Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

15 July 2021 *

(Reference for a preliminary ruling – Articles 263 and 267 TFEU – EU act which is not legally binding – Judicial review – Guidelines issued by the European Banking Authority (EBA) – Product oversight and governance arrangements for retail banking products – Validity – Power of the EBA)

In Case C-911/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 4 December 2019, received at the Court on 13 December 2019, in the proceedings

**Fédération bancaire française (FBF)**

v

**Autorité de contrôle prudentiel et de résolution (ACPR),**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan, M. Ilešič, L. Bay Larsen (Rapporteur), A. Kumin and N. Wahl, Presidents of Chambers, E. Juhász, T. von Danwitz, C. Toader, L.S. Rossi, I. Jarukaitis and N. Jääskinen, Judges,

Advocate General: M. Bobek,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 20 October 2020,

after considering the observations submitted on behalf of:

– the Fédération bancaire française (FBF), by F. Boucard, avocat,

– the Autorité de contrôle prudentiel and de résolution (ACPR), by F. Rocheteau, avocat,

– the French Government, by E. de Moustier and A. Daly, acting as Agents,

* Language of the case: French.

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Banking Authority (EBA), by J. Overett Somnier, C. Carroll and I. Metin, acting as Agents, and B. Kennelly QC and R. Mehta, Barrister,

– the European Commission, by D. Triantafyllou, V. Di Bucci and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 April 2021,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 263 and 267 TFEU and the validity, in the light of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ 2010 L 331, p. 12), as amended by Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 (OJ 2015 L 337, p. 35) ('Regulation No 1093/2010'), of the Guidelines of the European Banking Authority (EBA) of 22 March 2016 on product oversight and governance arrangements for retail banking products (EBA/GL/2015/18) ('the contested guidelines').

2 The request has been made in proceedings between the Fédération bancaire française (French Banking Federation) (FBF) and the Autorité de contrôle prudentiel et de résolution (Authority for Prudential Supervision and Resolution, France) (ACPR) concerning the adoption by the ACPR of a notice by which it declared that it complied with the contested guidelines.

### Legal context

#### *Directive 2007/64/EC*

3 Article 10(4) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1) stated:

'The competent authorities shall grant an authorisation only if, taking into account the need to ensure the sound and prudent management of a payment institution, the payment institution has robust governance arrangements for its payment services business, which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective procedures to identify, manage, monitor and report the risks to which it is or might be exposed, and adequate internal control mechanisms, including sound administrative and accounting procedures; those arrangements, procedures and mechanisms shall be comprehensive and proportionate to the nature, scale and complexity of the payment services provided by the payment institution.'

### *Directive 2009/110/EC*

4 Article 3(1) of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ 2009 L 267, p. 7) states:

'Without prejudice to this Directive, Articles 5 and 10 to 15, Article 17(7) and Articles 18 to 25 of Directive [2007/64] shall apply to electronic money institutions *mutatis mutandis*.'

### *Regulation No 1093/2010*

5 Article 1(2), (3) and (5) of Regulation No 1093/2010 provides:

'2. The [EBA] shall act within the powers conferred by this Regulation and within the scope of [Directive 2009/110], … [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)] …, including all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the [EBA]. …

3. The [EBA] shall also act in the field of activities of credit institutions, financial conglomerates, investment firms, payment institutions and e-money institutions in relation to issues not directly covered in the acts referred to in paragraph 2, including matters of corporate governance, auditing and financial reporting, provided that such actions by the [EBA] are necessary to ensure the effective and consistent application of those acts.

…

5. The objective of the [EBA] 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 [EBA] shall contribute to:

…

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

(f) enhancing customer protection.

…'

6 Article 8(1), (1a) and (2) of that regulation provides:

‘1. The [EBA] shall have the following tasks:

(a) to contribute to the establishment of high-quality common regulatory and supervisory standards and practices, in particular by providing opinions to the Union institutions and by developing guidelines, recommendations, draft regulatory and implementing technical standards, and other measures which shall be based on the legislative acts referred to in Article 1(2);

…

(b) to contribute to the consistent application of legally binding Union acts, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of the acts referred to in Article 1(2) …;

…

(h) to foster depositor and investor protection;

…

1a. When carrying out its tasks in accordance with this Regulation, the [EBA] shall:

(a) use the full powers available to it; …

…

2. To achieve the tasks set out in paragraph 1, the [EBA] shall have the powers set out in this Regulation, in particular to:

…

(c) issue guidelines and recommendations, as laid down in Article 16;

…’

7 Article 15(4) of that regulation is worded as follows:

‘The implementing technical standards shall be adopted by means of regulations or decisions. …’

8 Article 16(1) and (3) of Regulation No 1093/2010 provides:

‘1. The [EBA] shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS [European System of Financial Supervision], and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial institutions.

…

3. The competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations.

Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the [EBA], stating its reasons.

…

If required by that guideline or recommendation, financial institutions shall report, in a clear and detailed way, whether they comply with that guideline or recommendation.'

### *Directive 2013/36*

9 Article 74(1) to (3) of Directive 2013/36 states:

'1. Institutions shall have robust governance arrangements, which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks they are or might be exposed to, adequate internal control mechanisms, including sound administration and accounting procedures, and remuneration policies and practices that are consistent with and promote sound and effective risk management.

