TO BE OR NOT TO BE (LEGALLY BINDING)? JUDICIAL REVIEW OF EU SOFT LAW AFTER *BT* AND *FÉDÉRATION BANCAIRE FRANÇAISE*

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Abstract

EU soft law is like a mythological creature of the EU governance: like a satyr is half man and half goat, so EU soft law is half law, half non-law. Its twofold nature unrestrained by legislative procedure has facilitated its proliferation, but controversy continues arising concerning its role in the EU and in the Member States. Two recent cases add to the saga on the effects of EU soft law: *BT v. Balgarska Narodna Banka* and *Fédération bancaire française v. Autorité de contrôle prudentiel et de résolution*. These two judgments, being the fruit of two preliminary ruling requests, are to a certain extent extraordinary: the Court of Justice of the European Union has for the first time considered the validity of EU recommendations and guidelines, EU soft law measures *par excellence*, in the context of preliminary ruling requests. But beside their outcomes, these decisions have also casted shadows on the effects of EU soft law. After illustrating the opinions of the Advocates General and the judgments of the Court of Justice, the paper moves on to tackle three issues: the loopholes in the concept of 'legally binding effects' under EU law, the (unclear) guidance on the use

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of EU soft law in national courts, and the evolution of validity review of EU soft law. To be or not to be (legally binding?) That is the question for EU soft law.

Keywords

EU soft law; guidelines; recommendations; judicial review; CJEU; national courts; legally binding effects.

¿SER O NO SER (JURÍDICAMENTE VINCULANTE)? DESARROLLOS RECIENTES SOBRE EL CONTROL JURISDICCIONAL DEL SOFT LAW DE LA UE

Resumen

El *soft law* de la UE es como una criatura mitológica de la gobernanza de la UE: si un sátiro es mitad hombre y mitad cabra, así la ley blanda de la UE es mitad derecho y mitad no-derecho. Su doble naturaleza irrestricta por el procedimiento legislativo ha facilitado su proliferación, pero sigue surgiendo la controversia sobre su papel en la UE y en los Estados miembros. Dos casos recientes se suman a la saga sobre los efectos del *soft law* de la UE: *BT contra Balgarska Narodna Banka* y *Fédération bancaire française contra Autorité de contrôle prudentiel et de résolution*. Estas dos sentencias, fruto de dos cuestiones prejudiciales, son en cierta medida extraordinarias: el Tribunal de Justicia de la Unión Europea ha analizado por primera vez la validez de las recomendaciones y directrices de la UE, medidas de *soft law* de la UE por excelencia, en el contexto de las solicitudes de cuestiones prejudiciales. Pero además de sus resultados, estas decisiones también han arrojado dudas sobre los efectos del *soft law* de la UE. Tras exponer las conclusiones de los abogados generales y las sentencias del Tribunal de Justicia, el trabajo aborda tres cuestiones: las lagunas en el concepto de «efectos jurídicamente vinculantes» en el derecho de la UE, las orientaciones (poco claras) sobre el uso del *soft law* de la UE en los tribunales nacionales y la evolución de la revisión de la validez del *soft law* de la UE. Ser o no ser (¿jurídicamente vinculante?) Esa es la cuestión del *soft law* de la UE.

Palabras clave

Soft law de la UE; directrices; recomendaciones; control jurisdiccional; TJUE; tribunales nacionales; efectos jurídicamente vinculantes.

ÊTRE OU NE PAS ÊTRE (JURIDIQUEMENT CONTRAIGNANT)? DÉVELOPPEMENTS RÉCENTS SUR LE CONTRÔLE JUDICIAIRE DE LA SOFT LAW DE L›UE

Résumé

La *soft law* de l'UE est comme une créature mythologique de la gouvernance de l'UE: comme un satyre est moitié homme et moitié bouc, donc la *soft law* de l'UE est moitié droit, moitié non-droit. Sa double nature non restreinte par la procédure législative a facilité sa prolifération, mais la controverse continue à propos de son rôle dans l'UE et dans les États membres. Deux affaires récentes s'ajoutent à la saga sur les effets de la *soft law* européenne: *BT contre Balgarska Narodna Banka* et *Fédération bancaire française contre Autorité de contrôle prudentiel et de résolution*. Ces deux arrêts, étant le résultat de deux demandes de renvoi préjudiciel, sont dans une certaine mesure extraordinaires: la Cour de justice de l'Union européenne a pour la première fois examiné la validité des recommandations et des lignes directrices de l'UE, mesures de *soft law* de l'UE par excellence, dans le cadre des demandes de décision préjudicielle. Mais à côté de leurs résultats, ces décisions ont également jeté des doutes sur les effets de la *soft law* de l'UE. Après avoir exposé les conclusions des avocats généraux et les arrêts de la Cour de justice, le travail aborde trois questions: les lacunes du concept d'«effets juridiquement contraignants» en droit de l'UE, les orientations (peu claires) sur l'utilisation de la *soft law* de l'UE dans les tribunaux nationaux et l'évolution du contrôle de validité de la *soft law* de l'UE. Être ou ne pas être (juridiquement contraignant ?) Telle est la question du *soft law* de l'UE.

Mots clés

Droit non contraignant de l'UE; lignes directrices; recommandations; contrôle juridictionnel; CJUE; tribunaux nationaux; effets juridiquement contraignants.

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I. INTRODUCTION

It is a principle of good governance that the law is central to liberal democratic societies: all public decisions should be taken according to the law, public and private entities abiding by it (Council of Europe, 2008). Additionally, good governance requires that individuals affected in their legal entitlements and positions should have access to judicial protection (Council of Europe, 2008). However, EU soft law, being the category in which press releases, guidelines, recommendations adopted by EU agencies and institutions fall, somehow challenges these tenets of good governance, in at least two respects.

