JUDICIAL REVIEW OF EU SOFT LAW: A REVOLUTIONARY STEP WHICH HAS NOT FULLY HAPPENED (CASE NOTE ON *BT V BALGARSKA NARODNA BANKA*, C-501/18)

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ABSTRACT: In the judgment in case BT v Balgarska Narodna Banka, the Court of Justice of the EU declared, for the first time, invalid a part of a legally non-binding EU act - a recommendation adopted by the European Banking Authority and addressed to the Bulgarian National Bank. It also confirmed that the referring court deciding upon damages has a duty to take such a recommendation into consideration. Moreover, the individuals in the national proceedings should have a right to rely upon the content of the recommendation even if they are not addressees of such an act. However, when assessed in more detail, the case points out to several interesting aspects related to EU soft law that have not been properly discussed yet.

KEYWORDS: banking and finance, soft law, EBA recommendation, judicial review, Grimaldi doctrine.

EL CONTROL JURISDICCIONAL DEL SOFT LAW DE LA UE: UN PASO REVOLUCIONARIO QUE NO SE HA DADO COMPLETAMENTE (COMENTARIO DE LA SENTENCIA *BT C. BALGARSKA NARODNA BANKA, C-501/18*)

RESUMEN: En la sentencia BT c. Balgarska Narodna Banca, el Tribunal de Justicia de la UE ha declarado inválida, por primera vez, una parte de un acto de la UE de carácter no obligatorio - una recomendación adoptada por la Autoridad Bancaria Europea dirigida al Banco Nacional de Bulgaria. Dicha sentencia confirma también que la jurisdicción nacional de remisión, jurisdicción que debe decidir sobre la indemnización de daños, tiene el deber de tomar dicha recomendación en consideración. Adicionalmente, las partes en el procedimiento nacional deberían tener el

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derecho de prevalerse del contenido de la recomendación incluso cuando ellos no son los destinatarios de dicho acto. Sin embargo, cuando se analiza en más detalle, el asunto pone de relieve varios aspectos interesantes relacionados con el soft law de la UE que no han sido aún debidamente discutidos.

PALABRAS CLAVE: banca y finanza; soft law; recomendación de la Autoridad Bancaria Europea (ABE); control jurisdiccional; doctrina Grimaldi.

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I. INTRODUCTION

In case BT v Balgarska Narodna Banka (C-501/18),[2] the Court of Justice of the EU wrote another chapter in the saga of the judicial reviewability of legally non-binding (soft law) acts and the duty of national courts to take EU soft law into consideration. Although the judgment includes other issues, related to banking and finance and the liability of the Member State, this case note will focus only on the aspects about the EU recommendations and their legal effects.

At first sight, the judgment seems like a ground-breaking decision: For the first time in history, the Court of Justice confirmed in practice what had been before rather a theoretical opportunity somehow foreseen in its case law: It declared an EU recommendation, formally a "genuine" soft law act, invalid within the preliminary reference procedure. But a closer look at the reasoning and mainly at the content of the recommendation in question raises additional questions or rather doubts: What exactly did the Court invalidated? What implications can this decision have? The Recommendation was adopted by the European Banking Authority ("EBA") and was addressed to the Bulgarian National Bank ("BNB").[3] It contains a part establishing the breach of EU law by the BNB and a part suggesting steps to be taken by the BNB in order to comply with EU law. The invalidation by the Court of Justice does not affect the "actual" recommendations, but rather the provisions where the breach of EU law is determined.

A similar confusion arises with regard to the interpretation and application of the EBA Recommendation and its legal effects. The Court of Justice referred, quite mechanically,

[2] Judgment of 25 March 2021, BT v Balgarska Narodna Banka (BNB) (C-501/18, ECLI:EU:C:2021:249).

[3] Recommendation EBA/REC/2014/02 of the European Banking Authority (EBA) of 17 October 2014 addressed to the Balgarska Narodna Banka and the Fund za garantirane na vlogovete v bankite on the measures necessary to comply with Directive 94/19/EC.

to the Grimaldi duty, according to which the national courts are bound to take EU recommendations into consideration.[4] But when we examine the content of the EBA Recommendation and the context of the case, it seems dubious whether it is really a genuine recommendation what the referring court must take into consideration in the given case. The referring court adjudicates upon the action for damages claiming the breach of EU law by the Member State. In the given case, the Court of Justice did not apply the Grimaldi duty to a provision that would help with the interpretation of hard law norms, but rather to the part of the document which establishes the breach of EU law. Moreover, the overall context indicates that the referring court must do more than just recognize the existence of the Recommendation, and therefore the routine application of the Grimaldi duty seems to be inadequate in the given case.

On a more general level, a profound look into the case and the content of the EBA Recommendation shows that not all recommendations adopted by EU institutions or other bodies are always the same. Different types of recommendations may have diverse content and may induce various kinds of legal effects. Furthermore, a document which is labelled as a "recommendation" does not necessarily include just non-mandatory suggestions of future behaviour. There might be other parts which can be legally relevant, but which should be probably given a different legal status.

In any event, the judgment in BT v Balgarska Narodna Banka brings into the light new aspects of EU soft law which have not been thoroughly discussed or solved yet. Mainly the intricacies of the EBA Recommendation indicate that there are much more nuances in EU soft law than the Court of Justice might admit.

II. BACKGROUND OF THE CASE

The preliminary reference arose in a case on action for damages brought against the Balgarska Narodna Banka (Bulgarian National Bank) for its failure to fulfil duties stemming from EU law.

The action for damages was brought by BT, an individual depositor who concluded, between 2008 and 2011, three contracts with Bulgarian bank Korporativna Targovska Banka ("KTB") on unlimited deposits in euros and leva at preferential conditions. The amounts deposited were guaranteed by the Bulgarian Bank Deposit Guarantee Fund ("Fund") up to BGN 196 000 (approximately EUR 100 000). On 20 June 2014, KTB notified to the BNB its lack of liquidity due to a massive bank run and informed of the consequent suspension of payments to its customers. On the same day, the BNB put KTB under special supervision because of a risk of insolvency, suspended its obligations

[4] Judgment of 13 December 1989, Grimaldi (C-322/88, EU:C:1989:646, paragraph 18).

and prohibited it from continuing its banking activities. On 30 June 2014, the BNB reduced the interest rates applied to deposits at KTB. On 16 September, the BNB extended the special supervision until 20 November 2014. In any event, the BNB did not make the formal determination of the unavailability of assets which is required by Article 1(3)(i) of Directive 94/19.

On 17 October 2014, the European Banking Authority adopted, based on Article 17(3) of Regulation 1093/2010, Recommendation EBA/REC/2014/02 ("Recommendation") addressed to the BNB and the Fund. In its preamble, the Recommendation establishes that the BNB breached EU law by failing to make the determination of the unavailability of assets in accordance with Article 1(3)(i) of Directive 94/19, by suspending the obligations of KTB and by removing access of depositors to their guaranteed deposits. Moreover, the Recommendation concludes that the Fund is required to pay out the guaranteed amounts of unavailable deposits following the determination of the BNB - which was not made expressly but was inherent in the BNB's decision to put KTB under special supervision and to suspend its obligations.

