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Legal effects and justiciability of EU financial soft law: What lessons following the BNB and FBF rulings?

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1. Introduction

This paper aims to analyse two important jurisprudential developments pertaining to the enforcement of EU financial regulation via soft law instruments adopted by European Supervisory Authorities (ESA) to draw wider conclusions pertaining to the justiciability of EU conduct, legal accountability of ESAs and judicial protection. The discussion will take primarily a constitutional angle and will not engage with the implications of these developments from a financial law perspective.

Both examined cases concern the validity of soft law acts issued by the European Banking Authority (EBA) and are significant in more than one aspect. The BNB case[1] was the first ever instance where the Court accepted to review (albeit indirectly) and, even more, partially invalidate an instrument with no binding legal force (EBA Recommendation) issued by a non-Treaty based actor in the context of preliminary ruling proceedings. The second case that will be discussed, FBF[2] draws on the first one and records, for the first time, the intensity of review that is applied by the Court of Justice in respect of EU financial soft law. These cases expand the original position in *Grimaldi* and the more recent post-*Grimaldi* case law that EU acts with no binding legal force[3] (in that case an EU Guideline) may still be subject to indirect judicial review. Yet, as it will be argued in this paper, they leave important questions unanswered.

2. The BNB case

Background

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[1] Case C-501/18, *Balgarska Narodna Banka*, EU:C:2021:249. For a detailed annotation of this case see, Pavlina Hubkova, 'Judicial review of EU soft law: a revolutionary step which has not fully happened (Case note on BT v. Balgarska Narodna Banka, C-501/18', Revista General de Derecho Europeo, pp. 174-199.

[2] Case C-911/19, FBF, EU:C:2021:599.

[3] See Article 288 TFEU.

In BNB, the Court of Justice was called upon to give a preliminary ruling on the validity of a Recommendation adopted by the EBA. The contested EBA Recommendation was not of general application; it was addressed specifically to the Balgarska Narodna Banka (BNB), a national authority. By issuing it, EBA suggested that the BNB did not comply with certain EU law provisions and set out measures to be taken by the BNB to address the breach. The matter was eventually referred by the Bulgarian court to the Court of Justice following an action for damages brought by an individual depositor against BNB claiming the latter's failure to comply with its EU law obligations.

The contested Recommendation was not adopted by virtue of the EBA's standard power to issue Guidelines and Recommendations under Article 16 ESA Regulations. Instead, it was adopted under a specialised procedure governed by Article 17(3) ESA Regulation that applies to instances where the EBA intervenes, as an EU law enforcer, in response to EU law breaches by national competent authorities. A distinctive feature of this type of Recommendations is that it is placed within a composite enforcement procedure.[4] If the national authority fails to comply with the EBA's Recommendation, the EU legislator empowers the Commission and EBA to adopt further binding measures. Broadly speaking, however, both types of EBA Recommendations are considered to introduce – at least in the first instance – similar requirements which are typically referred to as the 'comply or explain' mechanism.[5]

The Opinion of the Advocate General

In his Opinion, Advocate General Campos Sánchez-Bordona relied on *Grimaldi* to conclude that the validity of EU Recommendations, which fall within the scope of Article 288 TFEU, can be the subject matter of preliminary ruling references. The AG suggested that this principle should also apply to EBA Recommendations. It would not be logical, according to the AG, for a national court to have a duty to take into consideration an EU Recommendation in the course of interpreting other legal provisions and at the same time, if the national court has doubts about that Recommendation's compatibility with EU law to not be permitted to refer a question about its validity to the Court of Justice.[6]

Focusing on the compatibility of the EBA Recommendation with substantive EU law provisions, the AG essentially dismissed the arguments of the referring court. Whilst he concluded that the EBA's Recommendation failed to comply with EU law in one aspect, the

[4] R. Vabres, 'La portée des recommendations de l'Autorité européenne des marches financiers' in F. Ferrand (ed.), L'Europe bancaire, financière et monétaire. Liber amicorum Blanche Sousi (RB édition 2016) p. 95-104.