First, EU soft law questions the very idea of 'law' in the EU. In fact, soft law measures are not adopted according to the legislative procedures laid down in the Treaties, but can be issued by EU institutions and agencies to implement other pieces of EU law (Lefevre, 2006). Authors disagree regarding the nature of soft law: some scholars consider it as a different creature from traditional (hard) law (Baxter, 1980: 549), while others see soft and hard law as parts of a legal continuum (Terpan, 2015: 68). Ultimately, soft law raises questions on what is 'law' in the EU: should EU law be conceptualised as exclusively referring to the acts adopted by the EU institutions following legislative procedures, or should this notion also encompass other quasi-regulatory measures, such as EU soft law? On the basis of the answer to this question, one may wonder about the role of EU soft law in the EU governance model.

Second, and consequently, access to judicial remedies when it comes to EU soft law is complex. It was observed that EU soft may have legal effects (Snyder, 1996: 463; Stefan, 2014; Stefan *et al.*, 2019: 10), ranging from inter-

pretative to implementing ones. Scholarship has offered a detailed analysis of the impact of these measures both at EU and national level (Eliantonio, Korkea-aho and Stefan, 2021): for instance, guidelines and recommendations in the field of EU state aid and competition law are currently applied in the practice of EU and national authorities (Stefan, 2012; Georgieva, 2017). Multiple EU instruments empower EU and national authorities to adopt soft law to give effects to EU (hard) law.[2] Soft law is present in almost all areas of EU competence. However, there is resistance from EU Courts to consider these acts as legally binding (Gentile, 2020). In turn, the absence of legally binding effects attached to EU soft law has significantly limited the possibility for individuals and Member States to challenge these measures in direct actions before the EU judicature (Gentile, 2020). Consequently, there is also a certain uneasiness regarding the interplay between EU soft law and national law (Gentile, 2021).

Due to the complex matters raised by EU soft law, critical stances towards these instruments have been voiced. Dermine has suggested that the divide between hard and soft law should be surpassed (Dermine, 2021), while it has been argued elsewhere that these measures may have de facto legal effects and should thus be amenable to direct judicial review by EU courts (Gentile, 2020). Two recent cases shed further light on the crux of the judicial review of EU soft law and its effects: *BT v. Balgarska Narodna Banka* (hereinafter, *BT*) [3] and *Fédération bancaire française v. Autorité de contrôle prudentiel et de resolution* (hereinafter, *FBF*).[4] These two judgments, being the fruit of two preliminary ruling requests, are to a certain extent extraordinary: the Court of Justice of the EU (CJEU) has for the first time considered the validity of EBA recommendations and guidelines in the context of preliminary ruling requests. The CJEU had already considered the validity of an EU communication, an example of EU soft law, in the preliminary ruling raised in *Kotnik*

2 See for instance Regulation (1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/78/EC OJ L 331, 15.12.2010, p. 12-47, (hereinafter, Regulation 1093/2010).

3 Judgment of the Court (Fourth Chamber) of 25 March 2021, *BT v Balgarska Narodna Banka*, 501/18, EU:C:2021:249 (hereinafter, Judgment in *BT*).

4 Judgment of the Court (Grand Chamber) of 15 July 2021, *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)*, 911/19, EU:C:2021:599 (hereinafter, Judgment in *FBF*).

case.[5] Yet, the validity of recommendations and guidelines had not been considered via the same procedure until the *BT* and *FBF* judgments.[6] Hence, these two judgments add important pieces to the puzzle of the EU judicial review of EU soft law acts. But beside their outcomes, these decisions have also casted some shadows on the role of EU soft law in the EU governance.

This paper analyses and discusses these two new cases. After illustrating the opinions of the Advocates General and the CJEU judgments, the paper moves on to tackle three issues: the loopholes in the concept of 'legally binding effects' under EU law, the (unclear) guidance on the use of EU soft law in national courts, and the evolution of validity review of EU soft law.

II. THE *BT* CASE

The *BT* case concerned the application of Directive 94/19 on deposit-guarantee schemes.[7] For the purposes of our analysis, two questions on the review of EU soft law were referred to the CJEU: (a) whether depositors, despite not being the addressees of the European Banking Authority (EBA) recommendation 2014/02, might rely on that recommendation in proceedings for damages for the harm caused by the infringement of EU law; and (b) whether that EBA recommendation was valid.

1. THE OPINION

To answer these questions,[8] AG Campos Sánchez-Bordona started his analysis by looking at the powers of the EBA. Under Art. 1(2) of Regulation No 1093/2010, one of the competences of that authority concerned the issuance of recommendations addressed to the competent national authorities. Such recommendations allow the EBA to guide national authorities on the application of EU law especially concerning the operations of the European System of

[5] Judgment of the Court (Grand Chamber) of 19 July 2016, *Tadej Kotnik and Others v Državni zbor Republike Slovenije,* 526/14 EU:C:2016:570.

[6] It should be recalled that an EU recommendation was challenged in *Belgium* v. *Commission*, Judgment of the Court (Grand Chamber) of 20 February 2018, 16/16 EU-:C:2018:79, but the Court dismissed that action.

[7] Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes OJ L 135, 31.5.1994, p. 5-14.

[8] Opinion of AG Campos Sánchez-Bordona *BT v Balgarska Narodna Banka,* 501/18 EU:C:2020:729.

Financial Supervision.[9] AG Campos Sánchez-Bordona subsequently observed that recommendations are in general not legally binding. Thus, they fall within the remit of Art. 288(5) TFEU.[10] However, he continued, recommendations might have some legal effects, although not binding. To evaluate the production of legal effects by EBA recommendations, he assessed their nature and purpose. In the case at hand, two categories of recommendations could be identified:[11] those adopted under Art. 16 of the Regulation No 1093/2010, and those issued under Art. 17 of the same regulation. The former are general in nature and call on the national authority to explain whether it complies or not, and why. The latter are individual in nature and, for that reason, akin (but not identical) to decisions; an *ad hoc* procedure can be triggered to deal with the consequence of non-compliance with such recommendations, including the issuance of a (binding) decision on national authorities. AG Campos Sánchez-Bordona clarified that the recommendations issued under Art. 17(1) to (8) of Regulation No 1093/2010 could produce legally binding effects. Notably, these acts can become binding following the issuance of a formal opinion by the Commission urging the authority to take the measures necessary to comply with EU law.