On 6 November 2014, the BNB withdrew the authorisation to increase KTB's equity capital by means of funds provided under a loan agreement and revoked the KTB's banking licence. On 4 December 2014, the Fund paid out to BT the amount of BGN 196 000 plus contractual and remuneration interest for the period from 30 June to 6 November 2014. The remaining credit balances (BGN 44 070) were included in the list of recognised claims within the bankruptcy proceedings.

Consequently, BT brought an action for damages against the BNB claiming compensation for the loss incurred as a result of actions and omission of the BNB committed in breach of EU law. In particular, BT claimed that the BNB should be ordered to pay statutory interest on the guaranteed amount of the deposits held by the KTB for the period form 30 June to 4 December 2014. BT argued that the BNB is responsible for the delay in reimbursement since it failed to make the formal determination of unavailable assets in the period prescribed by Directive 94/19. Moreover, BT demanded the reimbursement of the amount exceeding the ceiling of the guaranteed amount of the deposits, arguing that the special supervisory measures vis-à-vis KTB were unjustified and disproportionate to the situation of that bank.

In its preliminary reference, the referring court raised several questions concerning the interpretation of Directive 94/19, the duty of national courts to raise Article 4(3) TEU of their own motion or the conditions of compensation of loss incurred as a result of a breach of EU law. With regard to the EBA Recommendation, the referring court asked upon its legal effects and raised doubts as to its validity.

III. OPINION OF THE ADVOCATE GENERAL

Advocate General Campos Sánchez-Bordona examined, in his opinion, the question on interpretation and validity of the EBA Recommendation quite thoroughly. First of all, he assessed the nature of the Recommendation. He acknowledged that EBA recommendations are not legally binding, and therefore clearly fall within the category of recommendations included in Article 288 TFEU.[5] However, the EBA is empowered to adopt recommendations by Article 16 of Regulation 1093/2010 (its founding regulation) which specifies, in its third paragraph, that competent authorities and financial institutions must make every effort to comply with those recommendations. Moreover, the competent authorities have a complementary duty to inform the EBA whether they intend to comply with the recommendations or not. That indicates that although the recommendations are not binding, they still have some legal effects.[6]

Nonetheless, the Recommendation in question was adopted pursuant to Article 17(3) of Regulation 1093/2010 which establishes a specific category of recommendations. While recommendations based on Article 16 are of a general scope and their effects are derived from the "comply or explain" principle, recommendations based on Article 17(3) are individual in nature and their non-compliance is followed by a specific procedure.[7]

The Advocate General reminded that following settled case law of the CJEU, recommendations cannot be reviewed within the action for annulment under Article 263 TFEU since this procedural channel allows for the assessment of only legally binding acts. Nevertheless, they may be relied upon in a dispute before a national court which has a duty to take them into consideration if they provide for the interpretation of binding provisions.[8]

Concerning doubts of the referring court whether Recommendation EBA/2014/02 is compatible with EU law, the Advocate General elaborated, first in abstract, whether the CJEU has jurisdiction to assess validity of recommendations within the preliminary reference procedure and whether it makes sense to invalidate a measure without binding legal effects. He reminded the Grimaldi principle according to which a national court is bound to take recommendations into consideration especially when they can help with interpretation of binding provisions. Based on this, he suggested to recognise the possibility of making a reference for a preliminary ruling on the validity of recommendations because "[i]t would not be logical for [the] national court to have regard,

[5] Opinion, paragraph 76.

[6] Opinion, paragraph 78.

[7] Opinion, paragraph 79.

[8] Opinion, paragraphs 82-84.

for interpreting purposes, to a recommendation the validity of which it questions precisely because it considers it to be incompatible with EU law but does not have standing to say so."[9] The national court has a duty to take a recommendation into account, but it can do so only if the recommendation is in compliance with binding EU law provisions. If the national court has doubts upon the compliance, it must have a possibility to refer the issue to the Court of Justice, which has exclusive competence to declare EU law acts invalid.[10]

Then the Advocate General focused on the Recommendation in question and assessed the doubts of the referring court. According to the referring court, the Recommendation was wrongly addressed to the BNB which is not the authority competent to determine the unavailability of deposits in the sense of Article 1(3)(i) of Directive 94/19. However, in the judgment in case Kantarev,[11] the Court of Justice clarified that the BNB was the competent authority. Based on the Bulgarian law, the BTB was the competent authority for supervising banking institutions since 25 March 2014. Since 14 August 2015, it has been, for sure, the authority competent to determine the unavailability of deposits. In the opinion of the Advocate General, it is upon the referring court to find out, based on the applicable Bulgarian law, whether the BTB was such an authority even before that, especially in time where actions against KTB were taken. In any event, as the Court of Justice stated in Kantarev, the fact that Bulgarian authorities did not determine explicitly the unavailability of deposits at KTB presented a sufficiently serious breach of Article 1(3)(i) of Directive 94/19.[12]

Furthermore, the referring court raised a question whether the Recommendation is compatible with recital 27 of Regulation 1093/2010 with regard to Article 1(3)(i) of Directive 94/19 that does not provide for clear and unconditional obligations. The Advocate General pointed out to the fact that recital 27 refers to final decisions of the EBA, not to recommendations. In any case, the Court of Justice already held in Kantarev that Article 1(3)(i) of Directive 94/19 has direct effect. It follows that this provision and even the recommendation, which is linked to it, may be relied on by individuals before the referring court. The Advocate General concluded that this aspect does not make the Recommendation invalid.[13]

Finally, the Advocate General examined the impact of the judgment in Kantarev on the Recommendation. In Kantarev, the Court of Justice highlighted that the competent

[9] Opinion, paragraph 100.

[10] Opinion, paragraph 102.

[11] Judgment of 4 October 2018, Kantarev (C 571/16, EU:C:2018:807).

[12] Opinion, paragraph 113.

[13] Opinion, paragraph 116.

national authority must determine the unavailability of deposits expressly. Contrary to what the EBA stated in the Recommendation, this determination cannot be derived from other activities or statements of the authority, such as the decision of the BTB to put KTB under special supervision. This conclusion of the EBA included in the Recommendation is therefore incompatible with Article 1(3)(i) of Directive 94/19, and the referring court must not take that aspect of the Recommendation into consideration when interpreting EU law.[14]

With regard of the validity of the Recommendation, the view of the Advocate General is rather clear: The doubts of the referring court are unfounded. The Recommendation is contrary to a binding EU law provision only in one aspect - when it states that the decision of the BTB to put KTB under special supervision shall be considered the determination of the unavailability of deposits. Nonetheless, the Advocate General did not suggest invalidating the Recommendation for such an error. He only proposed that this aspect of the Recommendation must be disregarded by the referring court in the national proceedings.

IV. JUDGMENT

The Court of Justice reminded that recommendations adopted on the basis of Article 17(3) of Regulation No 1093/2010 are addressed to competent authorities and set out measures to be taken to comply with EU law. In accordance with the opinion of the Advocate General, the Court acknowledged that such recommendations fall within the category of recommendations foreseen by Article 288 TFEU. As it was highlighted in the judgment in case Belgium v Commission (C-16/16 P), this Article entrusts the institutions with the power to exhort and to persuade, which is distinct from the power to adopt acts having binding force. It is settled case law that albeit being not binding, recommendations must be taken into consideration by national courts, especially if they help to interpret binding EU law provisions.[15]

The Court of Justice did not examine further the legal nature or the content of the Recommendation in question, but it directly concluded that the Recommendation must be taken into consideration by national courts even in action for damages brought against the Member State for its failure to fulfil duties stemming from EU law. The Court of Justice added that individuals harmed by the breach of EU law must be able to rely on the

[14] Opinion, paragraph 120.