[5] A noticeable difference between the two types of Recommendations is that non-compliance with the ones adopted under Article 17(3) may trigger specialised procedural steps potential leading to the Commission bringing infringement proceedings under Article 258 TFEU.

[6] Opinion of AG Campos Sánchez-Bordona, para. 100.

AG took the view that legal error did not justify invalidating the EU Recommendation and suggested that the referring court should disregard this point.

The Judgment of the Court of Justice

In respect of the reviewability of the EBA Recommendation, the Court of Justice broadly endorsed the AG's approach. Relying on its previous findings in *Belgium v Commission*, the Court recalled that Article 288 TFEU empowered EU authorities to adopt acts that are capable to 'exhort and persuade' and distinguished these normative effects from the power to issue acts with legally binding force. Without adding any further conceptual depth or clarity on the legal effects of EU Recommendations, the Court found that Recommendations must generally be regarded by national courts when these are relevant for interpreting other legal provisions and that individuals can rely on the invalidity of an EU Recommendation as basis for establishing the liability of a Member State.[7]

Applying these principles to the cast at hand, the reviewability of the EBA Recommendation in question was not treated as a controversial issue and was confirmed relatively swiftly by the Court. Referring to its previous case law, the Court ruled that, whilst Recommendations are explicitly exempted from direct annulment actions under Article 263 TFEU, the Court of Justice can still assess the validity of all acts of Union institutions without any exception within its preliminary ruling jurisdiction under Articles 19(3)(b) TFEU and 267(b) TFEU.[8]

Turning the focus to the compatibility of the EBA Recommendation with substantive EU law provisions, the Court, like the AG, dismissed the referring court's grounds. Yet, it identified a separate legal error which justified the EBA Recommendation's partial invalidity. The Court recalled its finding in a previous case,[9] that, under the existing legal framework,[10] the determination that a credit institution is unable to repay certain deposits to depositors due to its own financial circumstances must be made by an explicit act of a national authority and cannot be inferred from other acts. In this instance, the Court found that the EBA erred in law because its Recommendation failed to acknowledge the absence of such an explicit act. Instead, the EBA wrongfully equated the national authority's decision to place a credit institution under special supervision and suspend its obligations with a determination that the credit institution's funds were unavailable.[11] As such, it was declared partially invalid.

The FBF case

[7] Case C-501/18, para. 81.

[8] Case C-501/18, paras 82 and 83, making reference to judgments of 13 December 1989, Grimaldi, C-322/88, EU:C:1989:646, paragraph 8; of 13 June 2017, Florescu and Others, C-258/14, EU:C:2017:448, paragraph 71; of 20 February 2018, Belgium v Commission, C-16/16 P, EU:C:2018:79, paragraph 44; and of 14 May 2019, M and Others (Revocation of refugee status), C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 71 and the case-law cited

[9] Case C-571/16, *Kantarev*, EU:C:2018:807.

[10] Article 1(3)(i) EU Directive 94/19.

[11] Case C-501/18, paras. 99-101.

Background

This case concerns a different type of ESA soft law, namely certain Guidelines issued by the EBA in 2016 and addressed primarily to national competent authorities. In essence, these Guidelines set out product governance requirements targeting financial and payment institutions that sell financial products to consumers. The conduct of these market participants is governed by specialised EU rules and is largely monitored by national authorities.

A key contested matter in this case pertained to whether the EBA Guidelines were issued *ultra vires*. Specifically, it was questioned whether the substance of the EBA Guidelines fell within the scope of 'product governance', in which case it would be within the ambit of the EBA's conferred powers, or whether it amount to 'corporate governance' which would exceed the scope of its mandate.

The French banking lobby Fédération bancaire française (FBF) challenged the validity of an online notice issued by the French competent authority confirming the latter's compliance with the EBA Guidelines before domestic courts. The case eventually reached the Court of Justice by means of a request by the Conseil d'État for a preliminary ruling. The French Court forwarded three questions: First, is it possible to challenge the validity of EBA Guidelines via a direct annulment action and would FBF have legal standing to initiate this action? Second, if not, can the preliminary ruling procedure be used to challenge the Guidelines? Third, if yes, were the EBA Guidelines issued *ultra vires* in this instance?