However, focusing on the EBA recommendation No 2014/02, which was adopted under Art. 17 of the Regulation, AG Campos Sánchez-Bordona explained that it lacked binding effects since it was not followed by a formal opinion from the Commission. The absence of binding effects precluded the possibility to lodge an action for annulment under Art. 263 TFEU.[12] Nevertheless, AG Campos Sánchez-Bordona also submitted that the recommendations could be relied upon in a dispute before national courts where the interpretation of the binding provisions of EU law to which those recommendations are linked is at stake. With this dictum, he confirmed the *Grimaldi* jurisprudence.[13] He further observed that, if national courts are required to take into account recommendations when applying binding EU law in the Member States, it follows logically that they should be able to make references to the CJEU for a ruling on the validity of the content of EU recommendations. Limiting the competence of the Court only to preliminary rulings on the interpretation, and not on the validity, of recommendations would be contrary to the duty of national courts to consider recommendations in cases

[9] Art. 16 Regulation 1093/2010.

[10] Para. 76.

[11] Para. 77 and following.

[12] Para. 82.

[13] Para. 84.

brought before them. It is indeed only for the CJEU to evaluate the validity of EU recommendations according to the *Foto-Frost* case law.[14]

The opinion then moved on to consider the validity of the recommendation. Two were the grounds submitted by the referring court to contest the validity of the EBA recommendation: first, the recommendation was directed at a national authority, i.e. the Bulgarian National Bank (BNB) which was not competent to determine the unavailability of deposits under Directive 94/19; second, the recommendation was allegedly conflict with recital 27 of Regulation No 1093/2010, requiring mechanisms to redress violations of EU law in the field covered by the regulation subject to the condition that EU law defines clear and unconditional obligations. Namely, it was argued that Art. 1(3)(i) of Directive 94/19, being one of the legal bases of the recommendation, did not lay down clear and unconditional obligations. The first ground was dismissed, in so far as it was for the referring court to identify the competent authority to determine the unavailability of deposits in accordance with Bulgarian law. Also the second ground was rejected, since Art. 1(3)(i) of Directive 94/19 lays down clear and unconditional obligations and thus has direct effects.

Nevertheless, AG Campos Sánchez-Bordona found that the EBA recommendation was invalid on competence grounds. The EBA had issued that recommendation to declare that the BNB had failed to make a declaration regarding the unavailability of deposits within the time limits established under the Directive. However, this was contrary to the *Kantarev* judgment,[15] which held that the unavailability of deposits must be determined by an express act of the competent national authority and cannot be inferred from other measures adopted by the national authorities. Accordingly, EBA recommendation 2014/02 violated Directive 94/19 as interpreted in the *Kantarev* judgment.

2. THE JUDGEMENT

The judgment followed an approach similar to that proposed by AG Campos Sánchez-Bordona. As in the opinion of AG Campos Sánchez-Bordona, the CJEU considered the effects of the EBA recommendation, and

[14] Judgment of the Court of 22 October 1987 *Foto-Frost* v *Hauptzollamt Lübeck-Ost*, 314/15, EU:C:1987:452.

[15] Judgment of the Court (Fifth Chamber) of 4 October 2018 *Nikolay Kantarev* v *Balgarska Narodna Banka*, 571/16, EU:C:2018:807.

found that it was a non-binding act for the purposes of Art. 288(5) TFEU.[16] Nevertheless, the Court recalled that national courts are obliged to take recommendations into consideration with a view to resolving the disputes submitted to them, in particular when they are intended to supplement binding EU law provisions.[17] In addition, 'Individuals harmed by the breach of Union law established by such a recommendation, even if they are not the addressees of the recommendation, must be able to rely on it as a basis for establishing, before the competent national courts, the liability of the Member State concerned for the breach of Union law in question.'[18]

Moving to the issue of the validity of the recommendation, the CJEU evoked its established case law according to which that Court can give preliminary rulings on the validity of EU acts with no exceptions.[19] Accordingly, the Court was competent to scrutinise the validity of the recommendation. While it concluded that the grounds raised by the national courts to support the unlawfulness of the recommendation were not founded, the Court nevertheless held that the recommendation at stake was invalid. In particular, the EBA recommendation was unlawful in so far as it contradicted the *Kantarev* judgment, according to which 'the unavailability of deposits must be established by an explicit act of the competent national authority and cannot be inferred from other acts of the national authorities'.[20] Since the recommendation equated to the decision and thus sustituted that national act, the EBA recommendation was invalid.

III. THE *FBF* CASE

Three were the questions submitted to the attention of the CJEU in the *FBF* case: first, whether an action for annulment before the EU courts was available to a national professional federation to challenge guidelines issued by EU agencies; second, whether the same guidelines could be the object of a validity preliminary ruling, and individuals whose interests were protected by those guidelines but were not directly or individually concerned could challenge the guidelines by raising a plea of invalidity before national courts; third, in case the validity of those guidelines could be tested via a plea of illegality

16 *Ibid.*, para. 80.

17 *Ibid.*, para. 81.

18 *Ibid.*, para. 81.

19 *Ibid.*, para. 82

20 *Ibid.*, para 99.

before national courts, whether the guidelines exceeded the powers conferred to EBA under Regulation No 1093/2010.

