Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

8 July 2020 *

(Economic and monetary policy – Prudential supervision of credit institutions – Article 18(1) of Regulation (EU) No 1024/2013 – Administrative pecuniary penalty imposed by the ECB on a credit institution – First subparagraph of Article 26(3) of Regulation (EU) No 575/2013 – Continued breach of capital requirements – Negligent breach – Retroactive application of less severe enforcement legislation – Absence – Rights of defence – Amount of the penalty – Obligation to state reasons)

In Case T-576/18,

Crédit agricole SA, established in Montrouge (France), represented by A. Champsaur and A. Delors, lawyers,

applicant,

v

European Central Bank (ECB), represented by C. Hernández Saseta, A. Pizzolla and D. Segoin, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of Decision ECB/SSM/2018-FRCAG-75 of the European Central Bank of 16 July 2018, taken pursuant to Article 18(1) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63) and imposing on the applicant an administrative pecuniary penalty of EUR 4 300 000 for continued breach of the capital requirements laid down in Article 26(3) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1, and corrigenda OJ 2013 L 208, p. 68, and OJ 2013 L 321, p. 6),

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of S. Papasavvas, President, V. Tomljenović, F. Schalin, P. Škvařilová-Pelzl and I. Nõmm (Rapporteur), Judges,

Registrar: M. Marescaux, Administrator,

* Language of the case: French.

having regard to the written part of the procedure and further to the hearing on 21 January 2020,

gives the following

Judgment

Background to the dispute

1 The applicant, Crédit agricole SA, is a French credit institution which is subject to direct prudential supervision by the European Central Bank (ECB).

2 On 22 December 2016, the ECB's investigating unit sent the applicant a statement of objections pursuant to Article 126(1) and (2) of Regulation (EU) No 468/2014 of the ECB of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities ('the SSM Framework Regulation') (OJ 2014 L 141, p. 1). The ECB claimed that the applicant had classified capital instruments as Common Equity Tier 1 ('CET 1') instruments without obtaining the prior permission of the competent authority, in breach of Article 26(3) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1, and corrigenda OJ 2013 L 208, p. 68, and OJ 2013 L 321, p. 6).

3 On 18 January 2017, the applicant submitted its written observations on the statement of objections.

4 On 2 August 2017, the ECB's investigating unit sent the applicant a draft decision in order to allow it to submit its written observations.

5 On 4 August 2017, the applicant asked the ECB for an extension of the deadline for the submission of its observations. On 7 August 2017, the ECB granted that request in part, by extending that deadline until 30 August 2017.

6 On 30 August 2017, the applicant submitted written observations on the draft decision which had been sent to it.

7 On 16 July 2018, the ECB adopted Decision ECB/SSM/2018-FRCAG-75, taken pursuant to Article 18(1) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63) and imposing on the applicant an administrative pecuniary penalty of EUR 4 300 000 for continued breach of the capital requirements laid down in Article 26(3) of Regulation No 575/2013 ('the contested decision').

8 First, the ECB made a finding of illegal conduct on the part of the applicant. It took the view that it followed from the first subparagraph of Article 26(3) of Regulation No 575/2013 that credit institutions could classify their capital instruments as CET 1 instruments only after having obtained the prior permission of the competent authority.

9 In that regard, the ECB refuted the applicant's argument based on the fact that the ordinary shares were included on the list published by the European Banking Authority (EBA) pursuant to the third subparagraph of Article 26(3) of Regulation No 575/2013 ('the list published by the EBA'). It took the view, in essence, that the presence of an instrument on that list did not exempt a credit institution from obtaining the prior permission of the competent authority pursuant to the first subparagraph of Article 26(3) of Regulation No 575/2013.

10 The ECB pointed out that, on 23 June 2015, 12 November 2015 and 21 June 2016, the applicant had carried out three issuances of ordinary shares which had a 'loyalty feature' awarding the shareholders an increased dividend for each share which they owned for a continuous period of at least two years. It criticised the applicant for having, without its permission, classified those capital instruments as CET 1 instruments in its quarterly consolidated reporting on capital and capital requirements from the second quarter of 2015 to the second quarter of 2016 and in its pillar 3 public disclosures from 30 June 2015 to 30 June 2016.

11 The ECB also recalled that, on 18 April 2016, the Joint Supervisory Team had advised the applicant of its obligation to request and obtain the permission of the ECB before classifying capital instruments as CET 1 instruments, following which the applicant had submitted, on 30 May and 22 June 2016, applications for permission relating, first, to the issuances of 23 June and 12 November 2015 and, secondly, to the issuance of 21 June 2016, respectively. The permissions were granted by the ECB on 26 July and 29 August 2016 respectively.

12 The ECB thus concluded that the applicant had failed from 30 June 2015 to 30 June 2016 to comply with Article 26(3) of Regulation No 575/2013, by classifying capital instruments as CET 1 instruments without the permission of the competent authority, and that that breach had been committed at least negligently.

13 Moreover, in the contested decision, the ECB recalled that, subsequent to the permissions which it had given, it had been informed by the EBA that ordinary shares including a 'loyalty feature' did not meet the conditions set out in Article 28(4) of Regulation No 575/2013 and could not be classified as CET 1 instruments. That led it to ask the applicant, on 1 August 2017, to take appropriate measures to render its ordinary shares fully compliant with Regulation No 575/2013.

14 Secondly, the ECB imposed an administrative pecuniary penalty of EUR 4 300 000 on the applicant on account of its illegal conduct. It emphasised that, pursuant to Article 18(1) of Regulation No 1024/2013, it had the right to impose an administrative pecuniary penalty in the event of breach of a requirement under relevant directly applicable acts of Union law in relation to which administrative pecuniary penalties were to be made available to competent authorities under the relevant Union law. It added that, pursuant to Article 18(3) of Regulation No 1024/2013, the penalties applied had to be 'effective, proportionate and dissuasive'.

15 As regards the severity of the breach, the ECB took into account the fact that the capital instruments at issue represented 67 basis points of the applicant's CET 1 ratio as of 30 June 2016 and that the breach of Article 26(3) of Regulation No 575/2013 had occurred in five consecutive quarterly reporting periods and three pillar 3 public disclosures, in 2015 and 2016. It took the view that the breach had been committed at least negligently and pointed out that the applicant had continued to classify its issuances of ordinary shares as CET 1 instruments after having been warned by the Joint Supervisory Team of the obligation to obtain its prior permission.

16 By way of a mitigating factor, the ECB took into account the fact that, following the applications which the applicant had made, it had granted it permission to classify its issuances of ordinary shares as CET 1 instruments.

17 The ECB considered that an administrative pecuniary penalty of EUR 4 300 000, representing, according to the ECB, 0.0015% of the annual turnover of the group to which the applicant belonged, constituted a proportionate penalty.

