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Working Paper

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EBA Staff Paper Series, No. 15

Provided in Cooperation with:
European Banking Authority (EBA), Paris La Défense

Suggested Citation: Giotaki, Zoi Jenny; de la Bouillerie, Pauline; Nebot Seguí, Rafael (2023) : The characteristics and the legal nature of the supervisory and resolution handbook of the EBA, EBA Staff Paper Series, No. 15, ISBN 978-92-9245-866-9, European Banking Authority, Paris La Défense, https://doi.org/10.2853/012116

This Version is available at:
https://hdl.handle.net/10419/299547

EBA STAFF PAPER SERIES

N. 15 – 07/2023

THE CHARACTERISTICS AND THE LEGAL NATURE OF THE SUPERVISORY AND RESOLUTION HANDBOOK OF THE EBA

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EBA EUROPEAN BANKING AUTHORITY

ABSTRACT

Article 16 of the EBA Founding Regulation enables the EBA to issue guidelines and recommendations, while Articles 8 (1) (aa) and (ab) and 29 (2) of that Regulation enable it to develop a handbook for supervision and resolution. The European Court of Justice (ECJ or Court, hereinafter), in its recent case-law, dealt extensively with the legal nature of guidelines. In this paper, we discuss the characteristics and the legal nature of the handbook, and we try to determine which of the principles set out in this case law for the guidelines should also be relevant for handbook.

KEYWORDS

Soft law; handbook; guidelines; binding or non-binding nature; reviewability and preliminary ruling; ECJ.

JEL CODES

JEL: G1; G18; G2; K00; K10; K19; K20; K29; K39; K40

Introduction

When the Banking Union was created and the Single Supervisory Mechanism established by Regulation 1024/2013[1], the EBA Founding Regulation[2] was amended[3] to confer upon the EBA the new task of the adoption of a European supervisory handbook that would complement the single rulebook and that would be drawn up by the EBA in consultation with the competent authorities. After the establishment of the Single Resolution Mechanism by Regulation 806/2014[4], and during the general revamping of the founding regulations of the European Supervisory Authorities[5] (known as "ESAs review"[6]), the EBA Founding regulation was again amended[7] to extend the coverage of the handbook to resolution matters as well.

This paper discusses the legal nature of the handbook, whether for supervisory or for resolution issues. The discussion is developed considering the literature on soft law instruments and of the recent case law[8] developed by the Court on the judicial reviewability of soft law. The first section of the paper offers an overview of the soft law acts of the EBA and confirms that each act has separate and distinct characteristics. The second section performs a comparison between the handbook and the guidelines. The third section discusses the key findings of the Court in its recent case-law and argues that stemming from this an efficient system of effective EU remedies for soft law instruments has now been established by the Court. The fourth section offers some thoughts about the legal reviewability of the handbook. And, finally, conclusions are presented.

[1] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63–89. For a general overview of the Banking Union, see Gortsos (2018).

[2] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331, 15.12.2010, p. 12–47 (EBA Founding Regulation).

[3] Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013, OJ L 287, 29.10.2013, p. 5–14.

[4] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30.7.2014, p. 1–90.

[5] EBA Founding Regulation plus the Regulation establishing EIOPA and ESMA (Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ L 331, 15.12.2010, p. 48–83, and Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84–119.

[6] For further information on the ESAs review, see Commission website.

[7] Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds, OJ L 334, 27.12.2019, p. 1–145.

[8] We refer to three recent cases, where the Court addressed the issue of soft law. The cases are the following: (a) Case C-16/16 P *Belgium -v- Commission* ; (b) Case C-501/18 *Balgarska Narodna Banka*; and (c) Case C-911/19 *Fédération bancaire française (FBF) -v- Autorité de contrôle prudentiel et de résolution (ACPR)*.

EBA's soft law acts have different characteristics

Soft law acts or instruments are not uncommon, neither in Union law[9] nor in financial regulation[10]. These acts exert significant influence on their addressees and even beyond them, despite being by default and in principle, non-binding. Article 288(5) of the Treaty on the Functioning of the European Union (TFEU), a provision that makes a direct reference only to recommendations and opinions issued by the Commission, is to be seen as the constitutional basis of these acts. Some of these instruments are typical, notably they are expressly mentioned in the law[11]. Others are atypical, as they are mere products of administrative action and not expressly mentioned in the law. Soft law instruments may be acts of general application[12], individual acts[13] or even contractual, such as MoUs[14].

Soft law increases the harmonisation of how Union law is to be applied and ensures supervisory convergence, reducing uncertainty and the subsequent cost of compliance, while avoiding regulatory or supervisory arbitrage and ensuring the level playing field. In addition, soft law is an efficient and effective method of regulatory intervention, as it achieves standardisation, but it also avoids formal rulemaking where technical complexity and the need to act in a timely way makes hard law less appropriate and more burdensome. However, soft law "is not exempt from risks, such as the lack of clarity about the discretion with which the European authorities [or agencies] can act, and the type of scrutiny (especially judicial) to which they will be subjected"[15], a matter which is addressed in this paper.

The EBA Founding Regulation enables the EBA to issue a number of soft law acts. As typical acts, the Regulation mentions warnings (Article 9), no action letters (Article 9c), guidelines and recommendations (Article 16), opinions to national authorities (Article 29) and to some Union institutions and technical advice (Article 16a), questions and answers (Article 16b) and other recommendations in a number of occasions, such as in the case of a "breach of Union law" (Article 17), the identification of an emergency situation (Article 18), in order to correct issues identified in stress tests (Article 21), in cases of systemic risk (Article 22) or in peer reviews (Article 30).

Moreover, the EBA's output should not be seen as constrained only to the taxonomy of acts explicitly contemplated in the above-mentioned provisions (typical acts). Article 29 (2) of EBA's Founding Regulation provides that the EBA may also develop *new practical instruments and convergence tools* to promote common supervisory approaches and practices, meaning the authority may act through atypical soft law acts to achieve

[9] A comprehensive analysis can be found in Stefan (2012).

[10] Before the establishment of the ESAs, their predecessors, notably CEBS, CESR and CEIOPS had already issued a number of guidelines, despite them not being Union agencies.

[11] Recommendations explicitly mentioned in the Treaty, but also other acts mentioned in secondary legislation.

[12] Acts which are abstract-general in nature not concerning or addressed to particular individuals. For relevant literature and jurisprudence, see Hofmann H., Gerard R., and Türk A. (2011) p. 178.

[13] An individual act is an act concerning and, therefore, addressed to a certain individual (natural or legal person). See also distinction between soft regulatory and administrative rule-making in Van den Brink and Senden (2012), p. 12.