1. THE OPINION

In the opinion on the case,[21] AG Bobek opened his analysis by considering the nature of the guidelines. He submitted that the guidelines would not be considered as having legally binding effects under the consolidated EU case law. However, he also argued that the parameters used by that jurisprudence (i.e. substance of the act, the context of its adoption, and the powers of the author)[22] failed to take into consideration the true effects of the guidelines at stake, especially at the national level.[23]

Indeed, the contested EBA guidelines were addressed to national authorities,[24] and the latter could decide to comply or to explain to the EBA the reasons for non-compliance. When deciding to abide by the EBA guidelines, the national authorities transformed these instruments into binding ones, not only for themselves but also for the financial institutions. According to AG Bobek, these effects were not captured by the established case law. Therefore, he suggested that 'the test to determine whether an EU-law act is reviewable ought to focus on whether the act can reasonably be perceived as inducing (or even effectively imposing) compliance on the part of its addressee.'[25]

AG Bobek then analysed the compatibility of the contested guidelines with Regulation No 1093/2010, and, notably, whether the EBA had exceeded its competence by adopting those guidelines. The remit of the EBA's competences was delimited by a series of provisions[26] that laid down the substantive boundaries within which that agency could operate. That meant that the guidelines had to remain within the scope of the provisions included in the EU legislative framework. AG Bobek emphasised that, although the guidelines rightly referred to a series of legislative bases that were given flesh by the same guidelines, the subject matter of those legislative bases and that of the guidelines were nevertheless different. He continued: 'While the latter [i.e. the guidelines] have set out specific 'rules' that concern product

[21] Opinion of Advocate General Bobek delivered on 15 April 2021, *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution* (ACPR) 911/19, EU:C:2021:294 (hereinafter, *Opinion in FBF*).

[22] *Ibid.*, para. 41.

[23] *Ibid.*, para. 45.

[24] *Ibid.*, para. 47.

[25] *Ibid.*, para. 53.

[26] *Ibid.*, para. 56.

governance, the former all relate to corporate governance by providing, in particular, for internal procedures within financial institutions, clear organisational structures with consistent lines of responsibility, and procedures related to risk management and capital requirements.'[27] This distinction was not purely theorical but practical: 'corporate governance rules relate to the quality of internal processes and mechanisms which are there to ensure the smooth functioning of the company. Product governance rules concern business choices that are there, essentially, for the marketing of cars.'[28] AG Bobek concluded that the guidelines exceeded the competence of the EBA and were thus invalid. This outcome was reached under what he called 'normal scrutiny'. In AG Bobek's reasoning, this level of scrutiny was necessary to perform an intense review of EU soft law and the competences exercised thereunder.

At this point, the opinion explored the issue of whether EU soft law can be annulled via a preliminary ruling on validity. The view of AG Bobek was that preliminary rulings on validity had to be an available route for reviewing EU soft law, including the contested guidelines, for two reasons. First, in case of lack of competence for the EU institution to adopt EU soft law, a preliminary ruling on interpretation could not scrutinise this matter. Second, transforming preliminary rulings on validity into preliminary rulings on the interpretation could blur division of labour between the EU and national judicatures.

Subsequently, AG Bobek analysed the applicability of the *TWD* case law.[29] According to that jurisprudence, a preliminary ruling on the validity of an EU measure cannot be submitted if the parties interested have undoubtedly standing before EU courts for the purposes of an action for annulment. In this respect, AG Bobek observed that the threshold for applying the *TWD* case law is quite high, as it demands that the admissibility of the action for annulment should be manifest. In *FBF*, the guidelines bound the discretion of national authorities and financial institutions. However, there was no certainty that the CJEU would have deemed that a professional federation representing banks' interests in France was directly and individually concerned by those guidelines. Therefore, in *FBF* the professional federation could certainly challenge, by means of a plea of invalidity raised before national courts, the validity of the EBA guidelines.

[27] *Ibid.*, para. 67.

[28] *Ibid.*, para. 68.

[29] Judgment of the Court of 9 March 1994 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland*, 188/92, EU:C:1994:90.

Another issue discussed by AG Bobek was the applicability of the *Foto-Frost* decision,[30] according to which national courts are under the obligation to make a preliminary ruling request on the validity of an EU law measure unless they consider that the grounds put forward in support of invalidity are unfounded. This case law, according to AG Bobek, was created with the view to ensure the uniformity of the application of EU law.[31] In the *FBF* case, and particularly with regard to the contested EBA guidelines, there was no obligation of compliance, and, accordingly, there was no need to ensure their uniform application. For these reasons, the *Foto-Frost* case law could not apply.[32]

To conclude, AG Bobek proposed that the Court should decide that a preliminary ruling on validity is a possible route to challenge the invalidity of EBA guidelines, and that the EBA guidelines at stake were invalid for excess of competence.

2. THE JUDGEMENT

The CJEU commenced its judgment by evaluating the availability of an action for annulment concerning the contested EBA guidelines. The Court applied the consolidated case law and verified the following elements: the substance, the context and the powers of the adopting institution.[33] Although the Court remarked that the national competent authorities had a duty to notify the EBA on whether they complied with those guidelines and, if not, they had to state the reasons for their non-compliance,[34] it nevertheless assimilated the EBA guidelines to recommendations, which are not binding upon their addressees.[35] The Court reasoned that, since national authorities are not obliged to comply with the guidelines, the latter were accordingly non-legally binding acts. The CJEU concluded that 'the EU legislature intended to confer on that authority [ie the EBA] a power to exhort and to persuade, distinct from the power to adopt acts having binding force'.[36] It followed that the contested guidelines could not be contested by way of an action for annulment before the EU courts under Art. 263 TFEU.

[30] *Ibid*.
[31] Opinion in *FBF*, para. 106.
[32] *Ibid*, para. 123.
[33] Judgment in *FBF*, para 38.
[34] *Ibid*, para. 41.
[35] Art. 288(5) TFEU.
[36] Judgment in *FBF*, para 48.

Regarding the availability of the preliminary ruling procedure to assess the validity of non-legally binding acts, the Court recalled the *Belgium v. Commission* judgment in which it was held that the preliminary ruling allows the Court to interpret and assess the validity of all EU acts without exception.[37] The Court then assessed the possibility to raise a plea of illegality in the context of national proceedings and the relevant rules on standing. According to the established case law, it is a matter for national authorities to establish the rules on standing when it comes to pleas of illegality of EU law. Namely, 'it does not follow from Art. 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.'[38] Rules on standing are shielded under national procedural autonomy. Nevertheless, individuals should have access to national courts to challenge the legality of any decision or other legal measure related to an act of the Union.[39] Hence, the Court maintained that a preliminary ruling on the validity should be considered as admissible where it was made in the course of a genuine dispute in which a question on the validity of an EU act was 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'.[40] A preliminary ruling of validity should be a possible avenue to verify the lawfulness of EU soft law.

