

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

24 April 2018

(Economic and monetary policy — Prudential supervision of credit institutions — Article 4(1)(e) and (3) of Regulation (EU) No 1024/2013 — Person effectively directing the business of a credit institution — Article 13(1) of Directive 2013/36/EU and the second paragraph of Article L. 511-13 of the French monetary and financial code — Prohibition on combining the role chairman of the management body of a credit institution in its supervisory function with the role of chief executive officer of the same establishment — Article 88(1)(e) of Directive 2013/36 and Article L. 511-58 of the French monetary and financial code)

In Joined Cases T-133/16 to T-136/16,

Caisse régionale de crédit agricole mutuel Alpes Provence, established in Aix-en-Provence (France), represented by P. Mele and H. Savoie, lawyers,

applicant in Case T-133/16,

Caisse régionale de crédit agricole mutuel Nord Midi-Pyrénées, established in Albi (France), represented by P. Mele and H. Savoie,

applicant in Case T-134/16,

Caisse régionale de crédit agricole mutuel Charente-Maritime Deux-Sèvres, established in Saintes (France), represented by P. Mele and H. Savoie,

applicant in Case T-135/16,

Caisse régionale de crédit agricole mutuel Brie Picardie, established in Amiens (France), represented by P. Mele and H. Savoie,

applicant in Case T-136/16,

v

European Central Bank (ECB), represented by A. Karpf and C. Hernández Saseta, acting as Agents, and by A. Heinzmann, lawyer,

defendant,

supported by

European Commission, represented by V. Di Bucci, K.-P. Wojcik and A. Steiblytè, acting as Agents,

intervener in Cases T-133/16 to T-136/16,

ACTIONS pursuant to Article 263 TFEU for annulment of ECB decisions, respectively, ECB/SSM/2016-969500TJ5KRTCJQWXH05/98, ECB/SSM/2016-969500TJ5KRTCJQWXH05/100, ECB/SSM/2016-969500TJ5KRTCJQWXH05/101 and ECB/SSM/2016-969500TJ5KRTCJQWXH05/99, of 29 January 2016, adopted pursuant to Article 4(1)(e) 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), Article 93 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 (SSM Framework Regulation) (OJ 2014 L 141, p. 1) and Articles L. 511-13, L. 511-52, L. 511-58, L. 612-23-1 and R. 612-29-3 of the Code monétaire et financier français (French monetary and financial code),

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of M. Prek (Rapporteur), President, E. Buttigieg, F. Schalin, B. Berke and J. Costeira, Judges,

Registrar: G. Predonzani, Administrator,

having regard to the written part of the procedure and further to the hearing on 23 October 2017,

gives the following

Judgment

Background to the dispute

- 1 Crédit Agricole is a non-centralised banking group governed by Articles L. 512-20 to L. 512-54 of the Code monétaire et financier français (French monetary and financial code) ('the CMF'). It is organised on three levels: local agricultural credit union branches, regional agricultural credit union branches and, at the national level, a central authority, Crédit Agricole SA.
- 2 Crédit Agricole has been classified as a significant supervised group within the meaning of Article 6 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, therefore, as regards the tasks listed in Article 4(1) of that regulation, comes under the sole prudential supervision of the European Central Bank (ECB).
- 3 On 8, 10, 14 and 24 April 2015, the central authority of Credit Agricole, at the request of the applicants, Caisse régionale de crédit agricole mutuel Alpes Provence (applicant in Case T-133/16), Caisse régionale de crédit agricole mutuel Nord Midi-Pyrénées (applicant in Case T-134/16), Caisse régionale de crédit agricole mutuel Charente-Maritime Deux-Sèvres (applicant in Case T-135/16) and Caisse régionale de crédit agricole mutuel Brie Picardie (applicant in Case T-136/16), sought approval for the appointment of Mr B, Mr C, Mr T and Mr W, as chairmen of the boards of directors and 'effective directors' of the applicant institutions, from the Autorité de contrôle

prudential et de résolution (Authority for Prudential Supervision and Resolution, France) ('the ACPR').

- 4 Pursuant to Article 93 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 (SSM Framework Regulation) (OJ 2014 L 141, p. 1), those requests were notified by the ACPR to the ECB. All the necessary documents were received by the ECB on 8 June 2015.
- 5 On 31 August 2015, the ECB informed each of the applicants and Crédit Agricole's central authority of its intention not to approve the appointment of Mr B, Mr C, Mr T and Mr W, as 'effective directors' of the applicants, and gave them the opportunity to submit their comments pursuant to Article 31 of the SSM Framework Regulation.
- 6 On 30 September 2015, Crédit Agricole's central authority requested the ECB to suspend the procedure on the ground that the ECB's intention not to approve the appointment of Mr B, Mr C, Mr T and Mr W was based on Position 2014-P-07 of the ACPR 'concerning the appointment of "effective directors", within the meaning of Article L. 511-13 and Article L. 532-2, paragraph 4, of the [CMF]' ('Position 2014-P-07 of the ACPR'), the legality of which was disputed before the Conseil d'État (Council of State, France).
- 7 By four decisions of 7 October 2015, in the first place, the ECB refused, in respect of each of the applicants, to grant the application to suspend the procedure, on the ground that the decisions that it was required to take did not have as their legal basis Position 2014-P-07 of the ACPR. In the second place, it approved the appointment of Mr B, Mr C, Mr T and Mr W as chairmen of the board of directors of each of the applicants. In the third place, it opposed Mr B, Mr C, Mr T and Mr W simultaneously carrying out the function of 'effective director' of each of the applicants.
- 8 The ECB noted, in explaining those refusals, that Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338) contained provisions concerning good governance of credit institutions, including Article 88(1)(e) prohibiting, in principle, the chairman of the management body in its supervisory function of a credit institution from exercising simultaneously the functions of a chief executive officer within the same institution. It stated that the purpose of that prohibition, described in recital 57 of Directive 2013/36, was to ensure constructive challenging of the strategy of the institution by the non-executive members of the management body. In addition, it noted that it was required, pursuant to Article 4(3) of Regulation No 1024/2013, to apply Article L. 511-58 of the CMF, which transposed Article 88(1)(e) of Directive 2013/36. It pointed out that, in principle, that article, prevented the role of chairman of the management board, or any other body exercising the equivalent supervisory functions in respect of a credit institution or a finance company, being performed by the chief executive officer or by a person exercising equivalent management functions. It also pointed out that recital 54 of that directive allowed Member States to introduce principles and standards of governance in addition to those required by that directive.
- 9 The ECB noted that it followed from Article L. 511-52-IV of the CMF that the functions enabling a person to obtain approval as 'effective director', within the meaning of

