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How to exhort and to persuade with(out legal) force: Challenging soft law after *FBF*

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

1. Introduction

The year 2021 marks a watershed for judicial review of soft law acts issued by EU agencies. History was made first in the *Balgarska Narodna Banka* judgment of 25 March 2021. In this case, the ECJ not only admitted the review of a recommendation issued by the European Banking Authority (EBA) but declared the contested act partly invalid, despite finding the act a "genuine" soft law act.[1] The Grand Chamber judgment in *FBF* consolidates the Court's more flexible approach towards soft law and clarifies the scope and function of the preliminary reference procedure (Art. 267 TFEU) insofar as legal challenges of certain soft law acts are concerned. The case concerned another EBA soft law act (guidelines), the validity of which was challenged before a national court and then referred to the ECJ. The Court's ruling in *FBF* remains faithful to the fundamental tenets of its soft law case law, stating that the EBA's power to issue guidelines and recommendations represents "a power to exhort and to persuade" that is "distinct from the power to adopt acts having binding force".[2] As in *Balgarska Narodna Banka*, however, the Court held that it could – and in this case should – review the validity of such acts. Second, *FBF* sets an important precedent on standing. Brought by a trade association, the case pioneers a route for non-privileged parties to challenge the guidelines and recommendations of European Supervisory Authorities (ESAs) via national courts, even if the challenged act concerned them neither directly nor individually.

1. Case C-501/18, *Balgarska Narodna Banka*, EU:C:2021:249, paras. 97–101. The Court held that the recommendation had erred in interpreting a provision of Directive 94/19/EC on deposit guarantee schemes.

2. Judgment, para 48. The phrase "power to exhort and to persuade" was first used in Case C-16/16 P, *Belgium* v. *Commission*, EU:C:2018:79, para 26. It was also picked up by the Court in Case C-501/18, *Balgarska Narodna Banka*, para 79.

FBF answers, at least in part, the increasing calls for better (judicial) accountability of soft law powers within the European Union.[3] At the same time, however, the judgment highlights structural gaps and inconsistencies in the Union's system of judicial protection and leaves unanswered important questions regarding the nature of Union soft law in general, and ESA guidelines and recommendations in particular. This annotation highlights the undisputed significance of *FBF* for the EU's soft law jurisprudence, but also calls for a more comprehensive approach to addressing the accountability deficit of soft law also beyond the European judiciary.

2. Factual and legal context: The road to *FBF*

The number and diversity of EU soft law acts, i.e. acts lacking formal binding force, have increased steadily, particularly in the realm of EU financial governance. The ESAs issue guidelines and recommendations, questions and answers (Q&As), opinions, statements, and other non-binding acts to interpret and supplement virtually every piece of EU legislation falling under their broad mandates. Most of these acts have been invented by the ESAs themselves in the course of discharging their duties and most of them have also been recognized and institutionalized by periodic reviews of the mandates and powers of the ESAs (and their predecessor Committees).[4] Guidelines and recommendations, issued by the ESAs under Article 16 of the ESA Regulations, are nevertheless different from all other ESA soft law acts because of their distinct character as quasi-binding instruments. Backed by a tailored "comply or explain" regime, they are perhaps the closest thing to real regulatory powers any EU agency has been bestowed with so far. Article 16 of the ESA Regulations states that the acts' addressees must "make every effort

3. See e.g. Curtin, Hofmann and Mendes, "Constitutionalising EU executive rule-making procedures: A research agenda", 19 ELJ (2013), 1–21; Senden, "Soft post-legislative rulemaking: A time for more stringent control", 19 ELJ (2013), 57–75; Senden and Van den Brink, *Checks and balances of soft EU rule-making* (European Parliament, 2012); Türk, "Oversight of administrative rulemaking: Judicial review", 19 ELJ (2013), 126–142; Scott, "In legal limbo: Post-legislative guidance as a challenge for European administrative law", 48 CML Rev. (2011), 329–355; Gentile, "Ensuring effective judicial review of EU soft law via the action for annulment before the EU Courts: A plea for a liberal-constitutional approach", 16 EuConst (2020), 466–492.

4. The reform of the ESA Regulations in 2019, by Regulation 2019/2175, added two new instruments, Q&As and so-called No Action Letters (*de jure* opinions), to the ESAs' permanent soft law toolbox. The revised regulations entered into force in Jan. 2020. Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 Dec. 2019, O.J. 2019, L 334/1. See Van Rijsbergen, *Legitimacy and Effectiveness of ESMA's Soft Law* (Edward Elgar Publishing, 2021), and Marjosola, "Shadow rulemaking: Governing regulatory innovation in the EU financial markets", 23 GLJ (2022), 186–203.

to comply" with them. More concretely, national authorities must confirm within two months of an act's issuance whether they comply or intend to comply with the act (Art. 16(3) ESA Regulations). Despite their non-binding form, ESA guidelines have exceptionally high rates of compliance: up to 95–98 percent.[5]

The effectiveness and increasing importance of ESA guidelines and recommendations have not gone unnoticed by market participants and other stakeholders who have emphasized the need to ensure that the ESAs stay within their statutory remit of competence when adopting such acts.[6] During the review of the ESA Regulations in 2019, stakeholders asked for further clarification on the possibility to challenge guidelines and recommendations under EU law.[7] The Commission expressed the view that guidelines and recommendations should be subject to review under Article 263(1) TFEU to the extent that they are intended to produce legal effects *vis-à-vis* third parties, but at the same time emphasized that the Court of Justice had not yet had the opportunity to rule on this particular aspect of the ESA Regulations.[8]