[15] Judgment, paragraph 80, referring to judgments of 13 December 1989, Grimaldi (C-322/88, EU:C:1989:646, paragraph 18); of 11 September 2003, Altair Chimica (C-207/01, EU:C:2003:451, paragraph 41); and of 15 September 2016, Koninklijke KPN and Others (C-28/15, EU:C:2016:692, paragraph 41).

Recommendation as a basis for establishing the liability of the Member State, although they are not addressees of such an act.[16]

As to the reviewability of the Recommendation, the Court of Justice was brief and rather straightforward: While Article 263 TFEU exempts recommendations from judicial review within the action for annulment, Articles 19(3)(b) TEU and 267(b) TFEU allow the Court of Justice to give preliminary rulings on validity of acts of the institutions of the Union without any exception.[17] Therefore the Court has jurisdiction to assess validity of the Recommendation in question.[18]

Concerning the alleged incompatibility of the Recommendation with recital 27 of Regulation No 1093/2010, the Court of Justice agreed fully with the Advocate General that the doubts of the referring court are unfounded. Directive 94/19 is one of the acts within the scope of action of the EBA as referred to in Article 1(2) of Regulation 1093/2010 and therefore the breach of such an act may be reason for issuing recommendations based on Article 17 of the Regulation. Since Article 1(3)(i) of that Directive imposes an unconditional and sufficiently precise obligation on the competent authority, the EBA was right to declare the breach of this Article in the Recommendation. Moreover, recitals do not have legal value on their own, and recital 27 in particular may not add additional conditions to Article 17 of the Regulation.[19]

The Court of Justice also denied the claim of the referring court that at the date when the Recommendation was issued, the BNB was not the competent authority do deal with the national deposit-guarantee scheme in the meaning of Article 4(2)(iii) of Regulation No 1093/2010. In accordance with the opinion of the Advocate General, the Court referred to the judgment in Kantarev[20] which established that the BNB was the competent authority to determine the unavailability of deposits, and it left to the referring court to verify whether, according to the applicable Bulgarian law, the BTB was the competent authority also in time of issuance of the Recommendation. In any event, the failure to determine explicitly the unavailability of deposits, as required by Article 1(3)(i) of Directive 94/19,

[16] Judgment, paragraph 81.

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

[18] Judgment, paragraph 83.

[19] Judgment, paragraphs 87-90.

[20] Judgment of 4 October 2018, Kantarev (C 571/16, EU:C:2018:807).

constituted a sufficiently serious breach of EU law and established the liability of the Member State.[21]

Although the Court of Justice considered uncertainties and doubts of the referring court unfounded, it discovered another reason for invalidating the Recommendation. According to the Recommendation, the EBA considered that the decision taken by the BNB to place KTB under special supervision and to suspend KTB's obligations was materially equal to the determination of the unavailability of deposits. However, as the Court of Justice already held in Kantarev, the unavailability of deposits must be established by an express act of the competent authority and cannot be deduced from other activities of national authorities.

With regard to the Recommendation, the conclusions were twofold. First, the Court of Justice stated that the referring court cannot, when deciding the dispute on damages, rely on the presumption that the decision of the BNB to put KTB under special supervision and to suspend its obligation is practically the determination of unavailability of assets.[22] Second, the Court of Justice ruled that the Recommendation is invalid, in so far as it equated the decision in question with the formal determination of unavailability of assets.[23]

V. COMMENT

With regard to EU soft law,[24] the case of BT v BNB points out to several issues which are worth being explored. First, the EBA Recommendation in question represents quite a specific kind of EU soft law. Second, the special character of the Recommendation should be taken into consideration when interpreting it. While the Court repeated a classic "Grimaldi" duty, according to which national courts must take EU soft law into consideration, it did not pay attention to what part of the document this duty applies for. Third, while the Court admitted that it has jurisdiction to assess validity of EU soft law within the preliminary reference procedure, in the given case, it invalidated a part of the

[21] Judgment, paragraph 97.

[22] Judgment, paragraph 100.

[23] Judgment, paragraph 101.

[24] Generally on EU soft law, see, e. g. BOTHE, M., "«Soft Law» in den Europäischen Gemeinschaften?", in VON MÜNCH, I., SCHLOCHAUER, H. J. (eds.), *Staatsrecht - Völkerrecht - Europarecht: Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981*, de Gruyter, Berlin, 1981; BRUNESSEN, B., "Les enjeux de la Soft Law dans l'Union européenne", *Revue de l'Union Européenne*, 2014; SENDEN, L., *Soft law in European Community law*, Hart, Oxford, 2004; STEFAN, O., "European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects", *The Modern Law Review*, vol. 75, 5, 2012; WELLENS, K. C.; BORCHARDT, G. M., "Soft law in European Community law", *European Law Review*, vol. 14, 5, 1989.

document which is not certain to be a genuine legally non-binding act. Fourth, the actual invalidation of the recommendation seems to fully open the window of judicial review of EU soft law acts within the preliminary reference, and it makes an attribution to the issue of judicial review of soft law in general.

1. Different types of EU recommendations

The given case enlightens that the "EU recommendations" do not stand for one homogenous type of acts which would have the same (or similar) content, structure, legal effects or even legal value. On the contrary, the concept of EU recommendation is internally diverse and covers several different types of acts.

The EU recommendations represent typical (or nominate) types of EU soft law. As specific legal acts, they are foreseen by Article 288 TFEU. This provision states, and it is probably the only thing that all types of recommendations would have in common, that recommendations shall have no binding force. By enabling to issue legally non-binding acts, Article 288 TFEU confers on the EU institutions "a power to exhort and to persuade, distinct form the power to adopt acts having binding force"[25]. Hence, even without binding legal force, recommendations have a capacity to change behaviour of their addressees or third persons by suggesting, inviting or mildly urging.

According to case law of the CJEU (Belgium v Commission, C-16/16 P)[26], EU recommendations under Article 288 TFEU do not produce binding legal effects - but only if they are "genuine" recommendations and not binding acts in disguise. The test to assess whether an act qualifies as a genuine recommendation is, however, quite shallow and focuses only on the wording, the content and the intent of the drafter: A genuine recommendation is worded in non-mandatory terms (which usually means using "should" instead of "shall"), its addressees do not have a duty to follow it, and nothing indicates that the drafter wanted, in fact, to issue a binding act.[27]

[25] Judgment, paragraph 79, referring to judgment of 20 February 2018, Belgium v Commission (C-16/16 P, EU:C:2018:79, paragraph 26).

[26] Judgment of 20 February 2018, Belgium v Commission (C-16/16 P, EU:C:2018:79). For critical comments of the judgment, see ARNULL, A., "EU Recommendations and Judicial Review: ECJ 20 February 2018, Case C-16/16 P, *Kingdom of Belgium* v *European Commission*", *European Constitutional Law Review*, vol. 14, 3, 2018; GUNDEL, J., "Rechtsschutz gegen Empfehlungen der EU-Kommission? : Anmerkung zum Urteil des EuGH (GK) v. 20.2.2018, Rs. C-16/16 P (Belgien/Kommission)", *Europarecht*, vol. 53, 5, 2018; MASTROIANNI, R., "What's in a Recommendation?", *Max Planck Institute Luxembourg for Procedural Law Research Paper Series*, 2, 2020.