Article L. 511-13 of the CMF were those of chief executive officer, deputy chief executive officer, member of the board of directors or sole managing director. It also referred to Position 2014-P-07 of the ACPR, from which it follows that the functions and tasks of non-executive supervision are entrusted to the chairman of the management body in its supervisory role, responsible for steering the work of that body, which are distinct from the executive functions and tasks of the chief executive officer, in accordance with French company law.

- 10 The ECB inferred from this that, in principle, there had to be a separation between the exercise of executive and non-executive functions within a management body. It concluded that, by virtue of their appointment as chairmen of the management boards and in the absence of any requests for derogation, Mr B, Mr C, Mr T and Mr W could not be approved as 'effective directors' of the applicant institutions.
- 11 On 6 November 2015, the applicants requested a review of each of those decisions under Article 24 of Regulation No 1024/2013, read in conjunction with Article 7 of Decision 2014/360/EU of the ECB of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (OJ 2014 L 175, p. 47). A hearing took place on 10 December 2015 before the Administrative Board of Review ('the Board of Review').
- 12 On 17 December 2015, the Board of Review delivered an opinion, common to cases T-133/16 to T-136/16, finding that ECB's decisions were lawful. It noted that the applicants, by four complaints, disputed the ECB's assimilation of the concept of 'effective director' with that of executive director. The ECB also observed that the applicants maintain that the appointment of the chairman of the board of directors as 'effective director', far from being at odds with the prohibition on the combination of supervisory and executive functions, allows for balance in the governance of credit institutions by the appointment of an 'effective director' who is not answerable to the chief executive officer.
- 13 In the first place, the Board of Review considered that it followed from Article L. 511-13, read together with Article L. 511-52 of the CMF, that even if the tasks of an 'effective director' were not defined, that function was envisaged as an executive mandate, similar to that of chief executive officer or deputy chief executive officer, whereas the chairman of the board of directors was classified as a non-executive director.
- 14 In the second place, the Board of Review referred to the prohibition on combining the functions of chairman of the management body and chief executive officer, set out in Article 88(1)(e) of Directive 2013/36 and transposed by Article L. 511-58 of the CMF. It concludes from this that that rule precludes the chairman of the board of directors from exercising executive functions equivalent to those of the chief executive officer.
- 15 In the third place, the Board of Review examined the powers of the chairman of the board of directors of the applicant institutions. In reply to the applicants' argument that the loi n° 47-1175 du 10 septembre 1947 portant statut de la coopération (JORF of 11 September 1947, p. 9088) (Law of 10 September 1947 on status as a cooperative) ('Law of 10 September 1947') does not provide for a division of the various functions within the board of directors, it stated that there had to be a differentiation between the supervisory and executive functions within the board of directors in order to ensure compliance with the rule set out in Article L. 511-58 of the CMF.

- 16 In the fourth place, the Board of Review examined the applicants' argument claiming that the appointment of the chairman of the board of directors as 'effective director' facilitated the application of the 'second pair of eyes' principle, provided for in Article L. 511-13 of the CMF, more in line with the pursuit of a balance of powers than the appointment of an 'effective director' hierarchically answerable to the chief executive office. It noted that it was necessary to take into consideration the principle of separation of supervisory and executive functions, introduced by Directive 2013/36 and transposed by Article L. 511-58 of the CMF, and to highlight the crucial role of the supervisory function in the good governance of a credit institution.
- 17 It concluded that it was apparent from a combined reading of Articles L. 511-13, L. 511-52 and L. 511-58 of the CMF that an 'effective director' exercises the executive functions assigned to the chief executive officer or a person exercising equivalent functions and that, as the chairman of the board of directors may not exercise such functions, he may not be appointed 'effective director'. The Board of Review, therefore, concluded that the decisions of 7 October 2015 should be replaced by identical decisions.
- 18 Thus, on 29 January 2016, the ECB adopted decisions ECB/SSM/2016-969500TJ5KRTCJQWXH05/98, ECB/SSM/2016-969500TJ5KRTCJQWXH05/100, ECB/SSM/2016-969500TJ5KRTCJQWXH05/101 and ECB/SSM/2016-969500TJ5KRTCJQWXH05/99, pursuant to Article 4(1)(e) of Regulation No 1024/2013, Article 93 of Regulation No 468/2014 and Articles L. 511-13, L. 511-52, L. 511-58, L. 612-23-1 and R. 612-29-3 of the CMF (together, 'the contested decisions'), which have, pursuant to Article 24(7) of Regulation 1024/2013, repealed and replaced the decisions of 7 October 2015, but left their content unchanged.
- 19 On 30 June 2016, the Conseil d'État (Council of State) gave a judgment in which it held that Position 2014-P-07 of the ACPR was lawful and, on that occasion, provided an interpretation of the second paragraph of Article L. 511-13 and Article L. 511-58 of the CMF.