The Opinion of the Advocate General

TBC

The Judgment of the Court of Justice

The Court began by assessing the legal effects of EBA Guidelines. Following its approach in the *BNB* case, it relied heavily on the line of reasoning developed in *Belgium v. Commission*. To determine the legal effects of the contested instrument, the Court paid attention to the wording and non-mandatory language used by EBA to conclude that these were 'genuine' Guidelines, in the sense that the instrument did not entail any disguised binding legal act.[12]

Thereafter, the Court found that – in respect of the type of legal effects that may be produced – EBA Guidelines can be treated by analogy to EBA Recommendations, on the basis that both instruments share the same legal basis, namely Article 16 EBA Regulation. Whilst the Court elaborated on some of the distinctive features of Guidelines, these particularities were not considered material to enable Guidelines to have binding legal force. Instead, EBA

[12] Case C-911/19, para. 40.

Guidelines were placed by the Court within the broader realm of EU acts having no legally binding force under Article 288 TFEU; such acts are generally considered not to require compliance from its addresses[13] and merely reflect a 'power to exhort and persuade'.[14] Mirroring its analysis in the BNB case, the Court concluded that, as non-legally binding acts, the EBA Guidelines cannot be challenged via a direct annulment action under Article 263 TFEU. However, this does not in any way limit the Court's jurisdiction to review all acts of EU institutions without exception.[15] In addition, the Court recalled the strict standing criteria of Article 263 TFEU do not find application in preliminary ruling proceedings and swiftly found that EU law posed no admissibility-related obstacles in the FBF's action.

Having placed EBA Guidelines within its reviewing competence, the Court then turned its attention to examining the validity of the contested Guidelines in the light of the specialised EU legal framework. As a first step, the Court considered it necessary to determine the degree or intensity of judicial review that applies to EBA Guidelines. According to the Court, the standard of judicial review is a distinct question that is not affected by the incapacity of EBA Guidelines to produce binding legal effects. At the same time, however, the Court justified this statement with reference to the potential effects of Guidelines vis-à-vis national authorities. First, national authorities apply such Guidelines to market participants and are expected to take them into account when applying EU and national law. Second, the court recalled its earlier finding[16] that EU soft law must be considered by national courts when these are intended to supplement binding provisions of European Union law. If the EBA's power to issue Guidelines was unchecked this would pose impermissible institutional balance-related risks within the EU.[17]

Thereafter, the Court dealt with the EBA Guideline's compliance with the relevant legal framework. Rather than focusing on the specialised financial EU law provisions delineating EBA's scope of action, the Court preferred to examine EBA's power to issue Guidelines under more abstract provisions in the EBA Regulation that set out its general mandate and objectives (e.g. *inter alia* Articles 1(2) and (3) EBA Regulation). Applying a teleological approach and a creative interpretation of Article 1(3) EBA Regulation, the Court recognised that EBA enjoyed a wide and generous scope action, including in respect of its awarded powers to issue Guidelines. Turning to the EBA Guidelines in question, the Court considered the wording of the instrument at hand and compared it with the legal bases stated in the Guidelines, namely the substantive financial law-related EU Directives, and the latter's scope of application. It concluded that by issuing these Guidelines, the EBA did not exceed its mandate under the substantive financial law regime and EBA Regulation.

3. Analysis

[13] Case C-911/19, para. 41-44.
[14] Case C-911/19, para. 48.
[15] Case C-911/19, paras. 53-54.
[16] Grimaldi, FBF.
[17] Case C-911/19, para 72.