2. The arrangements, processes and mechanisms referred to in paragraph 1 shall be comprehensive and proportionate to the nature, scale and complexity of the risks inherent in the business model and the institution's activities. The technical criteria established in Articles 76 to 95 shall be taken into account.

3. EBA shall issue guidelines on the arrangements, processes and mechanisms referred to in paragraph 1, in accordance with paragraph 2.'

### *Directive 2014/17/EU*

10 Article 7(1) of Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ 2014 L 60, p. 34) provides:

'Member States shall require that when manufacturing credit products or granting, intermediating or providing advisory services on credit and, where appropriate, ancillary services to consumers or when executing a credit agreement, the creditor, credit intermediary or appointed representative acts honestly, fairly, transparently and professionally, taking account of the rights and interests of the consumers. In relation to the granting, intermediating or provision of advisory services on credit and, where appropriate, of ancillary services the activities shall be based on information about the consumer's circumstances and any specific requirement made known by a consumer and on reasonable assumptions about risks to the consumer's situation over the term of the credit agreement. …'

11 The third paragraph of Article 29(2)(a) of that directive states:

'EBA shall develop draft regulatory technical standards to stipulate the minimum monetary amount of the professional indemnity insurance or comparable guarantee referred to in the first paragraph of this point for submission to the Commission by 21 September 2014. EBA shall review, and if necessary, develop draft regulatory technical standards to amend the minimum monetary amount of the professional indemnity insurance or comparable guarantee referred to in the first paragraph of this point for submission to the Commission for the first time by 21 March 2018 and every two years thereafter.'

12 Under Article 34(2) and (4) of that directive:

'2. …

Where the competent authority of the home Member State disagrees with such action taken by the host Member State, it may refer the matter to EBA and request its assistance in accordance with Article 19 of Regulation (EU) No 1093/2010. In that case EBA may act in accordance with the powers conferred on it by that Article.

…

4. …

Where the competent authority of the home Member State fails to take any action within one month from obtaining those findings or where, despite the action taken by the competent authority of the home Member State, a credit intermediary persists in acting in a manner that is clearly prejudicial to the interests of the host Member State consumers or orderly functioning of the markets, the competent authority of the host Member State:

…

(b) may refer the matter to EBA and request its assistance in accordance with Article 19 of Regulation (EU) No 1093/2010. In that case EBA may act in accordance with the powers conferred on it by that Article.'

13 Article 37 of that directive is worded as follows:

'The competent authorities may refer the situation to EBA where a request for cooperation, in particular the exchange of information, has been rejected or has not been acted upon within a reasonable time, and request EBA's assistance in accordance with Article 19 of Regulation (EU) No 1093/2010. …'

### *Directive 2015/2366*

14 Article 114 of Directive 2015/2366 states:

'Directive 2007/64/EC is repealed with effect from 13 January 2018.

Any reference to the repealed Directive shall be construed as a reference to this Directive and shall be read in accordance with the correlation table in Annex II to this Directive.'

### *The EBA Guidelines on Internal Governance*

15 Guideline 23 of the European Banking Authority (EBA) Guidelines of 27 September 2011 on Internal Governance (EBA BS 2011 116 final; 'the EBA Guidelines on Internal Governance') states that the institutions concerned are to have a new product approval policy and sets out the characteristics which that policy should have.

### *The contested guidelines*

16 Paragraph 2 of the contested guidelines provides:

'Guidelines set the EBA view of appropriate supervisory practices within the European System of Financial Supervision or of how Union law should be applied in a particular area. Competent authorities … to whom guidelines apply should comply by incorporating them into their practices as appropriate (e.g. by amending their legal framework or their supervisory processes), including where guidelines are directed primarily at institutions.'

17 Paragraph 3 of those guidelines provides:

'Pursuant to Article 16(3) of Regulation (EU) No 1093/2010, competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or otherwise with reasons for non-compliance … with the guidelines, where appropriate …'

18 Paragraph 5 of those guidelines states:

'These Guidelines deal with the establishment of product oversight and governance arrangements for both, manufacturers and distributors as an integral part of the general organisational requirements linked to internal control systems of firms. They refer to internal processes, functions and strategies aimed at designing products, bringing them to the market, and reviewing them over their life cycle. They establish procedures relevant for ensuring the interests, objectives and characteristics of the target market are met. However, these Guidelines do not deal with the suitability of products for individual consumers.'

19 Paragraph 6 of those guidelines is worded as follows:

'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], Article 10(4) of Directive [2007/64] and Article 3(1) of Directive [2009/110], in conjunction with Article 10(4) of [Directive 2007/64]; and

– Article 7(1) of Directive [2014/17].'

20 Paragraphs 11 to 14 of the contested guidelines designate the competent authorities which are the addressees of those guidelines.

21 Paragraph 15 of those guidelines defines, inter alia, the terms 'manufacturer' and 'product' by reference to Directives 2009/110, 2007/64, 2013/36 and 2014/17.

22 Guideline 1 of those guidelines states:

‘1.1 The manufacturer should establish, implement and review effective product oversight and governance arrangements. The arrangements should aim, when products are being designed and brought to the market, (i) to ensure that the interests, objectives and characteristics of consumers are taken into account, (ii) to avoid potential consumer detriment and (iii) to minimise conflicts of interest.

1.2 The product oversight and governance arrangement should be reviewed and updated by the manufacturer on a regular basis.

