Kramer Levin

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SUPERVISORY AUTHORITIES

Challenge of the guidelines of the European Banking Authority and notice of compliance by the Prudential Supervisory and Resolution Authority (ACPR)

In its notice of September 8, 2017, the ACPR stated that it complies with the European Banking Authority (EBA) guidelines on governance and supervision arrangements for retail banking products. The French Banking Federation (FBF) has requested the annulment of this notice on the grounds of abuse of power. In its decision of December 4, 2019 (9° and 10° ch together, req. no. 415550), the Conseil d'État decided to refer three questions to the Court of Justice of the European Union for a preliminary ruling:

1° Are the guidelines issued by a European supervisory authority liable to be the subject of the action for annulment provided for by the provisions of Article 263 of the Treaty on the Functioning of the European Union? If so, is a professional federation admissible to challenge, by way of an action for annulment, the validity of guidelines intended for the members whose interests it defends and which do not concern it either directly or individually?

2. If the answer to one of the two questions in 1° is negative, are the guidelines issued by a European supervisory authority liable to be the subject of a referral for a preliminary ruling provided for by the provisions of Article 267 of the Treaty on the Functioning of the European Union? If so, is a professional federation admissible to challenge, by way of exception, the validity of guidelines intended for the members whose interests it defends and which do not concern it either directly or individually?

3° In the event that the French Banking Federation (FBF) is entitled to raise a challenge, by way of exception, the guidelines adopted by the European Banking Authority on March 22, 2016, has this Authority, in issuing these guidelines, exceeded the powers vested in it by Regulation No. 1093/2010 of the European Parliament and of the Council of November 24, 2010 establishing a European Supervisory Authority (European Banking Authority)?

These issues are important not only for the European Banking Authority but also for the other European Supervisory Authorities: European Securities and Markets Authority and European Insurance and Occupational Pensions Authority. Indeed, all

of these authorities produce guidelines or guidance that may, in one way or another, be imposed on professionals.

Strengthening of ESMA's powers vis-à-vis central counterparties

The Regulation of October 23, 2019 (Regulation (EU) 2019/2099 of the European Parliament and of the Council of October 23, 2019 amending Regulation (EU) 648/2012 as regards procedures for the authorisation of central counterparties and the authorities participating in them and the requirements for the recognition of third country CCPs) increases the role of ESMA in the oversight of CCPs. While they are and always will be approved by the authorities of the country of origin, which must, under the conditions of Article 17 of Regulation 648/2012 of July 4, 2012, known as the EMIR Regulation, take into account the opinion of the College provided for in Article 18, such approval can now only be granted after the opinion of the European Securities and Markets Authority (ESMA) has been obtained. It states that the Competent Authority "shall give it due consideration and shall inform ESMA of any subsequent action or inaction thereto. Where the competent authority does not agree with an opinion of ESMA, it shall provide comments to ESMA on any significant deviation from that opinion" (Art. 23 bis, EMIR Regulation, resulting from Article 1, 7), Regulation of October 23, 2019).

ESMA has also been given new powers, such as a power of investigation (Article 25g, EMIR Regulation, from Article 1, 11), Regulation of October 23, 2019) and a power to impose sanctions (Article 25j, EMIR Regulation, resulting from Article 1, 11), Regulation of October 23, 2019). It has also been authorised to take supervisory measures vis-à-vis certain central counterparties (Art. 25q, EMIR Regulation, resulting from Article 1, 11), Regulation of October 23, 2019).

ESMA and Colleges of Central Counterparties

The Regulation of October 23, 2019 provides for the establishment, within ESMA, of an internal committee within the Authority, called the "Central Counterparty Supervisory Committee" (Article 24a, EMIR Regulation, resulting from Article 1, 9), Regulation of October 23, 2019). The 2019 Regulations provide for its composition (Article 2). This Committee, which is assisted by dedicated ESMA staff, is entrusted with some of the tasks entrusted to ESMA vis-à-vis CCPs (Article 24a, op. cit.)

The same Regulation provides for the establishment of a college of third country CCPs to facilitate the sharing of information (Article 25c, EMIR Regulation, resulting from Article 1, 11), Regulation of October 23, 2019).

FINANCIAL INTERMEDIARIES

Definition of credit institution and extension of the competence of the European Central Bank

The definition of credit institutions, as set out in Article 4, § 1, point 1, of Regulation 575/2013, is amended by Article 62 of Regulation 2019/2033 of November 27, 2019. Credit institutions now include two types of undertakings: undertakings that receive funds from the public and grant credit; undertakings that provide investment services for dealing on own account and the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis when these undertakings meet certain conditions, in particular when the total value of consolidated assets reaches or exceeds 30 billion Euros. The category of credit institutions thus includes large investment firms that are systemically important on a global scale in order to subject them to the same prudential regime as credit institutions and to the supervision of the European Central Bank.