[14] De Gregorio Merino, A. "Memoranda of understanding: a critical taxonomy", ECB Legal Conference, December 2019, *Building bridges: central banking law in an interconnected world*.

[15] Ramos Muñoz, David. Ruiz Almendral, Violeta: "Estabilidad financiera y disciplina presupuestaria: una perspectiva constitucional del Semestre Europeo".

these objectives. This legal basis, enabling the adoption of atypical acts, had already been used extensively for the development of tools, such as the questions and answers tool, which was later established as a typical act[16] during the ESAs review[17].

As Andreas Hofmann[18] notes, the non-legally binding nature and the non-enforceability of soft law is "where the similarity between the myriad forms of soft law in the EU ends". From a brief look at the provisions of the EBA Founding Regulation foreseeing the different soft law tools available to the EBA, this view is fully confirmed. While it is true that soft law issued by the EBA shares, in principle, the common purpose *to protect the public interest by contributing to the short-, medium- and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses*[19], but the objective, scope, subject matter, addressees, process of adoption and, ultimately, the legal characteristics of each soft law tool is indeed different.

An account on the typology of soft law instruments is offered by Linda Senden[20] and presented by Andreas Hofmann. According to this account, we can distinguish soft law between law with a close connection to hard law and law with little or no connection to hard law. The first category is further divided between interpretative and decisional soft law. Interpretative is the law that "offers an interpretation of a piece of hard law for a third-party audience", while decisional is the soft law that "present an interpretation of a piece of hard law that guides the conduct of the author itself" or of a third-party that will have to supervise the application of the law as interpreted by the relevant act of soft law. Finally, the second category of soft law "comprises instruments that do not bear a close connection to hard law, but rather independently suggests a certain course of action (steering soft law)"[21].

This typology helps with the identification of the legal effects of each EBA soft law act and might be relevant, along with the other differentiated features of that act, in determining the scope of its judicial review.

As a preliminary remark, the EBA, when adopting soft law, is constrained by the rule of law[22] and, in particular, by the principle of legality, which requires a transparent, accountable, democratic and pluralistic process[23]. In addition, the Court's jurisprudence in the *Meroni* case[24] held that any scope of action delegated to any executive body must be well delineated in order to be politically and judicially reviewable[25]. Accordingly, any soft law act issued by the EBA must be confined within the scope of Article 1 (2) of the EBA Founding Regulation. Furthermore, Article 8 (3) of the EBA Founding Regulation provides that EBA's action must be based upon and remain within the limits of the legislative framework.

[16] See Article 16b of the EBA Founding Regulation.

[17] Supra note 6 and 7.

[18] Hofmann (2021) p. 39.

[19] Article 1 (5) of the EBA Founding Regulation.

[20] Senden (2004) p. 45.

[21] Hofmann (2021) p. 42.

[22] Enshrined in Article 2 of the Treaty of the European Union.

[23] https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1757.

[24] Cases C 9/56 and 10/56 *Meroni v High Authority,* where the Court set, with a view to ensure institutional powers, limits and strict criteria for the delegation of powers. For a detailed analysis of the case, see Chamon, M. and N. De Arriba-Sellier (2021), p. 300.

[25] See also Case 270/12, United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (the "short selling" case), where the Court qualified its *Meroni* doctrine when it come to the ESAs holding that articles 290 and 291 TFEU do not represent a closed system of delegation and that a delegation of powers to ESMA through a provision of sectoral legislation was possible, to the extent it was in itself well-delineated and it remained within the scope of the ESMA Founding Regulation.

Guidelines versus handbook: similarities and differences

To determine the regulatory intervention that the EBA may have with the guidelines and the handbook and to prepare for the discussion of the judicial reviewability of these acts, we discuss in this section the similarities and differences between them.

While the purpose of the guidelines is *to establish consistent, efficient and effective supervisory practices within the European System of Financial Supervisors* and to *ensure the common, uniform and consistent application of Union law,* the purpose of the handbook is *to establish a common supervisory culture*. In both cases, supervision and supervisory practices should be understood, in line with Article 2 (5) of the EBA Founding Regulation, to include *all relevant activities of all national authorities to be carried out pursuant to the Union acts under EBA's remit*.

To achieve the establishment of that common supervisory culture, the handbook sets out *supervisory and resolution best practices and high-quality methodologies and processes for supervisory authorities*. In Recital 7 of Regulation 1022/2013[26] introducing the handbook, it is clarified that the *handbook is a complement of the single rulebook*, *it should be drawn up by the EBA in consultation with the national authorities, it should identify best practices across the Union as regards supervisory methodologies and processes to achieve adherence to core international and Union principles* and *should cover all matters which are within EBA's remit and should set out metrics and methodologies for risk assessment, early warnings and criteria for supervisory action*.

The Founding Regulations are less enlightening on how guidelines should achieve their purpose: the relevant recital[27] merely states that the guidelines *should not extend to areas covered by regulatory or implementing technical standards*. Namely, the EBA cannot regulate by means of guidelines a topic for which it has been granted a mandate to develop technical standards. Conversely, the EBA should adopt guidelines where it deems it necessary to ensure consistent, efficient and effective supervisory practices or the common, uniform and consistent application of a technical standard. This view is supported by the fact that the legislator does not carve technical standards out of the notion of "Union law", for which guidelines can be issued.

Referring to the Senden and Hofmann typology, guidelines are primarily interpretative in nature: they interpret hard law, thereby specifying its application across the Union. At the same time, they can also be decisional, to the extent they provide guidance on how national authorities should ensure the hard law, as interpreted by the guidelines, is complied with by financial institutions. Acknowledging this deeper effect of the guidelines, the legislature made them explicitly subject to the principle of better regulation (Article 8(3) EBA Founding Regulation), as the EBA must, before issuing new guidelines, first review existing guidelines and recommendations, to avoid any duplication.

The handbook, on the other hand, is more of a "steering" character. It provides the authorities with a set of best practices, methodologies, processes, and metrics and does not, in principle, offer a reading of the law. It is linked to hard law, as the practices it proposes should concern the enforcement of the Union action within the remit of

[26] Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013, OJ L 287, 29.10.2013, p. 5–14.

[27] Recital 26 of EBA Founding Regulation.

the EBA. The handbook's "steering" character does not come from its non-connection to hard law in general. It comes from the absence, or the low density, of hard law provisions as to "how" supervision should be affected and from the fact that, through the handbook, the EBA effectively provides "steering" without itself having direct supervisory powers[28]. The handbook is particularly useful in areas with low density of hard law provisions and technical complexity, where the discretion of authorities is wide and supervisory practices can, thus, significantly diverge. The EBA has used the handbook to set out best practices on, for instance: how national authorities validate the credit risk IRB models of the credit institutions[29] or how valuation in resolution should work[30].