The judgment then evaluated the validity of the guidelines. The CJEU preliminarily observed that the Regulation No 1093/2010 laid down the powers of the EBA in great detail. Therefore, the scrutiny of the EU judicature should be strict in this respect, regardless of the fact that these measures did not possess legally binding effects. The CJEU subsequently analysed the framework of the EBA's powers in the light of Regulation No 1093/2010, and, in particular, Art. 8 and 16 thereof. The Court found that there were no elements capable of disclosing that the guidelines did not fall within the scope of the competences of the EBA as outlined by the EU legislature. It followed that the guidelines in question were valid.

As an interim conclusion, *BT* and *FBF* offer a crucial finding: the bindingness of an act does not bear any consequences on the admissibility of

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37 Judgment of the Court (Grand Chamber) of 20 February 2018 *Kingdom of Belgium v European Commission,* 16/16, EU:C:2018:79.

38 Judgment in *FBF*, para. 63.

39 *Ibid.*, para. 63.

40 *Ibid*, para. 64.

a validity preliminary ruling request. However, this dictum raises a series of controversial issues, as will be explored in the following sections.

IV. BLURRING THE LINES: LEGALLY BINDING EFFECTS AND OTHER LEGAL EFFECTS UNDER EU LAW

The first issue concerns the unsettled edges of the concept of 'legally binding effects'. Both in *BT* and *FBF*, the Court distinguished the category of legally binding effects from the persuasion and exhortation effects created through the guidelines and recommendation adopted by the EBA.[41] It should be recalled that the Court found only exhortation and persuasion but not legally binding effects as a consequence of the EBA recommendation and guidelines challenged, respectively, in *BT* and *FBF*. While in *FBF* the Court concluded that the guidelines lacked legally binding effects based on the settled judicial test,[42] in *BT* the Court skipped that application of the test and merely assumed that recommendations do not produce legally binding effects in light of Art. 288(5) TFEU. Between the two approaches, it is preferable to carry the established test on the production of legal effect — even though the case law illustrates that the result of these two methodologies might not differ in practice. What is more, the difference between legally binding effects and the exhortation/persuasion identified in these two cases is controversial, and *BT* and *FBF* leave open several questions.

First, one may wonder what the enforcement consequences are for these categories of legal effects under EU law. Some reflections on this point are provided by AG Bobek.[43] Reading in between the lines of the judgments of the Court, a possible difference in the implications of these categories of effects, beyond the availability of an action for annulment before EU courts only for acts producing legally binding effects, may be that non-compliance with acts that generate binding legal effects can be sanctioned. *A contrario*, the acts that do not have legally binding effects cannot entail sanctions in case of non-compliance. However, these two judgments do not offer a firm interpretation on this issue; moreover, the EBA recommendations analysed in *BT* could entail sanctions for non-compliance,[44] which further complicates the task of distinguishing these categories of legal effects.

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41 Cfr Judgment in *BT*, para 79 and Judgment in *FBF*, para 69.

42 See above.

43 See para. 48 and following of the opinion in *BT*.

44 See Art. 17(3) of Regulation No 1093/2010.

Second, the distinction between 'bindingness' and 'exhortation and persuasion' is also unclear from a conceptual stand-point. Focusing on the EBA recommendation analysed in the *BT*, the Court acknowledged that that recommendation was adopted under Art. 17(3) of Regulation No 1093/2010, a provision that outlines the power of the Commission to initiate enforcement proceedings against national authorities in violation of EBA recommendations. As explained by Art. 17(3) of the Regulation, '[t]he competent [national] authority shall, within 10 working days of receipt of the recommendation, inform the Authority [i.e. the EBA] of the steps it has taken or intends to take to ensure compliance with Union law. It follows that national regulators should comply with those recommendations.' In case of non-compliance by the national authority within one month from the receipt of the recommendation, '[…] the Commission may, after having been informed by the Authority, or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law.'

Moving on to the EBA guidelines contested in *FBF*, in paragraphs 43 and following of the judgment, the Court observed that guidelines such as those adopted by the EBA are linked to a regulation, namely, Regulation No 1093/2010. In this sense, these acts give effect to a piece of EU (binding) law. Moreover, Art. 16(3) of that Regulation imposes a twofold obligation on the national authorities which are addressees of EBA guidelines: first, they shall make every effort to comply with the EBA guidelines; second, they should either comply with the guidelines or explain the reasons why they do not wish to do so. It follows that the guidelines provide a set of legal directions which can be accepted or not by national authorities: they are de facto a parameter to be followed by national regulators to ensure compliance with the Regulation.[45]

The production of legally binding effects becomes particularly evident when national authorities decide to comply with the EBA guidelines. By deciding to comply with the guidelines, the national authority *de facto* renders the guidelines binding at national level *in addition* to any EU hard law. As argued by AG Bobek, once the guidelines are accepted by national authorities, 'there is very little choice, or rather none at all, on the part of the real addresses of the guidelines, namely, the financial institutions, on whether to comply with them'.[46] In this case, arguing that guidelines are not

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[45] As a matter of fact, when EU agencies issues guidelines or recommendations, national competent authorities tend to comply with those. See Solvency II Wire, 'Getting to grips with Guidelines – Set 1, December 2015', https://bit.ly/3CYL78q.

[46] Para. 48.

binding act over the national authorities and financial institutions seems to run counter to legal reality.