[27] Judgment of 20 February 2018, Belgium v Commission (C-16/16 P, EU:C:2018:79, paragraphs 34-36).

Both the Advocate General and the Court in the given case noted that the EBA Recommendation falls within the category of genuine recommendations under Article 288 TFEU.[28] However, what is its proper character and what effects does it entail?

As the Advocate General pointed out, the EBA is empowered, by its founding Regulation No 1093/2010, to adopt two types of recommendations.[29] First, there are recommendations foreseen by Article 16 of the Regulation. They are addressed to competent national authorities or financial institutions. Their purpose is to help with establishing consistent, efficient and effective supervisory practices within the ESFS or to ensure the common, uniform and consistent application of EU law, therefore they are soft law acts with an interpreting/implementing function. Their addressees have a duty to make every effort to comply with them. Moreover, the addressees have a duty to inform the EBA whether they comply or intend to comply with the recommendations. In case of non-compliance, the addressees must provide for reasons for it. The recommendations under Article 16 represent acts of a general nature, which are, in themselves, legally non-binding, but - due to accompanying duties of making effort to comply and of informing about the compliance or non-compliance - they have some legal effects.[30]

Second - and this the case of the EBA Recommendation in BT v BNB - there are recommendations under Article 17(3) of Regulation No 1093/2010. The whole Article 17 regulates the steps of the EBA in a situation where a competent national authority has not applied particular EU acts (falling under the scope of competence of the EBA) or has applied them in a way which appears to be a breach of EU law. In such a case, the EBA is empowered to issue a specific kind of recommendation addressed directly to the national authority which has allegedly failed to fulfil its duties stemming from EU law. By the recommendation, the EBA suggests what steps the national authority should pursue in order to comply with EU law.

This type of recommendation differs from the general one also in accompanying duties and consequences for non-compliance. The national authority has a duty to inform the EBA within 10 days about what steps it has already taken or intends to take to ensure compliance with EU law. If the authority does not comply with the recommendation, the

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[28] Opinion, paragraph 76; Judgment, paragraph 79.

[29] Concerning soft law acts issued by the EBA and other two European Supervisory Authorities (European Securities and Markets Authority and European Insurance and Occupational Pensions Authority), see DICKSCHEN, J. E., *Empfehlungen und Leitlinien als Handlungsform der Europäischen Finanzaufsichtsbehörden: eine dogmatische Vermessung*, Springer, Berlin, 2017; GORTSOS, C.; LAGARIA, K., "The European Supervisory Authorities (ESAs) As «Direct» Supervisors in the EU Financial System", *European Banking Institute Working Paper Series*, 57, 2020; MOLONEY, N., "The European Supervisory Authorities and Discretion. Can the Functional and Constitutional Circles be Squared?", in MENDES, J. (ed.), *EU executive discretion and the limits of law*, Oxford University Press, Oxford, 2019.

[30] Opinion, paragraph 78.

Commission intervenes by issuing a formal opinion in which it requires from the competent authority to take the necessary action [Article 17(4)]. If non-compliance remains, the EBA may issue individual decisions addressed to financial institutions urging them to take measures necessary to comply with EU law. Such individual decisions must be in compliance with the Commission's formal opinion [Article 17(6)] and they must be respected also by the competent authority [Article 17(7)]. If necessary, the Commission may launch infringement proceedings against the Member State under Article 258 TFEU.

While recommendations under Article 16 are general and addressed to all competent authorities and relevant financial institutions, recommendations according to Article 17 are individual in nature. The recommendations of the first type are similar to regulations or directives since they include general rules, albeit worded in non-mandatory terms. The individual recommendations, on the other hand, are similar to decisions. The general recommendations are based on the principle "comply or explain" and the competent national authorities have a complete leeway to choose non-compliance without any sanction, while non-respect of individual recommendations entail legal consequences, potentially even infringement proceedings. In that sense, the general recommendations are final acts, while individual recommendations represent only an intermediary part in a chain of steps of the EU institutions. The individual recommendations thus serve a specific function. They indicate where the concrete problem within the compliance of EU law is and what particular moves or measures should be undertaken in order to ensure the compliance.

In any event, these two categories of recommendations are not the only types of EU recommendations. For example, the gambling recommendation of the Commission,[31] which was assessed in case Belgium v Commission[32] and which served as a model for the "genuine" recommendation, differs from the EBA recommendations in several features. It was issued by the Commission without any explicit empowerment in a legally binding act (it is only based on the general empowerment to issue recommendations under Article 292 TFEU), hence it is a self-standing soft law act. It is addressed to Member States in general (or better, their legislators). Since it is not accompanied by any additional duty, it is based on the principle "take it or leave it" (although Member States are still recommended to report to the Commission whether they complied or not).

We can see that EU recommendations, as acts without binding legal force, may be issued in several variations. There are general recommendations or individual

[31] Commission Recommendation 2014/478/EU of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online (OJ 2014 L 214, p. 38).

[32] Judgment of 20 February 2018, Belgium v Commission (C-16/16 P, EU:C:2018:79).

recommendations. They may be adopted based on an explicit empowerment in a legally binding act or spontaneously without any specific (material) legal basis. They may serve as a tool which helps with implementing/interpreting binding provisions, or they may present a self-standing act which is not linked to any binding provision. Recommendations may be addressed to Member States in general or they may have more specific addresses, such as competent national authorities. Non-compliance with some recommendations does not entail any consequence ("take it or leave it") and there can be recommendations which are accompanied by corollary duties ("comply or explain").

In any event, in BT v BNB, the Court of Justice did not analyse in detail the specific character of the EBA recommendations issued under Article 17(3) of Regulation 1093/2010, nor did it examine whether this type of recommendations could have different legal effects than general recommendations. The Court only referred to its case-law related to EU soft law, and it derived its conclusions therefrom. And it is something that seems to be problematic.

2. The EBA Recommendation and the duty "to take into consideration"

Concerning interpretation of the EBA Recommendation, the Court laconically noted that this act falls under the category of genuine recommendations under Article 288 TFEU[33] and referred to the Grimaldi line of case law, according to which national courts have the duty to take EU recommendations into consideration.[34] Based on this, the Court deduced that even in cases on action for damages due to the failure of the Member State to fulfil its duties stemming from EU law, the national courts must take the EBA recommendation into consideration.[35] At first sight, there is nothing striking in this reasoning. What seems to be more disturbing, is the follow-up with regard to individuals allegedly harmed by the breach of Union law by the Member State. The Court explicitly states that when the EBA recommendation *establishes* the breach of Union law by the Member State, the individuals in national proceedings (even if they are not addressees of such an act) must *be able to rely on it as a basis for establishing the liability* of the Member State. How can a (genuine) recommendation, i. e. a legally non-binding prescriptive act, even establish the breach of law or the liability of the Member State?

[33] Judgment, paragraph 79.