1.3 When launching a new product the manufacturer should ensure that the product oversight and governance arrangements are considered in the new product approval policy (NPAP) in line with Guideline 23 of the EBA’s Guidelines on Internal Governance … in cases where [the latter apply].

…’

23 Guideline 2 of the contested guidelines states:

‘2.1 The manufacturer should ensure that product oversight and governance arrangements are an integral part of its governance, risk management and internal control framework as referred to in [the EBA Guidelines on Internal Governance], where applicable. To that end, the manufacturer’s management body should endorse the establishment of the arrangements and subsequent reviews.

2.2 Senior management, with support from representatives of the manufacturer’s compliance and risk management functions, should be responsible for continued internal compliance with the product oversight and governance arrangements. They should periodically check that the product oversight and governance arrangements are still appropriate and continue to meet the objectives as set out in Guideline 1.1 above, and should propose to the management body that the arrangements be amended if this is no longer the case.

2.3 The responsibilities for the oversight of this process by the Risk Control function and the Compliance function should be integrated into their normal line of duties as outlined in Guidelines 25, 26 and 28 of [the EBA Guidelines on Internal Governance], where applicable.

2.4 Senior management should ensure that staff involved in designing a product are familiar with and follow the manufacturer’s product oversight and governance arrangement; are competent and appropriately trained; and understand and are familiar with the product’s features, characteristics and risks.’

24 Guidelines 3 to 8 of the contested guidelines lay down principles relating, respectively, to the target market, product testing, product monitoring, remedial action, distribution channels and information for distributors.

25 Guidelines 9 to 12 of the contested guidelines relate to product oversight and governance arrangements for distributors.

## The dispute in the main proceedings and the questions referred for a preliminary ruling

26 On 8 September 2017, the ACPR published a notice on its website by which it (i) stated that it complied with the contested guidelines and (ii) specified that those guidelines applied to credit institutions, payment institutions and electronic money institutions under its supervision.

27 On 8 November 2017, the FBF lodged before the Conseil d'État (Council of State, France) an application seeking the annulment of that notice.

28 In support of its application, the FBF claimed that that notice was based on the contested guidelines and that the EBA could not issue those guidelines without exceeding its competence.

29 After finding that the notice of the ACPR at issue in the main proceedings should be regarded as adversely affecting the FBF, the referring court notes that the FBF cannot, in accordance with the Court's case-law, challenge, by way of objection, the validity of the contested guidelines should it be declared entitled to bring an action for annulment of those guidelines under Article 263 TFEU. That court is therefore uncertain whether such a remedy was available in this instance to the FBF.

30 If the Court were to conclude that that was not the case, the referring court wonders whether the Court has jurisdiction to assess the validity under Article 267 TFEU of the contested guidelines and the admissibility of a challenge, by way of an objection, to the validity of those guidelines by a professional federation which is not directly or individually concerned by those guidelines.

31 If the Court were to hold that the FBF was indeed entitled to challenge the validity of the contested guidelines before a national court, the referring court considers that it must refer to the Court of Justice the question whether the EBA exceeded its powers by issuing those guidelines.

32 The referring court notes, in that regard, that none of the EU acts mentioned in paragraph 6 of those guidelines contains any provision relating to the governance of retail banking products, except as regards credit agreements for consumers relating to residential immovable property. Furthermore, none of those acts contains any provision empowering the EBA to issue guidelines on the governance of retail banking products.

33 However, according to the referring court, it is conceivable that the EBA's power to issue the contested guidelines may be based on the objectives assigned to that authority by Article 1(5) of Regulation No 1093/2010 or on the task of supervising financial activities entrusted to that authority in accordance with Article 9(2) of that regulation.

34 In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) May an action be brought under Article 263 [TFEU] 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 [the first question], may guidelines issued by a European supervisory authority be the subject of a reference for a preliminary ruling under Article 267 [TFEU]? 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 [contested guidelines], did [the EBA], in issuing those guidelines, exceed the powers conferred on it under Regulation No 1093/2010 …?'

## Consideration of the questions referred

### *The first question*

### *The first part of the first question*

35 By the first part of its first question, the referring court asks, in essence, whether Article 263 TFEU must be interpreted as meaning that acts such as the contested guidelines may be the subject of an action for annulment under that article.

36 It is settled case-law of the Court that actions for annulment, provided for under Article 263 TFEU, are available in the case of all measures adopted by the institutions, bodies, offices and agencies of the European Union, whatever their form, which are intended to have binding legal effects (see, to that effect, judgments of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 31, and of 26 March 2019, *Commission* v *Italy*, C-621/16 P, EU:C:2019:251, paragraph 44 and the case-law cited).

37 Conversely, any European Union act not producing binding legal effects falls outside the scope of the judicial review provided for in Article 263 TFEU (see, to that effect, judgments of 12 September 2006, *Reynolds Tobacco and Others* v *Commission*, C-131/03 P, EU:C:2006:541, paragraph 55, and of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 27).

38 In order to determine whether an act produces binding legal effects, it is necessary, in accordance with the settled case-law of the Court, to examine the substance of that act and to assess its effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the EU institution, body, office or agency which adopted it (see, to that effect, judgments of 25 October 2017, *Romania* v *Commission*, C-599/15 P, EU:C:2017:801, paragraph 48, and of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 32).