The ESA review sought to address these concerns with a new administrative *ultra vires* mechanism (discussed in section 5.3 below) whilst also updating certain *ex ante* procedural requirements.[9] The reformed Regulations also explicitly require that the ESAs must always act within their powers and within the scope of legislative acts enumerated in Article 1(2) of the ESA Regulations, also when adopting generally applicable soft law acts.[10]

Until 2021, however, any person wishing to challenge the *validity* of ESA soft law acts has had slim chances of accessing the Court of Justice. Since

5. For instance, the EBA compliance table lists 121 guidelines addressed to EEA Member States as well as to the European Central Bank and the Single Resolution Board, where applicable. The table currently records 218 "no comply" responses. The list is available at <www.eba.europa.eu/about-us/legal-framework/compliance-with-eba-regulatory-products> (all websites last visited 9 June 2022). The ESMA's compliance table for 65 guidelines records non-compliance notifications in only 29 individual cases. The compliance table is available at <www.esma.europa.eu/convergence/guidelines-and-technical-standards>.

6. COM(2017)536 final, Proposal for a Regulation of the European Parliament and of the Council amending the ESA Regulations, at p. 19.

7. COM(2014)509 final, Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS), at pp. 5–6.

8. Ibid.

9. For instance, the Q&A procedure has been laid down in a new Art. 16b, which enables three voting members of the Board of Supervisors to request the Board of Supervisors to decide whether to request advice from the Stakeholder Group, to conduct open public consultations or to analyse potential related costs and benefits.

10. Art. 8(3) ESA Regulations. However, Art. 1(3) also permits action in certain other fields "not directly covered" by the Art. 1(2) legislative texts.

1971, the Court has held that an action for annulment (now under Art. 263 TFEU) should be available for "all measures adopted by the institutions, whatever their nature or form …".[11] Article 263(1) TFEU now explicitly provides that this possibility also extends to such acts of bodies, offices or agencies of the Union that *intend to produce legal effects vis-à-vis third parties*. In subsequent case law, however, this "legal effects test" has been somewhat narrowed to capture only acts intending to produce *binding* legal effects.[12] And as the Court recently confirmed in *Belgium* v. *Commission*, it will not admit direct actions for annulment under Article 263 TFEU as long as the contested act qualifies as a "genuine" soft law measure – i.e. one that does not intend to produce binding legal effects.[13] Only a handful of soft law acts have been successfully challenged via Article 263.[14] Moreover, standing requirements under Article 263 are highly restrictive for non-privileged applicants. The provision precludes direct actions by a natural or legal person unless the challenged act is either specifically addressed to that person or the act is of direct and individual concern to them.[15] According to established case law, measures of general application can meet the individual concern requirement only exceptionally.[16]

The preliminary ruling procedure under Article 267 TFEU has provided an alternative and potentially more effective route to European courts. Already in *Grimaldi* in 1989, the ECJ confirmed that its jurisdiction to give preliminary rulings on validity of legal acts covers all acts of the institutions "without exception".[17] The reason for this is that national courts are bound to take non-binding instruments into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the

11. Case C-22/70, *Commission* v. *Council*, EU:C:1971:32, paras. 39, 42 (interpreting Art. 173 EEC).

12. For a discussion of relevant case law, see Opinion of A.G. Bobek in Case C-911/19, *Fédération bancaire française (FBF)* v. *Autorité de contrôle prudentiel et de résolution (ACPR)*, EU:C:2021:294, para 110.

13. Case C-16/16 P, *Belgium* v. *Commission*, EU:C:2018:79.

14. For instance, Scott finds that European courts have adopted "an approach to admissibility that leaves most guidance documents beyond their control". See Scott, op. cit. *supra* note 3, 331.

15. The rules are less strict for "regulatory acts" which do not entail implementing measures; under Art. 263(4) TFEU such acts must only be of direct concern. The ECJ has held that regulatory acts include all acts of general application other than legislative acts. See Case C-583/11 P, *Inuit Tapiriit Kanatami and others* v. *Parliament & Council*, EU:C:2013:625, para 60.

16. Case C-309/89, *Codorniu* v. *Council,* EU:C:1994:197, para 19; Case 25/62, *Plaumann* v. *Commission,* EU:C:1963:17, para 107.

17. Case C-322/88, *Salvatore Grimaldi* v. *Fonds des maladies professionnelles*, EU:C:1989:646, paras. 8–9. See also Case C-278/94, *Commission* v. *Belgium*, EU:C:1996:321, para 44.

interpretation of binding provisions of national or Union law.[18] Contrary to this, non-binding instruments cannot in themselves create rights upon which individuals may rely before a national court.[19] Neither the text of the Treaty nor case law has qualified the ECJ's jurisdiction with anything similar to the Article 263 legal effects test. Nevertheless, it took until the 2016 *Kotnik* ruling for the Court to admit a question regarding the validity of a non-binding instrument – a banking communication from the Commission. In that case, the Court neither applied the legal effects test nor discussed the recommendation's character as a non-binding instrument.[20] After *Kotnik*, doubts only remained whether this more flexible approach could extend to acts other than those adopted by EU institutions.[21] The recent *Balgarska Narodna Banka* judgment, in which the Court reviewed the validity of a recommendation adopted by the EBA, showed that it could.