[34] Judgment, paragraph 80, referring to judgments of 13 December 1989, Grimaldi (C-322/88, EU:C:1989:646, paragraph 18); of 11 September 2003, Altair Chimica (C-207/01, EU:C:2003:451, paragraph 41); and of 15 September 2016, Koninklijke KPN and Others (C-28/15, EU:C:2016:692, paragraph 41). See also KORKEA-AHO, E., "National Courts and European Soft Law: Is Grimaldi Still Good Law?", *Yearbook of European Law*, vol. 37, 2018, p. 470.

[35] Judgment, paragraph 81.

It is necessary to look into the EBA recommendation in question. As it was elaborated above, a recommendation under Article 17(3) of Regulation No 1093/2010 is similar to an individual decision, and therefore its structure differs from a general (prescriptive) act. The EBA Recommendation EBA/REC/2014/02 has a preamble which is, in a traditional way, introduced by "Whereas" and which includes 29 recitals. It is followed by the actual recommendation - introduced by the phrase "Has adopted this recommendation". This main section of the document includes only five provisions of recommendations addressed to the BNB and the Fund (steps they should take in order to comply with EU law) and three provisions on implementation and monitoring. What are the parts that the national court should take into consideration and that the individuals in national proceedings must be able to rely upon? Surprisingly, not the actual recommendation but recitals of the preamble.

The preamble looks like a classic decision. It includes points on "Relevant factual background", a part entitled "EBA Findings" and finally five recitals under the heading "Conclusions". And the conclusions are crucial for the whole case. It is recital 25 where the EBA states that the BNB "has breached Union law by failing to make the necessary determination of the unavailability of assets in accordance with the requirements of Article 1(3)(i) of Directive 94/19/EC." Moreover, the BNB adopted a decision "which breaches Union law by removing access by protected depositors to their protected deposits, access which is protected by Directive 94/19/EC by ensuring availability of protected deposits through the relevant deposit guarantee scheme where direct access through the deposit-holder is not available".

Therefore, the provision, which the national court is obliged to take into consideration and upon which individuals in national proceedings may rely, is not the actual "recommendation" worded in non-mandatory terms, but a recital that establishes the breach of Union law - and it is definitely not written in non-mandatory language, but looks like a final verdict.

There is a kind of paradox stemming from the reasoning in BT v BNB. As the Court has been repeating at least since Grimaldi, genuine EU soft law acts (genuine recommendations) are those acts which are not intended to produce binding effects; and "[c]onsequently, they cannot create rights upon which individuals may rely before a national court."[36] However, in BT v BNB, there is a recommendation that establishes (*sic*!) the breach of Union law, and hence individuals harmed by that breach must be able to rely on it before national courts. An allegedly non-binding EU act serves as a basis for establishing the liability of the Member State concerned for that breach of Union law.

[36] Judgment of 13 December 1989, Grimaldi (C-322/88, EU:C:1989:646, paragraph 16).

A question arises whether the EBA Recommendation in question can be really considered a genuine recommendation, in the sense of reasoning of the Court in Belgium v Commission, especially when it "establishes" the breach of Union law and individuals may rely upon it before national courts. A genuine recommendation is usually intended to suggest a conduct or recommend future steps to be taken, not to declare or establish or legally assess steps that have already been taken.

As explained above, the EBA Recommendation at stake is a kind of a hybrid act: It firsts reiterates the findings regarding the breach of Union law, and only based on these findings it actually "recommends" steps to be taken by its addressees. The first part of the document, which is formally just a preamble, appears to be a standard administrative decision which includes the conclusions upon the breach of Union law. But with regard to the specific institutional setting and the division of competences, the EBA is not empowered to issue individual decisions addressed to the Member States or their authorities where it would formally declare the breach of EU law. What is materially an establishment of the breach of EU law is, in the context of banking and the competence of the EBA, only a preamble of a non-binding recommendation. Only the second part of the document contains the real "recommendations": There are suggested steps that the BNB and Fund should make in order to ensure the compliance with EU law. In fact, the individuals in the national proceedings, such as BT in the given case, are not allowed to rely on the actual "recommendation" but on the preamble of the document ("whereas") where the breach of Union law is declared and explained. There is nothing material in the second part (the actual recommendations) on which the individuals can rely.

As the Court itself reiterates, but with regard to recitals of Regulation 1093/2010, "the preamble to a Union act may explain the content of the provisions of that act and provides elements of interpretation which are likely to shed light on the intention of the author of that act." However, "it has no binding legal value and cannot be relied upon to derogate from the provisions of the act itself or to interpret those provisions in a manner contrary to their wording".[37] The first part may be easily transposed to the preamble of the EBA Recommendation: It is likely to shed light on the intention of the EBA and explains why the actual recommendations addressed to the BNB and the Fund were articulated. A potential problem is linked to the second part: the (true) preamble has no binding legal value. And yet, in the given case, it is the preamble on which the individuals may rely in national proceedings. Hence, the individuals in the national proceedings must be able to rely on a non-binding section of a non-binding EU act.

[37] Judgment, paragraph 90, referring to judgment of 19 December 2019, Puppinck and Others v Commission (C-418/18 P, EU:C:2019:1113, paragraphs 75 and 76 and the case-law cited).

The preamble has apparently a stronger legal value (at least for the referring court deciding upon damages and for the individuals) than the key part of the recommendation. Therefore, it could be possible to admit that the EBA Recommendation under Article 17(3) is a kind of "composite" document which contains two separate acts with different legal force: an individual binding (yet not final) decision which declares the breach of EU law and a non-binding recommendation. In other words, albeit introduced by "whereas", the first part of the EBA Recommendation is not a genuine preamble, but rather a separate act with binding conclusions establishing the breach of EU law. Or one can take it as an upside-down act, which has a binding preamble and a non-binding prescriptive part.

In any event, there is no big problem in the argument of the Court according to which the national court deciding upon damages must take into consideration the findings of the EBA (included in the Recommendation) that the BNB breached EU law. Apparently, the EBA is empowered to make investigation and to conclude upon the breach of EU law, and it is only natural that these findings can be used in national proceedings. Neither seems problematic to admit that individuals must be able to rely on such findings in the domestic proceedings. However, what remains questionable is the reasoning of the Court and the link of the conclusion to settled case law on soft law. The Court performed quite a shallow and mechanical application of its own case law and did not pay attention to potential nuances of the EBA Recommendation in question.

With reference to its ruling in case Belgium v Commission, the Court admitted that the EBA Recommendation is a genuine recommendation falling under Article 288 TFEU. Consequently, the Court referred to the Grimaldi line of case law, according to which genuine recommendations are not legally irrelevant since the national courts have a duty to take them into consideration, especially when they are intended to supplement binding EU provisions. Based on these premises, the Court concluded that the EBA Recommendation in question must be taken into consideration by the national court.

However, as it was explained above, the EBA Recommendation at stake is a document that, although bearing a label "recommendation", differs considerably from the model genuine recommendation assessed in case Belgium v Commission and even from the Grimaldi-type recommendation which must be taken into consideration as a helping tool when interpreting or applying binding legal provisions. The part of the EBA Recommendation, which is relevant for the national court, is not a prescriptive, forward-looking provision worded in non-mandatory terms that would navigate the national court and help it with interpretation of hard law. On the contrary, it is a declarative and backward-looking statement which ascertains that hard law has been breached.