The ESAs' quasi-rulemaking powers

The birth of ESAs can be traced back at the EU's regulatory response to the global economic and financial crisis as it formed part of the strengthening of the supervision of the Union's financial market. They are governed by a relatively similar legal framework, known as ESA Regulations.[18] Under this framework, ESA powers can be broadly divided into two main categories, namely, quasi-rule making powers and powers of intervention. In the early years, the powers conferred on ESMA attracted the primary attention both in the literature[19] and case law[20] - perhaps justifiably because ESMA enjoys direct supervisory powers. Yet, it did not take long for the focus to turn to other ESAs and specifically the EBA.[21]

The ESAs' primary task is to propose technical standards which are thereafter endorsed by the Commission by virtue of Articles 290 and 290 TFEU – hence becoming legally binding to their addresses. In compliance with the limitation of the Meroni/ESMA doctrine, the Union legislator prohibited the ESAs from adopting acts which reflect 'a very large measure of discretion',[22] including strategic decisions or policy choices; the ESAs' delegated power to propose regulatory standards is confined to a 'technical' level.[23] In this sense, with a noticeable and contentious exception,[24] from a legal point of view, the ESAs do not enjoy generally applicable binding rule-making powers.

Despite the above-mentioned limitations, their regulatory powers cannot and should not be underestimated. The lack of power to adopt acts with legally binding force has been replaced with a vast ecosystem of formal and informal ESA soft law instruments which act as a 'shadow rule making'[25] regime. The Union legislator explicitly awarded the ESAs with the power to regulate the financial markets via a range of soft law acts, primarily but not exclusively, guidelines and recommendations.[26] These instruments may be addressed to

[18] Regulation 1093/2010 of the European Parliament and of the Council establishing a European Banking Authority, [2010] OJ L331/12 (EBA Regulation); Regulation 1094/2010 of the European Parliament and of the Council establishing a European Insurance and Occupational Pensions Authority, [2010] OJ L331/48; Regulation 1095/2010 of the European Parliament and of the Council establishing a European Securities and Markets Authority, [2010] OJ L331/84.

[19] tbc

[20] See ESMA case.

[21] E. Ferran, 'The Existential Search of the European Banking Authority', 17 European Business Organization Law Review (2016)

[22] ESMA case, para. 53.

[23] Article 10(1) ESA Regulations.

[24] See 9(5) ESA Regulations which empower the ESAs to adopt certain executive binding decisions with limited general effects.

[25] Heikki Marjosola, 'Shadow Rulemaking: Governing Regulatory Innovation in the EU Financial Markets', 23 German Law Journal (2022), pp. 186-203.

[26] ESAs soft law toolbox is rich and diverse. Article 16(b) ESA Regulations grant the power to adopt non-binding 'questions and answers'. Article 15 ESA Regulations provide that the ESAs may issue Opinions pursuant upon request from the Council, the Commission or the Parliament. Finally, a large ecosystem of soft law instruments is provided in Article 29 ESA Regulations, including opinions to competent authorities and non-specified 'practical instruments and convergence tools to promote common supervisory approaches and practice'. Based

specific public authorities or private parties or be of general application. The objective of ESA's soft-law making power is to 'establish consistent efficient and effective supervisory practices within the EFSF and to ensuring the common, uniform, and consistent application of Union law'.[27] Notably, Article 16 does not confer a general power to ESAs to adopt soft law acts. In this sense, the ESAs cannot rely solely on Article 16 as the legal basis to issue such instruments; they must also identify a distinct provision of substantive EU financial law which empowers them to act.[28]

The legal consequences that are attached to ESA recommendations and guidelines is typically described via the 'comply or explain' formula. According to Article 16(3) ESA Regulations, the parties affected by ESA's soft law 'shall make every effort to comply with' them. This translates to a more specific duty of affected parties to inform the ESA within two months following its issuance, whether they intend, or not, to comply with the soft law's normative content; in the latter instance, they are additionally required to forward the reasons attached to their decision not to comply. To the extent the 'comply or explain' mechanism may not lead to sufficient degree of compliance, the EU legislator empowered the ESA with a 'name and shame' mechanism. The ESAs publish information on their online webpages pertaining to the fact of intention of non-compliance of competent authorities to recommendations and guidelines. In this respect, the ESA also holds the power to publish the reasons of non-compliance provided by the competent authority.