18 Thirdly, the ECB decided to publish the administrative pecuniary penalty imposed, without anonymising the applicant's name, on its website. It took the view that the circumstances highlighted by the applicant in support of its claim that such publication would seriously undermine its reputation and standing in the market were purely hypothetical, vague and generic and, therefore, did not demonstrate that that publication would cause disproportionate damage to it within the meaning of Article 132(1)(b) of the SSM Framework Regulation.

Procedure and forms of order sought

19 By application lodged at the Registry of the General Court on 25 September 2018, the applicant brought the present action.

20 Following a change in the composition of the Chambers of the Court, the case was allocated to a new Judge-Rapporteur, who was assigned to the Second Chamber, to which the present case was, consequently, allocated.

21 Acting on a proposal from the Second Chamber of the General Court, the latter decided, pursuant to Article 28 of its Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

22 Acting on a proposal from the Judge-Rapporteur, the Court (Second Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties on 13 December 2019. Each of the parties responded to the questions put by the Court, then submitted its observations on the other party's responses.

23 By decision of 6 January 2020, the President of the Second Chamber, Extended Composition, decided, after hearing the parties, to join the present case with Cases T-577/18 and T-578/18 for the purposes of the oral part of the procedure.

24 At the hearing on 21 January 2020, the parties presented oral argument and answered the oral questions put by the Court. At that hearing, the ECB was asked to respond in writing to a question from the Court and the applicant was asked to submit observations on that response. The parties complied with that request in the time allowed.

25 By decision of 2 March 2020, the Court (Second Chamber, Extended Composition) closed the oral part of the procedure.

26 The applicant claims that the Court should:

– annul the contested decision;

– order the ECB to pay the costs.

27 The ECB contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

28 In support of the action, the applicant puts forward two pleas in law.

29 The first plea in law is presented as alleging that the contested decision is ultra vires. This plea in law consists of three parts. The first part alleges infringement of Article 26(3) of Regulation No 575/2013. The second part alleges infringement of Article 18(1) of Regulation No 1024/2013 and the principle of legal certainty. The third part relates to the proportionality of the administrative pecuniary penalty imposed on the applicant.

30 By the second plea in law, the applicant claims that the ECB breached its right to be heard, in so far as it based the contested decision on objections which were not made explicit in the course of the administrative procedure.

31 As emphasised in paragraphs 8 to 18 above, the ECB, in the contested decision, first, found that there had been a breach on the part of the applicant, secondly, imposed an administrative pecuniary penalty on it as punishment for that breach and, thirdly, provided for the publication of that administrative pecuniary penalty on its website.

32 The Court takes the view that it is appropriate to distinguish between the applicant's criticisms which relate to the finding of a breach on its part and those which relate to the imposition of an administrative pecuniary penalty.

Legality of the contested decision in so far as it finds that there was a breach by the applicant

33 By the first part of the first plea in law, the applicant maintains, in essence, that, by finding that there had been a breach on its part, the ECB infringed Article 26(3) of Regulation No 575/2013. Moreover, in the first claim of the second part of the first plea in law, it takes the view that the ECB infringed Article 18(1) of Regulation No 1024/2013 by considering that it had committed a breach at least negligently. Finally, by its second plea in law, submitted in the alternative, the applicant maintains, in essence, that the conclusion that there was a breach, in the contested decision, is based on matters in respect of which it did not have the opportunity to express its views in the course of the administrative procedure, which constitutes a breach of its right to be heard.

First part of the first plea in law, alleging an error of law in the interpretation and application of Article 26(3) of Regulation No 575/2013

34 In the first part of the first plea in law, the applicant puts forward, in essence, two claims.

35 By the first claim, the applicant argues that the ECB erred in the interpretation and application of the version of the first subparagraph of Article 26(3) of Regulation No 575/2013 applicable at the time of the acts imputed to it.

36 By the second claim, submitted at the reply stage, the applicant maintains that, in any event, the acts imputed to it no longer constitute a breach, on account of the amendment made to Article 26(3) of Regulation No 575/2013 by Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (OJ 2019 L 150, p. 1). It maintains that that amendment must be taken into account by the Court since it appears to be a less severe punitive law.

– First claim, alleging an error in the interpretation and application of the version of the first subparagraph of Article 26(3) of Regulation No 575/2013 applicable at the time of the acts imputed to the applicant

37 In paragraph 3 of the contested decision, the ECB considered that the first subparagraph of Article 26(3) of Regulation No 575/2013 obliged the applicant to obtain the prior permission of the competent authority before classifying its issuances of ordinary shares as CET 1 instruments, even though that category of capital instrument was included on the list published by the EBA pursuant to the third subparagraph of that provision.

38 It should be observed that Article 26 of Regulation No 575/2013 relates to CET 1 instruments. More specifically, Article 26(3) concerns the evaluation by the competent authorities of the question of whether the instruments which credit institutions classify as CET 1 instruments satisfy the criteria in Article 28 or, where applicable, Article 29 of Regulation No 575/2013. That provision lays down a specific scheme for capital instruments.

39 Thus, the version of Article 26(3) of Regulation No 575/2013 applicable to the dispute provides as follows:

‘Competent authorities shall evaluate whether issuances of [CET 1] instruments meet the criteria set out in Article 28 or, where applicable, Article 29. With respect to issuances after 28 June 2013, institutions shall classify capital instruments as [CET 1] instruments only after permission is granted by the competent authorities, which may consult EBA.

For capital instruments, with the exception of State aid, that are approved as eligible for classification as [CET 1] instruments by the competent authority but where, in the opinion of EBA, compliance with the criteria in Article 28 or, where applicable, Article 29, is materially complex to ascertain, the competent authorities shall explain their reasoning to EBA.

On the basis of information from each competent authority, EBA shall establish, maintain and publish a list of all the forms of capital instruments in each Member State that qualify as [CET 1] instruments. EBA shall establish that list and publish it for the first time by 28 July 2013.

EBA may, after the review process set out in Article 80 and, where there is significant evidence of those instruments not meeting the criteria set out in Article 28 or, where applicable, Article 29, decide to remove non-State aid capital instruments issued after 28 June 2013 from the list and may make an announcement to that effect.’

40 Articles 28 and 29 of Regulation No 575/2013, to which Article 26(3) of that regulation refers, set out in detail the conditions which CET 1 instruments must meet. Article 28 of Regulation No 575/2013 establishes the conditions applicable to capital instruments issued by credit institutions, whereas Article 29 of that regulation concerns the conditions specific to capital instruments issued by mutuals, cooperative societies, savings institutions and similar institutions.

41 The parties have conflicting views on the interpretation of the phrase 'permission is granted by the competent authorities' which appears in the first subparagraph of Article 26(3) of Regulation No 575/2013.

42 In that regard, the applicant maintains that the permission of the competent authorities is granted by category of capital instrument and arises from the addition of the type of instrument at issue to the list published by the EBA pursuant to the third subparagraph of Article 26(3) of Regulation No 575/2013. Inasmuch as the ordinary shares were included on that list when it classified them as CET 1 instruments, it takes the view that the ECB was wrong to consider that it had breached Article 26(3) of Regulation No 575/2013.