The guidelines, handbook, as well as other soft law instruments of the EBA, are acts of the so-called Level 3, defined in the EBA Founding Regulation as being of a non-binding nature[31]. Regarding guidelines, national authorities may comply or not (though explaining the reasons, as described below) with them, while the handbook, characterized as non-binding already in the relevant recital, remains a set of best practices and is prevented from restricting judgement-led supervision[32].

The guidelines are by law[33] endowed with a unique comply or explain mechanism (hereafter: "comply or explain"), which other soft law acts do not possess, and which has the following elements:

(a) an obligation for national authorities and financial institutions, to which the guidelines are addressed, to *make every effort to comply* with them;

(b) an obligation for each addressed national authority to confirm within two months whether it complies or intends to comply with that guideline; if required by the guidelines, financial institutions must also issue a separate report on their compliance through the national authorities;

(c) an obligation of the national authorities that do not comply, or do not intend to comply, to state the reasons for their non-compliance;

(d) a transparency mechanism whereby the EBA must publish the fact that a national authority does not comply or does not intend to comply with a guideline and may also decide, on a case-by-case basis, to publish the reasons provided by the national authority for such non-compliance.

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[28] Unless a relevant EU legal act grants those supervisory competences to the EBA, for instance, as it would happen if the compromise text on the Regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (MiCA) – 2020/0265 (https://data.consilium.europa.eu/doc/document/ST-13198-2022-INIT/en/pdf) is finally adopted and published in the OJ. For a general discussion on the issues, see Gortsos, Ch.V. and K. Lagaria (2020).

[29] https://www.eba.europa.eu/regulation-and-policy/model-validation/supervisory-handbook-validation-internal-ratings-based-systems-0.

[30] https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Other%20publications/2020/880851/Handbook%20valuation%20-%20MIS%20Chapter.pdf. These module and the one mentioned supra (footnote 28) of the handbook have been published in the Website of the EBA, in Handbook's section. However, there are other chapters which might not be generally public, but only to the members and observers in the EBA.

[31] Final Report of the Committee of Wise Men on the Regulation of European Securities Markets 98 (Feb. 15, 2001), known as the *Lamfalussy* Report (named for Committee chairman Alexandre Lamfalussy). The report identified the then existing legislative process as the central impediment to integrating financial markets and proposed a four-level approach to regulating financial market. Level 1 referred to the adoption of framework directives and regulations on the basis of the co-decision process. Level 2 consisted of binding legal acts specifying the necessary details to be adopted without the need for co-decision, following an empowerment of the Level 1 and on the basis of advice received from the Level 3 committees (draft technical standards). Level 3 included acts issued by committees established at the EU level by national supervisors (then, CEBS, CESR, CEIOPS that were the predecessors of today ESAs: the EBA, the ESMA and the EIOPA). The Level 3 acts would aim at ensuring consistent implementation and enforcement of the binding acts and at coordinating supervisory practices. Finally, Level 4 referred to more effective enforcement of Union laws.

[32] Recital 7 of Regulation (EU) 1022/2013.

[33] Article 16 (3) EBA Founding Regulation.

Notification on compliance is to be made by competent authorities to the EBA on a self-declaratory basis. The EBA does not seem to have the power to unilaterally discard the declaration of compliance or non-compliance made by the national authority. It can question it though by asking for further explanations, if needed, or through the performance of peer reviews. Where the EBA assesses that the declaration of compliance made by a competent authority is inaccurate, it should not be prevented from acting in a transparent manner in connection thereto.

In the case of the handbook, conversely, no comply or explain mechanism exists. Instead, the power of the handbook appears to rest on a sort of moral suasion, supported by the exhortation that *national authorities should use the handbook* and that *the use of the handbook should be considered as a significant element in the assessment of the convergence of supervisory practices and for the peer review under Regulation (EU) No 1093/2010*[34]*.*

Regarding national assimilation, national authorities tend generally to be more familiar with interpretative and decisional soft law (mainly guidelines or recommendations) rather than with the steering one (such as the handbook). In guidelines, this familiarity is expanded to financial institutions too[35]. This is due to the fact that guidelines might be themselves addressed to financial institutions directly, but also because national authorities are, through the comply or explain mechanism, charged with the duty to ensure that institutions are complying with the guidelines. In most cases, this obligation of the complying national authorities (to ensure compliance of the institutions as well) compels[36] these authorities to incorporate the guidelines into their national legal order (although this significantly depends on national administrative law and practice[37]). This is usually accomplished by means of issuing national binding legal acts, whose application can then be enforced.

None of the above applies to the handbook, which can neither be addressed to financial institutions directly, nor does it have a comply or explain mechanism. When a national authority "uses" the handbook, either by issuing national instruments adopting the handbook's best practices, thereby committing itself to them, or by acting on an *ad hoc* basis in accordance with them, compliance with a best practice should, in itself, be deemed as sufficient reasoning for the administrative action. The authority can, of course, also depart from the handbook, where judgment-led supervision requires so. Where the authority has embraced and adopted the handbook, but even without this, departure from the handbook would clearly deserve justification as to why the best practice, process or method envisaged in the handbook was not appropriate in that case on the basis of judgment-led supervision.

Interestingly, while the guidelines seem to fully settle their subject-matter at least up to the point they are amended or repealed, the law envisages the handbook as an ongoing project, as the EBA must *maintain it up to date* (Article 29(2), second subparagraph of EBA Founding Regulation). The handbook is, thus, perceived as a "living document" adopted for providing a common benchmark as to the best practices, processes and methodologies; them being obsolete, could be a reason why national authorities could depart from the handbook.

[34] Recital 7 of Regulation (EU) 1022/2013.

[35] Hofmann (2021), p. 52.

[36] Hubkova (2022), p. 4.

[37] Gentile (2021), p. 77-95 see for example differences discussed therein between absorption of soft law in France and absorption in the UK.

The guidelines and the handbook are clearly both acts of general application[38] and they must respect the principle of *legality*[39] and the principle of *proportionality*[40]. On the handbook, the legislature is more concrete as to what should be taken into account for the purpose of proportionality, providing that the handbook should take into account, *inter alia*, *changing business practices and business models and the size of financial institutions and of markets* as well as *the nature, scale and complexity of risks, business practices, business models and the size of financial institutions and of markets*. For the guidelines, the general provisions of the EBA Founding Regulation on proportionality apply, whereby the *Authority's actions and measures shall, in accordance with the principle of proportionality, take due account of the nature, scale and complexity of the risks inherent in the business of a financial institution, undertaking, other subject or financial activity, that is affected by the Authority's actions and measures.* Moreover, they should respect legality as they should be within the limits of the Union acts included in the remit of the EBA.