Categories of third country central counterparties

The Regulation of October 23, 2019 distinguishes between two categories of third country CCPs: Tier 1 CCPs and Tier 2 CCPs. The latter are systemically important or are likely to be systemically important for the financial stability of the Union or of one or more of its Member States in the future. ESMA is responsible for determining, after consultation with, in particular, with central banks, whether a CCP in a third country falls into Tier 1 or Tier 2. The Regulation of October 23, 2019 gives criteria that will have to be specified in a delegated regulation (Art. 25, 2a, EMIR Regulation, resulting from Article 1, 10), Regulation of October 23, 2019). Some of the ESMA's powers, such as the power under the new Article 25g entitled "general enquiries", are specific to Tier 2 CCPs.

Prudential regulations applicable to investment firms

Investment firms were subject to the same prudential regime (Directive 2013/36/EU and Regulation 575/2013 of June 26, 2013) as credit institutions. However, it was considered that a specific regime for these undertakings is required where they are not systemically important in view of their size and their interconnection with other financial and economic actors. This explains why investment firms have been excluded from the rules applicable to credit institutions and are now governed by their own legislation: a Directive and a Regulation of November 27, 2019 (Directive (EU) 2019/2034 of the European Parliament and of the Council of November 27, 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU; Regulation (EU) 2019/2033 of the European Parliament and of the Council of November 27, 2019 on prudential requirements for investment firms and amending Regulations (EU) No 1093/2010, (EU) 575/2013, (EU) 600/2014 and (EU) 806/2014). It being noted that the non-application of the prudential banking regime to investment firms led to a change in the title of the Regulation of January 26, 2013, which no longer refers to investment firms. Formerly known as "Regulation (EU) 575/2013 of the European Parliament and of the Council of June 26, 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) 648/2012", the Regulation of June 26, 2013 has become "Regulation (EU) 575/2013 of the European Parliament and of the Council of June 26, 2013 on prudential requirements for credit institutions and amending Regulation (EU) 648/2012".

The approach taken is not absolute. Indeed, it cannot be inferred that all investment firms are subject to the provisions of the Regulation of November 27, 2019. On the one hand, small, non-interconnected investment firms may benefit from an exemption, and thus not be subject to all or part of the prudential regime (Articles 6(1) and 12). Other investment firms remain subject to the prudential banking regime. This is the case for undertakings which, among other conditions, meet the following condition: the total value of the consolidated assets reaches or exceeds 15 billion Euros (Art. 1 § 2). This situation must be distinguished from the situation of investment firms which are to take on the status of credit institution.

SANCTIONS

Manipulation of the Euribor rate and anti-competitive practice

The European Commission had sanctioned several banks, including HSBC, for anti-competitive practices, notably under Article 101 of the Treaty on the Functioning of the European Union, which prohibits cartels, by taking part in a single and continuous infringement aimed at altering the normal price fixing process on the Euro Interest Rate Derivative (EIRD) market for interest rate derivatives denominated in Euros linked to Euribor and/or EONIA.

These banks had been jointly and severally ordered to pay a fine of 33,606,000 Euros.

In its decision of September 24, 2019 (Case T-105/17, HSBC Holdings plc, HSBC Bank plc, HSBC France v. European Commission), the Court of First Instance of the European Union validates, while reducing the scope of the infringement, the European Commission's assessment. On the other hand, as regards the fine, the Commission's decision is invalidated on the ground that it is insufficiently reasoned to understand how the amount of the fine was set.

Penalties for obstructing AMF investigations

In a decision dated November 19, 2019 (Decision 15 of November 19, 2019, proceeding 18/13, Novaxia Investissement, Azan, Novaxia Développement, Novaxia Gestion and Novaxia), the Sanctions Committee sanctioned a management company and its chairman and three companies in the same group for obstructing AMF supervision.

The first two are accused of "failing to act with due diligence by responding to the audit team's requests within excessive time limits when they did not require any special effort on their part" (Decision No. 153) and "failing to act with the loyalty required by Article 143-3 of the AMF General Regulation by responding inaccurately to the audit team's requests for disclosure of the minutes of the Novaxia group's joint management committees and of the plenary meetings of all group employees. The notices of complaints also criticise the parties concerned for having incorrectly stated that there was no compilation of the agendas and materials for those meetings" (Decision No 154). This led the Commission to "consider that the answers provided by Novaxia AM were approximate or inaccurate and that the time limits within which the company responded to the auditors' requests were excessive. The

fact that the person designated to be the contact person for the auditors was new to the organisation is not a cause that would relieve the company of its duty of diligence and loyalty. It follows from the foregoing that the breach arising from the violation of the provisions of Article 143-3 of the AMF General Regulation is characterised" (Decision No. 164).