Whilst the normative significance of ESA guidelines and recommendations are still debated in the case law and literature, their practical force cannot be doubted. Concrete evidence shows that compliance with such instruments issued by ESMA and EBA is near absolute.[29] So, it may be reasonable to argue that the absence of ESA's power to adopt legally binding general rules has not prevented it from playing significant regulatory roles via alternative means with equivalent genuine practical impact.

Another missed opportunity

The recognition that EBA Recommendations[30] and Guidelines can be the subject matter of judicial review is an important development in the EU law doctrine. Notwithstanding that the Court had engaged in the past with questions pertaining to the legal effects of EU soft law in preliminary ruling proceedings, this was done primarily indirectly by interpreting EU

on these provisions, ESA have issued public statements, Q&As, principles, handbooks and letters, amongst other types of soft law instruments.

[27] Article 16(1) ESA Regulations.

[28] See 8(1)(a) ESA Regulations.

[29] See Marjosola, p. 189-190 and the references to ESA's compliance tables therein.

[30] Yet, one may note that the question pertaining to the validity of the EBA Recommendation in the BNB case was not the central question in this case. As the key issue remained the validity of the national authority's decision (which was endorsed by the EBA Recommendation), to an extent, the validity of the EBA Recommendation was placed in the background of the Court's reasoning in that case.

provisions, rather than explicitly ruling on the validity of the contested Union act.[31] The examined cases confirmed the dominant view in the scholarship that indirect review is the sole judicial avenue that is practically available to non-privileged applicants to challenge the legality of ESA soft law – and perhaps the majority of EU soft law – in the Union's system of judicial protection.

However, it appears that the Court missed another opportunity to elaborate on the conceptual distinctiveness of non-legally binding EU acts. Given that it was not contentious in this case whether the Recommendation in question was a 'genuine' non-legally binding EU act or whether the EBA enjoyed the power to adopt such acts, the Court confined its analysis largely in echoing its previous case law. Unlike we have seen in other cases (see e.g. *Belgium v. Commission*) the Court did not apply its widely established substantive approach to examine the normative value of the contended instrument taking into account diverse criteria, such as the author's intention, the wording, the context, the conferred powers, and the reasonable perception of affected parties.

An interesting issue in the BNB case pertains to the nature of the normative link between the contested EU Recommendation and the national act which was the subject matter before the national court. Identifying this normative link is necessary to justify the reviewability of the EU act in preliminary ruling proceedings. The normative connection between the national and EU act appears to be twofold: First, by issuing the EU Recommendation, the EBA practically endorsed – in the Court's own words 'established' – a previous breach of EU law on behalf of a Member State. In this sense, the illegality of the EU act arises from the EBA wrongfully validating the breach and failing to require the adoption of an explicit act by the national authority determining the unavailability of funds of a credit institution, in line with the existing framework and Court's case law. Notably, the source of illegality is not traced into the prescribed content of EBA's Recommendation to the national authority but in the preamble. The Court considered that the preamble of the EBA Recommendation contained an erroneous statement about the national competent authority's past conduct. The second aspect connecting the contested national act with the EBA Recommendation concerns the capacity of the latter to trigger an EU law-based duty of the national court to consider that Recommendation to determine an individual's claim for damages in domestic proceedings. It follows, that the EU act in question gives rise to legal consequences primarily vis-à-vis a national authority, namely the national court and secondarily the individual applicants.

The persistent obscurity surrounding the legal effects of EU soft law

[31] Case C-258/14, Florescu and Others, EU:C:2017:448; Case C-16/16 P Belgium v Commission, EU:C:2018:79, paragraph 44. Also note that in judgment of 19 July 2016, Kotnik and Others (C- 526/14, EU:C:2016: 570, paragraphs 45-60), although the referring court requested a ruling on the validity of a Commission Communication, the Court choice the option to offer a ruling on interpretation of relevant EU provisions.