As to the policy formation process, the EBA should, for the guidelines, conduct open public consultations, consult with the Banking Stakeholder Group, and analyse the related potential costs and benefits (impact assessment). Where the EBA does not conduct open public consultations or does not request advice from the Banking Stakeholder Group, it must provide reasons. In contrast, for the handbook the obligation to conduct open public consultations, request advice from the Banking Stakeholder Group and perform impact assessments is limited to where such consultations and analyses are proportionate to the scope, nature and impact of the handbook.

This difference reflects, on one hand, the scope of the handbook (best practices that should not limit judgment-led supervision vis-a-vis specifications on how Union law should be interpreted and implemented in the case of the guidelines) and, on the other hand, the absence of the enhanced compliance mechanism of the guidelines. This justifies a more systematic consultation and impact assessment process and the direct impact of the handbook to stakeholders other than the national authorities –whose views are taken into account already through the governance system of the EBA.

For the handbook, consultation and impact assessment should be deemed as appropriate when it has a significant impact, mainly, on stakeholders other than the national authorities (which are part of the internal governance). Such consultation should also be limited to the relevant stakeholders for consultation fatigue to be avoided, while wider consultation should not be excluded. Similar considerations should be taken into account for the need to assess the impact of the different choices. Again, considering the best practice approach of the handbook and the absence of a comply or explain mechanism, an impact assessment may be carried out in order to better inform the choices made or to assist in the selection among plausible different alternatives, predominantly, in cases where the handbook might have a significant impact on stakeholders other than the national authorities.

The handbook and the guidelines should be adopted by the EBA Board of Supervisors[41] through the internal governance procedure of the Authority, which involves in the decision-making process all national authorities but also other actors, such as the European Commission. For resolution issues, the guidelines and the handbook

[38] The guidelines were initially acts addressed to one or more national authorities or all financial institutions and before the ESAs review. This was also the case for the recommendations issued under Article 16 EBA Founding Regulation. After the ESAs review (see supra note 7 and 8) amending Article 16 of the EBA Founding Regulation, there is a distinction between guidelines that should be addressed to all national authorities or all financial institutions (acts of general application) and recommendations that should be addressed to one or more national authorities or to one or more financial institutions (individual acts).

[39] European Court of Justice, see ECJ, C-496/99 P, *Commission v. CAS Succhi di Frutta*, 29 April 2004.

[40] Article 5 of the EEC Treaty (Treaty of Rome). Case 8/55 *Federation Charbonniere de Belgique v High Authority*, in Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide*; and in Case 11/70 *R v Minister of Agriculture, Fisheries and Food ex parte Fedesa*.

[41] Established in accordance with Article 40 of the EBA Founding Regulation.

should be adopted by the EBA Resolution Committee[42], followed by the non-objection procedure of the Board of Supervisors[43]. While the adoption of the handbook requires a simple majority of the members of the Board of Supervisors or of the Resolution Committee, the guidelines are adopted by a qualified majority[44] of the members of one of these two EBA Committees, as relevant depending on the matter.

Both the guidelines and the handbook are being developed without a direct involvement of the European Parliament and of the Council. However, several accountability and transparency safeguards exist. Before 30 September of each year, the EBA adopts its work programme for the coming year, it transmits it to the European Parliament, the Council and the Commission and it makes it public[45]. Anticipated guidelines and the handbook will, in principle, be included in the programme[46] intended to be adopted in the coming year. Moreover, by 15 June each year, an annual report of EBA activities, including any guidelines and handbook issued during the preceding year, is transmitted to the European Parliament and to the Council (along with the Commission, the Court of Auditors and the European Economic and Social Committee) and is made public[47]. More importantly, within six weeks of each meeting of the Board of Supervisors, the EBA provides the European Parliament with a comprehensive and meaningful record of the proceedings in the agenda of that meeting that enables a full understanding of the discussions, and an annotated list of decisions, including on the guidelines and the handbook adopted. Such record shall not reflect discussions within the Board of Supervisors relating to individual financial institutions, though, unless otherwise provided for in Article 75(3) or in the legislative acts referred to in Article 1(2) of the EBA Founding Regulation [48]. This means that soft law acts that are of individual application might not be disclosed to the European Parliament with this process. To also note, that at the request of the European Parliament, the EBA Chairperson must participate in a hearing before the European Parliament on the performance of the Authority and must report in writing on the activities of the Authority to the European Parliament when requested[49], while the EBA must reply orally or in writing to any question addressed to it by the European Parliament or by the Council within five weeks of receipt[50]. Finally, upon request, the Chairperson shall hold confidential oral discussions behind closed doors with the Chair, Vice-Chairs and Coordinators of the competent committee of the European Parliament[51].

[42] Established in accordance with Article 127 of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190–348 ("BRRD"), which also states in this article that "EBA shall ensure structural separation between the resolution committee and other functions referred to in Regulation (EU) No 1093/2010". The Single Resolution Board, as observer of the EBA BoS, can appoint one delegate to the Resolution Committee to participate as observer (Article 4(13) of EBA Decision DC/2020/310 concerning the establishment of the Standing Committee on Resolution -Resco-).

[43] Being the Chair of the Single Resolution Board an observer (as per Article 40(6), last subparagraph EBA Founding Regulation).

[44] For guidelines, as per Article 44(1), second subparagraph, of the EBA Founding Regulation, decisions of the Board of Supervisors will be taken on the basis of a qualified majority of its members, as defined in Article 16(4) of the Treaty on European Union ('TEU') of the Treaty of the Functioning of the European Union ("TFEU"), which shall include at least a simple majority of the Members present at the vote from national authorities of Member States that are [SSM] participating Member States as defined in point 1 of Article 2 of the Council Regulation (EU) No 1024/2013 (supra note 1) and a simple majority of the Members present at the vote from national authorities of Member States that are not [SSM] participating Member States as defined in that Regulation.

[45] Article 43 (4) of the EBA Founding Regulation.

[46] Emergency situations, as in the case of COVID or from the Russian invasion of Ukraine, may, however impose change of priorities.

[47] Article 3 and 43 (5) of the EBA Founding Regulation.

[48] Article 43a of the EBA Founding Regulation.

[49] Article 3 (4) of the EBA Founding Regulation.

[50] Article 3 (7) of the EBA Founding Regulation.

[51] Article 3 (8) of the EBA Founding Regulation.