39 In the present case, as regards, in the first place, the content of the contested guidelines, it is apparent, first, from the wording of paragraph 2 of those guidelines, which appears under the heading 'Status of these guidelines', that they merely set 'the EBA view of appropriate supervisory practices within the [ESFS] or of how Union law should be applied in a particular area'.

40 Secondly, it should be noted that the contested guidelines are generally worded in non-mandatory terms.

41 Thirdly, while paragraphs 11 to 14 of the contested guidelines state that the addressees of those guidelines are only the competent authorities mentioned in those paragraphs, paragraph 3 of those guidelines states, referring to Article 16(3) of Regulation No 1093/2010, that competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or failing that, state the reasons for non-compliance with those guidelines.

42 As regards, in the second place, the context of which the contested guidelines are part and the powers of the body which adopted them, it must be stated, first of all, that guidelines issued by the EBA are subject, pursuant to Regulation No 1093/2010, to the same rules of law as 'recommendations' issued by the EBA, which are not binding upon those to whom they are addressed, in accordance with the fifth paragraph of Article 288 TFEU, and therefore, in principle, have no binding force (see, to that effect, judgment of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 30).

43 Next, while it is true that Article 16(3) of that regulation provides that the competent authorities and financial institutions are to make every effort to comply with the guidelines issued by the EBA, that provision states, nevertheless, that those authorities are to indicate whether they comply or intend to comply with those guidelines and that, if that is not the case, they are to inform the EBA of their choice, stating their reasons.

44 It therefore follows from that provision that those authorities are not required to comply with those guidelines, but that, as was stated in paragraph 41 of this judgment in relation specifically to the contested guidelines, those authorities have the power to depart from them, in which case they must state the reasons for their position.

45 The guidelines issued by the EBA cannot, therefore, be regarded as producing binding legal effects vis-à-vis the competent authorities (see, by analogy, judgment of 15 September 2016, *Koninklijke KPN and Others*, C-28/15, EU:C:2016:692, paragraphs 34 and 35).

46 Similarly, the guidelines issued by the EBA cannot be regarded as producing, as such, binding effects vis-à-vis financial institutions, since the fourth subparagraph of Article 16(3) of Regulation No 1093/2010 provides that those institutions are only required to report, in a clear and detailed way, whether they comply with those guidelines.

47 Lastly, it should be noted that the guidelines issued by the EBA differ in that regard from the implementing technical standards drawn up by that authority which are adopted by means of regulations or decisions, in accordance with Article 15(4) of that regulation.

48 It is therefore apparent that, by authorising the EBA to issue guidelines and recommendations, the EU legislature intended to confer on that authority a power to exhort and to persuade, distinct from the power to adopt acts having binding force (see, by analogy, judgment of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 26).

49 In those circumstances, it cannot be considered that the contested guidelines are intended to produce binding legal effects for the purposes of the case-law referred to in paragraph 36 of this judgment.

50 In the light of the foregoing, the answer to the first part of the first question is that Article 263 TFEU must be interpreted as meaning that acts such as the contested guidelines cannot be the subject of an action for annulment under that article.

### *The second part of the first question*

51 In view of the answer given to the first part of the first question, it is unnecessary to answer the second part of that question.

### *The second question*

### *The first part of the second question*

52 By the first part of the second question, the referring court asks, in essence, whether Article 267 TFEU must be interpreted as meaning that the Court has jurisdiction under that article to assess the validity of acts such as the contested guidelines.

53 As the Court has already held, Article 19(3)(b) TEU and point (b) of the first paragraph of Article 267 TFEU provide that the Court has jurisdiction to give preliminary rulings on the interpretation of EU law and the validity of acts adopted by the EU institutions without exception (see, to that effect, judgments of 13 December 1989, *Grimaldi*, C-322/88, EU:C:1989:646, paragraph 8, and of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 44).

54 Therefore, even though Article 263 TFEU excludes the review, by the Court, of acts which have no binding legal effects, the Court may, pursuant to Article 267 TFEU, assess the validity of such acts when it gives a preliminary ruling (see, to that effect, judgment of 20 February 2018, *Belgium* v *Commission*, C-16/16 P, EU:C:2018:79, paragraph 44).

55 The fact that, as is apparent from paragraphs 39 to 49 of this judgment, the contested guidelines do not have any binding legal effects is therefore not such as to preclude the Court's jurisdiction to rule on their validity in the present case.

56 The Court has, moreover, already recognised that it has jurisdiction to give a preliminary ruling on the validity of a recommendation of the EBA which does not have binding legal effects (see, to that effect, judgment of 25 March 2021, *Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paragraph 83).

57 Consequently, the answer to the first part of the second question is that Article 267 TFEU must be interpreted as meaning that the Court has jurisdiction under that article to assess the validity of acts such as the contested guidelines.

### *The second part of the second question*

58 By the second part of the second question, the referring court asks, in essence, whether EU law requires that the admissibility, before a national court, of a plea of illegality raised against a European Union act to be subject to the condition that that act is of direct and individual concern to the individual relying on that plea.

59 It should be noted that, although the fourth paragraph of Article 263 TFEU refers, among the Union acts against which a natural or legal person may bring an action for annulment before the Court, to acts which are of direct and individual concern to that person, that provision is not intended to determine the conditions under which the validity of a Union act may be challenged before the national courts.

60 Furthermore, according to the Court's settled case-law, the FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 92 and the case-law cited).