Furthermore, even in case of departure from those guidelines, national authorities should explain the reasons for their divergence from those instruments. In this sense, not only the distancing from the guidelines or recommendations entails an explanatory obligation for the national regulators; what is more, these EU soft law acts function as a parameter to give reasons for non-compliance. Let us take an example. If a recommendation establishes 'A', then national authority wishing to depart from 'A' shall explain that 'A' will not be followed because of 'X', 'Y', 'Z' reasons. In so doing, national regulators must engage with the reading of the recommendation at least in the form of 'departure parameter'.[47] The explanation obligations and the reliance on the recommendation as 'departure parameter' point to a certain degree of bindigness. These remarks apply not only to the guidelines at stake in *FBF* cases, but to all EU soft law that requires national authorities to engage in the 'comply or explain' exercise. An example of additional set of EU soft law that requires to comply or explain are the guidelines issued by EIOPA in the insurance field. Excluding the presence of legally binding effects of these acts is not convincing.

Another factor that signals to the potential bindingness of these soft law measures is that national authorities tend to adopt acts to implement EU soft law in their jurisdictions (Gentile, 2021). Such national measures seek to ensure compliance not only with EU hard law, but also with the soft law adopted by EU agencies, which are thus perceived to be binding by national authorities. Also with reference to the EBA recommendation and guidelines here considered, any measure adopted by national authorities to give effect to those measures would be liable to make those recommendation and guidelines factually binding in the Member States.

Hence, it is evident that both the EBA guidelines and recommendations impact the position of the addressees by imposing compliance duties which can be even sanctioned: non-compliance with the EBA recommendations adopted under Art. 17 of Regulation No 1093/2010 may potentially lead to the intervention of the Commission.[48] Even in case of non-compliance by national authorities, those instruments should be relied upon as departure parameters for the purposes of the explanation obligations imposed on national authorities. What is more, national regulators may adopt national measures to give effects to EU soft law, thus making the latter EU instruments de facto binding at national level. As a result, the exclusion of legally binding effects with regard

[47] See Art. 17(3) of Regulation No 1093/2010.

[48] *Ibid.*

to both the EBA recommendations and guidelines contested in *BT* and *FBF* appears far-fetched: how can acts imposing obligations whose non-compliance may be sanctioned in specific circumstances be deemed to entail only exhortation and persuasion effects? Distinguishing exhortation/persuasion from legally binding effects is not only a question of semantics, but also of conceptual clarity.

In light of the above discussion, the absence of legally binding effects and the presence of exhortation/persuasion effects with reference to the EBA guidelines and recommendations considered in *FBF* and *BT* do not seem to stand on solid ground. Excluding legally binding effects for the EU soft law measures considered in *BT* and *FBF* does not only lead to the exclusion of the action for annulment. On a more general level, the absence of legally binding effects for EU soft law may lead national authorities and individuals to increasingly disregard EU soft law; in turn, this could lead to fragmentation in the implementation of the EU (hard) law to which EU soft law is attached. The creation of sub-categories of 'legal effects' for EU acts also creates challenges for national courts and private parties, as the next section will demonstrate.

V. ANYTHING NEW UNDER THE SUN? NATIONAL COURTS, INDIVIDUALS AND EU SOFT LAW

A subsequent controversial matter stemming from the *BT* and *FBF* judgment concerns the role of EU soft law in disputes before national courts. It is established case law that national courts should take into account EU soft law in disputes pending before them.[49] In the *Koninklijke* judgment,[50] the CJEU interpreted this task in a rather stringent way. In particular, it was held that a national court could depart from a recommendation (in that case, the Commission Recommendation 2009/396) 'only where […] it considers that this is required on grounds related to the facts of the individual case […].'[51] Subsequen case law has not clarified whether this duty applies to all recommendations, but there are no evident reasons to argue for the contrary. This dictum would thus suggest that there is a presumption of 'quasi-compulsory'

[49] Judgment of the Court (Second Chamber) of 13 December 1989, *Salvatore Grimaldi v Fonds des maladies professionnelles*, 322/88, EU:C:1989:646.

[50] Judgment of the Court (Second Chamber) of 15 September 2016 *Koninklijke KPN NV et al v Autoriteit Consument en Markt,* 28/15, EU:C:2016:692.

[51] Para. 43.

duty of application of EU soft law pending over national courts, which have to provide reasons in case of departure from those measures. To this task for national courts, *BT* and *FBF* added a new potential role for EU soft law in the Member States' courts: individuals can invoke EU recommendations and guidelines before national judges,[52] even if they are not the addressees of the measures,[53] and also in actions involving the liability of national authorities for violation of EU law. Although not precluded in the past, the invokability of EU soft law before national courts is now clearly provided for in the *BT* and *FBF* cases.

In light of these developments, there are two ways for national courts to be confronted with EU soft law. The first is when individuals invoke those instruments in a dispute pending before national courts. The second is when national courts apply these acts *ex officio*. The application of EU soft law at national level seems rather straightforward and similar to that of any other EU act, *prima facie*. However, in both scenarios three sets of interconnected questions arise and complicate the role of EU soft law in national litigation: first, the perceived effects of EU soft law; second, and consequently, the way in which national courts should reconcile the perceived effects of EU soft law with their duty to consider EU non-binding measures; third, the relationship between EU soft law and implementing national measures.

Let us start with the first issue, that of the perceived effects of EU soft law. When raising points based on EU soft law, the parties to a dispute explain how those documents affect their positions and claims. In carrying this exercise, the parties inevitably illustrate the legal effects stemming from the contested EU soft law act. In particular, they might lament that a piece of EU soft law negatively impacts their position, or claim legal entitlements stemming from those instruments. What is more, before requiring the intervention of a national court, private parties likely discuss the effects of EU soft law with the national competent agency or authority, which may offer an interpretation of EU soft law that deploys compulsory obligations or legal entitlements – hence binding effects. This means that EU soft law could be interpreted as *binding* both by private parties and national authorities. In turn, this perception shapes the claims and the submissions lodged before national courts.

This bring us to the second issue, being how national courts should reconcile the submissions concerning the presence of legal (seemingly binding) effects of EU soft law, with the duty to take into account EU soft

[52] See above.