43 In contrast, the ECB takes the view that the first subparagraph of Article 26(3) of Regulation No 575/2013 means that a credit institution must seek the prior permission of the competent authority before classifying a capital instrument as a CET 1 instrument, even though the instrument is included on the list published by the EBA. It thus concludes that it was right to consider, in the contested decision, that the applicant had breached that provision by classifying three issuances of ordinary shares as CET 1 instruments without obtaining its prior permission.

44 As the phrase 'permission is granted by the competent authorities' used in Article 26(3) of Regulation No 575/2013 is not defined by that regulation, it is necessary to interpret it.

45 According to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (see judgment of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 41 and the case-law cited).

46 With regard, first, to the wording of the first subparagraph of Article 26(3) of Regulation No 575/2013, it is apparent from that wording that the permission of the competent authority must be obtained by the credit institution before classifying its capital instruments as CET 1 instruments.

47 It should be pointed out that the methods by which that permission of the competent authority may be demonstrated cannot be deduced from the wording alone of the first subparagraph of Article 26(3) of Regulation No 575/2013, as the term 'permission' is capable of referring both to prior permission applicable to capital instruments on an individual basis and to permission granted generally, by category of capital instrument.

48 In that regard and contrary to the applicant's assertions, the fact that other provisions of Regulation No 575/2013 expressly refer to obtaining 'prior permission' from the competent authority does not necessarily imply that the use of the term 'permission' in the first subparagraph of Article 26(3) of Regulation No 575/2013 is intended to cover a different mechanism to that of prior permission.

49 It is not apparent from a reading of all of the provisions of Regulation No 575/2013 which refer to the grant of either 'permission' or 'prior permission' by the competent authority that the methods of approval by the competent authority vary according to the terminology used by those provisions. Moreover, it should be pointed out that that distinction is not of a systematic nature, since other language versions of Regulation No 575/2013 do not necessarily adopt the distinction between '*accord*' (permission) and '*autorisation préalable*' (prior permission) which appears in the French version of that regulation.

50 Similarly, the ECB is wrong to maintain that the concept of 'category of instrument' does not appear in Article 26(3) of Regulation No 575/2013. Inasmuch as the third subparagraph of that provision refers to a 'list of all the forms of capital instruments in each Member State that qualify as [CET 1] instruments', published by the EBA, Article 26(3) of Regulation No 575/2013 envisages that the eligibility of capital instruments may be examined by category. It cannot, therefore, be found that the reference to 'capital instruments' in the first subparagraph of that provision necessarily implies an examination of each capital instrument on an individual basis.

51 With regard, secondly, to the contextual interpretation of the first subparagraph of Article 26(3) of Regulation No 575/2013, the applicant refers to the second and third subparagraphs of that provision. Thus, it argues that the second subparagraph of Article 26(3) concerns an examination of the eligibility of a form of capital instrument by the competent authority along with the EBA, which results in the inclusion of that form of capital instrument on the list published by the EBA pursuant to the third subparagraph of Article 26(3). That publication by the EBA constitutes the granting of permission by the competent authority envisaged in the first subparagraph of Article 26(3) of Regulation No 575/2013. Such publication therefore implies that the instrument meets the general criteria set out in Article 28 of Regulation No 575/2013 and that it is for the credit institutions concerned to verify whether the capital instrument in question meets the individual criteria laid down in that article, with the competent authority being able to review, a posteriori, the soundness of that assessment.

52 Such an interpretation cannot be accepted.

53 On the one hand, that interpretation is incompatible with the difference in the nature of the consultation of the EBA depending on whether it is envisaged pursuant to the first or second subparagraph of Article 26(3) of Regulation No 575/2013. Whereas that consultation is presented merely as an option for the competent authorities under the first subparagraph, since those authorities 'may consult [the] EBA', the second subparagraph of that provision implies, on the contrary, systematic consultation of the EBA by the competent authorities.

54 On the other hand, following the applicant's approach would imply that compliance only with the general criteria set out in Article 28 or, where applicable, Article 29 of Regulation No 575/2013 would be checked by the competent authority prior to the classification of a capital instrument as a CET 1 instrument. As the applicant acknowledges itself, it would be for the credit institution to verify whether the issuance of a capital instrument was compliant with the individual criteria laid down by Article 28 or, where applicable, Article 29 of that regulation.

55 It must be found that such a limitation of the control of the competent authorities would be contrary to the first subparagraph of Article 26(3) of Regulation No 575/2013. It follows from that subparagraph that a capital instrument may be classified as a CET 1 instrument only after

permission is granted by the competent authorities and that the evaluation by those authorities relates to compliance with the criteria set out in Article 28 or, where applicable, Article 29 of that regulation, with no distinction being made between criteria of general and individual scope.

56 It must, therefore, be found that Article 26(3) of Regulation No 575/2013 must be interpreted as envisaging two different types of decision-making: on the one hand, a decision arising from the cooperation between the competent authorities and the EBA envisaged in the second subparagraph of Article 26(3) of Regulation No 575/2013, which concerns the eligibility of forms of capital instrument and takes the form of their inclusion on the list published by the EBA, envisaged in the third subparagraph of that provision; and, on the other hand, a decision of the competent authority, for which consultation of the EBA is merely an option, which seeks to determine whether a capital instrument meets all of the criteria set out in Article 28 or, where applicable, Article 29 of Regulation No 575/2013, whether they are of general or individual scope.

57 As a result, whilst the inclusion of a capital instrument on the list published by the EBA implies that that instrument is, in principle, eligible for classification as a CET 1 instrument, in so far as it meets the general criteria set out in Article 28 or, where applicable, Article 29 of Regulation No 575/2013, it does not, of itself, allow a credit institution to classify that instrument as a CET 1 instrument. Prior to doing so, that institution must submit that instrument to the competent authority in order for it to verify its compliance with those criteria and, in particular, the criteria of individual scope.

58 Finally, thirdly, it is necessary to take into account the intention of the legislature, when Regulation No 575/2013 was adopted, to improve the quantity and quality of capital in the banking system, as recalled in recital 1 of Regulation No 575/2013 and reiterated in recital 72 of that regulation. Recital 72, inter alia, highlights the need to further improve the quality and harmonisation of own funds that credit institutions are required to hold and refers, in that regard, to a 'strict set of criteria for the core capital instruments'.

59 It is therefore consistent with the intention of the legislature to favour the interpretation of the first subparagraph of Article 26(3) of Regulation No 575/2013 which best allows the competent authority to ensure compliance with the criteria of eligibility of an instrument for classification as the highest quality capital, namely as a CET 1 instrument.

60 It must be found that checking compliance with the criteria laid down by Article 28 or, where applicable, Article 29 of Regulation No 575/2013 is better achieved by a procedure of prior permission than by a system in which verification of compliance with certain of those criteria would fall, primarily, to the credit institution itself, with review by the competent authority being carried out only a posteriori, and not necessarily systematically.