61 It should be added that it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 100 and the case-law cited).

62 In the absence of European Union rules governing the matter, it is accordingly for the domestic legal system of each Member State to designate, with due observance of the requirement cited in the previous paragraph and the principles of effectiveness and equivalence, the courts and tribunals with jurisdiction and to lay down the detailed procedural rules governing actions brought to safeguard rights which individuals derive from European Union law (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 102 and the case-law cited).

63 Although individual parties must, in this respect, be guaranteed, in proceedings before the national courts, the right to challenge before the courts the legality of any decision or other national measure relative to the application to them of a European Union act of general application (see, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 94 and the case-law cited), it does not follow from Article 267 TFEU that that article precludes national rules from allowing individuals to rely on the invalidity of an EU act of general application, by way of an objection, before a national court other than in a dispute relating to the application to them of such an act.

64 On the contrary, it is apparent from the case-law of the Court that a request for a preliminary ruling on validity must be regarded as admissible where it has been made in the course of a genuine dispute in which a question on the validity of an EU act is raised indirectly, even if that act has not been the subject of any implementing measure with regard to the individual concerned in the main proceedings (see, to that effect, judgments of 3 June 2008, *Intertanko and Others*, C-308/06, EU:C:2008:312, paragraphs 33 and 34; of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 29; and of 7 February 2018, *American Express*, C-643/16, EU:C:2018:67, paragraph 30).

65 Accordingly, the answer to the second part of the second question is that EU law does not require the admissibility, before a national court, of a plea of illegality raised against a European Union act to be subject to the condition that that act is of direct and individual concern to the individual relying on that plea.

***The third question***

66 By its third question, the referring court asks, in essence, whether the contested guidelines are valid in the light of the provisions of Regulation No 1093/2010 establishing the EBA's powers.

67 Since it is apparent from Regulation No 1093/2010 that the EU legislature has precisely delineated the EBA's power to issue guidelines, on the basis of objective criteria, the exercise of that power must be amenable to stringent judicial review in the light of those objective criteria (see, to that effect, judgment of 22 January 2014, *United Kingdom* v *Parliament and Council*, C-270/12, EU:C:2014:18, paragraphs 41 and 53).

68 The fact that the contested guidelines do not produce any binding legal effects, as is apparent from paragraphs 39 to 49 above, is not such as to affect the scope of that review.

69 As was observed in paragraphs 43 and 48 of this judgment, the issuance by the EBA of the contested guidelines is intended to exert a power of exhortation and persuasion on the competent authorities and on financial institutions, since those authorities and those institutions must make every effort to comply with those guidelines and those authorities must indicate whether they comply or intend to comply with those guidelines and, if that is not the case, state the reasons for their position.

70 In particular, such guidelines may lead the competent authorities to adopt, like the APCR in the case at issue in the main proceedings, acts of national law exhorting financial institutions to alter their practices significantly or to take account, as the Advocate General noted in point 51 of his Opinion, of compliance with EBA Guidelines when examining the individual situation of those institutions.

71 It is also for the national courts to take into consideration EBA Guidelines in order to resolve the disputes submitted to them, in particular when those guidelines are, like the contested guidelines, intended to supplement binding provisions of European Union law (see, to that effect, judgments of 13 December 1989, *Grimaldi*, C-322/88, EU:C:1989:646, paragraph 18, and of 25 March 2021, *Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paragraph 80).

72 Furthermore, to accept that the EBA may freely issue guidelines, irrespective of the specific framework established by the EU legislature, would be liable to undermine the allocation of powers between the institutions, bodies, offices and agencies of the European Union.

73 It is true that the issuance by the EBA of guidelines is without prejudice to the right of the EU legislature to adopt, within the limits of the powers conferred upon it by primary law, an act with binding legal effects laying down standards different from those recommended by the EBA, which would then entail disregarding the guidelines concerned.

74 However, that circumstance cannot call into question the requirement, referred to in paragraph 67 of this judgment, that the EBA is bound to act in accordance with the precise framework laid down, on the basis of objective criteria, by that legislature in Regulation No 1093/2010.

75 It follows from the foregoing that the EBA has competence to issue guidelines only to the extent expressly provided for by the EU legislature and that it is for the Court of Justice, in order to answer the third question, to ascertain whether the contested guidelines fall within the EBA's powers, as established by that legislature.

76 To that end, it must be stated, so far as concerns the scope of the powers conferred on the EBA by that legislature, that Article 1(2) of Regulation No 1093/2010 provides that the EBA is to act within the powers conferred by that regulation and within the scope of a series of acts listed in that provision, including all directives, regulations, and decisions based on those acts, and of any further legally binding EU act which confers tasks on the EBA.

77 Article 1(3) of Regulation No 1093/2010 provides that the EBA is to act also in the field of activities of credit institutions, financial conglomerates, investment firms, payment institutions and e-money institutions in relation to issues not directly covered in the acts referred to in Article 1(2) of that regulation, including matters of corporate governance, auditing and financial reporting, provided that such actions by the EBA are necessary to ensure the effective and consistent application of those acts.

78 As regards, more specifically, the EBA's power to issue guidelines, Article 8(1)(a) of Regulation No 1093/2010 provides that the EBA is to contribute to the establishment of high-quality common regulatory and supervisory standards and practices, inter alia by developing guidelines and recommendations which are to be based on the legislative acts of the European Union referred to in Article 1(2) of that regulation.