The present case concerned the EBA's guidelines on product oversight and governance arrangements for retail banking products (the Guidelines).[22] The Guidelines deal with manufacturers' and distributors' internal processes, functions, and strategies aimed at designing products, bringing them to the market, and reviewing them over their life cycle. The French *Autorité de contrôle prudentiel et de résolution* (Authority for Prudential Supervision and Resolution, ACPR) announced, as required under Article 16 of the EBA Regulation, that it complies with the Guidelines. This notice, issued on the ACPR's website, was challenged by the *Fédération bancaire française* (the French Banking Federation, FBF) before the French *Conseil d'État* (Council of State) on the grounds that the EBA lacked competence to adopt the Guidelines on which the notice was based. In essence, the applicant claimed that the Guidelines dealt mainly with product governance issues, whereas the relevant directives only concerned corporate governance. The questions referred concerned three issues: (1) whether the Guidelines could have been challenged via Article 263 TFEU (in an action for annulment); (2) whether, alternatively, the validity of guidelines may be the subject of a reference for a preliminary ruling under Article 267 TFEU; and (3) whether the action may be brought by a professional federation, such as the FBF, which is neither directly nor individually concerned with the Guidelines. The Commission sided with the applicant, holding that the Court should declare the Guidelines in part invalid.

18. Case C-322/88, *Grimaldi*, para 18.
19. Ibid., para 16.
20. Case C-526/14, *Kotnik*, EU:C:2016:570, paras. 31–34.
21. Korkea-Aho, "National courts and European soft law: Is *Grimaldi* still good law?", 37 YEL (2018), 470–495, 493.
22. European Banking Authority, "Guidelines on product oversight and governance arrangements for retail banking products", EBA/GL/2015/18.

3. Opinion of the Advocate General

The Opinion of Advocate General Bobek started with the preliminary issue of whether the contested guidelines qualified as a *genuine* non-binding measure. This issue was important from the perspective of Article 263 TFEU, which categorically precludes the review of such acts.[23] According to the Advocate General, the binary legal effects test under Article 263 TFEU fails to recognize the acts' exact effects. The more appropriate test, he argues, would ask whether the challenged act "can reasonably be perceived as inducing (or even effectively imposing) compliance on the part of its addressee".[24] Applying this test in the present case, the Advocate General found that the Guidelines are, if not hard law, at least something very close to hard law. Anticipating that the Court would nevertheless follow the traditional approach, the Advocate General found that the Court would probably not consider the Guidelines in question legally binding and reviewable under Article 263 TFEU.[25]

The Advocate General then jumped to assessing the substance of the third question, i.e. whether by issuing the Guidelines the EBA had exceeded its powers, as defined particularly under Article 1(2)-(3) of the EBA Regulation. The exercise involved assessing the substantive scope of a handful of banking directives, the main issue being to what extent product governance and corporate governance are sufficiently interrelated. The Advocate General found that "it seems rather clear" that the Guidelines go further than what the EBA Regulation allows.[26] He also argued for using a normal degree of intensity when scrutinizing non-binding acts of EU agencies – at least when dealing with *ultra vires* claims.[27] A more relaxed approach, he argued, might upset the institutional balance and question the legitimacy of the rules by encouraging further avoidance of the legislative process by soft law.[28] Advocate General Bobek therefore concluded that the Guidelines should be declared invalid.[29]

The final part of the Advocate General's Opinion concerned the difficult relationship between Articles 263 and 267 TFEU insofar as they concern soft law acts and standing of applicants such as professional associations.[30] In terms of standing, the Advocate General opined that, as a matter of EU law, professional federations "can certainly challenge" EU guidelines before

23. See Case C-16/16 P, *Belgium* v. *Commission*.
24. Opinion, para 53.
25. Ibid., para 52.
26. Ibid., paras. 62–65.
27. Ibid., paras. 59 and 94.
28. Ibid., paras. 85–86.
29. Ibid., para 109.
30. Ibid., para 38.

national courts using Article 267 TFEU.[31] This issue is legally distinct from Article 263 TFEU and its strict *locus standi* rules, which requires that the non-privileged applicant is directly and individually concerned.[32] He then considered whether the French court was under a duty to refer the matter to the ECJ, as is the case with legally binding acts. The Advocate General did not see how the logic and rationale of the *Foto-Frost*[33] approach could apply to non-binding acts. A national court should therefore be able "to annul . . . the national 'incorporation' or 'implementation' measure that made an EU soft law measure applicable within the national territory …"[34]

Finally, Advocate General Bobek presented his "dissatisfying but necessary solution" to the dissonant relationship between Articles 263 and 267 TFEU: the Court should allow the use of the preliminary reference procedure for the assessment of the validity of non-binding EU acts and declare the contested Guidelines invalid, regardless of whether the act meets the traditional legal effects test under Article 263 TFEU. This would guarantee "at least some resemblance of a complete system of remedies".[35]

4. Judgment of the Court

The first question concerned whether ESA guidelines may be subjected to an action for annulment under Article 263 TFEU. The Court held that the question, although arguably hypothetical, was admissible.[36] Reciting well-established case law, including Case C-16/16 P, *Belgium* v. *Commission*, the Court noted that the decisive factor in considering admissibility of formally non-binding acts is whether there is an intention on the part of the issuing EU institution, body, office, or agency to produce binding legal effects. The Court then examined the substance and effects of the Guidelines on the basis of objective criteria, taking into account the content of the act, the context in which the act was adopted, and the scope of the EBA's powers.[37]

31. Ibid., para 120. The A.G. suspects that the only way that this right could be affected is via the ECJ case law following the *TWD* judgment, Case C-188/92, *TWD Textilwerke Deggendorf,* EU:C:1994:90. That case law prohibits applicants from pleading invalidity of EU acts before a national court if that same applicant could have brought a direct action under Art. 263 and did not do so (on time). This exception – limited to situations of manifestly admissible claims under Art. 263 – hardly applies to soft law acts. See ibid., paras. 112–119.