Article 297 TFEU does not require soft law acts to be published in the Official Journal and the EBA Founding Regulation remains silent as to the publication requirements of the guidelines and of the handbook. EBA soft law acts are not accessible through general EU law portals such as EUR-Lex. The EBA is, however, bound by the principle of the transparency of administrative action enshrined in Article 15 TFEU, and the principle of effective communication of any act that it issues[52]. Against this background, the EBA consistently publishes guidelines on its website, and uploads the handbook on its extranet area accessible to the national authorities, which the handbook concerns. The EBA has exceptionally published on its website handbook modules[53], adhering to the principle of transparency, where the handbook might have a significant impact on stakeholders other than the national authorities, which would be already aware of potential impacts due to their participation in the Board of Supervisors.

When determining how the handbook will be made public, the EBA strives to achieve effective communication that also ensures that financial institutions and all relevant stakeholders get a clear understanding of how the handbook, which in principle concerns the national authority, pertains to them too. Effective communication may, therefore, dictate that some parts of the handbook where expectations impacting financial institutions are being set out are made public through the EBA website in a manner similar to the publication of the guidelines. Other parts that concern exclusively practices being employed by national authorities would be communicated to these authorities only (for example, through the EBA Extranet rather than with publication in the EBA website) to avoid creating expectations about supervisory practices on financial institutions, thereby not limiting judgment-led supervision.

[52] For an analysis of transparency of soft law, see Oana (2021) p. 323 seq.

[53] https://www.eba.europa.eu/eba-publishes-handbook-on-valuation-for-purposes-of-resolution.

The key findings of the Court in its recent case-law concerning EBA guidelines

Soft law raises legitimacy concerns pertain mostly to democracy and institutional balance. These arise from: the typical non-involvement of the co-legislators in the adoption of soft law acts; the absence of a single procedure for the adoption of these acts; and the subsequent uncertainty as to whether "essential procedural requirements"[54] are in place. Those essential requirements ensure: i) the reviewability and the enhanced legality of these acts; ii) the adequate transparency of the policy formation; and iii) the certainty of the legal effects of these acts. The latter is further aggravated by the diverse national implementation of these acts. In addition, the increasing volume and the intensifying variety of soft law acts, together with the need for their effective judicial review, becomes apparent[55].

The Court has consistently held, for more than fifty years since its *ERTA* ruling[56], that whether typical or atypical, of general or individual application, the non-binding nature of soft law should not be taken for granted and that an action for annulment under Article 263 TFEU will be available for all acts, whatever their nature or form, when these acts are intended to have legal effects.

Based on this case law, the Court has considered as binding and therefore reviewable a number of typical and atypical acts[57], which would in principle qualify as soft law. It has consistently held that, for an act's binding character to be assessed: (a) the substance of the act shall prevail over its form; and (b) in the *IBM* case[58], that any act should be seen as producing legal effects, when it is binding on, and capable of affecting the interests of the applicant resulting in a distinct change in their legal position.

Apparently, the main elements available to the Court to review, namely: the content, wording and context of the act; the intention of its author; and the perception of the parties concerned, are by nature case specific. Therefore, those could hardly lead to the establishment of a robust doctrine on the basis of which there would be absolute legal certainty about which soft law act would be seen as reviewable. In all cases, the Court should identify and exercise effective control over acts that do appear to have actual binding legal effects. The concept of legally binding effects appears to be intertwined[59] with the concept of direct and individual concern[60], and this may have been an additional factor reinforcing the not entirely predictable outcome of the reviewability

[54] The term "essential procedural requirement" is discussed below in footnote 65.

[55] Ramos Muñoz, David. and Ruiz Almendral, Violeta: "Estabilidad financiera y disciplina presupuestaria: una perspectiva constitucional del Semestre Europeo". They state that, although in Case C-270/12 *UK vs EP and Council* (ESMA case on short selling) the Court nuanced its stance under Meroni/Romano doctrines, there was still a lack of clarity on the scope of the exercise of powers of the agencies. It must be noted that this paper was written before Case C-911/19 *Fédération bancaire française (FBF) -v- Autorité de contrôle prudentiel et de résolution (ACPR)*.

[56] Case C-22/70 *ERTA.*

[57] For a review of the relevant jurisprudence in this matter, see Annunziata (2021).

[58] Case C-60/81 *IBM*. For an analysis of the evolution of the Court's jurisprudence see also N. Xanthoulis (2021).

[59] Case C-463/10 *Deutsche Post* para 38; Case T-517/12 *Alro* para 25, see Lenaerts, Maselis and Gutman (2014), para 7.21 and Xanthoulis (2021), p. 307

[60] Direct and individual concern is an admissibility requirement, not related to the reviewability of the act due to its capacity to develop binding legal effects, but to the "standing" of the applicants. The doctrine was developed in Case C-25/62 *Plaumann* and requires a non-privileged applicant to prove for his action of annulment to be admissible, either the act is addressed to them, or that it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and that by virtue of these factors these persons are distinguished individually just as in the case of the persons addressed by the act.

test. Even if the Court applied the reviewability test, considering that many soft law acts do not have a specific addressee, being acts of general application, most of them would not pass it, as they would be seen as non-binding. Thus, Article 263 TFEU does not seem to provide a formidable legal basis for the judicial review of soft law acts, not least because any legal certainty it could offer is limited. The certainty that an act is judicially reviewable is very important, because it ensures the discipline of the issuing authority. This becomes even more relevant in cases of soft law acts, as this certainty comes to offset, to a certain extent, at least, the absence of a single procedure for the adoption of these acts.

With that in mind, the Court resisted the proposal made by Advocate General Bobek in *Belgium-v-Commission* to reconsider the current restriction of Article 263 TFEU reviewability to acts producing legal effects only[61]. However, seemingly with a genuine aspiration to achieve the establishment of an effective and comprehensive system of judicial review of soft law acts, without constraining itself within the narrow limits of the act's "binding" character in the context of the Article 263 TFEU reviewability, the Court signalled that things might be different in the preliminary reference procedure under Article 267 TFEU.

Furthermore, three years later, in the *Balgarska Narodna Bank* case[62], the Court confirmed its ruling in *Grimaldi*[63], by declaring that soft law instruments are admissible for review under the preliminary reference procedure.

In doing so, the Court attenuated, although did not eliminate, the significance of the distinction between a binding and a non-binding act that the straight "jacket" of Article 263 TFEU would require. For the application of Article 267 TFEU, this distinction is less relevant, because the Court has jurisdiction to give preliminary rulings concerning the validity even of binding legal acts, both of general and of individual application, provided that the question referred for preliminary ruling relates to a real dispute. The only exception to this is the one established under the Deggendorf line of case-law[64], where the Court held that it is not possible to review by way of preliminary ruling the validity of an individual act, for which the legal or natural person could have brought "without any doubt" an action for annulment before the Court but failed to do so.