EU primary law formally recognises two general categories of EU acts from the point of view of their legal effects; namely acts with and acts without legally binding force. The Union courts acknowledged early on that the statement that a Union act has no legally binding force does not necessarily mean that this act has no legal effects at all. If that was the case, then it would be difficult for the Union Courts to justify their decision to review the legality of EU Guidelines and Recommendations in preliminary ruling proceedings. The legal literature attempted to conceptualise the emergence of this new category of legal (but not binding) effects by introducing the term 'soft law'.

Soft law instruments are perceived to entail an inherent twofold uncertainty. First, they are sometimes covered by a veil of informality, in the sense that they are not subject to strict procedural and publication requirements which are found in EU acts. Examples of such acts, which push the conceptual boundaries of 'EU acts' include, notices, public announcements, press releases and emails. Second, whilst soft law is widely considered to include instruments that do not produce binding legal effects, the literature has shown that identifying the precise legal effects of soft law instruments is far from an easy task. Furthermore, the literature has shown that there can be considerable discrepancies in the perceived legal effects of soft law between the authors of these instruments, their addresses and Union case law. In many instances, empirical evidence indicates that national authorities treat EU soft law as binding, despite these instruments being treated in the Union case law not intended to produce binding legal effects.

Whilst the Union legislator and courts refuse to use this term, the increasing EU soft law litigation has pressured the Union courts to offer some conceptual clarity on the nature of legal effects produced by EU acts that do not enjoy legally binding force under Article 288 TFEU; in other words, what precisely distinguishes acts with such legal effects from acts with legally binding force. In the Court's own words, 'Article 288 TFEU intended to confer on the institutions which usually adopt recommendations a power to exhort and to persuade, distinct from the power to adopt acts having binding force.'[32] Following BNB and FBF, the 'comply or explain' mechanism that is attached to the EBA Guidelines and the effects of EBA Guidelines are both considered by the Court to fall under the scope of 'exhort and persuade' and do not amount to binding legal effects. It is argued that this finding by the Court is very problematic.

The proposed argument goes as follows: The existence of a duty requires a person to perform a certain course of action (or inaction); what the duty-bearer needs to perform to comply with his obligations can take diverse and infinite forms. The key issue is that, in certain instances, the imposed duty appears to be far more limited when compared to ordinary obligations. A typical scenario of such limited duties is the 'comply or explain' mechanism, i.e. the requirement of a person to either 'comply' with an act's normative content or 'explain' the reasons of non-compliance. It is proposed that, what distinguishes these narrower duties

[32] See C-16/16P Belgium v Commission, para. 26 concerning a Commission Recommendation. The Court's approach was affirmed in Case 501/18, para. 79 and Case 911/19, para. 48 pertaining to EBA's Guidelines and Recommendations.

is that they do not entirely prohibit non-compliance with the main normative statement; instead, these acts permit a duty-bearer to depart from them, if they have met certain requirements. Although such requirements may be more restricted, it is suggested, when compared to other unqualified duties, they are still legally binding duties. For instance, if a national competent authority failed to comply with the normative statement of an EBA Recommendation and also failed to provide reasons (or provided inadequate reasons) for its non-compliance, that Union institution would be deemed to have failed to comply with a legally binding duty. Another example of such limited duties is the duty of national courts[33] to 'take into consideration' certain recommendations of Union institutions,[34] as was the instance in the BNB case. In these instances, the recommendation gives rise to an obligation for national authorities to use it as a 'mandatory interpretative aid' whenever it can assist in clarifying the meaning of certain EU and national norms. Failure on the part of national courts to include these recommendations as a relevant component in the task of interpreting and applying certain EU norms can equate to a breach of their legal obligation.[35]

It follows, that the proposition that certain types of EU acts - typically classified as soft law, including EU Recommendations, have no legally binding force can be true only if the notion 'legally binding force' is interpreted narrowly in this respect. Whilst these instruments do not generate a strict duty of compliance with its normative content, they do create a different set of legal duties. Indeed, compliance the requirements introduced by these types of EU soft law may appear to be less burdensome from an institutional point of view, yet, it is suggested that their normative significance clearly equals to a legal obligation.