61 The other arguments advanced by the applicant do not call into question the soundness of that conclusion.

62 That applies, inter alia, first, to the reference to the interpretation of Article 26(3) of Regulation No 575/2013 favoured by the EBA or the Autorité de contrôle prudentiel et de résolution (Authority for prudential supervision and resolution, France; 'ACPR'). In that regard, it is sufficient to recall that the interpretation of the relevant legislation by an administrative authority cannot bind the EU Courts, which have exclusive jurisdiction to interpret EU law, under Article 19 TEU (judgment of 13 December 2017, *Crédit Mutuel Arkéa* v *ECB*, T-712/15, EU:T:2017:900, paragraph 75).

63 That is also true, secondly, of the fact that the text of Article 26(3) of Regulation No 575/2013 was subsequently amended by Regulation 2019/876. In that regard, it is sufficient to emphasise that, whilst it is apparent from recital 23 of Regulation 2019/876 that the objective of that amendment was to introduce a new, clear and transparent approval process with regard to the classification of instruments as CET 1, no inference can be drawn from that as to the meaning of that provision prior to its amendment.

64 The applicant's first claim must, therefore, be dismissed.

– *Second claim, relating, in essence, to the retroactive application of the new version of Article 26(3) of Regulation No 575/2013*

65 In its reply, the applicant emphasises, in essence, that the wording of Article 26(3) of Regulation No 575/2013 was amended by Article 1(15) of Regulation 2019/876 with effect from 27 June 2019. It takes the view that, in the light of that new version of Article 26(3) of Regulation No 575/2013, its conduct no longer constitutes a breach of that provision and that, therefore, the principle of retroactive application of the less severe penalty implies that that new version of Article 26(3) of Regulation No 575/2013 is applicable to it.

66 The ECB takes the view that the present claim should be dismissed.

67 With regard, by way of a preliminary point, to the admissibility of this claim in so far as it was submitted at the reply stage, it should be observed that, whilst Article 84(1) of the Rules of Procedure provides that, in principle, no new plea in law may be introduced in the course of proceedings, such a prohibition does not apply where that plea in law is based on matters of law or of fact which come to light in the course of the procedure. Inasmuch as the present claim is based on a matter of law which came to light in the course of the procedure, namely the entry into force, on 27 June 2019, of Article 1(15) of Regulation 2019/876, it is therefore admissible.

68 However, such a claim is not capable, in the circumstances of the present case, of leading to the annulment of the contested decision.

69 It is true that the principle of the retroactive application of the less severe penalty constitutes a general principle of EU law (judgment of 11 March 2008, *Jager*, C-420/06, EU:C:2008:152, paragraph 59; see also, to that effect, judgments of 3 May 2005, *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, EU:C:2005:270, paragraphs 67 to 69, and of 27 June 2017, *NC* v *Commission*, T-151/16, EU:T:2017:437, paragraphs 53 and 54), which is now enshrined in the Charter of Fundamental Rights of the European Union ('The Charter').

70 According to Article 49(1) of the Charter:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.'

71 Moreover, the principle of the retroactive application of the less severe penalty may be relied upon not only against decisions imposing criminal penalties in the strict sense, but also administrative penalties (see, to that effect, judgments of 8 March 2007, *Campina*, C-45/06, EU:C:2007:154, paragraphs 32 and 33; of 11 March 2008, *Jager*, C-420/06, EU:C:2008:152, paragraph 60; and of 27 June 2017, *NC* v *Commission*, T-151/16, EU:T:2017:437, paragraph 54).

72 It must, however, be observed that the principle of the retroactive application of the less severe penalty, whilst it may lead to the annulment of a decision should the legal framework be amended after the facts of the particular case but prior to the decision which is contested in that case (see, to that effect, judgment of 27 June 2017, *NC* v *Commission*, T-151/16, EU:T:2017:437, paragraph 63), cannot be relevant in reviewing the legality of a measure which was adopted before the legal framework was amended, since the defendant institution cannot be criticised for having infringed rules of law which were not yet applicable.

73 Furthermore, it is only in the context of the exercise by the Court of its power to alter the amount of the penalty imposed, should the Court have such jurisdiction, pursuant to Article 261 TFEU, in respect of administrative penalties imposed by the ECB pursuant to Article 18(1) of Regulation No 1024/2013, that a change in the legal framework subsequent to the contested decision may be taken into account. With such a request before it, the Court would have to establish whether it was appropriate, on the date on which it adopted its decision, to substitute its own assessment for that of the ECB, so that the amount of the penalty was appropriate (see, to that effect, judgment of 17 December 2015, *Orange Polska* v *Commission*, T-486/11, EU:T:2015:1002, paragraph 67 and the case-law cited).

74 However, no request for alteration of the amount of the penalty imposed was made of the Court, which the applicant expressly confirmed at the hearing.

75 The second claim and, consequently, the first part of the first plea in law must, therefore, be dismissed.

First claim of the second part of the first plea in law, alleging infringement of Article 18(1) of Regulation No 1024/2013

76 In the contested decision, the ECB considered that the applicant had breached Article 26(3) of Regulation No 575/2013 at least negligently within the meaning of Article 18(1) of Regulation No 1024/2013.

77 The applicant takes the view that the ECB infringed Article 18(1) of Regulation No 1024/2013 by finding that a breach had been committed negligently, since it could not be considered that the applicant knew or should have known that its conduct constituted a breach. It recalls, in particular, having applied the interpretation favoured by the EBA and the ACPR, whereas the ECB did not provide any guidelines on Article 26(3) of Regulation No 575/2013 and almost all credit institutions adopted the same interpretation. It also takes the view that a mere difference of interpretation does not constitute fault and that it could not have been aware that its conduct constituted a breach of that provision.

78 The ECB maintains that the present claim should be dismissed.

79 According to Article 18(1) of Regulation No 1024/2013, 'for the purpose of carrying out the tasks conferred on it by this Regulation, where credit institutions, financial holding companies or mixed financial holding companies, intentionally or negligently, [commit a] breach … the ECB may impose administrative pecuniary penalties'.

80 As the Court has pointed out, the concept of negligence refers to an unintentional act or omission by which the person responsible breaches his or her duty of care (judgment of 3 June 2008, *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraph 75). Moreover, for the purposes of determining whether or not such negligence exists, account must be taken, in particular, of the complexity of the provisions at issue and the professional experience of and care taken by the undertaking concerned (see, by analogy, judgment of 11 November 1999, *Söhl & Söhlke*, C-48/98, EU:C:1999:548, paragraph 56).

81 In that regard, it must be observed that the applicant, in its capacity as a credit institution, had a duty to take great care when implementing the provisions of Regulation No 575/2013, paying particular attention to the extent of its obligations pursuant to those provisions.

82 Moreover, whilst Article 26(3) of Regulation No 575/2013 had not, until the present judgment, been interpreted by the EU Courts, the exact scope of the obligations of credit institutions could be deduced from a careful analysis of that provision, as demonstrated by the reasoning which appears in paragraphs 53 to 60 above.

