be derived from the general rules and principles of EU institutional law.[20]

Therefore, the AG conducted a preliminary examination of the EU institutional framework, the powers of the ECB in relation to prudential matters, and the standard of judicial review by the EU

[17] AG's Opinion, paras 25 and 26.
[18] Case C-389/21 *P European Central Bank (ECB) v Crédit Lyonnais*, Opinion of Advocate General Emiliou, 27 October 2022, (hereinafter AG's Opinion), ECLI:EU:C:2022:844, paras 27-28.
[19] AG's Opinion, para 3.
[20] AG's opinion, paras 33-129.

courts in accordance with the key provisions of the Treaties that establish the limits of powers conferred on them to EU institutions, as well as the key principles of EU institutional system.[21]

First, the AG referred to the *principle of institutional balance* enshrined in Article 13(2) of the Treaty on the European Union (TEU). This provision enables the EU institutions to exercise their powers within the limits of its mandate and observing the powers of other institutions.[22]

In the case of the ECB, their decisions of the EU institutions, including the ECB, are presumed to be lawful and produce legal effects. This derives from articles 132 of the Treaty on the Functioning of the European Union (TFEU) and 34 of the Statutes of the European System of Central Banks (ESCB) and the ECB.[23] Both provisions entrust the ECB to "take decisions necessary for carrying out the tasks entrusted to the ESCB under the Treaties and the Statute of the ESCB and of the ECB".

Therefore, the role of the Court of Justice is to "review the legality" of the ECB's decisions in line with articles 19(1) of the TEU and 35 of the ESCB and the ECB Statute.[24]

Second, the AG examines the ECB's powers on prudential supervision. He held that the ECB enjoys a margin of discretion to make decisions on prudential matters. Some specific tasks include the power to ensure compliance with the acts which impose prudential requirements on credit institutions in the area of, for example, leverage.[25] At the same time, the CRR sets out a binding leverage ratio, preventing banks from financing too large a portion of their activities with debt.[26] In this regard, the ECB "may" permit an institution to "exclude" some exposures from the leverage ratio.[27] In other words, the ECB enjoys discretion to permit or refuse the exclusion of certain exposures from the calculation of the leverage ratio.[28]

Third, the AG noted that Article 263 of the TFEU[29] sets out the *scope* of judicial review to be conducted by the Court of Justice but it does not establish the *standard* of judicial review to be applied by the EU courts.[30] According to the AG, "some form of judicial restraint by the judiciary vis-à-vis the administration" in cases where the latter (e.g., the ECB) "enjoys a margin of discretion exists in every legal system".[31]

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[21] Id.

[22] Article 13(2) of the TEU reads: "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation."

[23] Article 34 of the ESCB and the ECB Statutes provides that: "34.1. In accordance with Article 132 of the Treaty on the Functioning of the European Union, the ECB shall: – make regulations to the extent necessary to implement the tasks defined in Article 3.1, first indent, Articles 19.1, 22 or 25.2 and in cases which shall be laid down in the acts of the Council referred to in Article 41; – take decisions necessary for carrying out the tasks entrusted to the ESCB under these Treaties and this Statute; – make recommendations and deliver opinions.
34.2. The ECB may decide to publish its decisions, recommendations and opinions.
34.3. Within the limits and under the conditions adopted by the Council under the procedure laid down in Article 41, the ECB shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions."

[24] AG's Opinion, paras 33-35. Article 35(1) of the ESCB and the ECB Statutes establishes that: "The acts or omissions of the ECB shall be open to review or interpretation by the Court of Justice of the European Union in the cases and under the conditions laid down in the Treaty on the Functioning of the European Union. The ECB may institute proceedings in the cases and under the conditions laid down in the Treaties."

[25] Article 4(1)(d) and (3) of Regulation No 1024/2013.

[26] AG's Opinion, para 39.

[27] Article 429(14) of Capital Requirements Regulation, then in force.

[28] AG's Opinion, paras 36-40.