[53] See above.

law in pending disputes. Clearly, there is no easy answer, and national courts find themselves in a very difficult position: while the parties argue and offer evidence that EU soft law has in fact binding effects, national courts should also comply with the *BT* and *FBF* decisions, which reinforce that EU recommendations and guidelines *do not have* legally binding effects.[54] What is more, the CJEU does not seem to take into account the possibility that these acts may be found to produce legally binding effects. As mentioned above, in *BT* the CJEU categorically excluded the legally binding nature of EBA recommendations,[55] merely referring to Art. 288 TFEU, which states that 'Recommendations and opinions shall have no binding force.' To unpack the intricacies of these settings, let us consider an example: a Commission recommendation is of relevance for a case pending before a German court. The parties of that case lament the negative impact of such a recommendation on their position as a result of obligations stemming therefrom and argue it is an invalid EU act. According to the dictum in *Grimaldi*, the national court should 'take into account' the recommendation in the context of that dispute, but what does this actually mean? How to strike the balance between legal evidence advanced by the parties and the established EU case law? If that recommendation is non-binding as established in *BT* and *FBF*, how should it help the German court solving the pending claim? Hence, while, on paper, the duty to take EU soft law into account seems clear, there are significant uncertainties, exacerbated by the perception of the parties, on the role of non-binding EU acts in national litigation.

As a consequence, national courts find themselves in a tunnel with no apparent exit, having to reconcile diverging views on the same instrument. Certainly, national courts may submit a preliminary ruling request, even on the validity, of these EU acts, in order to obtain guidance from the CJEU. Yet, as discussed elsewhere (Gentile, 2020: 483), a preliminary ruling may come at a point where the effects of EU law, including EU soft law, have already influenced the conduct of national authorities and private parties. In this sense, a preliminary ruling may intervene too late both to aid national courts in solving the crux of the interpretation of EU soft law, as well as to restore the legal position affected by that soft law.[56] The preliminary ruling procedure remains nevertheless essential in ensuring that national courts

[54] This finding stems especially for the *BT* case, which suggests that a recommendation, simply because of its name, is deprived of legally binding effects. See Judgment in *BT*, para. 79.

[55] *Ibid*.

[56] The same applies also to EU hard law.

do not interpret EU soft law, a task that in principle should be left to the CJEU.

We arrive now to the third question, being the relationship between EU soft law and national law. As mentioned, EU soft law may not only be perceived as constraining the behaviour of national authorities and private parties. It may also lead to the adoption of national implementing or transposing measures. Therefore, EU soft law becomes part of a chain of acts that allow the implementation of EU law at national level. EU soft law may be central in ensuring the correct understanding of EU law and its application at national level. However, with the *BT* and *FBF* judgments, the CJEU has made clear that recommendations and guidelines issued by EU agencies are (most likely, when it comes to guidelines) non-binding. This complicates the relationship between national law and EU law: how should national courts solve potential issues of incompatibility between EU soft law and national law? If the former is not binding, then there would be no conflict between national law and EU soft law. Yet, as EU acts, they should prevail over national law. Giving prevalence to EU soft law could be facilitated by interpreting national law in the light of EU (hard and soft) law, where possible. Furthermore, also in this scenario, the resolution of a potential normative conflict may be provided by way of a preliminary ruling, allowing national courts to interrogate the CJEU on the implications of EU soft law. This solution would have as a positive consequence that of not blurring the division of labour between the EU and national courts. However, the CJEU's case law considered in this paper suggests that when it comes to EU recommendations or guidelines, there is no duty of uniform application of EU soft law, precisely because of the lack of legally binding effects, and thus triggering a preliminary ruling procedure would appear meaningless. We will return to this issue in the following section.

This overview has illustrated that an apparently 'simple' task for national courts, namely that of considering EU soft law in disputes pending before them, hides many hurdles. On the whole, it appears difficult to grasp the difference between 'taking into account' and simply 'applying' EU soft law in national disputes.

VI. NEW FRONTIERS IN THE VALIDITY REVIEW OF EU SOFT LAW

A final issue to analyse in light of the *BT* and *FBF* cases is the relationship between the preliminary ruling of validity and the action for annulment. Following these judgments, the different scope of application of these two actions was further delineated. The action for annulment covers only

EU legally binding acts; the preliminary ruling all EU acts, regardless of their legal effects. Yet, the outcome of these procedures may be the same: both in the context of validity preliminary rulings and annulment actions, the CJEU may interpret and annul EU acts. This development engenders an additional procedural consequence: the admissibility requirements for the validity review of EU acts are bifurcated depending on the type of action. The bindingness of an act influences the admissibility only of actions for annulment, but not of preliminary rulings on the validity.

Furthermore, *BT* and *FBF* separate the concept of validity of an EU act from its bindingness: an EU act can be valid but not necessarily binding. The validity assessment is therefore a different analysis from the evaluation of the legal effects of an EU act (i.e. whether it is binding). Yet, EU soft law, and especially recommendations and guidelines, are in principle non-binding: what would then be the practical difference regarding the validity (or the invalidity) of EU soft law, if those acts are not binding? The observations raised by AG Bobek in his opinion on the *FBF* case are legitimate: how can a document that does not produce legally binding effects, and thus does not bind individuals, be invalid and thus annulled?

The only answer to this question is that the validity of an EU act is still relevant for its application at national level. This is because, even if an EU act does not produce binding effects, it should be nevertheless considered by national courts in disputes pending before them. It follows that in case of alleged invalidity of an EU measure, even if non-binding, national courts can refer a preliminary ruling request to the CJEU. Yet, as demonstrated above, how national courts should handle EU soft law in disputes pending before them hovers in a cloud of vagueness. EU soft law is practically left in a legal limbo which enhances legal uncertainty.

Following the *BT* and *FBF* cases, national courts can review the *prima facie* illegality of EU soft law based on pleas of illegality submitted by the parties to a dispute. Seen from another perspective, these cases introduce a presumption of admissibility of a plea of illegality concerning EU soft law before national judges. Indeed, national procedural rules barring the possibility to raise points based on EU law, also involving EU soft law, should be considered as conflicting with the EU standards of effective judicial protection.[57] The Court is also careful in recalling that it is for national law to lay down the conditions under which an individual can invoke the illegality of EU law.[58] In particular, in *FBF* the CJEU mentioned the importance of

[57] See Judgment in *FBF*, para. 61 and following.