32. Ibid., para 38.

33. Case 314/85, *Foto-Frost* v. *Hauptzollamt Lübeck-Ost*, EU:C:1987:452, paras. 14–20.

34. Opinion, para 131.

35. Ibid., para 155.

36. In fact, the Court did not even elaborate on the question of admissibility. Compare with ibid., paras. 36–38.

37. Judgment, paras. 38–44.

According to the Court, the contested Guidelines merely represented an opinion of the EBA and were worded in non-mandatory terms. They were addressed to the competent authorities, who also had an option to either comply with the act or explain why they chose not to comply. Drawing a comparison with the non-binding character of recommendations (Art. 288 TFEU) on the one hand, and the binding character of technical standards on the other hand, the Court concluded that the Guidelines could not be regarded as intended to produce binding legal effects, neither *vis-à-vis* competent authorities nor *vis-à-vis* financial institutions.[38] The contested Guidelines could not be subjected to an annulment action before the Court: EBA's power to issue guidelines and recommendations represented "a power to exhort and to persuade" that was "distinct from the power to adopt acts having binding force".[39]

The second question considered by the Court consisted of two parts: (i) whether the Court was competent to assess the validity of ESA Guidelines under Article 267 TFEU; and (ii) whether an individual would have to be directly and individually concerned – the standing requirement under Article 263(4) TFEU – for a plea of illegality against an EU act to be admissible before a national court. With regard to the first part of this question, the Court was short but sweet. Following its recent judgment on an EBA recommendation,[40] as well as *Belgium* v. *Commission* decided in 2016, the Court confirmed that it had jurisdiction to rule on the validity of the Guidelines even if they did not have any binding legal effects: "even though Article 263 TFEU excludes the review, by the Court, of acts which have no binding legal effects, the Court may, pursuant to Article 267 TFEU, assess the validity of such acts when it gives a preliminary ruling".[41] This follows from settled case law, which confirms that the Court has jurisdiction to give preliminary rulings on the interpretation of EU law and the validity of acts adopted by the EU institutions "without exception".[42] The second part of the question regarding standing was answered in the negative: EU law does not require an EU act to be of direct and individual concern to the individual who raises a plea of illegality before a national court.[43] In other words, the strict *locus standi* requirements of Article 263 (governing direct actions before the Court of Justice) do not determine the conditions under which an action may be brought before a national court. On the contrary, it is the duty of Member States to set up a system of legal remedies that ensures the fundamental right

38. Ibid., paras. 45–49.
39. Ibid., para 48.
40. Case C-501/18, *Balgarska Narodna Banka*, para 83.
41. Judgment, para 54.
42. Case C-322/88, *Grimaldi*, para 8.
43. Judgment, para 65.

to effective judicial protection.[44] Hence, the FBF was able to challenge the validity of the Guidelines indirectly via the preliminary reference procedure.

The final part of the judgment concerns the merits of the validity plea. Contrary to the Opinion of the Advocate General, the Court concluded that the Guidelines were within the EBA's powers and found no factors that would affect their validity. In terms of substance, the contested Guidelines fell within the scope of application of the directives that form the subject matter of the Guidelines, and the Guidelines were also necessary to ensure the consistent and effective application of those directives.[45]

5. Comments

The *FBF* judgment is an important judgment for what it says as such and for what implications it may bring. This comment starts by discussing a dimension that neither the Court nor the Advocate General discuss at length: could expanding soft law powers by EU agencies be used to circumvent the Union's *non*-delegation doctrine deriving from *Meroni,* and if so, does the Union have in place a sufficient system of judicial controls to enable review of EU agencies' soft law-making? This brings us to the more specific questions concerning judicial review of Union soft law. What does the division of jurisdiction between national and European courts look like after *FBF* and how does the judgment relate to the Court's existing case law emphasizing the role of national courts in ensuring that the Union's system of judicial remedies fulfils the requirements of judicial protection and rule of law? Finally, looking further afield, alternative options and strategies are discussed, such as the role of the ESA Board of Appeal, in mitigating remaining challenges of judicial redress.

5.1. *Soft law and the non-delegation doctrine*

There is a long-standing debate in the EU as to which powers can be delegated to EU agencies and under what conditions. In the last, roughly speaking, 70 years of EU integration, we have moved from allowing the delegation of only "clearly defined executive powers the exercise of which can be subject to strict review in the light of objective criteria determined by the delegating

44. Judgment, paras. 59–61.
45. Judgment, paras. 103–132.

authority",[46] to allowing the delegation of powers to issue legally-binding and generally applicable measures, as long as such powers are subject to sufficiently delineating conditions and criteria limiting discretion and amenable to judicial review in the light of the objectives established by the delegating authority.[47] The main factor behind such relaxation of the delegation doctrine is the Lisbon Treaty. For instance, the Court's famous statement in *Romano* that agencies could not be delegated powers to adopt acts "having the force of law"[48] reflected the fact that agencies were not envisaged among the possible authors of legally binding decisions at the time of the EEC Treaty. This meant that judicial review of agency decisions was not possible.[49] In the *ESMA-short selling* case (decided in 2014), the Court said that the ban in *Romano* on delegating powers with "the effect of law" was effectively outdated by the Lisbon Treaty, because "the institutional framework established by the [TFEU], in particular the first paragraph of Article 263 TFEU and Article 277 TFEU, *expressly permits Union bodies, offices and agencies to adopt acts of general application*".[50] In the Court's reasoning, Articles 263 and 277 TFEU therefore went beyond presuming the existence of such regulatory powers; in fact, they constituted them.[51]

Under the Lisbon Treaty, the powers that the Union legislature can give to EU agencies can therefore include discretionary powers transferring part of the responsibility from the legislature to the agency.[52] Nonetheless, delegation of general rule-making powers to EU agencies is still excluded.[53] A

46. Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA* v. *High Authority of the European Coal and Steel,* EU:C:1958:7, pp. 151–152.

47. Case 270/12, *UK* v. *Council and Parliament*, EU:C:2014:18. See further Scholten and Van Rijsbergen, "The ESMA-short selling case: Erecting a new delegation doctrine in the EU upon the *Meroni-Romano* remnants", 41 LIEI (2014), 389–405, at 401.