[29] Article 263 of the TFEU states that: "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the […] of the European Central Bank […]"

[30] AG's Opinion, paras 41-42.

[31] AG's Opinion, para 45.

At the same time, the AG stressed that the principles of institutional balance and separation of powers also prevent the judiciary to set aside and replace every decision taken by the administration.[32] Conversely, the intensity of judicial review by the EU courts depends on the "degree of deference" accorded to the body in question: [33] the higher the degree of *discretion* granted to an EU institution to choose between various lawful courses of action, the lower the intensity of the judicial review.

To determine the degree of discretion of an institution, the AG distinguishes between policy discretion and technical discretion. Policy discretion confers the EU institutions "greater latitude" to balance out policy considerations (political, economic and social choices) and choose the most appropriate course of action to meet the objective which the competent institution is seeking to pursue. [34]

Technical discretion comprises a complex technical assessment of a situation (e.g., economic, scientific) that needs to be subsumed in a legal concept.[35] Since relevant factual background "*cannot*" be established with "*absolute certainty"* because relevant elements of complex situations are inherently "uncertain, speculative or subjective",[36] the particular institution needs to use some models, make assumptions and value-judgements to identify the facts and determine the legal consequences.[37] Hence, the intensity of the review will then depend on the level of interference with the right invoked by the applicant.

In particular, the AG states that when EU institutions decide on the most appropriate course of action on policy grounds (policy discretion), a manifest error may arise if the measures adopted are "manifestly inappropriate" to achieve the objective the institution aims to pursue.[38] Hence, the EU courts can "censure" an institution *only* in the event of manifest errors, in both policy discretion and technical discretion situations.[39]

The AG concluded that in both policy discretion and technical discretion situations, an error of assessment *only* arises where the conclusions drawn by the institution in question, e.g., the ECB, are not reasonable, i.e., "no longer justifiable in the light of the factual and evidential position. That is, when, despite the institution's margin of discretion, no reasonable basis for its decision can be discerned".[40]

3.2 First plea: potential manifest error of assessment

As regards the first plea, the AG examined whether the ECB decision was "manifestly erroneous", and, consequently, the General Court correctly rejected the ECB decision on the basis of factually accurate, reliable and consistent information, or, as argued by the ECB, the Court carried out an

[32] Id.
[33] AG´s opinión, paras 42-44.
[34] AG's Opinion, paras 47, 66.
[35] AG's Opinion, para 48, 68.
[36] AG's Opinion, para 66.
[37] AG's Opinion, para 49-50.
[38] AG's Opinion, paras 47-48, 54.
[39] AG's Opinion, para 56.
[40] AG's Opinion, para 55: the AG held that in "technical discretion" situations, judicial review comprises the examination whether the evidence "relied on is factually accurate, reliable and consistent" and "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"; and para 62, citing Opinion of AG Kokott in C-441/07 *P Commission v Alrosa*, 17 September 2009, EU:C:2009:555, para 84 ("conclusions drawn by the Commission are
no longer justifiable in the light of the factual and evidential position, that is to say if no reasonable basis can be discerned.").

ex novo assessment disregarding the margin of discretion which EU law entrusted the ECB on prudential matters.

The AG concluded that the General Court carried out an intrusive form of review of certain elements of the analysis made by the ECB, trying to replace the ECB's assessment with one of its own without providing adequate reasoning and evidence of probative value.[41]

In its analysis, the AG disagreed with the General Court's review on the basis of the following aspects:[42]

(1) The ECB enjoys a wide margin of discretion under Article 429(14) of the CRR;

(2) The alleged "safe nature" of regulated savings did not preclude depositors from withdrawing their funds during a period of stress of the credit institution or if they fear that the credit institution is not "healthy";[43]

(3) The General Court failed to indicate whether regulated savings relating to Crédit Lyonnais could be deemed to have a *particular low risk*;

(4) The ECB duly considered the risk of default of the French government, taking into account the low rating given by an external credit rating body while the General Court did not take any position to disprove the ECB's argument;