It seems confusing to link the EBA Recommendation in question with the Grimaldi-like obligation to take recommendations into consideration. The duty to take into consideration the conclusion of the EBA investigation in a concrete case is considerably different from the duty to take into consideration a prescriptive yet non-binding act in order to interpret and apply binding EU acts or national implementing provisions.

The Court should have made an explicit differentiation between these types of recommendations and probably should have nuanced the sole Grimaldi-like "duty to take into consideration". The duty to pay attention to an interpretative soft law act seems quite distinct from the duty to take into account a finding that law has been breached. Although it has not been fully clarified what everything "take into consideration" should mean in practice, it seems to be clear that a national court cannot be blamed for the decision not to follow the interpretative recommendation if it does not fit into the circumstances of the particular case before such a court. After all, it is only soft law, and its non-compliance does not trigger legal sanctions. But could a national court have such a discretion with regard to "conclusions upon the breach of EU law" contained in an EBA recommendation adopted under Article 17(3) of Regulation No 1093/2010? In other words, is the national court allowed to make its own conclusion whether EU law has been breached or not?

If the EBA recommendation is a genuine recommendation, then it is not legally binding, and therefore it should be perfectly fine for the national court to look at it (hence "take its existence into consideration), but to decide otherwise and conclude that EU law has not been breached. However, such a scenario seems to restrain the prerogatives of the EBA and its competence under Article 17 of Regulation No 1093/2010. It would probably be against the principle of primacy of EU law if the national court intentionally circumvents the legal assessment of an EU authority and decides in a totally opposite vein. With regard to the EBA recommendations under Article 17(3) and especially the conclusions contained in the "preamble", the duty to take into consideration seems rather as a euphemism for the duty to take the conclusion of the EBA as a binding declaratory decision.

But when the Court admitted that the EBA recommendation in question is a genuine recommendation, it could not explicitly acknowledge more that the "duty to take into consideration". Should the Court have analysed the EBA Recommendation as a hybrid act, it could have made the duty stronger and formally more accurate. After all, the Court acknowledges the principle "substance over form"[38], and therefore it should be natural to

[38] Judgment of 10 December 1957, Société des usines à tubes de la Sarre v High Authority (1/57 and 14/57, EU:C:1957:13, paragraph 114). For a detailed assessment of the principle, see Opinion of Advocate General Bobek delivered on 12 December 2017, Belgium v. Commission (C-16/16 P, EU:C:2017:959, paragraphs 54 and subsq.)

assess properly the substance of the act that formally appears to be a "mere" recommendation.

As a hybrid act, the EBA Recommendation includes a binding part establishing the breach of EU law and a non-binding part suggesting to its addressees steps to be taken in order to comply with EU law. If the Court made a proper analysis of the whole document and acknowledged its hybrid character, it could have stated that the findings of the EBA establishing the breach of EU law have an *erga omnes* effect and are binding for the national court.

Then it could also make more sense to confess that the individuals harmed by such a breach may, even if they are not addressees of such an act, rely upon the given document as a basis for establishing the liability of the Member State. It would be formally clearer to recognize that a part of the document is actually binding than to perform an acrobatic motion according to which an EU recommendation "cannot create rights upon which individuals may rely before a national court"[39] and at the same time it can be relied upon by the individuals in a national proceeding on the action for damages.[40]

3. The validity of the EBA Recommendation

The inadequate analysis or the unwillingness to understand properly the real nature of the EBA Recommendation probably induced flaws also in the assessment of the validity of the given Recommendation.

Since the landmark decision of Grimaldi, the Court of Justice has been constantly repeating that according to Article 267 TFEU, it has jurisdiction to give preliminary rulings on the interpretation and validity of acts of the institutions of the Union, *without any exception*.[41] The Grimaldi case was about interpretation of a Commission recommendation and, at that time, the Court did not dwell into the question whether it really can provide assessment of validity of a legally non-binding act. Anyway, since Grimaldi, the possibility to assess legality of EU soft law acts within the preliminary reference procedure still flied in the air and it was considered as a substitute for the action for annulment which does not allow such an assessment.[42] Although the Court never

[39] Judgment of 13 December 1989, Grimaldi (C-322/88, EU:C:1989:646, paragraph 16).

[40] Judgment, paragraph 81.

[41] Judgment of 13 December 1989, Grimaldi (322/88, EU:C:1989:646, paragraph 15). See also ARNULL, A., "The legal status of recommendations", *European Law Review*, vol. 15, 4, 1990; KNAUFF, M., "Europäisches Soft Law als Gegenstand des Vorabentscheidungsverfahrens", *Europarecht*, 5, 2011.

[42] TÜRK, A., "Liability and accountability for policies announced to the public and for press releases", *ECB Legal Conference 2017 Shaping a new legal order for Europe: a tale of crises and opportunities*, available at:

proceeded to the actual review of validity of soft law,[43] it acknowledged this possibility in Florescu, Belgium v Commission or M and Others.[44]

With regard to EU soft law, the Court of Justice always puts the regimes of the action for annulment and of the preliminary reference in juxtaposition: Article 263 TFEU explicitly exempts recommendations and opinions from the direct judicial review - therefore legally non-binding acts may not be reviewed within the actions for annulment, while Article 267 TFEU does not include any limitation - therefore the Court is allowed to assess validity of all acts including legally non-binding acts within the preliminary reference procedure. But the Court of Justice has never explicitly dealt with a question whether it actually makes sense to assess, within the preliminary reference procedure, validity of an act that does not bind anyone, or at least does not produce binding legal effects - which is the reason why it rejects assessing soft law acts within the action for annulment.

The argument against such a possibility would be of a practical nature: If an act does not bind anyone, just ignore it, and do not bother the already overloaded Court. One might find an argument based rather on legal theory and the classic binary understanding of law: If it is not binding, then it is not law at all - and therefore, by definition, it is not possible to speak about its validity. Or there might be an argument, which could potentially include the previous two, but which would be formally based on the systemic coherence: Acts not producing binding legal effects cannot be reviewed within the action for annulment, so - logically - acts of the very same legal nature cannot be reviewed within the preliminary reference either. In addition, there are arguments according to which out-of-court mechanisms (accountability to parliament or ombudsman bodies) can better provide control of soft law, and therefore there is no need to waste limited and scare capacity of courts.[45]

Nevertheless, in the present case, the Court dealt very shallowly with the issue whether it has a jurisdiction to review EU recommendations in the preliminary reference procedure and it did not examine the question whether it actually makes sense to assess a validity of a soft law act at all. With regard to direct actions for annulment, the Court has a set of arguments for the inadmissibility of actions against acts which do not have

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<https://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf?b452bb9c54dca55f8f5673b21631a4fem.>

[43] In Kotnik, the Court of Justice was asked upon validity of a Commission Communication but eventually, it provided for interpretation. See judgment of 19 July 2016, Kotnik and Others (C-526/14, EU:C:2016: 570, paragraphs 45-60).

[44] Judgments of 13 June 2017, Florescu and Others (C-258/14, EU:C:2017:448, paragraph 71); of 20 February 2018, Belgium v Commission (C-16/16 P, EU:C:2018:79, paragraph 44); and of 14 May 2019, M and Others (C-391/16, C-77/17 and C-78/17, EU:C:2019:403, paragraph 71).