48. Case 98/80, *Giuseppe Romano* v. *Institut national d'assurance maladie-invalidité*, EU:C:1981:104, para 20.

49. Chamon, "Le recours à la soft law comme moyen d'éluder les obstacles constitutionnels au développement des agences de l'UE", 567 Rev. de l'UE (2013), 152–160, at 155.

50. Case 270/12, *UK* v. *Council and Parliament*, para 65 (emphasis added).

51. See Marjosola, "Bridging the constitutional gap in EU executive rule-making: The Court of Justice approves legislative conferral of intervention powers to European Securities and Markets Authority: Court of Justice of the European Union (Grand Chamber) judgment of 22 January 2014, Case C-270/12, *UK* v. *Parliament and Council (Grand Chamber)*", 10 EuConst (2014), 500–527.

52. Compare Case 9/56, *Meroni*, in which the ECJ explicitly prohibited the delegation of "discretionary powers, implying a wide margin of discretion which may . . . make possible the execution of actual economic policy".

53. Note that this is different for the supervisory and intervention powers of ESMA. These powers are circumscribed by various conditions and criteria that limit the agency's discretion. They are precisely delineated and amenable to judicial review and therefore do not imply a "very large measure of discretion" incompatible with the EU Treaty. See also Van Rijsbergen and Foster, "'Rating' ESMA's accountability: 'AAA' status" in Scholten and Luchtman (Eds.),

comprehensive system of control, including sufficient delineation of powers and elements limiting discretion *ex ante*, as well as sufficient *ex post* checks such as judicial review, should always be in place. In this sense, the *Meroni* prohibition on delegating "discretionary powers implying a wide margin of discretion" and making "possible the execution of actual economic policy" still applies.

The delegation of soft regulatory powers to EU agencies, however, appears to bypass the *Meroni* restrictions.[54] This might have played a role in the development of Union agencies' soft law practices. Indeed, institutional practice has demonstrated that certain EU agencies have developed, under the guise of soft law, policy-making activity that comes close to full regulatory powers.[55] For instance, the European Aviation Safety Agency (EASA) may issue opinions to assist the Commission by preparing measures to be taken under the EASA Regulation and "[w]here those measures comprise technical rules, the Commission may not change their content without prior coordination with the Agency."[56] Similarly, the European Medicines Agency (EMA) issues scientific opinions regarding the authorization procedure for pharmaceutical products which triggers a period of 15 days for the Commission to prepare a draft decision to which "the Commission shall attach a detailed explanation of the reasons for the differences" if the draft decision differs from the opinion of the Agency.[57] Past research shows that in almost all cases the Commission confirms the EMA's drafts and transposes the content in its decisions without adding any new elements.[58] The practice with regard to the ESAs' technical standards is still fairly new, but so far demonstrates similar dynamics. ESA guidelines and recommendations have also been said to have significant quasi-binding effect given the practice of National Competent Authorities (NCAs) and the market, and this is further strengthened by the fact that the Board of Supervisors needs to adopt such acts by means of qualified majority voting.[59] Opinions and other non-binding instruments adopted on the basis of Article 29 of the ESA Regulations are not of a similar quasi-binding nature, but there is little evidence that they are not

Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability (Edward Elgar Publishing, 2017) pp. 53–81.

54. Senden and Van den Brink, op. cit. *supra* note 3, p. 65.

55. Ibid., at p. 23 ("while these general rule-making powers are soft by the label, they are often hard in practice").

56. Pursuant to Art. 75(2)(b) EASA Regulation.

57. Pursuant to Art. 10(1)(e) of the EMA Regulation.

58. Senden and Van den Brink, op. cit. *supra* note 3.

59. Moloney, *The Age of ESMA: Governing EU Financial Markets* (Bloomsbury Publishing, 2018).

followed by NCAs.[60] By strengthening judicial review of such EU agencies' soft law powers, *FBF* marks a clear improvement, also in terms of the *Meroni* doctrine.

5.2. *A complete system of remedies?*

At first glance, the *FBF* judgment confirms much that we already knew about judicial review of soft law. Articles 263 and 288 TFEU preclude the review of genuinely non-binding acts. Whether an act is a genuinely non-binding act or an act that intends to produce binding legal effects is a matter of the act's substance, not form. The criteria that reveal the true nature of the act (e.g. wording, context, intention and powers of authors) are well-established in ECJ case law to which *FBF* adds little.[61] The Court has also time and again stated that it is the responsibility of Member States to fill remaining gaps in the jurisdiction of Union courts in order to guarantee the fundamental right to effective judicial protection.[62] The resulting "complete system of remedies" should also mean that claims that are non-admissible under Article 263 TFEU – either because of lack of standing or lack of binding legal effects – should be admissible before national courts, which can refer the question of validity to the ECJ.[63] In this sense, *FBF* represents a continuation of Union case law emphasizing the gateway role of national courts in ensuring access to the Union judicature.

In *FBF* (and in *Balgarska Narodna Banka* before it) the ECJ nevertheless also breaks new ground. Most importantly, the Court *scrutinizes and answers the question of validity*. Before *Balgarska Narodna Banka*, the Court had explicitly refused to assess questions of validity of non-binding acts, preferring to rephrase the submitted questions as issues of interpretation.[64] *FBF* therefore confirms that the ECJ is now open to scrutinizing the merits of the plea of invalidity, even if the challenged act is a non-binding act. As a result, the EU legal order recognizes a limitless number of soft law acts that have the ability to "exhort and to persuade" in ways that are legally distinct

60. Ibid.

61. See e.g. Case C-16/16 P, *Belgium* v. *Commission*, para 32 and the case law cited.

62. Case 294/83, *Les Verts* v. *Parliament*, EU:C:1986:166, para 23; Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council of the EU*, EU:C:2002:462, paras. 40–41; Case C-583/11 P, *Inuit Tapiriit Kanatami and others*, paras. 92–95 and 99–102; Case C-263/02 P, *Commission* v. *Jégo-Quéré*, EU:C:2004:210, para 31.