(5) The General Court's argument as to the liquidity of regulated savings is incomplete;

(6) The ECB's mention of recent banking crisis intends to illustrate the speed with which massive withdrawals may take place, are in line with prudential assessment of risk that materialized in the past, and with the overall objective of ensuring the soundness and stability of financial institutions by limiting their leverage; and

(7) Paragraph 126 of the General Court judgement appears to 'step in the shoes' of the ECB, ignoring that institution's broad margin of discretion with regard to substantive assessments under Article 429(14) of the CRR.[44]

In the AG's view, the EU legislature "delegates certain powers to the institutions", including the ECB, and "determines the limits within which they can exercise those powers".[45] Thus, in its Opinion, the AG examined the wording and objectives of the relevant provisions, i.e., Article 429(14) of the CRR.[46]

First, the AG considered that Article 429(14) of the CRR grants the ECB both policy discretion and technical discretion to the ECB. Thus, the ECB enjoys a wide margin of manoeuvre to grant or refuse the exclusion of certain exposures to the calculations of the leverage ratio.[47]

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[41] AG's Opinion, paras 125-127.
[42] AG's Opinion, paras 81-129.
[43] AG's Opinion, paras 89-95.
[44] General Court judgement, para 126, stated that: "Having regard to the methodology used by the ECB it should be found that […]– concerning the creditworthiness of central government and the level of concentration of exposures to the CDC respectively, assuming they are not unlawful, do not amount to grounds for the refusal issued to the applicant. On the basis of that methodology, had those grounds alone been taken into consideration the ECB would not have refused to grant the applicant the full benefit of the derogation under Article 429(14) of Capital Requirements Regulation."
[45] AG's Opinion, para 67.
[46] AG's Opinion, para 81.
[47] AG's Opinion, para 82.

On the one hand, the ECB can determine the appropriate level of risk that can be acceptable given that Article 429(14) of the CRR stated that the ECB "may" authorize the exemption (policy discretion). [48] On the other hand, the ECB shall conduct a technical complex assessment of the risk of leverage that may be considered acceptable (technical discretion). In conducting the technical assessment, the ECB needs to apply uncertain value-judgements and predictions.[49]

According to the AG, in situations of great uncertainty, such as the one at hand, the interference with economic freedom of the banks may yield to the objective of granting the soundness of credit institutions and the protection of investors and creditors.[50] Since the ECB enjoys a rather broad margin of discretion, it may decide to stay on the safe side and apply the relevant provisions strictly (i.e., Type I errors [false positives leading to excessive strictness] are less consequential than Type II [false negatives leading to excessive leniency] errors).[51]

Consequently, the AG concluded that the margin of discretion that the ECB enjoys in assessing the relevant circumstances and the quantum of an exemption under Article 429(14) of the CRR is broad. Consequently, in the AG's view, the judicial review should not be "*too intrusive*" in relation to the substantive elements of the ECB decision (e.g., the "appropriate level of protection from the risks of excessive leverage", the "identity and weight of the elements taken into consideration to establish such a risk", or the "choices made in borderline situations"), to the point of bargaining in the margin of discretion conferred by law.[52]

Second, the AG emphasized that the General Court looked at the general features of regulated savings, but it did not examine the specific regulated savings corresponding to Crédit Lyonnais. Thus, the AG agreed with the ECB that the General Court "focused on the *probability* of massive withdrawals occurring within a short period of time", disregarding "the *consequences* which the materialisation of that risk could have on the financial situation of Crédit Lyonnais, given the level of its exposure to CDC".[53]

In conclusion, the AG held that the General Court failed to establish that the ECB made an unreasonable application of Article 429(14) of the CRR and its *ex novo* assessment of Crédit Agricole's request for exemption bursts in the margin of discretion that the EU legislature delegates to the ECB.[54]

3.3 Second plea: potential breach of the duty to state reasons

The ECB argues that the existence of the dual State guarantee over regulated savings did not prevent a risk of massive withdrawals by savers and the General Court did not provide reasons to justify otherwise.[55] The AG found this ground of appeal unfounded.