Procedure and forms of order sought

- 20 By applications lodged at the Court Registry on 29 March 2016, the applicants brought the present actions.
- 21 By documents lodged at the Court Registry on 4 July 2016, the European Commission applied for leave to intervene in support of the form of order sought by the ECB.
- 22 By decision of 1 August 2016, the President of the Fourth Chamber of the General Court decided to join Cases T-133/16 to T-136/16 for the purposes of the written procedure, any oral part of the procedure and the decision concluding the proceedings. By decision of the same day, the President of the Fourth Chamber of the General Court granted the Commission leave to intervene in support of the form of order sought by the ECB.
- 23 Following a change in the composition of the Chambers of the General Court, the Judge-Rapporteur was assigned to the Second Chamber, to which this case was, consequently, allocated.

- 24 Acting upon a proposal of the Second Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure of the General Court, to refer the case to a Chamber sitting in extended composition.
- 25 On the proposal of the Judge-Rapporteur, the General Court (Second Chamber, Extended Composition) decided to open the oral part of the procedure.
- 26 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 23 October 2017.
- 27 The applicants claim that the Court should annul the contested decisions.
- 28 The ECB and the Commission contend that the Court should:
- dismiss the application;
 - order the applicants to pay the costs.

Law

- 29 In support of the action, the applicants put forward arguments which may be regarded as being divided into four pleas, alleging, first, infringement of Article 13 of Directive 2013/36 and Article L. 511-13 of the CMF, secondly, infringement of Article L. 511-52-IV of the CMF, thirdly, infringement of Article L. 511-13 and of Articles 13 and 88 of Directive 2013/36, and, fourthly and in the alternative, infringement of Article L. 511-58 of the CMF.
- 30 The ECB argues that the four pleas should be rejected as unfounded. The Commission takes the view that the first three pleas should be rejected as ineffective and that the fourth should be rejected as unfounded. In the alternative, it argues that the first three pleas in law should be rejected as unfounded.
- 31 It should be noted that, in the first plea, the applicants argue that by equating the concept of effective direction with that of senior management, the ECB altered the meaning of Article L. 511-13 of the CMF and Article 13 of Directive 2013/36. By the second plea, they allege that the ECB erred in law by inferring from Article L. 511-52-IV of the CMF that only those in the role of chief executive officer, deputy chief executive officer, member of the board of directors or sole managing director could obtain approval as 'effective director'. By the third plea in law, they maintain that the rule prohibiting combining the functions of chairman of the board of directors and of chief executive officer does not mean that the concept of 'effective direction' is restricted to the exercise of only executive functions. As to the fourth plea, it is put forward in the alternative, in the event that the Court finds that only members of the management body with executive functions may be classified as 'effective directors'. In that plea, the applicants maintain that the ECB erred in its interpretation of Article L. 511-58 of the CMF, as that provision does not preclude the chairman of the board of directors from exercising all executive functions, only the function of chief executive officer.

32 It should be noted that the first three pleas have in common the fact that they concern the interpretation favoured by the ECB in the contested decisions of the concept of 'effective director'. It is therefore appropriate to examine them together.

The first three pleas in law, alleging incorrect interpretation by the ECB of the concept of 'effective director'

33 As is apparent from paragraphs 9 to 18 above, in the contested decisions, the ECB concluded that the concept of 'effective director' of a credit institution must be understood as referring to the directors with executive functions, such as the chief executive officer, the deputy chief executive officer, the members of the executive board or the sole managing director. Furthermore, it must be observed that the ECB, in referring to the concept of 'effective director' of a credit institution, intended to refer to 'persons effectively [directing] the business of the ... credit institution', within the meaning of Article 13(1) of Directive 2013/36, and to persons ensuring the 'effective direction of the credit institution', within the meaning of the second paragraph of Article L. 511-13 of the CMF.

34 Pursuant to Article 13(1) of Directive 2013/36, 'the competent authorities shall grant authorisation to commence the activity of a credit institution only where at least two persons effectively direct the business of the applicant credit institution'. According to the second paragraph of Article L. 511-13 of the CMF 'the effective direction of the activity of credit institutions, including branches of credit institutions referred to in point 1 of Article L. 511-10, or of finance companies shall be carried out by at least two persons'.

35 As a preliminary point, it is necessary to examine the arguments put forward by the Commission that those three pleas are ineffective. It is maintained that the rules that the applicants allege are infringed do not constitute the legal basis for the ECB's refusal to approve the appointment as 'effective directors' of the chairmen of the applicants' boards of directors, that refusal being based solely on Article 88(1)(e) of Directive 2013/36 and on Article L. 511-58 of the CMF, transposing that directive into French law.

36 In the contested decisions, the ECB did not accept that the chairmen of the applicants' boards of directors could simultaneously carry out the function of 'effective director'. It considered that the appointment of the chairmen of the boards of directors of each of the applicants as 'effective directors' infringed the prohibition on combining the role of chairman of the management body of a credit institution in its supervisory function and the role of chief executive officer in the same institution laid down in Article 88(1)(e) of Directive 2013/36 and transposed by the first paragraph of Article L. 511-58 of the CMF, which states that 'the role of chairman of the board of directors or any other body carrying out an equivalent supervisory role in a credit institution or a finance company may not be performed by the chief executive officer or by a person performing equivalent management duties'.