83 Such an analysis led the applicant to the conclusion that the publication carried out by the EBA, pursuant to the third subparagraph of Article 26(3) of Regulation No 575/2013 and the permission of the competent authority envisaged in the first subparagraph of that provision, related to two admittedly connected but distinct issues: on the one hand, the eligibility of a capital instrument for classification as a CET 1 instrument and, on the other, specific verification of compliance with the criteria – in particular of individual scope – listed in Article 28 or, where applicable, Article 29 thereof.

84 The ECB was therefore right to find that the applicant's conduct was negligent and to conclude that it had committed a breach in terms of Article 18(1) of Regulation No 1024/2013.

85 That conclusion is not called into question by the applicant's argument alleging essentially that it applied the interpretation which appears in the introductory clause of the list published by the EBA, which implied that it was not required to seek the prior permission of the competent authority in respect of the classification as a CET 1 instrument of a category of instrument included on that list.

86 In that regard, it has already been emphasised in paragraph 62 above that the EBA's interpretation cannot take precedence over the wording of Article 26(3) of Regulation No 575/2013.

87 Nonetheless, as one of the EBA's functions, pursuant to Article 8(1)(b) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ 2010 L 331, p. 12), is 'to contribute to the consistent application of legally binding Union acts, in particular by contributing to a common supervisory culture', its interpretation of Regulation No 575/2013, in particular where a provision has yet to be interpreted by the EU Courts, is especially relevant.

88 Similarly, it is correct that, viewed in isolation, one phrase in paragraph 4 of the introductory clause of the list published by the EBA might suggest that the EBA is of the opinion that the inclusion of a capital instrument in the list which it publishes implies that it may be classified as a CET 1 instrument, since it states that 'the inclusion of an instrument in the list implies that the instrument meets the eligibility criteria of … Regulation [No 575/2013] and can be included in the [CET 1 instruments] by all institutions in the Member State to which it refers'.

89 However, a more general reading of that clause should have led the applicant to put the scope of that phrase in context. That possibility to classify capital instruments included in the list published by the EBA as CET 1 instruments is not presented by the EBA as unconditional. On the contrary, reference is made to the need to meet rules of national law and to the possible need to obtain the permission of the competent authorities pursuant to Regulation No 575/2013. Whilst the drafting of the clause is not very clear, the fact remains that the reference to possible compliance with other conditions or obtaining permission from the competent authorities should have led the applicant to question the exact scope of its obligations pursuant to the first subparagraph of Article 26(3) of Regulation No 575/2013.

90 In addition, it must be observed that, on 18 April 2016, the applicant received a clarifying email from the ECB relating to the extent of its obligations pursuant to Article 26(3) of Regulation No 575/2013. In that email, the ECB indicated that prior permission was required before classifying capital increases as CET 1 instruments and set out in detail the list of documents which were to be provided.

91 Contrary to what the applicant maintains, the content of the email from the ECB of 18 April 2016 was unequivocal with regard to the ECB's preferred interpretation of Article 26(3) of Regulation No 575/2013.

92 However, despite that warning, the applicant persisted in applying a divergent and incorrect interpretation of its obligations pursuant to Article 26(3) of Regulation No 575/2013, by classifying, on 30 June 2016, in its pillar 3 public disclosure and in its quarterly consolidated reporting on capital and capital requirements, its issuances one to three as CET 1 instruments, before the ECB had given it its permission.

93 The applicant also argues, in essence, that the lack of clarity of Article 26(3) of Regulation No 575/2013 led some national authorities and many credit institutions to apply the same interpretation as the one which it favoured, which explains the amendment of that provision by Regulation 2019/876.

94 Such circumstances, even if proved, do not, however, demonstrate that the applicant was not negligent.

95 Whilst such factors may indicate that some operators encountered difficulties when interpreting Article 26(3) of Regulation No 575/2013, the fact remains that the care and diligence which may be expected of a credit institution of the applicant's significance should have led it to read that provision carefully, which would have allowed it to resolve those difficulties of interpretation as regards the scope of its obligations.

96 In view of the foregoing, the first claim of the second part of the first plea in law must be dismissed.

Second plea in law, submitted in the alternative, alleging breach of the applicant's right to be heard

97 The applicant maintains, in essence, that the ECB breached its right to be heard by basing the contested decision on matters of fact or of law on which it had not had the opportunity to comment in the course of the administrative procedure and recalls that, pursuant to Article 22(1) of Regulation No 1024/2013, the ECB may base its decisions only on objections on which the parties concerned have been able to comment, regardless of whether or not those objections have adversely affected those parties. In that regard, it criticises the ECB, in particular, for having itself interpreted the EBA's report of 23 May 2017 for the first time in the contested decision, for having referred to the EBA's calling into question the 'loyalty feature' included in its ordinary shares and for having claimed that it provided incorrect information to the market on its prudential situation.

98 With regard, more specifically, to the reference, in the contested decision, to the EBA's calling into question the 'loyalty feature' and to the alleged provision of incorrect information to the market, the applicant takes the view that those references had an impact on the amount of the penalty which was imposed on it.

99 The ECB argues that none of the matters of fact or of law not mentioned in the draft penalty decision, but appearing in the contested decision, was capable of adversely affecting the applicant's rights of defence or had a decisive effect on the outcome of the procedure.

100 According to settled case-law, observance of the rights of the defence is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the procedure in question (see order of 12 May 2010, *CPEM* v *Commission*, C-350/09 P, not published, EU:C:2010:267, paragraph 75 and the case-law cited).

101 Article 22(1) of Regulation No 1024/2013 reflects that principle, inasmuch as it provides that the ECB is to give the persons who are the subject of the proceedings the opportunity of being heard and that it is to base its decisions only on objections on which the parties concerned have been able to comment.

102 That principle is elucidated in both Article 31, headed 'Right to be heard', and Article 126, headed 'Procedural rights', of the SSM Framework Regulation.

103 Article 31 of the SSM Framework Regulation applies, under Article 31(1), to any supervisory decision 'addressed to a party which would adversely affect the rights of such party'. It provides for that party to have the opportunity of providing comments in writing to the ECB on the facts, objections and legal grounds relevant to the ECB supervisory decision, prior to its adoption.

104 Article 126 of the SSM Framework Regulation, which specifically concerns decisions imposing administrative penalties other than periodic penalty payments, provides as follows:

'1. On completion of an investigation and before a proposal for a complete draft decision is prepared and submitted to the Supervisory Board, the investigating unit shall notify the supervised entity concerned in writing of the findings under the investigation carried out and of any objections raised thereto.

2. In the notification referred to in paragraph 1, the investigating unit shall inform the supervised entity concerned of its right to make submissions in writing to the investigating unit on the factual results and the objections raised against the entity as set out therein, including the individual provisions which have been allegedly infringed, and it shall set a reasonable time limit for receipt of such submissions. The ECB shall not be obliged to take into account written submissions received after the time limit set by the investigating unit has expired.'