The AG agreed that the statement of reasons in relation to the importance of the dual State guarantee to prevent the risk of fire sales of assets by the credit institution is "short" and "non-explicit".[56]

However, the AG considered that the General Court took the view that "the existence of a dual State guarantee with regard to regulated savings made bank runs in respect of those savings

[48] AG's Opinion, para 82.
[49] AG's Opinion, para 83: e.g., the number of deposits that could be expected to be withdrawn, or whether the power of disposal of funds of the bank can reasonably cover unexpected losses in case of a bank run.
[50] AG's Opinion, para 85.
[51] AG's Opinion, para 86.
[52] AG's Opinion, para 87.
[53] AG's Opinion, para 126.
[54] AG's Opinion, paras 127-129.
[55] AG's Opinion, paras 130-134.
[56] AG's Opinion, para 133.

unlikely."[57] Thus, determining whether there is sufficient evidence to support the General Court's view is a matter of the *substance* of the General Court's analysis, not its *adequacy*.[58]

3.4 Third plea: potential distortion of evidence

The AG did not agree with the ECB that the General Court distorted the sense of the example used in the ECB decision regarding the recent banking crisis. The ECB's evidence was indented to illustrate the potential consequences of the materialization of the risk of massive withdrawals rather than making it a condition for the assessment of the risk.[59]

The AG considered that the term "distortion" entails a wrong interpretation of the document that "manifestly" goes beyond the limits of a reasonable assessment of the evidence.[60]

Considering the foregoing, the AG disagreed with the ECB. He held that the errors made by the General Court lie in the "manner" in which the General Court conducted the review rather than in the "end result" of the General Court's review.[61] In other words, the General Court *ex novo* assessment of the General Court paid little attention to the conclusions and methodology applied by the ECB, but one cannot conclude that there are substantive findings clearly incorrect on the basis of the documentation included in the case file.[62]

3.5 Fourth plea: potential misinterpretation of the definition of "risk of excessive leverage" (Article 4(1)(94)) and depravation of the margin of manoeuvre (Article 429(14))

The AG disagreed with the ECB that the General Court wrongly examined the definition of "risk of excessive leverage" envisaged in Article 4(1)(94) of the CRR as it incorrectly added some criteria (the freedom to use any deposits or the possibility of investing in illiquid or risky assets) which are not included in the provision.[63]

The AG held that the General Court did not misapply the provision, but it only held that, in its view, the ECB failed to having regard to certain characteristics of regulated savings in its assessment. For that reason, the General Court concluded that the ECB "had wrongly examined the circumstances that were relevant for the granting of the exemption."[64]

Regarding Article 429(14) of the CRR, the ECB argued that General Court's interpretation of this provision deprived the margin of discretion granted by this provision to the ECB to evaluate the exposures that can be exempted from the calculation of the leverage ratio.[65]

Crédit Lyonnais argued that the margin of manoeuvre of the ECB has not been undermined given that it would have been entitled to refuse the application of the exemption (in whole or in part) for other types of deposits (e.g., the regulated savings which had no State guarantees, or had it proven the likelihood that the State could actually default).[66]

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[57] AG's Opinion, para 133.
[58] AG's Opinion, para 134.
[59] AG's Opinion, para 137.
[60] AG's Opinion, paras 141-142.
[61] AG's Opinion, paras 142-144.
[62] AG's Opinion, paras 143-144.
[63] Article 4(1)(94) of the CRR states that: the "risk of excessive leverage" comprises "the risk resulting from an institution's vulnerability due to leverage or contingent leverage that may require unintended corrective measures to its business plan, including distressed selling of assets which might result in losses or in valuation adjustments to its remaining assets."
[64] AG's Opinion, para 151.
[65] AG's Opinion, para 151.
[66] AG's Opinion, para 148.

