

Case C-911/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

13 December 2019

Referring court:

Conseil d'État (France)

Date of the decision to refer:

4 December 2019

Appellant:

Fédération bancaire française (FBF)

Respondent:

Autorité de contrôle prudentiel et de résolution (ACPR)

1. Subject matter and circumstances of the dispute

- 1 On 22 March 2016 the European Banking Authority (EBA) adopted guidelines on product oversight and governance arrangements for retail banking products.
- 2 In a notice published on its website on 8 September 2017, the Autorité de contrôle prudentiel et de résolution (Authority for Prudential Supervision and Resolution) (ACPR), which is the national supervisory authority, announced that it complied with those guidelines and stated that they were applicable to the credit institutions, payment institutions and electronic money institutions under its supervision, which were to make every effort to comply with them and to ensure that their distributors comply with them.
- 3 The Fédération bancaire française (French Banking Federation) (FBF) seeks annulment of that notice on grounds of *ultra vires*, pleading that the guidelines issued by the EBA are invalid.

- 4 In its examination of the action, the Conseil d'État entertains doubts, first of all, as to the admissibility and merits of the appellant's plea that the guidelines issued by the EBA are invalid.

2. Provisions at issue

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)

- 5 Chapter I, 'Establishment and legal status', provides in Article 1:

'1. This regulation establishes a European Supervisory Authority (European Banking Authority) (hereinafter "the Authority").

2. The Authority shall act within the powers conferred by this Regulation and within the scope of Directive 2006/48/EC, Directive 2006/49/EC, Directive 2002/87/EC, Regulation (EC) No 1781/2006, Directive 94/19/EC and, to the extent that those acts apply to credit and financial institutions and the competent authorities that supervise them, within the relevant parts of Directive 2005/60/EC, Directive 2002/65/EC, Directive 2007/64/EC and Directive 2009/110/EC, including all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority.

...

5. The objective of the Authority shall be to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses. The Authority shall contribute to:

...

(e) ensuring the taking of credit and other risks are appropriately regulated and supervised; and

(f) enhancing customer protection'.

- 6 Article 9 provides:

'...

2. The Authority shall monitor new and existing financial activities and may adopt guidelines and recommendations with a view to promoting the safety and soundness of markets and convergence of regulatory practice'.

Guidelines on product oversight and governance arrangements for retail banking products (POG) EBA/GL/2015/18

‘Scope of application

6. These Guidelines apply to manufacturers and distributors of products offered and sold to consumers and specify product oversight and governance arrangements in relation to:

- Article 74(1) of Directive 2013/36/EU (“Capital Requirements Directive IV, (CRD IV)”), Article 10(4) of Directive 2007/64/EC (the “Payment Services Directive, (PSD)”), and Article 3(1) of Directive 2009/110/EC (the “E-Money Directive, (EMD)”) in conjunction with Article 10(4) of the PSD; and
- Article 7(1) of Directive 2014/17/EU (the “Directive on credit agreements for consumers relating to residential immovable property, or Mortgage Credit Directive, (MCD)”).

...

Addressees

11. These Guidelines are addressed to competent authorities as defined in [Article 4(2)(i)] of Regulation (EU) No 1093/2010 and to financial institutions as defined in Article 4(1) of Regulation (EU) No 1093/2010 (the “EBA Regulation”).

14. With regard to the Guidelines for distributors, competent authorities should either require distributors directly to comply with them or require manufacturers under their supervision to ensure that distributors comply with them.’

3. Arguments of the parties

The Fédération bancaire française

7 The Fédération bancaire française challenges the EBA’s power to draw up the Guidelines on product oversight and governance arrangements for retail banking products. In its opinion, the EBA misconstrued the scope of Article 1 of Regulation No 1093/2010, which allows it to act only within the scope of Directive 2006/48/EC, Directive 2006/49/EC, Directive 2002/87/EC, Regulation (EC) No 1781/2006, Directive 94/19/EC and the relevant parts of Directive 2005/60/EC, Directive 2002/65/EC, Directive 2007/64/EC and Directive 2009/110/EC.

8 The Fédération bancaire française contends in particular that the concept of ‘product governance’, the term ‘target markets’ and the distinction between manufacturers and distributors contained in the Guidelines on product oversight and governance arrangements for retail banking products issued by the EBA do

not appear in any of the regulations and directives which determine the extent of the powers of the EBA and, in particular, not in those listed in paragraph 1.6 of the Guidelines issued by the EBA on 22 March 2016.

- 9 However, the governance of financial products marketed by providers of investment services, as defined in Directive 2014/65/EU of 15 May 2014 on markets in financial instruments (known as the MiFID II Directive), and on the basis of which the European Securities and Markets Authority issued guidelines on 5 February 2018, is based on such concepts and terms.
- 10 It is therefore of the opinion that, by transposing, in its Guidelines of 22 March 2016, concepts and terms relating to the governance of financial products to the governance of retail banking products marketed by credit institutions — products entailing fewer risks for consumers — the EBA requires manufacturers of retail banking products to comply with a level of good practice that is not justified and does not flow from any EU directive or regulation which the EBA is responsible for ensuring is properly applied throughout the European Union. In adopting such guidelines, the EBA exceeded the scope of its powers as set out in Article 1(2) of Regulation No 1093/2010.