37 It is clear that such reasoning is necessarily based on the premiss advanced by the ECB equating the effective direction of the business of a credit institution, referred to in Article 13(1) of Directive 2013/36 and Article L. 511-13 of the CMF, with the exercise of executive functions within the institution.

38 Furthermore, that equivalent treatment appears is expressly referred to in the contested decisions when the ECB points out that 'Section IV of Article L. 511-52 [of

the CMF] describes the roles allowing a person nominated for approval as effective director as follows: ... the roles of chief executive officer, deputy chief executive officer, member of the board of directors or sole managing director'. Similarly, that equivalent treatment follows from the reference made by the ECB in the contested decisions to Position 2014-P-07 of the ACPR in order to emphasise the point that 'non-executive supervisory functions and tasks, distinct from the executive functions of the chief executive officer, are assigned to the chairman of the management body in its supervisory role, responsible for steering the work of that body, in accordance with French company law'.

39 Therefore, in so far as the contested decisions are based on the premiss put forward by the ECB equating the effective direction of the activities of a credit institution with the exercise of executive functions within that institution and, by the first three pleas in law, the applicants dispute the validity of that premiss, those three pleas in law cannot be ineffective, as argued by the Commission. If those pleas prove to be well founded, it is conceivable that they have a bearing on the legality of the contested decisions.

40 The Commission's argument that the first three pleas are ineffective must, therefore, be rejected.

41 In the first plea, alleging infringement of Article 13 of Directive 2013/36 of Article L. 511-13 of the CMF, the applicants argue that by equating the concept of 'effective direction' with that of 'senior management', the ECB altered the meaning of those two provisions. In that regard, they note, inter alia, that the use of the expression 'persons [who] effectively direct the business' in Article 13(1) of Directive 2013/36 makes no reference to the definition of 'senior management' set out in Article 3(1)(9) of that directive and infer from this that an 'effective director' is not necessarily a member of the senior management. The term 'effective' should be understood in its literal sense, that is as referring to that which is 'real' or that which 'actually exists'. Furthermore, Article 3(1)(9) of Directive 2013/36 does not preclude national law from providing that persons exercising a supervisory function may also have executive functions and does not imply that only members of the senior management may be classified as 'effective directors' or that the latter must be responsible for the day-to-day management of the credit institution. In addition, the concept of 'effective director' refers to the management of a credit institution which has a dual dimension, namely a supervisory function and an executive function. They also take the view that the ECB was wrong to infer from other provisions of the CMF that only directors with executive powers could be classified as effective. Lastly, the applicants maintain that the judgment of the Conseil d'État (Council of State) of 30 June 2016 may not reasonably be relied on for the purpose of explaining the refusal to appoint the chairmen of their boards of directors as 'effective directors', since that judgment was based on a misunderstanding of their cooperative bank status.

42 In the second plea in law, alleging infringement of Article L. 511-52-IV of the CMF, the applicants complain that the ECB erred in law by inferring from that provision that approval could be obtained for appointment as 'effective director' only by the chief executive officer, deputy chief executive officer, a member of the board of directors or sole managing director. They state that the objective of Article L. 511-52-IV is not to describe the functions which permit appointment as 'effective director', but simply to establish rules limiting the holding of more than one office so as to ensure that directors devote sufficient time to their duties. The imposition of the same set of rules on 'effective directors' as on executive directors does not mean that they can be equated with each other, since a concept is not defined by its legal rules. They add

that the specific duties entrusted to 'effective directors' by the CMF justifies their being subject to more restrictive rules, limiting the holding of more than one office, than those applicable to other members of the management body exercising non-executive functions. Lastly, the applicants consider that the ECB was wrong to refer to Article L. 511-52-IV of the CMF for the purpose of ascertaining the functions covered by the prohibition on holding more than one office set out in Article L. 511-58 of the CMF, since the rules on incompatibility covered by those provisions serve different purposes.

- 43 In the third plea, alleging infringement of Article L. 511-13 of the CMF and of Articles 13 and 88 of Directive 2013/36, the applicants maintain, in essence, that the rule against combining the functions of chairman of the board of directors and chief executive officer does not mean that the concept of effective direction must be restricted to the exercise of only executive functions. Thus, since the management body is responsible for both supervisory and executive functions, it is logical that those two categories of function should be represented by two 'effective directors'. They argue that the approach of the ECB, in that it has the effect of designating as 'effective directors', in addition to the chief executive officer, a deputy or assistant chief executive officer, undermines the 'second pair of eyes' principle or the 'four eyes rule' implemented by Article 13(1) of Directive 2013/36, since the 'effective director' is hierarchically answerable to the chief executive officer. They reiterate that the conclusion that the functions of chairman of the board of directors and 'effective director' are incompatible is based on the incorrect premiss that an 'effective director' may be equated with a chief executive officer. Lastly, the reference made by the ECB to the second paragraph of Article L. 511-58 of the CMF is irrelevant, as that provision concerns only the branches of credit institutions whose registered office is outside the European Union and constitutes, therefore, a 'specific set of rules on incompatibility'.
- 44 The ECB, supported by the Commission, disputes the applicants' arguments.
- 45 In essence, by the first three pleas in law, the applicants maintain that the ECB erred in law when interpreting the concept of 'effective director' by limiting it to senior managers with executive functions. Accordingly, they dispute the interpretation of Article 13(1) of Directive 2013/36 and the second paragraph of Article L. 511-13 of the CMF favoured by the ECB. In that regard, although the applicants, inter alia in the context of the second and third pleas in law, refer to other provisions of Directive 2013/36 and of the CMF and to the Law of 10 September 1947 on status as a cooperative, they do so in order to dispute the ECB's interpretation of Article 13(1) of Directive 2013/36 or of the second paragraph of Article L. 511-13 the CMF.
- 46 It should be recalled that the contested decision was adopted on the basis, inter alia, of Article 4(1)(e) of Regulation No 1024/2013, according to which 'the ECB shall, in accordance with paragraph 3 of this Article, be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States: ... to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose requirements on credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, risk management processes, internal control mechanisms, remuneration policies and practices and effective internal capital adequacy assessment processes, including Internal Ratings Based models'.
- 47 Pursuant to Article 4(3) of Regulation No 1024/2013, 'for the purposes of carrying out the tasks conferred on it by this regulation, and with the objective of ensuring high

standards of supervision, the ECB shall apply all relevant Union law, and where the Union law is composed of directives, the national legislation transposing those directives’.