The AG agreed with Crédit Lyonnais that the General Court's findings concerned one specific type of deposit did not undermine the ECB's leeway to make decisions in relation to other types of deposits.[67]

3.6 Final considerations

The AG leaved to the Court of Justice to examine the correct standard of judicial review in relation to: (1) the margin of manoeuvre the ECB enjoys in applying the methodology it deems adequate to assess the exemption of certain exposures (third part of the first plea); and (2) the alleged manifest error of assessment of the creditworthiness of the French government (first part of the third plea).

The AG added that neither the ECB decision was not unreasonable nor there was any manifest error in the assessment of the ECB to grant a partial exemption under Article 429(14) of the CRR.[68]

In the AG's view, the ECB considered how the specificities of regulated savings could impact on prudential matters, as it used a methodology that took into account the specific characteristics of regulated savings, the existence of a dual State guarantee, the risk of default of the French government, and whether massive withdrawals of deposits from savers would "sufficiently large and sudden" to justify the risk of fire sales of assets.[69]

Regarding the assessment of the creditworthiness of French government, the AG proposed to dismiss the application for annulment brought by Crédit Lyonnais. The AG stated that it is true that external credit rating bodies did not give the French government a high rating. However, the possible risk of default by the French State is one more relevant reason,[70] but not the only one, justifying a partial exemption of exposures. In this regard, the AG highlighted that the ECB gave a full exemption in relation to regulated savings to other credit institutions belonging to Crédit Agricole group. [71]

4. The Court of Justice judgement

The Court of Justice, in its ruling, clarified the scope of judicial review of the EU courts. It emphasized the importance of procedural guarantees and accurate assessment of evidence. The Court of Justice examined the four grounds of appeals submitted by the ECB.[72]

The Court of Justice found, as did the AG, that the General Court substituted its own assessment for that of the ECB without demonstrating manifest errors of assessment, leading to the set aside of the judgement of the General Court.

4.1 Finding of the Court of Justice: discretion, ECB's assessment of prudential risks and scope of judicial review

First, the Court of Justice affirmed that the ECB, in their decision-making process under Article 429(14) of the CRR has a broad discretion.[73] The Court of Justice, in line with the AG's Opinion, considered that, where an EU institution enjoys a broad discretion, the role of the EU courts (i.e.,

[67] AG's Opinion, para 152.
[68] AG's Opinion, paras 161-162.
[69] AG's Opinion, para 160.
[70] AG's Opinion, paras 168-169: the AG held that it was Crédit Lyonnais who placed value on "the safe investment nature of regulated savings because of the dual State guarantee". Thus, the fact that the French government's risk of default was considered non-negligible appears to be a relevant element.
[71] AG's Opinion, paras 165-167.
[72] See section 2 above.
[73] Court of Justice judgement, para 55.

the General Court) is "not to substitute their own assessment for that of the institution" (i.e., the ECB), but to ensure that the decision is based on accurate and reliable facts, without manifest errors of assessment or misuse of powers, that the evidence contains all the relevant information which must be taken into account in order to assess a complex situation,[74] and that all the procedural guarantees have been duly observed, including careful and impartial examination of all relevant aspects relating to the dispute.[75]

The Court of Justice stated that, however, the General Court compared and concluded that:

According to the Court of Justice, the General Court carried out its own assessment of the characteristics of regulated savings passbooks and compared the characteristics of such savings with ordinary deposits in order to rule on the ECB's assessment of the risk of fire sales of assets. The General Court stated that regulated savings passbooks were unlikely to higher contribute to excessive leverage,[76] and concluded that the level of risk of fire sales of assets was not sufficiently high to justify excluding all exposures to the CDC from Crédit Lyonnais's leverage ratio calculation.[77]

However, the Court of Justice held that the General Court departed from the ECB's assessment and replaced the ECB's assessment with its own without establishing that the ECB's assessment was manifestly incorrect. According to the Court of Justice, the General Court also failed to demonstrate that the ECB did not fulfil its obligation to examine all relevant aspects of the situation. [78] In other words, the General Court did not establish a manifest error of assessment but substituted its own assessment for that of the ECB.[79] In doing so, it exceeded the scope of its judicial review.[80]

4.2 Third part of the first plea and first part of the third plea

This part of the Court of Justice judgement revolves around two main arguments argument submitted by Crédit Lyonnais: (1) the ECB's assessment of the risk of fire sales of assets by the ECB lacks a detailed analysis of the characteristics of regulated saving passbooks;[81] and (2) the ECB failed to provide sufficient evidence to support the likelihood of a default by the French government and the refusal to authorize the exclusion in accordance with Article 429(14) of the CRR.