[45] JÄÄSKINEN, N., "Final Thoughts", in ELIANTONIO, M.; KORKEA-AHO, E.; ŞTEFAN, O. (eds.), *EU soft law in the member states: theoretical findings and empirical evidence*, Hart Publishing, Oxford, 2021 (EU law in the member states), p. 361.

binding legal force. On the contrary, concerning preliminary reference procedure, the Court makes it sufficient to rely upon the text of Article 267 TFEU: It does not exempt any type of EU acts, therefore "the Court has jurisdiction to give preliminary rulings on the interpretation and validity of acts of the institutions of the Union, without any exception".[46] In previous cases, this statement was only repeated but the Court never proceeded to the actual assessment of validity of soft law. In case BT v BNB, it did not challenge such a statement, it directly admitted that it has "jurisdiction to give a preliminary ruling on the validity of Recommendation EBA/REC/2014/02,"[47] and, without hesitation, it made an allegedly revolutionary step: for the first time in its history, the Court performed a judicial review of an EU soft act.

No matter how welcome this step seems to be, the lack of argumentation in support for the review of validity of soft law is, at least, disappointing. What is, however, more striking is the actual assessment of the EBA Recommendation and the final verdict.

The referring court raised two doubts upon the validity of the EBA Recommendation. In the Court's view, both these doubts are unfounded. Nonetheless, the Court discovered another reason for invalidating the Recommendation. The problem was in recital 27 of the Recommendation where the EBA stated that "[w]hile there has been no express determination [of the unavailability of assets in accordance with Article 1(3)(i) of Directive 94/19/EC] by BNB, the decision of BNB to impose conservatorship and suspend obligations inheres in the determination by BNB that deposits are unavailable."

This one sentence was, according to the Court, wrong because, as it had been already decided in Kantarev, "the unavailability of deposits must be established by an explicit act of the competent national authority and cannot be inferred from other acts of the national authorities, such as the placing under special supervision of a bank whose deposits have become unavailable".[48]

In other words, this particular conclusion of the EBA included in the preamble of the Recommendation was legally incorrect. The implication for the referring court was, according to the Court, that it cannot rely on the premise "that the decision of the BNB to place KTB under special supervision and to suspend its obligations can be equated with

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

[47] Judgment, paragraph 81.

[48] Judgment, paragraph 99, referring to judgment of 4 October 2018, Kantarev (C-571/16, EU:C:2018:807, paragraphs 73 and 77).

a finding that KTB's deposits are unavailable."[49] So far, the approach of the Court seems logical and understandable: One sentence in the preamble is erroneous, therefore the referring court should ignore it.

The following paragraph of the judgment shows, nonetheless, a hardly understandable plot twist: Not only that this one sentence should be disregarded for the purposes of national proceedings on damages, but the Recommendation is invalid "in so far as it equated the decision of the BNB to place KTB under special supervision and to suspend its obligations to a finding of unavailability of deposits, within the meaning of Article 1(3)(i) of Directive 94/19."[50]

There is probably a missing piece somewhere between paragraph 100 and paragraph 101 of the judgment which makes a kind of puzzle open to the reader: Paragraph 100 says that the decision of the BNB to place KTB under special supervision and to suspend its obligations cannot be considered "a finding" (determination) that KTB's deposits are unavailable, which is something that Art. 1(3)(i) of the Directive requires.[51] And paragraph 101 says that the Recommendation is invalid in so far as it considers the decision of the BNB as the "finding" (or determination). When reading it in the overall context, it is apparent that the Court did not invalidate the whole Recommendation but only one sentence that is incorrect. It is only regrettable that the Court did not specify the number of provision, because at first sight, the verdict can be confusing.

It leads to another problem that is linked to the specificity of the Recommendation issued under Article 17(3) of Regulation 1093/2010. In fact, the Court did not invalidate any real recommendation (actual suggestion of steps to be taken) but a sentence in a recital of a hybrid act which is labelled as a "recommendation". The actual recommendations addressed to the BNB and Fund remained intact. As it was elaborated above, the preamble of the EBA Recommendation is not a classic non-binding preamble that serves as an interpretative aid for the normative part of the document. It is rather a binding declaratory decision on its own. Normal recitals do not have the legal value on their own, and therefore it would not make any sense to invalidate them.

The implications of the invalidation of one sentence in the "preamble" are relevant only upon the national court deciding upon damages. But there is no implication vis-à-vis the BNB and the Fund as the formal addressees of the EBA Recommendation. According to the Court, the EBA only contains one wrong conclusion that should therefore be

[49] Judgment, paragraph 100.

[50] Judgment, paragraph 101.

[51] "The competent authorities shall make that determination as soon as possible and at the latest 21 days after first becoming satisfied that a credit institution has failed to repay deposits which are due and payable."

disregarded by the national court in proceedings on damages. It would have been better, should the Court have used what the Advocate General suggested: The recommendation is contrary to Article 1(3)(i) of the Directive in so far as it treats the decision of the BNB as a determination of the unavailability of deposits. There was no need to actually "invalidate" the recommendation or its part. The declaration of incompatibility would have been sufficient.

Despite the proclamation in the beginning, the Court did not assess validity of a genuine soft law act. It did not examine the actual prescriptive provisions worded in non-mandatory terms. The Court only reviewed the conclusions of the EBA upon the past behaviour of the BNB which are relevant for and must be taken into account by the national court deciding upon the damages in domestic proceedings.

4. Judicial review of EU soft law acts in general

Finally, the fact that the Court proclaimed an EU recommendation invalid definitely attributes to the general debate on the judicial review of soft law. In any event, when reading the judgment in isolation, it would still not be sure whether the ruling means a confirmation that all kinds of EU acts that could be subsumed under the concept of soft law are indeed reviewable within the preliminary reference procedure. Based solely on the reasoning in BT v BNB, it would still be possible to claim that the EBA Recommendation at stake represents such a specific type of an act which is apt to be judicially reviewed because it establishes the breach of EU law.

However, only a couple of months later, the Court issued a judgment in case FBF v ACPR in which it explicitly stated that Article 267 TFEU gives the Court the jurisdiction to assess the validity of another type of EU soft law - guidelines of the EBA.[52] This conclusion was somehow backed up by the reasoning in BT v BNB saying that "[t]he Court has, moreover, already recognised that it has jurisdiction to give a preliminary ruling on the validity of a recommendation of the EBA which does not have binding legal effects."[53] Again, no supportive arguments in favour of the judicial review of soft law were added. The Court relied solely upon the wording of Article 267 TFEU, which does not contain any exemption, and on the previous ruling. Therefore, it seems like a judicial development by accident: The Court has a power to perform the review of soft law, because it has already done it.

[52] Judgment of 15 July 2021, Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR) (C-911/19, EU:C:2021:599, paragraph 57).

[53] Ibid., paragraph 56 referring to Judgment in BT v BNB, paragraph 83.

In both cases, soft law acts of the EBA, an EU agency, were reviewed by the Court. Thus, it would be theoretically possible to claim that it is still not settled whether this approach can be transposed to all other types of EU soft law issued by other EU institutions. One could possibly construe an argument that soft law acts adopted within the delegated competence of EU agencies deserve the judicial control while soft law acts issued by the original institutions do not need it - especially soft law acts of the Commission whose opinions and recommendations are explicitly excluded from the direct judicial review under Article 263 TFEU. But the reasoning of the Court does not seem to reflect any concern about the judicial control of the delegated power. In both judgments, the Court highlighted the lack of binding legal effects and the wording of Article 267 TFEU which allows for assessment of validity of all acts without any exemption. Therefore, in spite of the lack of the argumentation in favour of the review of validity of soft law within the preliminary reference procedure, it seems to be the rule now.