48 Therefore, pursuant to Article 4(3) of Regulation No 1024/2013, the ECB was required to apply not only Article 13(1) of Directive 2013/36 but also the provision of national law transposing it, namely, the second paragraph of Article L. 511-13 of the CMF.

49 Thus, Article 4(3) of Regulation No 1024/2013 necessarily requires the Court to assess the legality of the contested decisions in the light of both Article 13(1) of Directive 2013/36 and the second paragraph of Article L. 511-13 of the CMF.

50 Therefore, for the purpose of determining whether the ECB committed the errors of law alleged by the applicants, it is necessary to establish the meaning not only of Article 13(1) of Directive 2013/36 but also that of the second paragraph of Article L. 511-13 of the CMF.

The interpretation of Article 13(1) of Directive 2013/36

51 It should be noted that the expression ‘persons [who] effectively direct the business of the institution’ is used in Article 13(1) of Directive 2013/36 and in Article 3(1)(7) of that directive, defining a management body as ‘an institution’s body or bodies, which are appointed in accordance with national law, which are empowered to set the institution’s strategy, objectives and overall direction, and which oversee and monitor management decision-making, and include the persons who effectively direct the business of the institution’.

52 Those are the only two references to that expression in Directive 2013/36. Thus, there is no reference to ‘persons who effectively direct the business of the institution’ either in the definition of ‘management body in its supervisory function’, in Article 3(1)(8) of Directive 2013/36, or in the definition of ‘senior management’, in Article 3(1)(9) of that directive.

53 Since the expression ‘persons who effectively direct the business of the institution’, used in Article 13(1) of Directive 2013/36, is not defined in that directive, it is necessary to interpret it.

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

55 In particular, where the textual and historical interpretations of a regulation, in particular of one of its provisions, do not permit its precise scope to be assessed, the legislation in question must be interpreted by reference to both its purpose and general structure (see, to that effect, judgments of 31 March 1998, *France and Others v Commission*, C-68/94 and C-30/95, EU:C:1998:148, paragraph 168, and of 25 March 1999, *Gencor v Commission*, T-102/96, EU:T:1999:65, paragraph 148).

– *The textual and historical interpretations of Article 13(1) of Directive 2013/36*

- 56 As regards, in the first place, the textual interpretation of the expression 'two persons [who] effectively direct the business of the ... institution' in Article 13(1) of Directive 2013/36, it should be noted that it consists of three elements: first, a reference to the concept of direction, 'at least two persons ... direct', then an adverb qualifying that direction, 'effectively', and, lastly, a reference to the subject of that direction, 'the business of ... the institution'.
- 57 Concerning, first, the reference to the concept of direction, it follows from this only that the persons concerned must be 'directors' and therefore members of the management body as defined in Article 3(1)(7) of Directive 2013/36, which is confirmed by the wording of the latter provision, which expressly refers to the presence within the management body of persons who effectively direct the business of the institution.
- 58 As it follows both from recital 56 of Directive 2013/36, according to which 'a management body should be understood to have executive and supervisory functions', and from the wording of Article 3(1)(7) of that directive, that the management body includes all the directors and that they have supervisory or executive tasks, the fact that the persons who effectively direct the business of the institution are part of the management body does not, in itself, enable the precise scope of that expression to be defined.
- 59 As regards, secondly, the adverb 'effectively', as is apparent from the submissions of the parties, it can be understood in at least two ways. On the one hand, it can be understood as implying a permanent presence and involvement in the day-to-day business by the directors of the credit institution, as the applicants maintain, in which case it is likely to cover the activities of non-executive directors entrusted with a supervisory role. On the other hand, it can be understood as referring to the executive management of the credit institution, as the ECB argues, which would tend to imply that it relates only to those members of the management body who participate in the senior management, as defined in Article 3(1)(9) of Directive 2013/36.
- 60 Concerning, thirdly, the reference to the subject of effective direction, namely, 'the business of the institution', it is clear that it seems rather to imply that only the members of the management body who are also members of the senior management may be regarded as effectively directing a credit institution.
- 61 The reference to the '[effective direction] of the business of the institution' seems conceptually closer to 'executive functions' and the responsibility for the 'day-to-day management' of the credit institution, referred to in Article 3(1)(9) of Directive 2013/36 in connection with senior management, than with the 'oversee[ing] and monitor[ing] [of] management decision-making', which Article 3(1)(8) of the directive entrusts to the management body in its supervisory function.
- 62 Concerning, in the second place, the historical interpretation of Article 13(1) of Directive 2013/36, it should be noted that, whilst an authorisation requirement for a credit institution resembling that set out in Article 13(1) of Directive 2013/36 was included in Article 3(2) of First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ 1977 L 322, p. 30), the wording of that requirement was altered in Directive 2013/36.

