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Press and Information

Advocate General's Opinion in Case C-911/19
Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)

# Advocate General Bobek: The Court should declare the European Banking Authority Guidelines on Product Oversight and Governance Arrangements for Retail Banking Products invalid

*The preliminary reference procedure may be used in order to review the validity of soft law EU acts*

In 2017, the European Banking Authority (EBA) issued Guidelines on product oversight and governance arrangements for retail banking products [1] (the guidelines). The French *Autorité de contrôle prudentiel et de résolution* (Authority for Prudential Supervision and Resolution - ACPR) announced in a notice that it complied with those guidelines, thus making them applicable to all financial institutions under its supervision.

The *Fédération bancaire française* (French Banking Federation - FBF) lodged an application seeking the annulment of the ACPR notice before the *Conseil d'État* (Council of State, France - the referring court). FBF claims that the EBA's guidelines, which were made applicable by the notice, are invalid due to the EBA's lack of competence to issue such guidelines. In its reference order, the *Conseil d'État* expressed some doubts as to the admissibility under Article 267 TFEU and the merits of the plea under which the contested guidelines are invalid.

In today's Opinion, **Advocate General Michal Bobek proposes that the Court should rule that EU law allows for a request for a preliminary ruling to be submitted on the assessment of validity of non-binding EU acts (soft law acts). It should also rule that a professional federation may, by means of a plea of illegality lodged before a national court, challenge guidelines intended for the members whose interests it protects even where such guidelines may not be of direct and individual concern to it. Finally, he proposes that the Court should find that the Guidelines on product oversight and governance arrangements for retail banking products should be declared invalid in so far as the EBA has acted outside the powers bestowed upon it by Regulation Nº 1093/2010 [2].**

## On whether the EBA exceeded its competences

After examining the nature of the guidelines as soft law EU measures and the ensuing consequences regarding the judicial review of such measures by the Court, Advocate General Bobek notes that, when comparing the scope of application with the actual content of the guidelines, it seems rather clear that, with regard to their legal basis, **the contested guidelines go further than what Regulation No 1093/2010 allows for**. As regards the directives which are specifically cited by the contested guidelines in relation to the latter's scope of application, the Advocate General notes that there is a clear mismatch between the subject matter of those acts and that of the guidelines. While the latter have set out specific 'rules' that concern *product* governance, the former all relate to *corporate* governance.

[1] Guidelines from 22 March 2016 (EBA/GL/2015/18).
[2] Regulation 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).

He therefore finds that **the EBA could not lawfully adopt guidelines on the governance of banking products**. The fact that the guidelines aim at protecting consumers does not alter that conclusion.

Advocate General Bobek then considers whether the fact that the kind of measures such as the guidelines do not generate any binding legal effect should mean that the **type of review** of their validity should be more lenient. The Advocate General concludes that it is essential to make soft law acts adopted by EU agencies subject to **normal judicial review**, at least with regard to their competences, so that those agencies do not unlawfully interfere with the competences of other EU bodies or institutions.

Concerning the **formal outcome of the review of soft law measures**, Advocate General Bobek explains that, while it would be possible for the Court to opt for an answer as to interpretation of EU law, he would still recommend to the Court to expressly provide **an answer as to the validity of the guidelines despite their nature as soft law measures**.

**On the relationship between Articles 263 and 267 TFEU**

According to *Foto-Frost* [3], a national court is under the duty to make a reference to the Court on the validity of an EU law measure unless it considers that the grounds put forward in support of invalidity are unfounded. [123] According to *Grimaldi* [4], a national court may ask the Court to give a preliminary ruling on both the validity and the interpretation of all acts of the institutions of the Union without exception. According to *Belgium v Commission* [5], actions for annulment under Article 263 TFEU against non-binding EU measures are inadmissible.

Advocate General Bobek points out the mutual logical inconsistencies arising from those three judgments of the Court as far as soft law EU measures are concerned. In view of the nature of those acts, it hardly makes sense to refuse judicial review of such acts under Article 263 TFEU while allowing it under Article 267 TFEU. However, the advocate general considers that, as long as there is no effective legal protection against potentially detrimental legal effects of soft law EU measures under Article 263 TFEU, **submitting a request for a preliminary ruling on validity under Article 267 TFEU with regard to those acts,** in accordance with the judgment in *Grimaldi*, **remains the only way in which this Court may ensure that there is at least some resemblance of a complete system of remedies provided for in EU law**.

That said, Advocate General Bobek finds that *Foto-Frost* is not applicable to soft law EU measures, in particular because the requirement of uniformity is by nature less imperative with regard to such measures. In practical terms, this means that a national court is within its right to annul, if it is itself entitled to do so under national law, the national 'incorporation' or 'implementation' measure that made a soft law EU measure applicable within the national territory, without first being obliged to submit a request for a preliminary ruling to the Court on that matter.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*Unofficial document for media use, not binding on the Court of Justice.*

*The full text of the Opinion is published on the CURIA website on the day of delivery.*

[3] Judgment of the Court of Justice of 22 October 1987, Foto-Frost, C-314/85
[4] Judgment of the Court of Justice of 13 December 1989, Grimaldi, C-322/88
[5] Judgment of the Court of Justice of 20 February 2018, Belgium v Commission, C-16/16

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