105 As has been underlined in the case-law with regard to Article 27(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1), which has substantially the same meaning as Article 22(1) of Regulation No 1024/2013 and Article 126 of the SSM Framework Regulation, the obligation associated with the rights of the defence is satisfied if, first, a statement of objections is sent to the parties which clearly sets out all the essential matters on which the European Commission relies at that stage of the procedure and, secondly, the decision does not allege that the persons concerned have committed infringements other than the objections of which they have been informed in the course of the administrative procedure and takes into consideration only facts on which the persons concerned have had the opportunity of stating their views (see judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 266 and the case-law cited).

106 In that regard, it should be pointed out that, according to settled case-law on observance of the rights of the defence in the course of procedures to enforce compliance with Articles 101 and 102 TFEU, that may be done summarily and the final decision is not necessarily required to be a replica of the statement of objections, since the statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature. Thus, it is permissible for the Commission to supplement the statement of objections in the light of the response of the parties, whose arguments show that they have actually been able to exercise their rights of defence. The Commission may also, in the light of the administrative procedure, revise or supplement its arguments of fact or of law in support of its objections (see judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 267 and the case-law cited).

107 It follows from the same case-law that communication to the parties concerned of further objections is necessary only if the result of the investigations leads the Commission to take new facts into account against the undertakings or to alter materially the evidence for the contested infringements (see judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 268 and the case-law cited).

108 Finally, again according to the case-law applicable to enforcement of compliance with Articles 101 and 102 TFEU, the rights of the defence are infringed where it is possible that the outcome of the administrative procedure conducted by the Commission might have been different as a result of an error committed by it. An applicant undertaking establishes that there has been such an infringement where it adequately demonstrates, not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defence had there been no error, for example because it would have been able to use for its defence documents to which it was denied access during the administrative procedure (see judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 269 and the case-law cited).

109 The same principles apply, by analogy, to observance of the rights of the defence in a procedure carried out by the ECB in respect of a breach of a requirement under relevant directly applicable acts of Union law, in terms of Article 18(1) of Regulation No 1024/2013.

110 First, it should be emphasised that the only objection made in respect of the applicant by the ECB – namely classifying certain capital instruments as CET 1 instruments without permission, in breach of Article 26(3) of Regulation No 575/2013 – was clearly expressed in the statement of objections which was sent to it on 22 December 2016.

111 Secondly, the applicant was able to express its views on that objection, not only when it responded to that statement but also in its observations on the draft decision which the ECB sent to it on 2 August 2017.

112 Thirdly, it must be found that the three matters whose appearance for the first time in the contested decision is criticised by the applicant cannot be regarded as new objections.

113 First, with regard to the reference made by the ECB, in paragraph 3.2.2.4 of the contested decision, to the EBA's report of 23 May 2017, it should be pointed out that the ECB mentioned it for the purposes of establishing the soundness of its interpretation of Article 26(3) of Regulation No 575/2013. However, that issue was discussed extensively by the parties in the course of the administrative procedure. More precisely, it must be emphasised that that reference was made by the ECB in response to the applicant's argument based on the fact that, at that time, the EBA had pointed out that Article 26(3) of Regulation No 575/2013 could be interpreted in different ways.

114 Secondly, with regard to the statement, in paragraph 3.2.2.4 of the contested decision, that the EBA had taken the view that the loyalty feature included in the applicant's ordinary shares prevented their classification as CET 1 instruments, it is sufficient to emphasise that that question relates to the compliance of the applicant's ordinary shares with the criteria set out in Article 28 of Regulation No 575/2013 and that it does not concern the objection raised by the ECB against the applicant, which relates exclusively to the breach by the applicant of Article 26(3) of that regulation.

115 Thirdly, the statement by the ECB, in paragraph 3.2.4 of the contested decision, that compliance with Article 26(3) of Regulation No 575/2013 would 'have not resulted in [the applicant's] reporting incorrect information on its prudential situation to the competent authorities and to the market' cannot be regarded as constituting a new objection in respect of the applicant. That comment was made by the ECB in connection with the assessment of the negligent nature of the applicant's conduct, in response to the applicant's assertion, in its observations of 30 August 2017, that it had acted 'in a prudent and diligent manner, with a view to avoiding the communication of any incorrect information on the actual situation regarding its capital'.

116 Fourthly, with regard to the applicant's claim that the matters mentioned in paragraphs 114 and 115 above had an impact on the amount of the pecuniary penalty which was imposed on it, it must be observed that that question does not concern the legality of the finding that there was a breach on the part of the applicant, but the legality of the amount of the penalty which was imposed on it.

117 It must, therefore, be concluded that the second plea in law must be dismissed in so far as it relates to the legality of the finding that there was a breach by the applicant.

118 In view of the foregoing, it must be concluded that the applicant has failed to demonstrate that the contested decision is unlawful in so far as that decision finds that there was a breach on the applicant's part.

Legality of the contested decision in so far as it imposes an administrative pecuniary penalty on the applicant

119 By the second claim of the second part of the first plea in law, the applicant maintains that the imposition of an administrative pecuniary penalty is, in the circumstances of the present case, contrary to the principle of legal certainty. Moreover, in the third part of the first plea in law, it takes the view that the pecuniary penalty which was imposed on it breaches the principle of proportionality. Finally, and as pointed out in paragraphs 98 and 116 above, in the second plea in law, the applicant argues that certain matters on which it was not heard had an impact on the amount of the penalty which was imposed on it, so that there was a breach of its right to be heard.

120 More specifically, in the third part of the first plea in law, the applicant challenges not only the proportionality of the very principle of the imposition of a penalty, but also the amount of that penalty. With regard to that amount, it argues, inter alia, that it does not represent 0.0015% of the turnover of the Crédit Agricole group, as indicated in the contested decision, but ten times more than that. It also alleges that the ECB failed to respect the methodology which it claims, in its written pleadings, to have used for the purposes of assessing the severity of the breach. Moreover, it emphasises that the ECB maintained, for the first time before the Court, that it took into account the size of the credit institution at issue for the purposes of determining the amount of the penalty, whilst such ground did not appear in the contested decision. It takes the view that the ECB is wrong to refer, in that context, to assessing the size of credit institutions on the basis of the total amount of their assets under management, rather than on their turnover, and argues that, in any event, that factor may not be taken into account by the Court, since it is not mentioned in the contested decision. It adds that the absence of that factor in that decision constitutes a failure to adequately state reasons, which renders the contested decision illegal.

121 At the outset, it should be observed that, in order for the Court to be in a position to examine the applicant's criticisms, the contested decision must set out in detail, to the requisite legal standard, the reasons for setting the amount of the penalty imposed on the applicant at EUR 4 300 000, representing 0.015% of the turnover of the group to which the applicant belongs.