63. E.g. Case C-50/00 P, *UPA*, para 40. This positive duty is further supported by Art. 19(1) TEU, which states that Member States "shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law".

64. Case C-50/00 P, *UPA,* paras. 96–98.

from binding legal acts, but which can still be declared invalid (at least through indirect actions) just like legally binding acts.

This, in essence, is the solution that Advocate General Bobek suggested the Court should follow – of course with the significant difference that the Court disagreed on the submitted pleas' merits. For the Advocate General, the chosen approach is the only possible one to ensure effective legal protection *vis-à-vis* non-binding Union measures. However, he also admits that the approach is "structurally dissatisfying" in conceptual and intellectual terms.[65] For the Advocate General the problem boils down to the ambivalent and incoherent judicial treatment of "non-binding" Union acts. Indeed, logic would have the act either binding and reviewable or non-binding and non-reviewable consistently under *both* Articles 263 and 267 TFEU.[66]

It is easy to agree that whatever *FBF* achieves in terms of legal protection of legal and natural persons affected by Union acts, it does so at the cost of coherence. The following table provides a simplified summary of the state of law after *FBF*.

Table 1. Judicial review of non-binding Union acts under Articles 263 and 267 TFEU

	Article 263 TFEU (direct action for annulment)	**Article 267 TFEU (preliminary reference)**
Privileged applicants (Member States, European Parliament, Council, and Commission)	Admissible if the act intends to produce (binding) legal effects *vis-à-vis* third parties (legal effects test) (Art. 263(2)-(3) TFEU).	Admissible regardless of the legal effects test, but access to the national court governed by applicable national procedural law.
Non-privileged applicants (natural and legal persons)	Admissible if the act meets the legal effects test and is either addressed to the person or is of direct and individual concern to the person (Art. 263(4) TFEU).[67]	Admissible, and national courts and domestic legal systems are under *a duty to enable challenge*. The legal effects test and standing requirements of Art. 263(4) do not apply.

65. Opinion, paras. 141 and 155.
66. Ibid., para 144.
67. We assume here for the sake of simplicity that "genuine" soft law acts cannot qualify as "regulatory acts". See, however, *infra* note 86.

As the table illustrates, *FBF* leaves the case law on Article 263 untouched. As recently confirmed in *Belgium* v. *Commission*, the article precludes direct review of acts having no binding legal effects, i.e. genuine soft law acts. The validity of such acts can only be reviewed via the preliminary ruling procedure, which is disconnected from Article 263 TFEU both in terms of standing and admissibility criteria.[68] It is the bottom-right corner of the table where the implications of *FBF* are possibly transformative. The Court's "complete system of remedies" case law has so far sought to ensure that non-privileged applicants have access to national courts where they lack standing under Article 263. As the Court stated in *UPA*:

> "… national courts are required [in accordance with the principle of sincere cooperation], so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act".[69]

FBF takes this line of case law to its logical extreme. The Court makes no distinction between genuine soft law acts and binding Union acts insofar as adequate judicial protection of individual parties is concerned.[70] Based on *FBF*, *any private applicant* may therefore seek to challenge, via a preliminary reference, the legality of *any non-binding act* – even acts that no applicant could challenge via Article 263 TFEU.[71] The fact that the strict standing rules of Article 263 TFEU do not apply means that, for instance, a trade association with the necessary geographical presence could challenge any ESA guideline via a suitable national court. Of course, nothing stops Member States themselves from trying to channel their actions against non-binding acts via national courts (the top-right corner of Table 1). But such cases would raise no issues of "fundamental right to judicial protection" and they would fall squarely within national procedural autonomy. It is therefore more likely that privileged applicants must rely on Article 263 TFEU also in the future. This would probably make it difficult for privileged applicants to challenge soft law

68. Judgment, para 54.

69. Case C-50/00 P, *UPA,* para 42.

70. Judgment, para 63: "individual parties must . . . be guaranteed, in proceedings before the national courts, the right to challenge before the courts the legality of any decision or other national measure relative to the application to them of a European Union act of general application."

71. The contrast is also highlighted by A.G. Bobek: an "act [genuine soft law measure] which cannot be challenged by any applicants under Article 263 TFEU suddenly becomes a challengeable act open to everyone under Article 267 TFEU", Opinion, para 142.

acts, including ESA guidelines and recommendations, before the General Court.[72]

FBF nevertheless hardly opens the floodgates for soft law litigation even for private litigants. The Member States have a positive duty to enable judicial review of soft law acts, *inter alia* by designating the relevant courts and by laying down necessary procedural rules on standing for individual applicants. This duty, however, is not boundless. Member States are generally under no obligation to provide for a free-standing action to challenge national measures based on their compatibility with higher-ranking EU law.[73] Bringing a legal challenge is less problematic where, as in the present case, a national act of implementation exists, such as a notice of compliance, that provides sufficient basis for an action. Beyond the "comply or explain" regime of Article 16 of the ESA Regulations, however, EU soft law acts rarely prompt such explicit acts of incorporation. Therefore – and absent a "genuine dispute" to which the act pertains[74] – it will be much harder to challenge the legality of ESA acts such as "principles", "public statements", "statements" and supervisory briefings adopted under Article 29,[75] or Q&As adopted under Articles 16b of the ESA Regulations. The same applies to other EU soft law acts, irrespective of the issuing body.