Nonetheless, the adoption of soft law within the delegated power opens another issue: Is it wise to rely upon the ruling in Belgium v Commission even if legally non-binding acts are issued by EU agencies, such as the EBA? In other words, should the guidelines and recommendations of the EBA really be exempted from direct judicial review under Article 263 TFEU? As it stems from so-called delegation doctrine, the execution of the delegated power must be under the judicial control of the CJEU.[54] EBA guidelines and recommendations might be perfectly non-binding, but their adoption is surely an execution of the delegated competence of an EU agency. But both in BT v BNB and in FBF v ACPR, the Court insisted that the lack of binding legal effects makes the soft law acts of the EBA comparable to recommendations of the Commission which are exempted from direct judicial review within the action for annulment. When only preliminary reference on validity is available, the possibility of judicial control of soft law acts of agencies is rather limited, and therefore the conditions of the delegation are somehow restrained. On a quite shallow and textual level, it could be added that Article 263 TFEU exempts from direct judicial review only recommendations of the Commission, the ECB and the Council. When it comes to acts of other bodies, including EU agencies, the Article requires that they must produce legal effects in order to be reviewable - and it does not specify that such effects must be necessarily binding. Therefore, it is only regrettable that in FBF v ACPR, the Court denied direct judicial review even in case of soft law produced by EU agencies.

[54] See judgments of 13 June 1958, Meroni (9/56, EU:C:1958:7), of 14 May 1981, Romano (98/80, EU:C:1981:104) and of 22 January 2014, United Kingdom v Parliament and Council („Short Selling", C-270/12, EU:C:2014:18).

One step further is the sole issue of the sustainability of the conclusion of Belgium v Commission towards soft law in general. As discussed in scholarly works[55] as well as in AG opinions,[56] EU soft law acts are apt to change the normative sphere of their addressees or third parties even despite the lack of binding legal force. They have an important impact on the normative landscape in the EU and they significantly influence the governance in the EU. Such a power would definitely deserve an effective judicial control - especially through the most direct way under Article 263 TFEU, and not only through a more complicated preliminary reference procedure. Moreover, in both BT v BNB and FBF v ACPR, the Court confirmed that EU soft law acts as such present a reviewable material. Only the text of Article 263 TFEU (together with its own case-law which extends the exemption of recommendations and opinions to all EU soft law acts) prevents the Court from providing for an appropriate control of acts within the action for annulment. The whole approach of the Court thus creates an internal systemic discrepancy: When a soft law act is challenged by a privileged applicant under Article 263 TFEU, the Court denies looking at it. But when the very same act finds its way to Luxembourg through the preliminary reference procedure, the Court is automatically willing to assess it and eventually to invalidate it.

VI. CONCLUSION

With regard to EU soft law and its legal effects, the case in BT v BNB pointed out to a specific category of recommendations adopted by the EBA under Article 17(3) of its founding regulation No. 1093/2010. However, the Court of Justice did not dare to examine the real legal effects of such recommendations and only referred to the Grimaldi doctrine - but this doctrine is predominantly about the duty of national courts to take into account those recommendations which aim to help with the interpretation of EU hard law norms or of domestic implementing provisions. It seems that this duty is somehow copy-pasted anywhere where EU soft law plays a certain role. However, a closer look at specific recommendations issued under Article 17 Regulation No. 1093/2010 uncovers that the Grimaldi doctrine has (or should have) a more limited scope.

[55] GENTILE, G., "Ensuring effective judicial review of EU soft law via the action for annulment before the EU Courts: a plea for a liberal-constitutional approach", *European Constitutional Law Review*, 2020; UTRILLA, D., "Governing a pandemic through soft law: challenges for judicial review", *EU Law Live. Weekend edition*, 13/06/2020; ELIANTONIO, M. "Judicial Review of Soft Law before the European and the National Courts: A Wind of Change Blowing from the Member States?" in ELIANTONIO, M.; KORKEA-AHO, E.; ŞTEFAN, O. (eds.), *EU soft law in the member states: theoretical findings and empirical evidence*, Hart Publishing, Oxford, 2021 (EU law in the member states), p. 283.

[56] Opinions of Advocate General Bobek delivered on 12 December 2017, Belgium v Commission (C-16/16 P, EU:C:2017:959) and on 15 April 2021, Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR) (C-911/19, EU:C:2021:294).

In fact, not all types of recommendations serve to enlighten the meaning of hard law. The role and the content of the EBA recommendation in question is different, since it establishes breach of EU law; and only based on this conclusion, it recommends actual conduct. Therefore, it reminds rather a hybrid act that includes a binding declaration of the breach of EU law which is followed by a non-binding suggestion of steps to be taken to comply with EU law. It is pitiful (and contrary to its own case law) that the Court of Justice did not assess the content of the act properly, it did not acknowledge its hybrid character, and hence it gave precedence rather to form over substance.

It is highly probable that the judgment in BT v BNB will be used (and it has already been used in case FBF v ACPR) as a reference proving the possibility and willingness of the Court of Justice of the EU to assess validity of EU soft law acts within the preliminary reference procedure, and to actually declare a soft law act invalid. Indeed, one reads in the operative part of the judgment that the EBA Recommendation "is invalid". But in practice, the Court did not do so, or at least not fully. The Court only found incorrect a conclusion included in the alleged preamble of a soft law act - which should rather be considered a binding part of the whole document.

However, it does not mean that the EBA Recommendation is a false soft law, i. e. a hard law act only pretending to be soft law. In fact, it seems problematic to apply the test of genuine soft law as developed by the Court in case Belgium v Commission[57] to all types of non-traditional soft law acts. Even though soft law is a phenomenon which restrains the classic binary concept of law (either it is binding, or it is not law at all), the Court still applies a kind of binary logic when assessing soft law acts: Either it is a genuine soft law act, or it is a hard law act in disguise. The Court seems to be unwilling to admit that the concept of soft law can have sub-variants that deserve a special and adapted treatment.

Apparently, we have to wait for the proper invalidation of a proper prospective legally non-binding EU act. While in case FBF v ACPR, the Court proceeded to review a prospective soft law adopted by the EBA (guidelines), it found it perfectly valid[58] - contrary to the opinion of the Advocate General who suggested that the given guidelines are invalid for the lack of competence of the EBA.[59] We will see whether future cases can lead to invalidation of proper soft law acts and what consequences it will entail.

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[57] Judgment of 20 February 2018, Belgium v Commission (C-16/16 P, EU:C:2018:79).

[58] Judgment of 15 July 2021, Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR) (C-911/19, EU:C:2021:599).

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

Moreover, what remains is also a question whether it makes sense to reject the direct assessment of legality of soft law acts under Article 263 TFEU. If we accept that the EBA Recommendation is, indeed, a genuine EU recommendation, then the given case proves that EU soft law acts as such are apt to be reviewed by the Court of Justice and even to be declared invalid - even if they do not produce binding legal effects. Therefore, it creates an inconsistency in the whole system of judicial review. But it seems to be another episode. The saga on EU soft law obviously continues and we can look forward to future developments.