79 Article 8(2)(c) of Regulation No 1093/2010 states that, to achieve the 'tasks' set out in Article 8(1) thereof, the EBA is to have the power to issue guidelines and recommendations, as laid down in Article 16 of that regulation, while Article 8(1a) of that regulation states that, when carrying out its tasks in accordance with that regulation, the EBA is to use the full powers available to it.

80 It should be noted, in that context, that the tasks assigned to the EBA include, inter alia, in accordance with Article 8(1)(b) and (h) of Regulation No 1093/2010, that of contributing to the consistent application of legally binding EU acts, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of the acts referred to in Article 1(2) of that regulation, and that of fostering depositor and investor protection.

81 In addition, Article 16 of Regulation No 1093/2010, to which Article 8(2)(c) thereof refers and which the contested guidelines cite as constituting their legal basis, provides, in paragraph 1 thereof, that the EBA is, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of EU law, to issue guidelines and recommendations addressed to competent authorities or financial institutions.

82 Furthermore, under Article 1(5) of Regulation No 1093/2010, the objective of the EBA is to protect the public interest by contributing to the short-, medium- and long-term stability and effectiveness of the financial system, for the EU economy, its citizens and businesses. Article 1(5)(e) and (f) of that regulation also states that the EBA is to contribute, inter alia, to ensuring that the taking of credit and other risks are appropriately regulated and supervised and to enhancing consumer protection.

83 In the light of the foregoing, it must be held that the validity of guidelines issued by the EBA is subject to compliance with the provisions of Regulation No 1093/2010 specifically delineating the EBA's power to issue guidelines, and to the condition that those guidelines fall within the EBA's scope of action which Article 1(2) and (3) of that regulation establishes by reference to the application of certain European Union acts, as is confirmed indeed by the fact that Article 8(1)(a) of that regulation provides that the guidelines adopted by the EBA must be based on the Union acts referred to in Article 1(2) of that regulation.

84 Moreover, as is apparent in particular from paragraphs 77 and 80 to 82 of this judgment, the EBA may, with a view to ensuring the common, uniform and consistent application of EU law, issue guidelines relating to the prudential supervisory obligations on the institutions concerned, inter alia in order to protect the interests of depositors and investors by an appropriate framework for the taking of financial risks, there being nothing in Regulation No 1093/2010 to suggest that measures relating to the design and marketing of products are excluded from that power, provided that those measures fall within the EBA's scope of action, as specified in the previous paragraph of this judgment.

85 In the present case, as regards the content of the contested guidelines, it is apparent from paragraph 5 of those guidelines, entitled 'Subject matter', that those guidelines deal with the establishment of product oversight and governance arrangements as an integral part of the general organisational requirements linked to internal control systems of firms, and refer to internal processes, functions and strategies aimed at designing products, bringing them to the market, and reviewing them over their life cycle. That paragraph also states that the purpose of those guidelines is to establish procedures relevant for ensuring the interests, objectives and characteristics of the target market are met.

86 To that end, first of all, Guideline 1 of the contested guidelines provides that the product oversight and governance arrangements established should aim, when products are being designed and brought to the market, inter alia, to take account of the interests, objectives and characteristics of consumers and to avoid potential consumer detriment.

87 That guideline also recommends regular review and updating of the product oversight and governance arrangements and their integration in the new product approval policy of the institutions concerned which is the subject of Guideline 23 of the EBA Guidelines on Internal Governance, as a requirement relating to that governance intended to ensure risk management.

88 Next, Guideline 2 of the contested guidelines encourages those institutions, more broadly, to integrate product oversight and governance arrangements in their governance, risk management and internal control framework. It also clarifies the role that should be conferred on various bodies of those institutions for this purpose, referring once again to various aspects of the EBA Guidelines on Internal Governance. In particular, Guideline 2.4 states that senior management should ensure that staff involved in designing a product are familiar with and follow the manufacturer's product oversight and governance arrangement; are competent and appropriately trained; and understand and are familiar with the product's features, characteristics and risks.

89 Lastly, in that context, on the one hand, Guidelines 3 to 8 of the contested guidelines give concrete form to the product oversight and governance arrangements which should, according to those guidelines, be incorporated into the internal governance arrangements of the institutions concerned.

90 More specifically, those Guidelines 3 to 8 encourage various measures to be taken to ensure that the design and marketing of a product are appropriate in the light of the relevant target market, that that product is tested, monitored, rectified, distributed through appropriate channels and that it is accompanied by information for distributors. Thus, Guideline 3.3 states that the manufacturer should only design and bring to the market products with features, charges and risks that meet the interests, objectives and characteristics of, and are of benefit to, the particular target market identified for the product.

91 Those Guidelines 3 to 8 therefore specify various aspects of the procedures which should be established within the institutions concerned in order to ensure adequate supervision of the design and marketing of products and thus to control the risks arising therefrom.

92 On the other hand, Guidelines 9 to 12 of the contested guidelines establish for distributors standards which are comparable to those set out in Guidelines 3 to 8 of the contested guidelines in relation to manufacturers.

93 On that basis, it is necessary to assess, in the first place, whether the contested guidelines fall within the EBA's scope of action, as defined in Article 1(2) and (3) of Regulation No 1093/2010.