In relation to the first point, Crédit Lyonnais claimed that regulated savings passbooks are a "safe investment" during a banking crisis due to the guarantee provided by the French government. Crédit Lyonnais disputed the ECB's reference to a hypothetical withdrawal scenario covering 10% to 30% of guaranteed deposits in less than five days, deeming it unverifiable and irrelevant.[82]

Furthermore, Crédit Lyonnais contended that regulated savings passbooks are part of a structurally balanced mechanism for balance sheets, as the deposits collected by Crédit Lyonnais correspond to debts owed to the institution by the CDC. Crédit Lyonnais argued that institutions collecting these deposits do not need to sell assets to obtain liquidity for withdrawals since the CDC is obligated to refund the withdrawn amounts. Crédit Lyonnais also asserted that the volume

[74]Court of Justice judgement, para 56, citing C-621/16 P C*ommission* v *Italy*, 26 March 2019, EU:C:2019:251, paragraph 104, and C-933/19 P *Autostrada Wielkopolska* v *Commission and Poland*, 11 November 2021, EU:C:2021:905, para 117.
[75]Court of Justice judgement, para 57.
[76]Court of Justice judgement, paras 60-61, 65-66.
[77]Court of Justice judgement, paras 60-61, 65-66.
[78]Court of Justice judgement, paras 70, 74-75.
[79]Court of Justice judgement, paras 71-72.
[80]Court of Justice judgement, paras 70, 74-75.
[81]Court of Justice judgement, para 81-87.
[82]Court of Justice judgement, para 83.

of deposits on regulated savings passbooks depends on factors beyond the institution's control and that they merely act as an intermediary between depositors and the CDC.[83]

Finally, Crédit Lyonnais referred to an EBA report of 3 August 2016 on exposures benefiting from specific legal guarantee mechanisms[84] and by Article 429a(1)(j) of amended CRR to justify that regulated saving passbooks do not expose collecting institutions to an excessive leverage risk.[85]

The ECB opposed Crédit Lyonnais' arguments. The Court of Justice determined that the ECB has a broad discretion when assessing the risk under Article 429(14) of the CRR, and the Court's review is limited to verifying that the decision is not based on incorrect facts, manifest errors of assessment, or misuse of powers.

The Court of Justice found that the ECB carried out a prudential assessment of risk for the institution subject to its supervision and concluded that, in the case of Crédit Lyonnais, there was still a prudential risk which had to be taken into consideration to excluding the 34% of exposures from Crédit Lyonnais's leverage ratio calculation.[86] The Court of Justice also affirmed that the ECB considered the potential effects of events that may or may not occur on an institution's ability to withstand potential massive withdrawals in a short period of time.[87] Thus, while Crédit Lyonnais provided evidence suggesting that regulated savings passbooks are a safe investment and that deposit levels tend to increase during banking crises, the Court of Justice concluded that these arguments, in the context of broad discretion, do not render the ECB's withdrawal scenario implausible.