- 63 Article 3(2) of Directive 77/780 required that 'there shall be at least two persons who effectively direct the business of the credit institution'. Similarly, Article 6(1) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1) and Article 11(1) of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ 2006 L 177, p. 1) required that 'there are at least two persons who effectively direct the business of the credit institution'.
- 64 It is clear that the reference to the '[effective direction of] the business of the ... institution' might be understood as referring to a function specific to the management body in its entirety, which is empowered 'to set the institution's strategy, objectives and overall direction', according to Article 3(1)(7) of Directive 2013/36.
- 65 Concerning Article 13(1) of Directive 2013/36, for the reasons given in paragraphs 60 and 61 above, the reference to the '[effective direction of] the business of the ... institution' seems conceptually closer to 'executive functions' and responsibility for the 'day-to-day management' of the institution referred to in Article 3(1)(9) of Directive 2013/36 in relation to senior management.
- 66 Thus, the structure of the wording of Article 13(1) of Directive 2013/36 develops moving from a reference which can apply to all the members of the management body to a reference intended to designate only the members involved in the institution's senior management.
- 67 In the light of the foregoing, it must be concluded that the textual and historical interpretations of Article 13(1) of Directive 2013/36 tend rather to imply that the expression 'two people who effectively direct the business of the institution' must be understood as referring to the members of the management body who are also part of the senior management of the credit institution.
- 68 However, those interpretations in themselves do not enable the meaning of the expression used in Article 13(1) of Directive 2013/36 to be determined with certainty, since that directive makes no express link between membership of the senior management of the credit institution and the '[effective direction] of the business of the ... institution'. It is necessary, therefore, in accordance with the case-law cited at paragraph 55 above, to determine whether that conclusion is supported by teleological and contextual interpretations of Article 13(1) of Directive 2013/36.
- *The teleological and contextual interpretations of Article 13(1) of Directive 2013/36*
- 69 Directive 2013/36 is silent on the objective of Article 13(1) of that directive, since no recital deals with that provision. Nor can that objective be inferred from earlier legislation.
- 70 Neither Directive 77/780, Directive 2000/12 nor Directive 2006/48 contain any recital explaining the purpose of the authorisation requirement for a credit institution referred to in paragraph 62 above.
- 71 In that regard, the applicants maintain that Article 13(1) of Directive 2013/36, like the relevant provisions of Directives 77/780, 2000/12 and 2006/48, have as their

objective good governance of credit institutions, consisting in the creation of 'a second pair of eyes' principle or a 'four eyes rule', to avoid the concentration of power in the hands of one individual, and the preservation of the effectiveness of that principle or rule means that, in addition to the chief executive officer, there must be another 'effective director' who is not hierarchically answerable to the chief executive officer, which is the situation of the chairman of the management body.

- 72 It is true that the mandatory presence of at least two persons effectively directing the business of a credit institution could be understood as designed not only to permit continuation of the effective direction of a credit institution, by ensuring the direction is not compromised in the event that a single director is unable to carry out his duties, but also to establish mutual monitoring by the persons effectively directing the credit institution.
- 73 However, it should be noted, concerning the governance of credit institutions, that the objectives of Directive 2013/36 are clear from the preamble, in particular, recitals 53, 54 and 57.
- 74 Accordingly, recital 53 of Directive 2013/36, states that 'weaknesses in corporate governance in a number of institutions have contributed to excessive and imprudent risk-taking in the banking sector which has led to the failure of individual institutions and systemic problems in Member States and globally. The very general provisions on governance of institutions and the non-binding nature of a substantial part of the corporate governance framework, based essentially on voluntary codes of conduct, did not sufficiently facilitate the effective implementation of sound corporate governance practices by institutions'. In that regard, the legislature made clear, in the same recital that 'in some cases, the absence of effective checks and balances within institutions resulted in a lack of effective oversight of management decision-making, which exacerbated short-term and excessively risky management strategies'.
- 75 Similarly, recital 54 of Directive 2013/36 states that 'in order to address the potentially detrimental effect of poorly designed corporate governance arrangements on the sound management of risk, Member States should introduce principles and standards to ensure effective oversight by the management body.'
- 76 Lastly, recital 57 of Directive 2013/36 states that 'the role of non-executive members of the management body within an institution should include constructively challenging the strategy of the institution and thereby contributing to its development, scrutinising the performance of management in achieving agreed objectives, satisfying themselves that financial information is accurate and that financial controls and systems of risk management are robust and defensible, scrutinising the design and implementation of the institution's remuneration policy and providing objective views on resources, appointments and standards of conduct'.
- 77 Therefore, it is apparent from examination of the preamble to Directive 2013/36 that, although the directive is silent on the objectives of the rule set out in Article 13(1) of that directive, it contains a clear explanation of the objective pursued by the legislature as to the rules concerning good governance of credit institutions. That objective is to ensure effective oversight of the senior management by the non-executive members of the management body, necessitating checks and balances within the management body.