In the case of genuine soft law instruments issued by the ESAs, reviewing those acts by way of preliminary ruling (rather than trying to establish whether they are binding enough to be reviewed under Article 263 TFEU) would be not only easier but also more effective. This way, in the case of implementation at national level, reviewability would likely be triggered at the national level first, as this is the level where these soft law acts (issued by ESAs) may impact individuals. This might be less so for acts, where implementation at national level might not be necessary. Notably, the ESAs might issue, in the context of their direct supervisory tasks, acts lacking the need of national implementation. For this type of act, the action of annulment directly before the Court appears to be the only way for their legal review.

In the *Balgarska Narodna Bank* case[65], the Court also made it clear that a finding that an act reviewed under the preliminary ruling procedure is a defective act will always lead to the declaration by the Court of this act as invalid. The Court attaches similar consequences to the declaration of invalidity of an act during the preliminary reference procedure of Article 267 TFEU and the declaration of nullity under an action of annulment under Article

[61] *FBF* Opinion of Advocate General.

[62] Case C-501/18 *Balgarska Narodna Banka.*

[63] Case C-322/88 *Grimaldi.*

[64] Case C-188/92 *WD Textilwerke Deggendorf*.

[65] Id supra. footnote 60.

263 TFEU[66]: the invalid act may no longer be applied by national authorities and courts and its issuing authority must take appropriate steps to rectify the illegality. An act that is annulled is considered as if it never existed, while an invalid one does not automatically cease to exist, merely its application is prevented. Itis not so important that one can claim that the judicial review under the action for annulment is more effective, at least from the perspective of the legal consequences on the act.

Finally, in the *Balgarska Narodna Bank* case*,* the Court – confirming its ruling in its landmark *Foto frost* decision[67] – declared that it alone has the sole power to declare a Union act invalid and, therefore, national courts are obliged to refer the issue of validity of an act or relevant interpretation of Union law to the Court. To put it differently, when soft law takes full effect in the national legal order, its judicial control by means of the preliminary reference procedure appears as the only legal remedy available, which, however, covers all acts regardless of their legal characteristics.

Within six months of the *Balgarska Narodna Banka* case, in its *FBF-v-ACPR* judgment[68], the Court also further clarified many remaining issues concerning the judicial review of soft law through the preliminary reference procedure.

First, on the scope of review. In the context of an action for annulment under Article 263 TFEU, a Union act will be annulled by the Court for *lack of competence*[69] if the act would be seen as outside the remit of the EBA or due to an *infringement of an essential procedural requirement*[70]. In the case of acts issued by the EBA, for instance, the relevant act could be annulled for lack of consultation or impact assessment, defective reasoning, non-observance of adoption rules, or failure to publish or effectively communicate the act. Moreover, it can be annulled due to *illegality stricto sensu*, consisting in an infringement of the Treaties or of the rule of law regarding any of the following: i) application of the Treaties; ii) violation of general principles of Union law, including proportionality, protection of legitimate expectations and equal treatment; iii) conflict with or misapplication of any provisions of higher-ranking Union law; or iv) in an error in determining the factual basis on which the application of the Union law is founded[71]. Finally, an act could be annulled due to *misuse of power* (use of powers for a purpose other than that for which they were conferred)[72].

Typically, the Court distinguishes between full and marginal review[73]. Full review is the standard level of judicial control, it addresses all issues of law and fact, and it is the strictest form of scrutiny that EU courts may exercise. Marginal review or review of legality of the act is employed by the Court when the reviewable act is issued with broad discretion by the issuing authority or touches upon policy matters or entails complex economic

[66] Lanearts, Maselis and Gutman (2014) para 10.21.

[67] Case C-314/85 *Foto frost.*

[68] Case C-911/19 FBF vs ACPR.

[69] Competence has substantive, territorial, personal and temporal aspects. For an overview of the relevant jurisprudence, see Lenaerts, Maselis and Gutman (2014), paras 7.148 to 7.157. Delegation issues (see section 1 on the *Meroni* doctrine and footnotes 22 and 23) are systematically included in the review of competence.

[70] An essential procedural requirement is a procedural rule intended to ensure that the act is formulated with due care, capable to influence the act's content and enabling the legality of the act to be judicially reviewed (such as the requirement to provide a statement of reasons) or expressing a fundamental institutional rule (such the right to be heard). For an overview of the relevant jurisprudence, see Lenaerts, Maselis and Gutman (2014), paras 7.150 to 7.175.

[71] For an overview of the relevant jurisprudence, see Lenaerts, Maselis and Gutman (2014), paras 7.176 to 7.180.

[72] Lenaerts, Maselis and Gutman (2014), paras 7.181 to 7.184.

[73] For a discussion of the concepts of full and marginal review, see Türk, Oversight of administrative rulemaking: Judicial review, 19 EL Rev. (2013), 126-142, and Kalintiri, Andriani (2016) *What's in a name? The marginal standard of review of "complex economic evaluations"* Common Market Law Review, 53 (5). pp. 1283-1316.

assessments. In marginal review, the Court will annul the act for misapplication of Union law, manifestly wrong assessment of the facts or misuse of powers.

The distinction between full and marginal review is less clear in the preliminary reference procedure, where the grounds on which validity can be contested are largely delimited by the order for reference of the national court. All parties to the main proceedings and the Court itself may raise additional grounds. The Court may also re-word the questions raised, but unavoidably the questions play a crucial role in the review of the act.

The Court clarified in the *FBF-v-ACPR* case that the formal non-binding character of soft law would not in itself affect the scope of its judicial review and declared that it would not be limiting itself to only ascertaining whether such (in principle) a soft law act roughly falls within the mandate of the issuing authority (lack of competence). In its line of reasoning, the (alleged) absence of binding character of an act should not alter *per se* the scope of its review if the authority exercises through that act the public power to "exhort and persuade" [74]. Therefore, the Court did not exclude *per se* the full review of soft law acts and suggested that the scope of review of each act will be analogous to its suasion, acknowledging the fact that different soft laws have different suasion and each retains for itself the right to adjust its scope of review accordingly. What the Court did not do in the *FBF* case was to determine thoroughly the standard of review of EBA guidelines or of any other soft law for that matter. Undoubtedly, the highly technical and, sometimes, political character of the guidelines, their (by default) non-binding nature, and the broad discretion of the EBA when adopting them as acts of general application, will be very relevant in that respect.