Finally, access to the ECJ is not guaranteed even after the case is lodged in a national court. On the one hand, the fundamental principle that the ECJ has sole jurisdiction to declare an EU act invalid is protected by sound case law.[76] On the other hand, the national court is not obliged to use the Article 267 procedure unless a question of validity is raised in a case pending before courts of last instance. And even those courts may decide to rule on the validity of a Union act themselves if they consider the pleaded grounds unfounded.

72. See also ibid., para 146.

73. Case C-432/05, *Unibet* v. *Justitiekanslern*, EU:C:2007:163.

74. See judgment, para 64. It is established case law that although national implementing measures are not required for a reference pursuant to Art. 267, the act cannot be challenged without there being a genuine dispute. See Case C-62/14, *Gauweiler and others*, EU:C:2015:400, para 29 (and cited case law). The ECJ has, however, deferred to national courts in determining the relevance of the submitted questions as well as the need for a preliminary ruling. Ibid., para 24.

75. Art. 29(2) provides that the ESAs may promote common supervisory approaches and practices by developing new practical instruments and convergence tools. The revised Art. 8(a) of the ESA Regulations, enumerating the ESAs' powers and tasks, is also more open-ended than before with regard to the type of regulatory and supervisory instrument that the ESAs may use to pursue EU-wide standards and practices. Whereas the previous legislation only mentioned guidelines, recommendations, and binding technical standards, the revised wording also mentions "other measures, including opinions".

76. Case 314/85, *Foto-Frost,* para 20. See also Case C-583/11 P, *Inuit Tapiriit Kanatami and others*, para 96; Joined Cases C-188 & 189/10, *Melki and Abdeli*, EU:C:2010:363, paras. 55 and 56.

What is more, even if the arguments put forward by the parties are deemed well-founded, it remains unclear whether the *Foto-Frost* duty to refer extends to non-binding Union acts at all. The ECJ in *FBF* did not discuss the issue even *obiter*.

The Advocate General argued in his Opinion that *Foto-Frost,* "on its logic and purpose", should not apply to non-binding EU measures. His reasoning deserves closer scrutiny, particularly because *Foto-Frost* appears to be the final piece in the EU soft law puzzle, at least insofar as judicial review is concerned. The Advocate General discusses two distinct justifications behind *Foto-Frost* case law: uniformity of EU law and coherence of the system of judicial protection. In terms of uniformity, the Advocate General opines that because national authorities may, under Article 16(3) of the ESA Regulations, opt out of ESA guidelines, the effect of a national court annulling a national measure that implements an EU non-binding measure would be tantamount to the national authority simply deciding (retrospectively) not to comply.[77] The Advocate General is right that the comply-or-explain regime of the ESA Regulations is specifically designed to tolerate such divergence. Furthermore, Article 16 of the ESA Regulations does not limit the explanations that national authorities may offer as reasons for non-compliance. Thus, assessed purely against the *uniformity* justification, Advocate General Bobek's technical argument makes sense. Its relevance, however, is limited to the narrow context of the Article 16 comply-or-explain mechanism.

The Advocate General's second argument about the *coherence* of the system of judicial protection is more complex. He recalls that the centralizing logic of *Foto-Frost* was also justified by the fact that the EU courts provide for effective review that is comparable to that guaranteed by national courts.[78] In the case of non-binding EU measures this justification is, according to Advocate General Bobek, rendered meaningless. Because the Union courts, unlike (some) national legal systems, do not provide for any protection against genuine soft law measures (under Art. 263 TFEU), centralizing validity review at the EU courts would make individuals less protected, not more.[79] The key, again, is coherence:

> "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

77. Opinion, para 125.
78. Ibid., para 127.
79. Ibid., paras. 128–130.

> annuls it? At best, that court is engaging in a completely futile exercise, killing something that was always dead."[80]

This argument is rather odd considering Advocate General Bobek's strong arguments against the Court's binary approach to soft law, developed at greater length in his Opinion in *Belgium* v. *Commission*.[81] Perhaps his point here is simply to show the absurd consequences of expanding the Court's binary and circular logic "whereby the nature of the act is determined by the intent of its author and *vice versa*"[82] to the realm of the preliminary ruling procedure. The Court did not, however, follow that path, but decisively upheld C-322/88, *Grimaldi* and abandoned any possibility to apply the strict legal effects test in cases referred by national courts. Therefore, neither the national court nor the ECJ needed to consider, as a preliminary matter of admissibility, whether the contested soft law act intends to produce binding legal effects *vis-à-vis* third parties, i.e. whether it qualifies as soft law or something more. In such a world, the purpose of *Foto-Frost* case law remains relevant.

5.3. *Non-judicial control of soft law*

The 2019 ESA reforms introduced a new executive oversight mechanism for addressing possible *ultra vires* problems. Article 60a of the ESA Regulations ("Exceeding of competence by the Authority") provides that any natural or legal person may send reasoned advice to the Commission if that person is of the opinion that the ESA in question has exceeded its competence when issuing guidelines or recommendations under Article 16 or answers to questions under Article 16b. As Advocate General Bobek notes in his Opinion, the provision demonstrates a clear willingness on the part of the Union legislature to enhance monitoring of the ESAs' actions and to ensure that they stay within their powers.[83] Apart from acknowledging that the *ultra vires* problem is indeed real, the provision is unlikely to have any effect. The provision requires that the concerned person may send a reasoned advice to the Commission only if the act in question *is of direct and individual concern to that person*, thus replicating the strictest standing requirements of Article 263 TFEU. How the Commission will interpret these requirements in the absence of any oversight remains to be seen. In addition, even if a person managed to get beyond this threshold, the provision offers no clue as to what

80. Ibid., para 132.
81. Opinion in Case C-16/16 P, *Belgium* v. *Commission*, EU:C:2017:959.
82. Opinion, para 53.
83. Ibid., para 19.

would happen next. In fact, it does not even require the Commission to provide a reasoned response to the reasoned advice.