As regards the deferred adjustment period between withdrawals and reimbursement by the CDC the ECB acknowledged the existence of a guarantee from the French government but it still found a risk of fire sales of assets due to the lack of an adequate time horizon.[88] The Court of Justice held that the ECB's consideration of this deferred period is within its broad discretion for assessing the relevant prudential risk and was not vitiated by a manifest error.[89]

The Court also dismissed Crédit Lyonnais' argument regarding the ECB's distinction between liquidity risk and leverage ratio assessment, noting the different time horizons linked to each calculation.[90]
The Court of Justice dismissed Crédit Lyonnais' argument that the volume of regulated savings is beyond its control on the grounds that the credit institution did not demonstrate its lack of influence over the deposits.[91]

The Court also rejected Crédit Lyonnais' references to Article 429a(1)(j) and the alleged EBA report, stating that the legislative amendment does not apply *ratione temporis* in this case.[92] Also, the Court noted that the report is not binding on the ECB recommended the exclusion for exposures other than those resulting from deposits made on regulated saving passbooks.[93] In accordance with the Court of Justice, the EBA report "makes it possible at most to note that the EBA considered that those other exposures also had a low risk profile, which corresponds, as

[83]Court of Justice judgement, paras 85-86.
[84] EBA (2016). EBA Report on the Leverage Ratio Requirements under Article 511 of the CRR.
[85]Court of Justice judgement, para 87.
[86]Court of Justice judgement, para 90.
[87]Court of Justice judgement, paras 90-91.
[88]Court of Justice judgement, paras 101-103.
[89] Court of Justice, para 106.
[90]Court of Justice judgement, para 104: "…[W]hile the liquidity requirement is intended to ensure sufficient coverage of liquidity outflows under stressed conditions over a period of 30 days, the leverage ratio, for its part, is intended to prevent an institution which is in a situation of insufficient liquidity from being forced to resort to corrective measures such as 'distressed' selling of assets under conditions of depreciation."
[91]Court of Justice judgement, para 107.
[92]Court of Justice judgement, paras 109-111.
[93]Court of Justice judgement, paras 112-113.

noted in paragraph 90 of the present judgment, to the overall assessment made by the ECB in the decision at issue as regards regulated savings passbooks."[94]

Ultimately, the Court of Justice concluded that Crédit Lyonnais did not prove that the ECB's assessment of the risk of fire sales of assets related to its exposures to the CDC is manifestly erroneous.

As regards the second point, the Court of Justice stated that the ECB's assessment of the risk of default by the French State was reasonable and based on evidence that pointed out that the risk related to the creditworthiness of the government was not negligible.

The Court of Justice noted that the ECB took into account the creditworthiness of the French State to assess the risk of default in the event of CDC defaulting on deposits made on regulated saving passbooks.[95] The ECB took the view that that risk did not, in itself, give rise to 'prudential issues' which would justify the refusal to authorize the exclusion under Article 429(14) of the CRR. [96]

However, as the Court of Justice noted, the ECB considered external credit rating agencies' ratings of the French State, which were not the highest possible, and credit default swaps implying a non-negligible probability of default for the country.[97] The ECB argued that the exposure of the institutions under its supervision to the CDC was a relevant factor in assessing the overall prudential risk associated with these institutions. The Court of Justice held "that in the present case it was for the ECB, in the context of the exercise of the broad discretion available to it, to determine whether the low risk of default on the part of the French Republic which it found, on the basis of an assessment that did not contain a manifest error, had to be taken into account for the purposes of the assessment required of it."[98]

The Court of Justice found that Crédit Lyonnais did not prove any manifest error of assessment in the ECB's assessment and, conversely, the ECB assessed the risk on the basis of "reasonable evidence".[99] Conversely, the ECB enjoyed wide discretion in ascertaining whether the low risk of default by the French State, as assessed without any manifest error, should be considered in its evaluation.

Finally, the Court of Justice rejected the second part of the third plea and dismissed the action at first instance.

Elia Cerrato García, 21st of August of 2023.

[94] Court of Justice judgement, para 113.
[95]Court of Justice judgement, para 118.
[96]Court of Justice judgement, para 119.
[97]Court of Justice judgement, para 120."Standard & Poor's, which was not 'the highest possible', and of the five-year credit default swaps, which implied 'a non-negligible probability of default [of that country].'"
[98]Court of Justice judgement, para 122.
[99]Court of Justice judgement, para 121.