122 The Court takes the view that it is necessary to examine, first of all, whether the contested decision contains an adequate statement of reasons with regard to the determination of the amount of the penalty imposed.

123 In that regard, it should be recalled that, in an action for annulment, a plea alleging absence of reasons or inadequacy of the reasons stated for the measure of which the legality is challenged involves a matter of public policy which must be raised by the EU judicature of its own motion and, consequently, may be raised by the parties at any stage of the procedure (judgment of 13 December 2001, *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, T-45/98 and T-47/98, EU:T:2001:288, paragraph 125).

124 Moreover, that obligation, on the part of the EU judicature, to raise of its own motion a matter of public policy must be performed in the light of the rule that the parties should be heard (see, to that effect, judgment of 2 December 2009, *Commission* v *Ireland and Others*, C-89/08 P,

EU:C:2009:742, paragraphs 59 and 60). In the present case, it should be pointed out that the ECB, at the hearing, had the opportunity to express its views on whether or not the contested decision contained an adequate statement of reasons.

125 At the hearing, the ECB thus maintained that the reasons for the contested decision were stated to the requisite legal standard. In essence, it said that it had applied a two-step methodology for the purposes of determining the amount of the penalty.

126 The first step involves the determination of the basic amount of the penalty incurred. The starting point for the determination of that basic amount is to assess the severity of the breach at issue, observing the effects of the breach on the prudential situation of the credit institution concerned and the conduct of that institution. The ECB emphasises that that matter is covered in the contested decision, since reference is made in the contested decision to the total amount of the instruments which were incorrectly classified. Similarly, the illegal nature of the credit institution's conduct is highlighted in the contested decision, in which the ECB emphasised that the applicant should have been aware of the obligations incumbent on it pursuant to Article 26(3) of Regulation No 575/2013. Once the severity of the breach has been determined, the ECB adds to the equation the total amount of the credit institution's assets under management. That is how the basic amount is calculated by taking into account, first, the severity of the breach and the total amount of assets under management.

127 By way of the second step, that basic amount is adjusted in order to take account of possible mitigating or aggravating circumstances. In the present case, the applicant had the benefit of a mitigating circumstance.

128 At the hearing, the ECB also argued that the absence, in the contested decision, of an explanation of the methodology allowing the precise amount of the penalty to be determined was intended to preserve the deterrent effect of that penalty. Credit institutions should not be able to anticipate the amount of the penalties which may be imposed, which could reduce the incentive to comply with prudential regulations. It also acknowledged that the fact that the total amount of the applicant's assets under management was taken into account was not included in the contested decision, but it took the view that that did not constitute a failure to adequately state reasons, since it was a purely objective matter.

129 It is important to recall that, according to settled case-law, the obligation to state reasons laid down in the second paragraph of Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. From that point of view, the statement of reasons required must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which such a decision is based is, therefore, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (see judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraphs 146 to 148 and the case-law cited; judgments of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraphs 114 and 115; and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 44).

130 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of concern within the meaning of the fourth paragraph of Article 263 TFEU, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 150; of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 116; and of 13 December 2016 *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 45).

131 It is also clear from the case-law that the statement of reasons must, in principle, be notified to the person concerned at the same time as the decision adversely affecting him or her. A failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the EU Courts (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 149; of 19 July 2012, *Alliance One International and Standard Commercial Tobacco* v *Commission*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 74; and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 46).

132 With regard, more specifically, to the statement of reasons for the administrative pecuniary penalties imposed pursuant to Article 18(1) of Regulation No 1024/2013, first, it should be recalled that the ECB has the right to impose an administrative pecuniary penalty which may be up to 10% of the total annual turnover of the group to which the legal person concerned belongs.

133 It follows that the ECB has wide discretion to determine the amount of the pecuniary penalty. In such circumstances, it is settled case-law that respect for the rights guaranteed by the EU legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the right of the person concerned to have the decision at issue reasoned to the requisite legal standard. Only in this way can the Court of Justice and the General Court verify whether the factual and legal elements upon which the exercise of the discretionary power depends were present (judgments of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14, and of 6 November 2008, *Netherlands* v *Commission*, C-405/07 P, EU:C:2008:613, paragraph 56).

134 Therefore, in view of both the wide discretion conferred on the ECB by Article 18(1) of Regulation No 1024/2013 and the very substantial amounts of the administrative pecuniary penalties incurred, the obligation to state reasons for decisions imposing such a penalty is of particular importance.

135 Secondly, it should be pointed out that the statement of reasons for a decision imposing a penalty must allow the Court to assess whether that decision is compliant with EU law and, in particular, the principle of proportionality, and to verify whether the ECB correctly assessed the criteria appearing in Article 18(3) of Regulation No 1024/2013, which emphasises, in addition to the proportionate nature of the penalty, its effectiveness and its dissuasive nature.

136 In order for such a review to be carried out, the statement of reasons for the contested decision must show, to the requisite legal standard, the methodology used by the ECB for the purposes of determining the amount of the penalty (see, to that effect, judgment of 27 September 2006,

Jungbunzlauer v *Commission*, T-43/02, EU:T:2006:270, paragraph 91) and the weighting and assessment of the factors taken into account (see, to that effect, judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 61).

137 Finally, thirdly, it follows from the case-law cited in paragraph 130 above that whether a decision contains an adequate statement of reasons must be assessed, inter alia, in view of its context.

138 Thus, it was found that, where a decision of the ECB was an extension of the opinion of the Administrative Board of Review, the explanations contained therein could be taken into account for the purposes of determining whether the contested decision in that case contained a sufficient statement of reasons (see, to that effect, judgment of 8 May 2019, *Landeskreditbank Baden-Württemberg* v *ECB*, C-450/17 P, EU:C:2019:372, paragraph 95). Moreover, also in connection with the context of such a decision, it has repeatedly been held that the reasons on which a decision following a well-established line of decisions is based could be given in a summary manner, for example by reference to those decisions (judgments of 14 February 1990, *Delacre and Others* v *Commission*, C-350/88, EU:C:1990:71, paragraph 15, and of 8 November 2001, *Silos*, C-228/99, EU:C:2001:599, paragraph 28). Similarly, the publication by the defendant institution of the methodology which it intends to use when exercising its decision-making power may lessen its obligation to state reasons for its individual decisions, to the extent that it applies that methodology.

139 However, in the present case, the contested decision was not adopted by way of an extension of an opinion of the Administrative Board of Review and there is no prior practice of the ECB with regard to the imposition of an administrative pecuniary penalty pursuant to Article 18(1) of Regulation No 1024/2013. In addition, the ECB did not make public the methodology which it intended to apply for the purposes of determining the amount of the penalties imposed pursuant to that provision.

140 Therefore, the question of whether the reasons for the contested decision were adequately stated must be assessed solely on the basis of the reasons appearing in that decision.

141 It is in the light of those considerations that it is necessary to verify whether the ECB complied, in the present case, with its obligation to state reasons.