The obscurity that governs the legal effects of EU soft law inevitably gives rise to legitimacy concerns. If the genuine legal consequences of soft law are masked, there is a real risk that an EU institution may exceed its legal mandate. At the same time, good governance requires that affected parties enjoy a reasonable degree of transparency and accessibility in respect of the normative consequences that flow from regulatory conduct. In addition, it has long been established in the scholarship that the Treaty limitations in the EU system of judicial review, poses noticeable obstacles for controlling the legality of EU soft law. Given that EU

[33] And perhaps all national authorities, See, D. Sarmiento, 'European Soft Law and National Authorities: Incorporation, Enforcement and Interference', in J-F Flauss, J Iliopoulos-Strangas (eds.), *Das Soft Law der europäischen Organisationen* (Nomos / Stämpfli / Sakkoulas, 2012) 267.

[34] See case, Case C-322/88 *Grimaldi*, EU:C:1989:646. Also, Case C-188/91 *Deutsche Shell*, EU:C:1993:24. This case concerned a Community Recommendation which the Belgian legislator had failed to implement. In assessing its legal status, the Court said that the recommendation could not be regarded 'as having no legal effect' because 'national courts are bound to take them into consideration' in certain circumstances (para 18). The scope of this obligation is disputed. For a discussion see, P. L. Láncos, 'A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?' 24(4) *European Public Law* (2018), pp. 755–784; A. Arnull, 'The Legal Status of Recommendations' 15 *European Law Review* (1990) 318; Senden, *supra* n. **Error! Bookmark not defined.**, pp. 387-393. Similar obligations have been found in C-274/07 *Commission v Lithuania*, EU:C:2008:497, para 50; Case C-69/13 *Mediaset*, EU:C:2014:71, para 31.

[35] Based on a review of the post-*Grimaldi* case law, Korkea-aho concludes that to the extent a recommendation 'is issued by an EU institution and its development is foreseen in primary or secondary law', national courts can depart from the interpretation offered in the measure 'only if they can provide detailed and substantively valid reasons why it should not apply'. E. Korkea-aho.

acts lacking binding legal effects can only be challenged before EU courts via indirect pathways, there is a persistent gap in the legal accountability of certain EU actors and, in certain instances, practically eliminates the procedural avenues for judicial review available to non-privileged applicants.

It is not suggested that formalism is the answer to all these problems. It is important to maintain a practical and realistic approach when balancing between the desire to promote 'smart' and efficient regulation and control mechanisms of executive power. Over-judicializing public governance may reduce regulatory efficiency and pose unwanted institutional balance-related tensions. Even more, there is evidence from the other side of the Atlantic that it may incentivise executive actors to divert from standard instruments and further informalise their regulatory toolbox to avoid judicial scrutiny and liability risks.

4. Concluding remarks

These judgments illustrate the tension that arises in finding normatively coherent and pragmatic resolutions in respect of two main types of tensions:

In the first place, the Court is called upon to reconcile the limitations of key principles of EU constitutional law with the present reality in the Union's complex and multi-level governance framework and policy-related demands. The survival of the Meroni/ESMA non-delegation doctrine increasingly exercises pressure to the Court to choose between one of the following unwanted outcomes: either pose structural obstacles in the agencification of EU executive power and essentially force the redesign of the EU financial supervision blueprint or find recourse to creative interpretative means to maintain the expanded ESA powers within the scope of the non-delegation principle, adding another layer of obscurity to this doctrinal relic.