In addition to *ex post* controls, it is important to recognize the importance of *ex ante* safeguards and controls in the ESAs' decision-making processes. For instance, expert stakeholders are involved by means of public consultations and through embeddedness of the formal stakeholder group in the rulemaking procedures. Besides, NCAs are heavily involved in the making of guidelines. Last but not least, at the time of the facts, political oversight was prescribed by Article 16 of the ESAs' founding regulations. Its fourth paragraph required the relevant ESA to state, in its annual report, which guidelines and recommendations have been issued, which competent authority has not complied with them, and how it intended to ensure that the non-complying competent authority concerned followed its recommendations and guidelines in the future. The 2019 review of the ESAs' founding regulations also addressed some of the procedural shortcomings. For instance, a procedural standard similar to Article 16 of the ESA Regulations, which requires the ESAs to conduct ("where appropriate") cost-benefit analyses and public consultations before issuing guidelines and recommendations, now applies to all ESA soft law acts, except the Q&A procedure. Thus, one could argue that a comprehensive system of controls – a system including different types of control (judicial review, political oversight, public scrutiny, etc.) – could mitigate mere marginal judicial review. A balanced system of controls is needed to strike a balance between effectiveness and legitimacy of a shared administration of the EU.[84]

The system of legal protection by judicial review could also be further developed via the ESAs' joint Board of Appeal. The Board of Appeal procedure protects effectively the rights of parties affected by the ESAs' decisions not least because all decisions by the Board can be appealed to the Court of Justice. The Board of Appeal procedure, however, covers binding ESA decisions only and thus excludes all non-binding acts.[85] It is hard to see why the Commission (under the new Art. 60a procedure), rather than an independent body of experts, would be better suited to review *ultra vires* claims concerning ESA soft law acts. Article 60 of the ESA Regulations could be broadened to give standing for those legal and natural persons affected by ESA guidelines and recommendations. This option would be important particularly for the gradually expanding group of entities supervised directly by ESMA. These entities currently have no way of circumventing the strict

84. Gargantini and Scholten, "The past is the past. The future is all that's worth discussing" (30 Sept. 2021), blog post available at <eulawenforcement.com/?p=8077#>.

85. Art. 60 ESA Regulations.

standing requirements of Article 263 TFEU.[86] Adding the Board of Appeal procedure as a preliminary step would have the additional benefit of ensuring that the claims – which, as *FBF* showed, often concern highly technical issues – are given due consideration by independent experts.

In fact, in its proposal for a revised ESMA Regulation, the Commission originally foresaw review of guidelines and recommendations by the Commission at the request of a majority of the ESA Stakeholder Groups.[87] In cases where the Commission agreed with the Group's view that the ESA had exceeded its competences, it could require the agency to withdraw the soft law act concerned. The European Parliament further proposed to allow guidelines, recommendations and opinions to be challengeable before the ESA Board of Appeal. Neither of these two proposals became law.

6. Conclusion

The *FBF* judgment represents an important continuation of Union case law emphasizing the gateway role of national courts in ensuring access to the Court of Justice where the legality of Union measures is contested. What makes the case ground-breaking – together with *Balgarska Narodna Banka* – is the ECJ's newly found comfort in scrutinizing the validity of soft law acts. While *FBF* does not indicate that the Court's standard of review will be particularly strict, it confirms that acts labelled as non-binding and worded in non-binding terms do not enjoy special protection from the Court's jurisdiction – particularly where compliance with such acts is secured by a tailored regime such as the one set up by Article 16 of the ESA Regulations. *FBF* also confirms in clear terms that national courts need not be concerned about the strict *locus standi* requirements under Article 263 TFEU. This more liberal approach could increase soft law litigation before EU Courts, although much depends on how the ESAs respond, and how ready and willing the national courts are to take up the role offered to them.

At the same time, *FBF* hardly completes the Union's system of remedies for soft law. Strangely enough, Member States and other privileged applicants seem to be left worse off, having fewer options to challenge genuine soft law acts compared to lobbying organizations and other private applicants. Such private applicants will, however, in most cases be dependent on the

86. See Marjosola, op. cit. *supra* note 4, discussing judicial review of acts adopted by the ESMA within its expanding remit of direct supervision. Given the unilaterally binding character of such "directly applicable" acts, an argument could be made that the acts should qualify as "regulatory acts" in line with Art. 263(4) TFEU.

87. Proposal for a Regulation amending the ESA Regulations, cited *supra* note 6.

willingness of the national court to refer the issue of validity to the ECJ. *FBF*'s impact on the wider gamut of EU soft law could also prove limited. ESA guidelines and recommendations are exceptional in producing as by-products rather easily challengeable national acts, which are unfamiliar to other specimens of EU soft law. Such shortcomings highlight the need for a more comprehensive approach to controlling Union soft law. A combination of *ex ante* and *ex post* mechanisms is needed to mitigate the shortcomings due to limits on individual types of control, such as judicial review. These mechanisms should be considered more carefully, also in legal scholarship.[88]

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88. Scholten, Strauss and Brenninkmeijer, "Controlling EU agencies: An introduction" in Scholten and Brenninkmeijer (Eds.), *Controlling EU Agencies: The Rule of Law in a Multi-jurisdictional Legal Order* (Edward Elgar Publishing, 2020), pp. 1–16; Scholten, Maggetti and Papadopoulos, "Towards a comprehensive system of controls for EU agencies" in Scholten and Brenninkmeijer, ibid., pp. 312–327.

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