- 78 That is apparent from Article 88 of Directive 2013/36, entitled 'Governance arrangements', which states, inter alia, in paragraph (1)(d) and (e), respectively, that 'the management body must be responsible for providing effective oversight of senior management' and that 'the chairman of the management body in its supervisory function of an institution must not exercise simultaneously the functions of a chief executive officer within the same institution, unless justified by the institution and authorised by competent authorities'.
- 79 It necessarily follows that, in the general scheme of Directive 2013/36, the objective relating to good governance of credit institutions on which the applicants attempt to pin their interpretation of Article 13(1) of that directive requires effective oversight of the senior management by the non-executive members of the management body, which necessitates checks and balances within the management body. It is clear that the effectiveness of such oversight may be jeopardised if the chairman of the management body in its supervisory function, while not formally acting as chief executive officer, is also responsible for the effective direction of the business of the credit institution.
- 80 Therefore, whereas Article 3(2) of Directive 77/780, Article 6(1) of Directive 2000/12 and Article 11(1) of Directive 2006/48 may be understood as authorising the joint appointment as 'effective directors' of the chief executive officer and the chairman of the management body in its supervisory function, for the purpose of allowing a 'second pair of eyes' in the management of the credit institution, such an interpretation cannot be followed in respect of Directive 2013/36, as that directive lays down specific rules concerning good governance of credit institutions, which preclude, in principle, the chairman of the management body in its supervisory function from being also responsible for the effective direction of the business of the credit institution.
- 81 That conclusion is not undermined by the reference in recital 55 of Directive 2013/36 to the fact that:
- 'Different governance structures are used across Member States. In most cases a unitary or a dual board structure is used. The definitions used in this directive are intended to embrace all existing structures without advocating any particular structure. They are purely functional for the purpose of setting out rules aiming to achieve a particular outcome irrespective of the national company law applicable to an institution in each Member State. The definitions should therefore not interfere with the general allocation of competences in accordance with national company law.'
- 82 Contrary to the applicants' submissions, such an interpretation does not preclude the existence of a unitary governance structure for a credit institution, in which the management body has both executive and supervisory functions, but relates only to the organisation of powers within the management body.
- 83 Therefore, it is apparent from the textual, historical, teleological and contextual interpretations of Article 13(1) of Directive 2013/36 that the expression 'two persons [who] effectively direct the business of the ... institution' refers to the members of the management body who are also part of the senior management of the credit institution.

The interpretation of the second paragraph of Article L. 511-13 of the CMF

- 84 Where the interpretation of a national law provision is at issue, it should be borne in mind that, according to settled case-law, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see judgments of 27 June 1996, *Schmit*, C-240/95, EU:C:1996:259, paragraph 14 and the case-law cited, and of 16 September 2015, *Commission v Slovakia*, C-433/13, EU:C:2015:602, paragraph 81 and the case-law cited).
- 85 In that regard, it should be noted that the ECB and the Commission refer, inter alia, to the interpretation of Article L. 511-13 of the CMF in the judgement of the Conseil d'État (Council of State) of 30 June 2016 referred to in paragraph 19 above. The applicants had the opportunity to submit their observations on that judgment in their observations on the statement in intervention by the Commission and at the hearing.
- 86 Furthermore, it should be noted that that judgment was given following an action for misuse of powers in respect of Position 2014-P-07 of the ACPR, in which the ACPR clarified that its interpretation of the concept of 'effective director' was the same way as that advocated by the ECB, which referred to Position 2014-P-07 of the ACPR in the contested decisions. The judgment of the Conseil d'État (Council of State) of 30 June 2016 is therefore particularly relevant in the present case.
- 87 Moreover, it should be noted that the fact that the judgment of the Conseil d'État (Council of State) of 30 June 2016 postdates the contested decisions does not preclude it being taken into account for the purpose of interpreting Article L. 511-13 of the CMF, since the applicants have had the opportunity to present their observations before the General Court (see to that effect and by analogy, judgment of 5 April 2017, *EUIPO v Szajner*, C-598/14 P, EU:C:2017:265, paragraphs 44 to 46).
- 88 In paragraph 7 of the judgment of the Conseil d'État (Council of State) of 30 June 2016, the following is stated:

'Under Article L. 225-51 of the code de commerce français (French Code of Commerce) "the chairman of the board of directors shall organise and oversee the work of the board and report to the general meeting thereon. He shall supervise the company's management structures to ensure that they function properly and ensure, in particular, that the directors are able to accomplish their task". It follows from those provisions that the chairman of the board of directors of a credit institution in the form of a joint stock company, except where he is responsible for the institution's general management — as permitted under Article L. 225-51-1 of that code on condition that he has been authorised in accordance with the requirements laid down in Article L. 511-58 [of the CMF] — may not be regarded as effectively directing the credit institution, within the meaning of Article L. 511-13 of that code. Accordingly, the ACPR did not misconstrue those provisions by stating that, other than in that situation, the chairman of the board of directors of a credit institution, constituted as a joint stock company with a board of directors, may not be appointed as 'effective director' of that institution. The applicants cannot, in that regard, validly rely on the specific nature of credit institutions governed by the loi du 10 septembre 1947 portant statut de la coopération (Law of 10 September 1947 on status as a cooperative), since the abovementioned provisions of the Commercial Code apply to them regardless of the freedom of organisation which they enjoy under that law or under Article L. 512-31 of the CMF.'

89 Accordingly, by its judgment of 30 June 2016, the Conseil d'État (Council of State) held that it was only in the event that the chairman of the board of directors of a credit institution had been expressly authorised to have responsibility for its general management that that individual could be appointed 'effective director' of that institution, within the meaning of the second paragraph of Article L. 511-13 of the CMF.

90 It follows that the ECB did not commit the errors of law alleged by the applicants in considering that the concept of 'effective director' of a credit institution must be understood as referring to directors with executive functions, such as the chief executive officer, the deputy chief executive officer, the members of the executive board or the sole managing director.

91 Both Article 13(1) of Directive 2013/36 and the second paragraph of Article L. 511-13 of the CMF imply that only members of the management body who are also part of the senior management of the credit institution may be appointed as 'persons [who] effectively direct the business of the institution', within the meaning of Article 13(1) of Directive 2013/36, or persons 'effectively directing the credit institution', within the meaning of the second paragraph of Article L. 511-13 of the CMF.