94 In that regard, it follows from paragraphs 76, 77 and 83 of this judgment that the validity of guidelines issued by the EBA, which, like the contested guidelines, concern matters relating to corporate governance, is subject to the condition that they fall within the scope of action of at least one of the acts referred to in Article 1(2) of Regulation No 1093/2010 or that they are necessary to ensure the consistent and effective application of such an act.

95 According to paragraph 6 of the contested guidelines, those guidelines specify product oversight and governance arrangements in relation to Article 74(1) of Directive 2013/36, Article 10(4) of Directive 2007/64, Article 3(1) of Directive 2009/110 and Article 7(1) of Directive 2014/17.

96 All those directives must be regarded as constituting acts referred to in Article 1(2) of Regulation No 1093/2010.

97 First of all, Directives 2013/36 and 2009/110 are expressly mentioned in that provision.

98 Next, although Directive 2007/64 was not cited in the version of Article 1(2) of Regulation No 1093/2010 applicable on the date on which the contested guidelines were issued, it should be noted (i) that that version of that provision referred to Directive 2015/2366, which succeeded Directive 2007/64, and (ii) that Directive 2007/64 was mentioned in the version of that provision applicable before 12 January 2016.

99 It is therefore apparent that, as a result of a clerical error, the EU legislature substituted a reference to Directive 2015/2366 for a reference to Directive 2007/64, without taking account of the fact that Directive 2015/2366 repealed, in accordance with Article 114 thereof, Directive 2007/64 only as from 13 January 2018.

100 In those circumstances, the reference to Directive 2015/2366 which appeared in Article 1(2) of Regulation No 1093/2010 on the date on which the contested guidelines were issued must be interpreted as referring, on that date, to Directive 2007/64.

101 Lastly, although Directive 2014/17 is not cited in Article 1(2) of Regulation No 1093/2010, Article 29(2)(a), Article 34(2) and (4) and Article 37 of that directive provide that the EBA must take various measures to ensure the enforcement of that directive, so that in so far as that directive confers tasks on the EBA, it must be regarded as an act referred to in Article 1(2) of Regulation No 1093/2010.

102 Consequently, in order to answer the third question, it remains for the Court to determine whether the contested guidelines do indeed fall within the scope of application of the directives referred to in paragraph 6 of those guidelines or whether they are necessary to ensure the consistent and effective application of those directives.

103 As regards, first, Directive 2013/36, Article 74(1) thereof provides that the institutions to which it refers are to have robust governance arrangements, which include a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks they are or might be exposed to, adequate internal control mechanisms, including sound administration and accounting procedures, and remuneration policies and practices that are consistent with and promote sound and effective risk management.

104 In that regard, it should be noted that, as the EBA and the ACPR submitted, the placing on the market by financial institutions of banking products designed and marketed without taking into consideration the characteristics of the relevant markets and of the consumers concerned is liable to generate significant risks for those institutions, in particular by exposing them to considerable costs associated with the incurring of their liability and the imposition of penalties on them.

105 That finding is also reflected in the EBA Final Report of 15 July 2015 on the contested guidelines, which states, moreover, that the conduct of financial institutions, including as regards retail sales, concerns regulatory authorities not only from a consumer protection perspective, but also from a prudential perspective and in relation to the objective of promoting market confidence, financial stability and the integrity of the financial system at the national and European levels.

106 Since, as is apparent from paragraphs 86 to 92 of this judgment, the contested guidelines are intended to establish how the institutions concerned should include product oversight and governance arrangements, aimed at ensuring that the characteristics of the relevant markets and of the consumers concerned are taken into account, in their internal structures and procedures, those guidelines must be regarded as laying down principles intended to ensure effective processes to identify, manage and monitor risks as well as adequate internal control mechanisms within the meaning of Article 74(1) of Directive 2013/36, in order to ensure the existence of the robust corporate governance arrangements required by that provision.

107 Furthermore, since Article 74(3) of that directive expressly provides that the EBA must comply with Article 74(2) of that directive when issuing guidelines on the arrangements, processes and mechanisms referred to in Article 74(1) thereof, it should be pointed out that the integration in those processes and mechanisms of factors intended to take account of the situation on the target markets must be regarded as contributing to the proportionality, required in Article 74(2) of that directive, of those processes and mechanisms to the complexity of the risks inherent in the business model and the institution's activities.

108 Those findings are not called into question by the fact that the contested guidelines relate specifically to product oversight and governance, or by the particular significance which those guidelines attach to the interests, objectives and characteristics of consumers, even though those factors are not directly mentioned in Article 74 of Directive 2013/36.

109 On the one hand, as is stated in paragraph 5 of the contested guidelines, those guidelines do not deal with the suitability of products for individual consumers.

110 It is apparent, on the contrary, from paragraphs 86 to 92 of this judgment that those guidelines refer to the interests, objectives and characteristics of consumers only in order to ensure that those interests, objectives and characteristics are taken into account in the risk management processes and the internal governance mechanisms of the institutions concerned.

111 On the other hand, it is true that the technical criteria set out in Articles 76 to 95 of Directive 2013/36, to which Article 74(2) thereof refers, do not specifically mention product governance and oversight or the interests, objectives and characteristics of consumers.

112 However, the fact that, under Article 74(2) of that directive, account must be taken of those technical criteria does not mean that the robust governance arrangements referred to in Article 74(1) of that directive must be defined exclusively on the basis of those technical criteria.