Secondly, these cases highlight the everlasting struggle to balance between regulatory demands and competing constitutional principles, specifically, effective application of EU law, institutional balance, legal accountability and judicial protection. The increasing use of soft law instruments by ESAs adds another layer of difficulty when the Court is invited, on the one hand to maintain the effectiveness in the Union's financial regulatory blueprint and on the other hand, ensure that EU agencies do not act within an accountability vacuum. This is far from easy when EU conduct takes the form of soft law instruments with general application that carry an inherent uncertainty in respect of their legal effects. In such circumstances, the risk of EU agencies using creative regulatory tools to circumvent the arguably outdated – but impossible to ignore – strict legal boundaries of agency powers or adopting 'crypto-legislation'[36] capable of bypassing standard legislative processes[37] cannot be underestimated.

What is the impact of these cases on the Union's institutional balance? To begin with, the Court seems to send a clear message that, EU Agencies, even when they intervene by

[36] Opinion of AG Bobek in Case C-911/19, Fédération Bancaire Française v. Autorité de Contrôle Prudentiel et de Résolution, ECLI:EU:C:2021:294, para. 85.
[37] AG Bobek, Case C-6/16 P.

means of non-legally binding instruments, remain legally accountable for their conduct. Additionally, by acknowledging that EBA Guidelines and Recommendations fall within its reviewing competence, the Court shows its willingness to retain its hand on the valve that controls the delegation of power to EU Agencies. At the same time, the Court shows its readiness to review and, if necessary, invalidate any kind of agency conduct that is ultra vires of fails to adhere to other EU law requirements. So, from one point of view, these cases solidify that ESAs are subject to legal accountability standards that typically apply to other executive EU actors.

From another point of view, however, the explicit recognition that EBA Guidelines and Recommendations are reviewable in preliminary ruling proceedings is arguably not a very surprising development. There was already a consensus in the literature that the preliminary ruling avenue would remain open for such EU soft law instruments. Also, the Court's case law had left the matter not only theoretically open but arguably most probable. If this was not the case, it would not be easy to suggest that the minimum requirements of effective judicial protection would be met to say the least.

What is perhaps more problematic is the Court's approach in examining the validity of EBA Guideline in the FBF case. The teleological, and objectives-led reading of EBA Regulation by the Court which lead to the conclusion that the contested EBA Guidelines fell within the ambit of EBA's wide scope of action cannot go unnoticed. Whilst the right to challenge EBA soft law is now a reality, the Court set a high threshold for applicants intending to argue that EBA acted ultra vires by issuing such instruments. Notwithstanding the Court's readiness to examine the content and language of EBA Guidelines to confirm that it is a genuine soft law instrument, once this hurdle is passed, FBF signals that it may prove difficult to invalidate such Guidelines on the basis that their normative content fails to fully comply with other specialised EU law provisions.

Broadly speaking, the judiciary's readiness to place executive action within the realm of their reviewing powers and the intensity of judicial scrutiny can have an impact on executive authorities' behaviour, particularly in the choice of means via which they exercise their regulatory powers. The outcomes in the two cases are likely to incentivise EBA to continue using Recommendations and Guidelines in performing its quasi-regulatory role. The Court's assessment does not seem to exercise pressure to EBA to pursue more informal or normatively obscure soft law instruments. The Court's decision to investigate the wording of the Guideline in the FBF case is likely to encourage EBA to pay due care when drafting these Guidelines to ensure that the language reflects the choice of instrument and intended legal effects. At the same time, it would not be surprising if these cases encourage private parties to challenge the validity of other ESA Guidelines and soft law instruments before EU courts via the preliminary reference route, opening a new generation of litigation targeting EU soft law.

To conclude, whilst these cases show that following BNB and FBF a clear avenue is now confirmed for challenging the legality of EBA Guidelines and Recommendations (and possibly other ESA soft law instruments), this is primarily due to these instruments being

capable to influence the normative content of national acts and thus, trigger preliminary ruling proceedings. This procedural avenue, however, is not available in circumstances where there is no national act available which can be normatively linked with an EU soft law instrument and whose validity can be the initial subject matter of judicial proceedings at national level. This known gap in the Union's system of judicial protection might might have concrete effects in respect of the EU's financial regulation to the extent that ESAs can use of certain types of soft law acts whose normative impact at national level is less straightforward, such as public statements and Q&As.