With regard to the other entities, it is stated that "the persistent refusal of the Novaxia Entities to disclose to the auditors all of their ledgers for the years 2014, 2015 and 2016 constitutes an obstruction of supervision within the meaning of the provisions of Article L. 621-15 II f) of the Monetary and Financial Code" (Decision No. 203).

CONSUMER PROTECTION

Strengthening of consumer protection

Directive 2019/2161 of the European Parliament and of the Council of November 27, 2019 (OJEU No. L 328/7 of December 18, 2019) strengthens consumer protection. To this end, it amends three texts: Directive 93/13/EEC of April 5, 1993 on unfair terms, Directive 98/6/EC of February 16, 1998 on the indication of the price of products offered to consumers, Directive 2005/29 EC of May 11, 2005 on unfair commercial practices and Directive 2011/83/EU on consumer rights. Particularly noteworthy are the additions to the sanctions regime for unfair terms (Art. 1) as well as the specific additional information requirements applicable to contracts concluded on online market places (Art. 4, 5).

Reduction of the total cost of credit in the event of early repayment

In the event of early repayment, the consumer "shall be entitled to a reduction in the total cost of the credit, such reduction consisting of the interest and the costs for the remaining duration of the contract" (Art. 16(1), Directive of April 23, 2008). This formula gives rise to difficulties: does it imply that only the costs related to the remaining period of the contract can be reduced or should the costs related to that period be taken as an indication for the calculation of the reduction, which implies that any costs due for that period, whether or not related to it, can be reduced? This second interpretation was adopted by the CJEU in its judgement of September 11, 2019 (case C-383/18, Lexitor sp. z o.o. c Spółdzielcza Kasa Oszczędnościowo - Kredytowa im. Franciszka Stefczyka, Santander Consumer Bank S.A., mBank S.A.) :

Article 16(1) of the 2008 Directive "must be interpreted as meaning that the right of the consumer to a reduction in the total cost of the credit in the event of early repayment of the credit includes all the costs imposed on the consumer".

Mention of the APR in the consumer credit agreement

Article 10 of the Directive of April 23, 2008, which requires the APR to be stated in the credit agreement, precludes the APR from being expressed in the consumer credit agreement not by a single rate but by a range referring to a minimum rate and a maximum rate (CJEU, December 19, 2019, Case C-290/19 RN v Home credit Slovakia a.s.).

Due diligence of the presenting banker in the event of cheques made payable to a person who is a court-appointed administrator

The banker, who does not have to interfere in his client's affairs, must nevertheless detect apparent anomalies. The anomaly is apparent when cheques made payable to an individual in his professional capacity are cashed on his personal account (Court of Cassation, Commercial Division, September 25, 2019, judgement No. 677 F-D, appeal No. A 18-15.965 and W 18-16.421, Caisse de garantie des administrateurs judiciaires et des mandataires judiciaires v. Caisse de crédit mutuel de Bastia et al.).

Due diligence of the presenting banker when cashing cheques on which the name of a payee has been added next to the name of the initial payee

"Although the juxtaposition of the names of two payees on a cheque does not, in itself, constitute an apparent anomaly, the presenting bank is nevertheless required, when one of the two payees hands over a cheque bearing such a mention for cashing for its sole benefit, to ascertain the consent of the other, unless there are special circumstances that allow it to take such consent for granted" (Court of Cassation, Commercial Division, November 27, 2019, Judgement No. 927 FS-P+B, Appeal No. F 18-11.439 and E 18-12.427, Société MMA Vice v. Société Lyonnaise de banque et al.)

Under what conditions can a borrower blame a bank for having calculated the interest on the loan over a 360-day banking year?

It is up to the borrower to show that the interest on his loan has been calculated on the basis of a 360-day year and that this calculation has generated an additional cost to his detriment of an amount greater than the decimal provided for in Article R

313-1 of the Consumer Code (Court of Cassation, 1st Civil Division, November 27, 2019, Judgement No. 997 F-P+B+I, Appeal No. E 18-19.097, Banque populaire Auvergne Rhône Alpes v. M. X).

Are insurance companies obliged to provide annual information to the guarantor?

Article L 313-22 of the Monetary and Financial Code concerns only credit institutions and not insurance companies, even though they grant loans secured by a guarantee (Court of Cassation, Commercial Division, October 23, 2019, Appeal No. P 17-25.656, Judgement No. 838 FS-P+B).

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