Second, on the legal standing of the parties of the main proceedings, the Court clarified that the requirement of direct and individual concern applies only for the admissibility of an action for annulment and not to determine the conditions under which the validity of a Union act may be challenged before the national courts[75]. The Court recalled its ruling in the *Inuit Tapiriit Kanatam* case[76], according to which it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection[77]. Moreover, the Court went even further by stating that this should not be seen as "preclud[ing] 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"[78]. In the Court's view: "a request for a preliminary ruling on validity must be regarded as admissible where it has been made in the course of a genuine dispute in which a question on the validity of an EU act is raised indirectly, even if that act has not been the subject of any implementing measure with regard to the individual concerned in the main proceedings"[79] and, therefore, "EU law does not require the admissibility, before a national court, of a plea of illegality raised against a European Union act to be subject to the condition that that act is of direct and individual concern to the individual relying on that plea"[80].

This decision of the Court in the *FBF* case was, all things considered, quite well balanced. Weighing, on the one hand, the principles of institutional balance, democratic legitimacy, and conferral and, on the other hand, the need to facilitate the functioning of the Union banking market and speed up its harmonization through soft law,

[74] Case C 911/19 *FBF* paras 68 and 69.

[75] Case C-911/19 FBF para 59.

[76] Case C-583-11 P. Inuit Tapiriit Kanatam case.

[77] Case C 583/11 P, para 100.

[78] Case C-911/19 FBF, para 63.

[79] Case C-911/19 FBF, para 64.

[80] Case C-911/19 FBF, para 65.5.

the Court used all the remedies provided by Union law and succeeded in drawing a golden line between all conflicting objectives[81].

The decision rendered many discussions on the nature of soft law less relevant too. Whether an act is capable to produce binding legal effects, and is therefore reviewable under an action of annulment, whether it can be classified as soft law or as purely an administrative output lacking legal bindingness, things will not be much different. The act could be reviewed by the Court, if not under a direct action for annulment, then through the preliminary reference procedure accessible by a wide variety of individuals. The review will be performed to the necessary scope and the act, if defective, would be declared invalid.

This decision of the Court to revert to the preliminary reference procedure to tackle the issue of judicial reviewability of – the constantly increasing volume of – soft law should be seen in combination with its recently published intention to transfer the competence for the preliminary rulings to the General Court[82]. This would certainly increase the capacity of judicial review and guarantee effective control of this type of act[83]. However, the said preliminary reference procedure is not devoid of shortcomings when considering enhancing reviewability, such as the fact that legal question is not controlled by the party, but by the national court, and this is only "compelled" to ask the question when it is the highest court and can still refuse if there is an "acte clair"[84].

Turning now to the third issue of the *FBF* judgment: as Annunziata points out[85], "from now on, in considering whether the ESAs can effectively elaborate soft law in their fields of intervention, a broad interpretation should be followed". As the Court held, a soft law does not need to specify a particular provision of hard law, provided it remains within EBA's remit and is in line with EBA's institutional mandate, namely with the aims and objective that the EBA pursues.

This position of the Court received some criticism[86], mainly on the grounds that, because the remit of the three ESAs may overlap, there is a risk that multiple and conflicting pieces of soft law acts on the same subject-matter may be issued by each ESA with a negative impact on legal certainty. In the view of some scholars, this risk derives from the numerous cross-cutting issues in the regulation of the financial sector and would remain the same regardless of the distribution of competences among the ESAs[87]. The criticism is not unfounded. However, on the one hand, there are safeguards that prevent such conflicts from arising and, on the other hand, the benefits from this innovative view of the Court compensate for the risk in question. As to the safeguards, because the sectoral acts forming the remit of each ESA are specifically set out in each ESA's founding regulation, any such confusion on the scope of each ESA's action would be addressed by clarifying competences at this level. Further,

[81] See Chamon, M. and N. De Arriba-Sellier (2021) p. 305 for a number of other non-judicial remedies for EBA soft law.

[82] https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf

[83] See Chamon, M. and N. De Arriba-Sellier (2021) p. 306 for the dialectic between the Advocate General's Opinion and the FBF Judgment on the parallelism between the action for annulment and the preliminary ruling procedure also in light of the *Foto first* judgment.

[84] However, ECtHR Case Georgiou v. Greece (14 March 2023), might be of relevance as the ECtHR found a violation of Article 6 of the European Convention on Human Rights (the Convention) on the basis that a Greek Court had not referred questions to the CJEU, without examine nor giving reasons.

[85] Annunziata (2021) p. 26 and Chamon, M. and N. De Arriba-Sellier (2021) p. 309.

[86] For a presentation of the critique, see Annunziata (2021), p. 27.

[87] Ringe, Wolf-Georg and Morais, Luis Silva and Ramos Muñoz, David (2019), p. 13, here it clarified that its model has its challenges for the application of competences.

both because the law requires it and in practice, ESAs cooperate closely in all areas of shared competence[88]. And, finally, the nature of the acts as soft law instruments should, in itself, alleviate concerns as to the potential impact on the legal certainty of such a concurrent, though improbable, action of the ESAs.

As to benefits, as Annunziata (2021) rightly notes, this broad approach of the Court, that will, most probably, apply to other EBA soft law instruments, increases predictability. It also inspires the EBA to exercise its competences and to offer guidance for the efficient and harmonized interpretation and application of the Union banking law in all the necessary fields.

[88] See Joint Committee of ESAs under Section 1 of EBA Founding Regulation, shall serve as a forum in which the Authority shall cooperate regularly and closely to ensure cross-sectoral consistency, while considering sectoral specificities, with the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority).

What would change if the Court were to review the handbook?

In this section, the recent FBF case-law of the Court, as analysed in section 3, is taken as a benchmark and the question that arises is which parts of this case-law would be maintained or would change, if the Court were to review a module of the handbook, instead of guidelines.

A direct action for annulment under Article 263 TFEU against a module of the handbook would, most likely again, be deemed as inadmissible, as the handbook will, most probably, be seen as a soft law act. However, of course, the Court would need to apply its *ERTA* and *IBM* reviewability test and, based on the handbook's substance rather than on its form, it would decide whether the handbook was capable of producing legal effects. The wording of the handbook and other *ad hoc* elements -showing the intention of the EBA or the perception of the parties- will remain relevant. Arguably though, the structural elements of the handbook themselves, such as the absence of a comply or explain mechanism, the fact that financial institutions are not directly addressed by the handbook, the nature of the handbook as a collection of best practices (rather than as a specification of sectoral provisions), and the expected absence of national measures of general application transposing the handbook will, most probably, contribute to a negative answer in the reviewability test. Even if national measures are issued based on supervisory best practices of the handbook as individual binding acts or acts of general application, that would not change the non-binding character of the handbook itself, as the authority did not have to act in accordance with the handbook in the first place and retains discretion to do so. The authority should, indeed, use the handbook, but only to the extent this does not interfere with its judgment-led supervision. Accordingly, most likely the Court would treat the handbook as to its non-reviewability under Article 263 TFEU in a way different than it treated Guidelines in its recent FBF case-law.