113 It follows that the contested guidelines may be regarded as necessary to ensure the consistent and effective application of Article 74(1) of Directive 2013/36.

114 Secondly, Article 10(4) of Directive 2007/64 imposes, as regards institutions intending to provide payment services, obligations couched in the same terms as those laid down in Article 74(1) of Directive 2013/36.

115 Accordingly, it follows from the considerations set out in paragraphs 103 to 110 above that the contested guidelines, which cover, inter alia, payment services, may be regarded as necessary to ensure the consistent and effective application of Article 10(4) of Directive 2007/64.

116 Thirdly, the same is true of Article 3(1) of Directive 2009/110, since that provision merely provides that certain articles of Directive 2007/64, including Article 10 thereof, are to apply to electronic money institutions.

117 Fourthly, Article 7(1) of Directive 2014/17 provides, inter alia, that, when manufacturing credit products or granting, intermediating or providing advisory services on credit to consumers relating to residential immovable property, the creditor, credit intermediary or appointed representative is to act honestly, fairly, transparently and professionally, taking account of the rights and interests of the consumers.

118 That provision also states that, in relation to the granting, intermediating or provision of advisory services on such credit, the activities are to be based on information about the consumer's circumstances and any specific requirement made known by a consumer and on reasonable assumptions about risks to the consumer's situation over the term of the credit agreement.

119 It should be borne in mind, first of all, that Guideline 1 of the contested guidelines states that the product oversight and governance arrangements described should aim to ensure that, when products are being designed and brought to the market, the interests, objectives and characteristics of consumers are taken into account and that potential consumer detriment is avoided.

120 Next, the taking into account of the interests, objectives and characteristics of the target market or markets which is the subject of Guidelines 3 and 11 of the contested guidelines involves determining and then integrating in the decision-making processes the situation of the consumers on those markets.

121 Lastly, it should be noted that the specific measures mentioned in Guidelines 4, 5, 7, 9 and 12 are defined by referring expressly to the taking into account, at various stages of the design and marketing of the products in question, of the interests, objectives and characteristics of consumers.

122 The contested guidelines may therefore be regarded as necessary in order to ensure the consistent and effective application of Article 7(1) of Directive 2014/17.

123 Accordingly, the contested guidelines must be regarded as falling within the EBA's scope of action, as defined, in general terms, in Article 1(2) and (3) of Regulation No 1093/2010.

124 In the second place, it is necessary to determine whether the contested guidelines fall within the specific framework laid down by the EU legislature for the exercise of the EBA's power to issue guidelines.

125 In that regard, it is apparent, first, in the light, inter alia, of the matters set out in paragraphs 119 to 121 above, that the aim of the contested guidelines is to contribute to consumer protection and depositor and investor protection which are referred to in Article 1(5)(f) and Article 8(1)(h) of Regulation No 1093/2010.

126 Secondly, in the light of the considerations set out in paragraphs 104 and 110 of this judgment, the contested guidelines must also be linked to the functions conferred on the EBA, under Article 1(5)(e), as regards the framework for the taking of risks by financial institutions.

127 Thirdly, the contested guidelines must be regarded as contributing to the establishment of consistent, efficient and effective supervisory practices within the ESFS to which Article 8(1)(b) and Article 16(1) of Regulation No 1093/2010 refer.

128 Those guidelines directly implement the principles laid down in the Joint Position of the European Supervisory Authorities on Manufacturers' Product Oversight & Governance Processes (JC-2013-77) adopted by the European Securities and Markets Authority, the EBA and the European Insurance and Occupational Pensions Authority.

129 It should be noted, in particular, that that joint position, the stated aim of which is to foster consumer protection and ensure the stability, effectiveness and integrity of the financial markets, expressly provides that the EBA will use the principles that that joint position lays down in order to develop more detailed requirements for the governance and oversight of banking products.

130 Consequently, it must be held that the contested guidelines fall within the specific framework laid down by the EU legislature for the exercise of the EBA's power to issue guidelines as resulting from Article 8(1) and (2) and Article 16(1) of Regulation No 1093/2010, in conjunction with Article 1(5) thereof.

131 In the light of all the foregoing, it must be held that the contested guidelines fall within the EBA's powers, as established by that legislature.

132 Accordingly, it is apparent that examination of the third question has disclosed no factor of such a kind as to affect the validity of the contested guidelines.

## Costs

133 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 263 TFEU must be interpreted as meaning that acts such as the Guidelines of the European Banking Authority (EBA) of 22 March 2016 on product oversight and governance arrangements for retail banking products (EBA/GL/2015/18) cannot be the subject of an action for annulment under that article.**

2. **Article 267 TFEU must be interpreted as meaning that the Court has jurisdiction under that article to assess the validity of acts such as the Guidelines of the European Banking Authority (EBA) of 22 March 2016 on product oversight and governance arrangements for retail banking products (EBA/GL/2015/18).**

3. **EU law does not require the admissibility, before a national court, of a plea of illegality raised against a European Union act to be subject to the condition that that act is of direct and individual concern to the individual relying on that plea.**

4. **Examination of the third question has disclosed no factor of such a kind as to affect the validity of the Guidelines of the European Banking Authority (EBA) of 22 March 2016 on product oversight and governance arrangements for retail banking products (EBA/GL/2015/18).**

[Signatures]