92 Since the Conseil d'État's judgment of 30 June 2016 is sufficient to establish the scope of the rules of national law that the ECB was required to apply on account of the reference made in Article 4(3) of Regulation No 1024/2013, that is, to the second paragraph of Article L. 511-13 of the CMF, the submissions made by the applicants calling into question the validity of that interpretation, including by reference to other rules of national law, must be rejected at the outset. The same applies, in particular, to the freedom of organisation enjoyed by the applicants under the loi du 10 septembre 1947 portant statut de la coopération (Law of 10 September 1947 on status as a cooperative), the Conseil d'État (Council of State) having expressly ruled on that question in paragraph 7 of its judgment of 30 June 2016.

93 The applicants' first three pleas in law must, therefore, be rejected.

The fourth plea in law, raised in the alternative, alleging infringement of Article L. 511-58 of the CMF

94 As explained in paragraphs 8 and 18 above, in the contested decisions, the ECB based its refusal to approve the appointment of the chairmen of the applicants' board of directors as their 'effective directors', inter alia, on the wording of Article L. 511-58 of the CMF, transposing Article 88(1)(e) of Directive 2013/36. It also referred to the fact that recital 54 of the directive allows Member States to introduce governance principles and standards additional to those required by the directive.

95 In the fourth plea in law, the applicants argue that the ECB erred in its interpretation of Article L. 511-58 of the CMF, since that provision does not preclude the chairman of the board of directors from exercising any executive function, only the function of chief executive officer. They state that, in French law, the chairman of the board of directors has genuine executive functions, distinct from those of a chief executive officer. They point out that their organisation is governed by the loi du 10 septembre 1947 portant statut de la coopération (Law of 10 September 1947 on status as a cooperative), which is characterised by considerable flexibility concerning organisation, enabling them to define, very broadly in their statute, the powers conferred on the board of directors and its chairman. Furthermore, the extent of the powers of the chairman of

the board of directors, either independent or delegated by the board of directors, is sufficient to warrant the classification of the chairman as 'effective director', without at the same time treating the chairman in the same way as a chief executive officer. Furthermore, by restricting the role of the board of directors and its chairman to purely supervisory functions, the ECB negated the specific nature of 'monistic' governance models, in which the board of directors participates in both supervisory and executive functions, contrary to the legislature's intention, as set out in recital 55 of Directive 2013/36. Lastly, the applicants point out that they did not seek the appointment of the chairman of their board of directors as chief executive officer but as 'effective director'.

- 96 The ECB, supported by the Commission, disputes the applicants' arguments.
- 97 As regards, in the first place, Article 88(1)(e) of Directive 2013/36, it should be pointed out that that article is clearly worded in that it precludes 'the chairman of the management body in its supervisory function of an institution [exercising] simultaneously the functions of a chief executive officer within the same institution, unless justified by the institution and authorised by competent authorities'.
- 98 As regards, in the second place, Article L. 511-58 of the CMF, which transposes Article 88(1)(e) of Directive 2013/36, it states that 'the role of chairman of the board of directors or any other body carrying out an equivalent supervisory role in a credit institution or a finance company may not be performed by the chief executive officer or by a person carrying out equivalent management duties'.
- 99 In that regard, it should be noted that, whilst Article L. 511-58 of the CMF is broader in scope than Article 88(1)(e) of Directive 2013/36 in that it precludes not only the 'chief executive officer', but also 'a person carrying out equivalent management duties', chaire the board of directors, whereas Article 88(1)(e) of Directive 2013/36 refers only to the chief executive officer, the broader scope of Article L. 511-58 of the CMF does not mean that it is incompatible with Article 88(1)(e). As the ECB correctly pointed out in the contested decisions, recital 54 of Directive 2013/36, whose content is referred to in paragraph 75 above, allows the Member States to introduce principles and standards to ensure effective oversight by the management body. Furthermore, the extension of the prohibition on combining the functions of chairman of the board of directors with those of chief executive officer to a 'person carrying out equivalent management duties' is consistent with the objectives of Directive 2013/36, as set out in paragraphs 73 and 79 above, namely, the objective of effective oversight of the senior management by the non-executive members of the management body, which involves a balance of powers within the management body.
- 100 Concerning the interpretation of Article L. 511-58 of the CMF, it follows from paragraph 7 of the judgment of 30 June 2016, referred to in paragraph 88 above, that the Conseil d'État (Council of State) found that that provision precluded the chairman of the board of directors of a credit institution being appointed as 'effective director' of that institution, except where that person has been authorised to have responsibility for its general management.
- 101 It follows from the interpretation of Article 88(1)(e) of Directive 2013/36 in paragraph 97 above that, in applying Article L. 511-58 of the CMF, the ECB adopted a decision that is consistent with Article 88(1)(e). Therefore, there is no need to examine the argument put forward by the applicants calling into question the validity of the interpretation of Article L. 511-58 of the CMF.

- 102 It follows that the ECB did not err in law in concluding that Article L. 511-58 of the CMF precluded the appointment of the chairmen of the applicants' boards of directors as their 'effective directors'.
- 103 The fourth plea in law must, therefore, be rejected and, in consequence, the action dismissed in its entirety.

Costs

- 104 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay the costs incurred by the ECB, in accordance with the form of order sought by the latter.
- 105 In accordance with Article 138(1) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. The Commission must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

- 1. Dismisses the actions;**
- 2. Orders, the Caisse régionale de crédit agricole mutuel Alpes Provence, the Caisse régionale de crédit agricole mutuel Nord Midi-Pyrénées, the Caisse régionale de crédit agricole mutuel Charente-Maritime Deux-Sèvres and the Caisse régionale de crédit agricole mutuel Brie Picardie to bear their own costs and pay the costs incurred by the European Central Bank (ECB).**
- 3. Orders the European Commission to bear its own costs.**