The handbook, however, might be subject to a review through the procedure of preliminary reference under Article 267 TFEU, following a request by a national court. That court would be forced to make the request, if it heard an appeal against a national measure issued by the national authority on the basis of the handbook and the validity of the handbook was brought into question. There is a wide circle of individuals that can ask a national court to submit such a request for a preliminary ruling (due to the absence of a requirement for the individuals to prove their direct and individual concern). In addition, there are no time-limits in the relevant process and the handbook is an act of general application. Therefore, the probability of the handbook being reviewed by the Court would be directly proportional to two factors: on one hand, the extent of the use of this tool by the EBA and, on the other, the intensity of the influence that the handbook will have on the supervisory practices of national authorities.

The fact that the handbook is not directly addressed to financial institutions should not be seen as affecting its reviewability under the preliminary reference procedure. To the extent a national act is based on the handbook and a question of the handbook's validity is raised, reference to the Court should be mandatory for the last instance national judge[89].

Arguably, if faced with the handbook, the Court would qualify its stance on the scope of review for acts of soft law lacking the comply or explain mechanism, which the guidelines are endowed with (as described in section

[89] See Chamon, M. and N. De Arriba-Sellier (2021) p. 308, where the relevant problem is posed.

2), and which, according to the Court, is the "hardening factor"[90] that effectively avails to the EBA the "power to exhort and persuade". In any case, it is difficult to anticipate what the Court would determine as to the scope of review of the handbook.

Elements relating to *procedural requirement* (such as, public consultation or impact assessment) might be more relaxed, precisely due to the absence of an enhanced compliance mechanism or of a direct impact of the handbook on stakeholders other than the national authorities, whose views are considered already through the governance system of the EBA.

Regarding the *lack of competence,* most likely the Court would apply the *FBF* test to ensure that the handbook remains within the remit of the EBA, even if legally based on the EBA Founding Regulation only. However, the Court might be ready to accept the handbook's steering effect and be more relaxed as to the *anchoring* required between the handbook and relevant provisions of hard law, which the handbook should be seen as specifying.

Finally, given the overly technical and complex assessment underpinning the announcement of certain practices, methods and processes as "best", and their subsequent inclusion in the handbook and the low density of hard law when it comes to supervisory practices, most likely the scope of review of *illegality stricto sensu* would be very limited.

[90] For a discussion of the concepts of full and marginal review, see Türk, "Oversight of administrative rulemaking: Judicial review", 19 EL Rev. (2013), 126-142.

Conclusions

By clearing the way for the judicial reviewability of EBA guidelines, the Court created the necessary legal certainty for the adoption, not only of guidelines, but also of other instruments of soft law, ensuring harmonization of how Union law is applied and supervisory convergence. Despite the Court's case law pertaining to EBA guidelines, but not specifically to handbook, it still provides adequate insights as to the handbook's reviewability and, subsequently, its legal nature as a Union act.

It is now, thus, established by the Court that soft law acts deemed as without binding legal effects would not be subject to an action for annulment, but may (and some of them most probably would) be reviewed by means of a preliminary ruling. In any case, the Court holds that soft law would be subject to judicial review regardless of their binding or non-binding character. National judicature would also be involved in reviewing soft law, as the latter develops different legal effects in several jurisdictions. However, the Court's prerogative in interpreting Union law will be maintained. The scope of the review of soft law will, the Court said, be commensurate to the power of each soft law act to "exhort and persuade". Staying away from the debate about the binding or quasi-legally binding character of soft law, and aiming at establishing a predictable, efficient, compact, participatory and proportional judicial review of these acts is what seemed to drove, enabled and justified the Court's broader consideration of the legal possibilities of the EBA when issuing soft law.

What the Court did not do was to give a "free pass" to any attempt for regulatory activism that would obstruct the democratic and institutional balance. Conversely, it clearly held that appropriate judicial scrutiny will be exercised in all cases. Any soft law act called to produce binding legal effects (which would be decided by the Court on a factual basis) could be subject to an action for annulment. Moreover, any soft law, though does not need to specify a particular provision of hard law, it must be based in law, notably it must be within the EBA's mandate, competences and objectives set out in the EBA Founding Regulation, which in turn refers to the sectoral legislation for which the EBA is in charge. And, EBA has always to respect appropriate formalities when adopting such law, whether of an interpretative, decisional or steering nature.

Indeed, between the guidelines and the handbook there are differences: the handbook does not have a "comply or explain" mechanism and is more of a "steering" character providing best practices without impinging upon the authorities' judgment-led supervision. Both, however, are acts not intended to produce binding legal effects, are also acts of general application and are both subject to the principle of legality and proportionality. They are typical acts, in the sense that EBA Founding Regulation sets out for each of them a process for adoption.

The structural elements of the handbook themselves would most likely bring the handbook outside the scope of an action for annulment, if drafted and structured in line with the EBA Founding Regulation –clearly stating that the handbook is not legally binding. The handbook's nature as non-legally binding should be notwithstanding the way national authorities choose to take the handbook into account when exercising supervision.

The handbook could therefore be opened to a review by means of a preliminary ruling, following a request by a national court. The probability of the latter being directly proportional the extent of the use of this tool by the EBA and to the intensity of the handbook' impact on the actual supervisory practices and acts of the competent authorities. The Court most likely would find the handbook as an act with less power to "exhort and persuade" compared to the guidelines. The Court might be inclined to accept the handbook's "steering" effect and be more relaxed as to the *anchoring* required on the provisions of hard law. Finally, the assessment underpinning the announcement of certain practices, methods and processes as "best" may be seen by the Court as technical and complex, thereby limiting the scope of review to substantial and procedural legality, including proportionality elements.

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ACKNOWLEDGEMENTS

We would like to thank Associate Prof. Dr. David Ramos Muñoz and Prof. Dr. Christos Gortsos for their precious contributions, as well as anonymous referees, for their review and comments. The paper has also benefited from discussions with several colleagues within the Legal and Compliance Unit. Any remaining errors are the authors' own.

The opinions expressed are those of the authors and are not the responsibility of the Authority.

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ISBN 978-92-9245-866-9
ISSN 2599-7831

doi:10.2853/012116
DZ-AH-23-001-EN-N