The Autorité de contrôle prudentiel et de résolution (ACPR)

- 11 The Autorité de contrôle prudentiel et de résolution (Authority for Prudential Supervision and Resolution) (ACPR) contends, as its main argument, that the contested notice is not open to challenge and that therefore the application is inadmissible and, in the alternative, that the pleas put forward are unfounded.

4. Findings of the Conseil d'État

Concerning the admissibility of the plea of invalidity

- 12 The Conseil d'État points out first of all that national courts 'may consider the validity of [an EU] act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. ... On the other hand, those courts do not have the power to declare acts of the [EU] institutions invalid' (judgment of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraphs 14 and 15).
- 13 It adds that 'by [Articles 263 and 277 TFEU], on the one hand, and by Article [267 TFEU], on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the [EU] Courts. ... Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article [263] of the Treaty, directly challenge Community measures of general application, they are able,

depending on the case, either indirectly to plead the invalidity of such acts before the [EU] Courts under Article [277] of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid ..., to make a reference to the Court of Justice for a preliminary ruling on validity' (judgment of 25 July 2002, *Unión de Pequeños Agricultores v Council*, C-50/00 P, EU:C:2002:462, paragraph 40).

- 14 It considers in the present case that the admissibility of the plea of invalidity put forward by the Fédération bancaire française therefore depends on the answer to the question of whether guidelines issued by a European supervisory authority may be the subject of an action for annulment under Article 263 TFEU. If so, it would be necessary to ascertain whether it is open to a professional federation to challenge by that means the validity of guidelines which are intended for the members whose interests it protects but which are not of direct or individual concern to it.
- 15 Furthermore, in the event that guidelines issued by a European supervisory authority may not be the subject of a direct action for annulment or in the event that such an action is not open to a professional federation, the admissibility of the plea of invalidity raised by the appellant federation before the Conseil d'État would then depend on whether those guidelines may be the subject of a reference for a preliminary ruling under Article 267 TFEU. If so, it would be necessary to ascertain whether it is open to a professional federation to challenge, by that means, the validity of guidelines which are intended for the members whose interests it protects but which are not of direct or individual concern to it.

Regarding the powers of the European Banking Authority

- 16 The Conseil d'État finds, first, that none of the legislative acts listed in paragraph 1.6 of the Guidelines issued by the EBA on 22 March 2016 makes express provision concerning the governance of retail banking products, apart from Directive 2014/17/EU, which governs credit agreements for consumers relating to residential immovable property. Thus, in particular, although it follows from the MiFID II Directive that the identification of 'target markets' is essential for the governance of financial products, that term appears only in Article 79(d) of Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, with regard to a provision concerning the adequate diversification of credit portfolios held by credit institutions, in the context of the management of the risk to which such institutions are exposed.
- 17 The Conseil d'État notes, second, that none of those legislative acts, including Directive 2014/17/EU of 4 February 2014, contains any provision empowering the EBA to issue guidelines on the governance of retail banking products.
- 18 However, Article 1(5)(e) and (f) of Regulation No 1093/2010 provides that the EBA is to contribute to 'ensuring the taking of credit and other risks are

appropriately regulated’ and ‘enhancing ... protection [for EU customers]’, objectives which the governance of retail banking products contributes to attaining. Moreover, the ‘new and existing financial activities’ entrusted to the supervision of the EBA under Article 9(2) of that regulation are likely to include retail banking products offered by credit institutions and, therefore, to justify the EBA issuing guidelines for their proper governance.

- 19 The response to the plea alleging the EBA’s lack of powers depends on the answer to the question whether, by issuing guidelines on product oversight and governance arrangements for retail banking products, the EBA exceeded the powers conferred on it by Article 1(2) and (5) and by Articles 8 and 16 of Regulation (EU) No 1093/2010.

5. The questions referred for a preliminary ruling

- 20 The Conseil d’État refers the following questions:

1. May an action be brought under Article 263 of the Treaty on the Functioning of the European Union for annulment of guidelines issued by a European supervisory authority? If so, is it open to a professional federation to challenge, by means of an action for annulment, the validity of guidelines intended for the members whose interests it protects but which are not of direct or individual concern to it?

2. In the event of a negative answer to either of the questions raised in paragraph 1, may guidelines issued by a European supervisory authority be the subject of a reference for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union? If so, is it open to a professional federation to challenge, by means of a plea of invalidity, guidelines intended for the members whose interests it protects and which are not of direct or individual concern to it?

3. In the event that it is open to the Fédération bancaire française to challenge, by means of a plea of invalidity, the Guidelines adopted by the European Banking Authority on 22 March 2016, did that Authority, in issuing those guidelines, exceed the powers conferred on it under Regulation No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority)?