142 Paragraph 4.1.2 of the contested decision, headed ‘Amount of the penalty’, is worded as follows:

‘In order to determine the administrative penalty to be imposed, the ECB has considered the following circumstances:

4.1.2.1. As regards the severity of the breach, the ECB takes into account that the Supervised Entity incorrectly classified capital instruments as CET 1 instruments for a total amount of EUR 2 088 million, which represents 67 basis points of the Supervised Entity’s CET 1 ratio on a consolidated basis as of 30 June 2016. The fact that most of the capital instruments incorrectly classified as CET 1 were issued following the distribution of scrip dividends to the shareholders and therefore were similar to the ordinary shares generating such dividends is also considered in the assessment of the severity of the breach.

4.1.2.2. Furthermore, the ECB takes into account that the breach occurred during five consecutive quarterly reporting periods and three consecutive pillar 3 public disclosures in 2015 and 2016.

4.1.2.3. As regards the severity of misconduct of the Supervised Entity, the ECB considers that the breach was committed at least negligently. In particular, the wrongfulness of the misbehaviour is determined by the circumstances described in section 3.3. The Supervised Entity was given sufficient time to adapt its operations to the regulatory requirements of Regulation (EU) No 575/2013 and was warned by the ECB (JST) of the need to obtain prior permission of the ECB before classifying capital instruments as CET 1 instruments. However, despite the knowledge of such requirements, the Supervised Entity continued classifying the instruments without the necessary permission.

4.1.2.4. As a mitigating factor, the ECB takes into account the fact that, following the application of the Supervised Entity, the ECB granted permission to classify the issuances as CET 1 instruments …

Therefore, in the light of all the elements set out above, including the arguments raised by the Supervised Entity in its written observations, and taking into account the principle of proportionality that guides the ECB in the exercise of its sanctioning powers, the administrative penalty is set at EUR 4 300 000, which represents around 0.0015% of the total annual turnover in 2017 of the supervised group to which the Supervised Entity belongs and ensures credible and effective deterrence to prevent such breaches from being committed in the future.'

143 In paragraph 4.2.4 of the contested decision, the ECB added that 'the administrative penalty imposed d[id] not exceed 10% of the total annual turnover of the supervised group to which the [applicant] belong[ed] relating to the year preceding the date of the [contested] decision'.

144 It must be found that that passage of the contested decision does not provide details of the methodology applied by the ECB for the purposes of determining the amount of the penalty imposed, but merely highlights some considerations relating to the severity of the breach, its duration, the severity of the applicant's alleged failure and the assurance that a mitigating factor was taken into account.

145 Worded as they are, paragraphs 4.1.2.1 to 4.1.2.4 of the contested decision neither allow the applicant to understand the methodology chosen by the ECB nor allow the Court to review the legality of the penalty imposed.

146 The fact that the ECB set out in detail, in its defence, then at the hearing, the methodology which it applied in the present case cannot remedy that inadequacy, since, according to the case-law cited in paragraph 131 above, the ECB could not remedy a failure to adequately state reasons by communicating the reasons for the decision during proceedings before the Court. In addition, the applicant had the right to know the method for calculating the amount of the penalty which was imposed on it, without being obliged, in order to achieve that, to bring an action before the Court.

147 Moreover, paragraphs 4.1.2.1 to 4.1.2.4 of the contested decision do not provide the minimum information which could have made it possible to understand and verify the relevance and weighting of the factors taken into account by the ECB in determining the amount of the penalty.

148 Whilst, in paragraph 4.1.2.1 of the contested decision, relating to the severity of the breach, the ECB emphasises that the capital instruments classified without permission represented 67 basis points of the applicant's CET 1 ratio, it does not provide any further explanation of the degree of severity of such a failure from the point of view of compliance with the prudential obligations incumbent on the applicant.

149 In the same paragraph of the contested decision, the ECB highlights the fact that most of the capital instruments which were incorrectly classified were issued following the distribution of scrip dividends to the shareholders and emphasises that that factor was considered in the assessment of the severity of the breach. However, in that regard too, no explanation is provided of the impact of that finding on the determination of the amount of the penalty imposed on the applicant.

150 Finally, whilst, in paragraph 4.1.2.4 of the contested decision, the ECB gives an assurance that it took into account, as a mitigating factor, the fact that it had ultimately granted the applicant permission to classify the instruments at issue as CET 1 instruments, no indication is given of the weighting which it gave that factor in determining the final amount of the penalty.

151 In addition, it should be pointed out that the ECB mentioned only the size of the group to which the applicant belonged, and not the size of the applicant, even though the breach was imputed only to the applicant.

152 It must be found that, by not including, in the contested decision, the size of the credit institution which committed the breach at issue, the ECB failed to mention a factor which, according to its own statements before the Court, was particularly relevant for the determination of the amount of the penalty.

153 The fact that the size of the credit institution concerned is not mentioned prevents the Court from reviewing the ECB's assessment of the criteria of effectiveness, proportionality and dissuasion appearing in Article 18(3) of Regulation No 1024/2013.

154 Before the Court, the ECB maintained that it had taken into account the size of the institution concerned, when determining the amount of the penalty, in the form of the total amount of its assets under management. However, according to the case-law cited in paragraph 131 above and for reasons analogous to those set out in paragraph 146 above, an explanation provided at that stage cannot be taken into account for the purposes of assessing compliance, by the ECB, with the obligation to state reasons which is incumbent on it.

155 In addition, the fact, highlighted by the ECB at the hearing, that it is allegedly an 'objective' matter does not excuse the ECB from clearly setting out that factor in the contested decision, if only for the purposes of explaining how and on the basis of what weighting it was taken into account in determining the amount of the penalty imposed on the credit institution at issue.

156 It follows from the foregoing that the penalty imposed on the applicant is vitiated by an inadequate statement of reasons and must, therefore, be annulled, without its being necessary to rule on the other claims raised in that regard.

157 As the ECB's assessment relating to the amount of the administrative pecuniary penalty is severable from the remainder of the contested decision, that decision must be annulled only to the extent that it imposes an administrative pecuniary penalty on the applicant of EUR 4 300 000.

Costs

158 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties shall bear their own costs.

159 In the present case, the applicant has been unsuccessful in part and succeeded in part, since the contested decision is to be annulled only to the extent that it imposes on the applicant an administrative pecuniary penalty of EUR 4 300 000. In view of those factors, on a fair assessment of the circumstances of the case, each party should be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Annuls Decision ECB/SSM/2018-FRCAG-75 of the European Central Bank (ECB) of 16 July 2018 in so far as it imposes on Crédit agricole SA an administrative pecuniary penalty of EUR 4 300 000;**

2. **Dismisses the action as to the remainder;**

3. **Orders Crédit agricole to bear its own costs;**

4. **Orders the ECB to bear its own costs.**

Papasavvas Tomljenović Schalin

Škvařilová-Pelzl Nõmm

Delivered in open court in Luxembourg on 8 July 2020.

E. Coulon President
Registrar

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