[58] *Ibid*.

effective judicial protection in the EU, and the special role of national courts in this context.[59]

Yet, a remarkable feature of the judgments in *BT* and *FBF* is the absence of any mention of the duty of uniform application and interpretation of EU soft law. While the Court has argued that documents such as EU recommendations and guidelines may be subject to validity review via preliminary rulings and may even be invalidated, no consideration was paid to the need to ensure the consistent application and interpretation of EU soft law. Ensuring uniformity in the enforcement of EU law is one of the constitutional foundations of the EU legal order, protected as a mantra in the EU jurisprudence and the *raison d'être* of the preliminary ruling procedure. Although EU soft law is generally considered as non-binding, it is nevertheless one of the parameters that national courts should consider in solving cases pending before them and involving matters governed by EU law. It would follow only logically that, as EU hard law should be uniformly applied, the same should hold for EU soft law. Otherwise, the need to scrutinise EU soft law via preliminary ruling requests would become hollow.

A contrario, the exclusion of the duty of uniform interpretation for EU soft law entails that national courts may not only interpret EU soft law in different ways; taking this point a step further, national courts could depart from the interpretation of EU law given by the CJEU: after all, assuming the absence of a duty of uniform interpretation and application, national courts are not obliged to follow a specific reading of EU soft law provided by the CJEU. Accordingly, it may be even argued that the finding of the CJEU regarding the (in)validity of an EU soft law act might not be followed by national courts, precisely because of the non-binding nature of EU soft law. However, ensuring the uniform interpretation and application of EU soft law becomes even more pressing in the light of the above observations: EU soft law is part of a chain of acts that facilitate the application of EU (hard) law. It would suffice for a single national court to deviate from an EU soft law act and the uniformity of the interpretation of EU (hard) law could also be endangered.

All in all, *BT* and *FBF* indicate that the CJEU is progressively delegating the application of EU soft law to national courts due to the impossibility to scrutinise EU soft law before courts via the action for annulment. The preliminary ruling is of essence in these settings: it allows the national courts and the CJEU to dialogue regarding the implications of EU soft law. Yet, in light of the dicta in these two cases, an application of EU soft law at different speeds

[59] *Ibid*.

becomes a tangible scenario, due to the lack of binding legal effects and the absence of a duty of uniform application. In turn, the EU hard law instruments to which EU soft law is attached may not be effectively implemented: the realisation of the internal market may ultimately prove haphazard.

VII. CONCLUSION

Hamlet is a classic, a tragedy revealing the contradictions of the human being. No one would have thought that a similar degree of contradictions could have arisen with regard to EU soft law. The *BT* and *FBF* cases bring to the fore the conundrums of EU soft law, by providing some answers and raising (even more) questions. After summarising these cases, the paper has sought to address the issues stemming from *BT* and *FBF*. In particular, it has analysed three controversial matters: firstly, the loopholes in the EU understanding of legally binding effects; secondly, the uncertain role of EU soft law in national litigation; and, finally, the new frontiers in the validity review of EU soft law.

The paper has shown that the argument embraced by the CJEU according to which EU recommendations and guidelines subject to a duty of national authorities to 'comply or explain' are deprived of legally binding effects does not stand on solid ground. These instruments become *de facto* binding on national authorities as soon as the latter decide to comply with them. EU law has also laid down procedures to redress instances of non-compliance with these instruments. Also in case of non-compliance with these EU soft law instruments, national authorities are subject to explanation obligations and should rely on those acts as 'departure parameters' to delineate the reasons to distance themselves from EU soft law. Moreover, these acts may acquire binding effects by way of adoption of implementing measures by national authorities. As a result, the identification of 'exhortation and persuasion effects' and the exclusion of legally binding effects for these measures seem far-fetched.

Furthermore, the task of national courts to 'take into account' EU soft law in pending litigations appears complicated, rather than facilitated, by the possibility of the CJEU to assess the validity of these instruments. How should national courts strike the balance, for instance, between legal evidence advanced by the parties on the legal (binding) effects of EU soft law, and the established EU case law denying such effects? The solution could be provided via an EU preliminary ruling request. However, as explained elsewhere, a preliminary ruling may arrive too late in redressing the consolidated effects of EU soft law.

Finally, the paper has addressed the new frontiers in the validity review of EU soft law. The *BT* and *FBF* judgments indicate that the bindingness of an EU act counts only for the admissibility of an action for annulment, and not for preliminary ruling requests of validity. In so holding, these judgments bifurcate the assessment of validity (being a preliminary step) from that of the legal effects (ie whether an act is binding) of an EU act. At the same time, *BT* and *FBF* introduce a presumption of admissibility of pleas alleging the invalidity of EU soft law before national courts. However, one may wonder what practical advantage the scrutiny of the validity of EU soft law by the CJEU generates. Why should an EU act that does not produce legally binding effects, and therefore does not bind individuals, be invalid and thus annulled? The paper also raises questions on the uniform interpretation of EU soft law. The *BT* and *FBF* cases do not provide guidance in this respect, and the opinion of AG Bobek in *FBF* suggests that no duty of uniform interpretation of EU soft law should exist. However, it was demonstrated that the absence of a duty to ensure the uniform interpretation and application of EU soft law may ultimately hinder the achievement of the objectives included not only in EU soft law, but also in EU hard law.

As argued by AG Bobek: 'Coherence is key here. Either one believes that such measures do in fact produce some effects (but, in that case, access to the EU Courts would then have to be granted), or one believes that there are no legal effects whatsoever. However, then the question becomes: why would there be a problem if a national court annuls it? At best, that court is engaging in a completely futile exercise, killing something that was always dead.'[60] To be or not to be (legally binding)? That's the question for EU soft law.

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[60] *BT* Opinion, para. 132.

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