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THE USE OF SOFT LAW IN EU BANKING REGULATION

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FREQUENT ABBREVIATIONS

- AG (Advocate General of the Court of Justice of the European Union)
- BCBS (Basel Committee on Banking Supervision)
- BoA (Joint Board of Appeals of the European Supervisory Authorities)
- BoS (Board of Supervisors of the European Banking Authority)
- C.C. (Italian Civil Code)
- CET1 (Common Equity Tier 1)
- CFREU (Charter Fundamental Rights of the European Union)
- CJEU (Court of Justice of the European Union)
- CRD IV (Capital Requirements Directive)
- CRR (Capital Requirements Regulation)
- DTS (Draft Technical Standards)
- EA (European Agencies)
- EBA (European Banking Authority)
- ECB (European Central Bank)
- ECJ (European Court of Justice)
- EP (European Parliament)
- ESAs (European Supervisory Authorities)
- ESCB (European System of Central Banks)
- ESFS (European System of Financial Supervisors)
- ESMA (European Securities and Markets Authority)
- EU (European Union)
- FBF (Judgment of the Court […] Fédération bancaire française, C-911/19)
- FSB (Financial Stabity Board)
- FSF (Financial Stability Forum)
- G&R (Guidelines and Recommendations issued by the European Banking Authority, art. 16)
- GC (Governing Council of the European Central Bank)
- GFC (Global Financial Crisis)
- GHOS (Group of Governors and Heads of Supervision of the Basel Committee on Banking Supervision)
- GL (Guidelines)

- IFSs (International Financial Standards)
- IMF (International Monetary Fund)
- IOs (International Organisations)
- ITS (Implementing Technical Standards)
- LSIs (Less Significant Institutions)
- MoU (Memorandum of Understanding)
- NCAs (National Competent Authorities)
- Q&As (Questions and Answers issued by the European Banking Authority, art. 16b)
- QMV (Qualified majority voting)
- RTS (Regulatory Technical Standards)
- RWAs (Risk Weighted Assets)
- SB (Supervisory Board of the European Central Bank)
- SMEs (Small and Medium Enterprises)
- SR (Single Rulebook)
- SSB (Standard Setting Bodies)
- SSM (Single Supervisory Mechanism)
- SSMR (Single Supervisory Mechanism Regulation, Regulation 1024/2013)
- TEU (Treaty on the European Union)
- TFEU (Treaty on the Functioning of the European Union)
- TRNs (Transnational Regulatory Networks)
- VCLT (Vienna Convention on the Law of Treaties)
- WTO (World Trade Organization)

INTRODUCTION

Every legal order establishes rules that govern various aspects of the society it affects. They regulate how business must be conducted, how taxes must be collected, how public powers are exercised, how contracts are concluded. In the contemporary legal orders of the European Union (EU) it is the Constitution that establishes are rules are set. They establish the organs who have legislative powers, the limits and the procedure to approve them. Even in International Law the approach is similar: states agree to sign treaties and subsequently ratify them according to their national Constitutions. If a treaty establishes an international organisation that has the power to issue rules it will establish, in its founding treaty, how that can be enacted.

The fundamental characteristic of laws is that they are binding. That does not necessarily mean that every rule establishes a sanction for those who do not comply with it or that the legal order will force compliance through enforcement procedures using the public force. Sanctions and enforcement are one possible effect that is produced by formal binding law. Binding, more broadly, means that if a rule describes one or multiple situations in abstract terms, when situations that fit into that description happen in the real world that will automatically trigger legal effects. the fact that a sanction is absent is a consequence of how the rule is worded but it does not affect its status as a legal rule.

Soft law is different insofar there are no direct *legal* effects attached to it. If that also meant that it is legally irrelevant then there would be no need for this analysis and certainly it would not have become such a popular method of governance and regulation. The fact is that, while being different from binding law, it is still part of the legal order, results in legal act and is not completely devoid of legal and practical effects. Those effects vary, depending on who issues it, in what context, to whom it is addressed, etc.

Banking and financial regulation constitutes an area where regulation through soft legal act has thrived becoming widespread in use and very relevant from the perspective of a legal analysis on the regulatory approaches.

The following analysis looks into and aims to provide answers (fully aware that a definitive answer is all but impossible due to the evolution of the issue and the uncertainty that still very much surrounds it) to the following questions:

- What are the effects of soft law and what, more specifically are the effects in banking and financial law?
- Why has this field of regulation become such a fertile ground for this regulatory approach? And how does this in practice work?
- What are the problematic aspects of soft law?
- In relation to EU law specifically, are the current checks and balances over the adoption of soft law sufficient and proportional in relation to its supposed effects?

Banking regulation has developed to be a multilevel framework of governance and lawmaking. Each level usually produces both binding law and soft law. In other instances, what is initially issued as soft law at one level, subsequently goes through the so-called *hardening* process and becomes binding law at a lower level. These mentioned levels broadly correspond to international/global, EU and national levels of regulation. Within each level, multiple bodies, authorities and organisations engage in rulemaking through production of soft law which comes in the forms of guidelines, best practices, recommendation, standards, common approaches, cooperation between supervisory authorities.

At the international level there are informal fora and organisations that are usually made up by representatives of the national supervisory authorities. As they do not retain the power to conclude treaties under international law they reach agreements that are non-binding. The various so-called networks are divided by field of competence. The most relevant for this analysis is the Basel Committee on Banking Supervision (BCBS). At the EU level the general regulatory framework is adopted by the competent institutions of the EU in accordance with general regulatory powers. After the Global Financial Crisis of 2008, the aim of the EU regulator has been to develop a common regulation applicable to all banks operating in the EU, called the "Single Rulebook", which in turn consists of a multilevel system. The highest level is constituted by EU secondary law which largely reproduces the standards developed by the BCBS that were previously soft but have become generally applicable binding law

in all the EU member states. The second level is regulation issued by the Commission. The third level is the central point of focus of this research. The European Banking Authority, created in 2010, has relevant regulatory powers through the enactment of soft acts. The last level is constituted by implementation at the national level and the executive supervisory activity carried out by the European Central Bank (ECB) and the National Competent Authorities (NCAs).

The main rationale behind this governance structure is that the lawmaking process will be more efficient by being developed as technical standards instead of policy choices. As it is a complex and ever evolving sector, regulation, to keep up with real world developments, has to be developed rapidly and by highly expert bodies, to be effective. However, this also raises a lot of issues. It is unclear from this structure who retains the rulemaking powers, what is the impact of soft law, if there are limits to how it can be used?

Binding law, both at the international and internal level, in consideration of the relevant impact that it produces is accompanied by a number of safeguards that ensure that rules are shared and approved in accordance with democratic principles. The approval by parliaments and the public debate and scrutiny that come with it ensure that the rules that are adopted are, somehow, expression of the will of the majority. Soft law does instead resemble a set of rules that is developed by a small circle of technical experts and business representatives, regardless of whether they are shared by the wider public. This research will examine whether the current, *ex ante* and *ex post*, checks and balances are sufficient in relation to soft law or if changes should be made.

In particular it will focus on the role of the EBA as a *de-facto* regulator and the role of the Court of Justice of the EU (CJEU) in reviewing the legal acts issued by the EBA. As explained, the Authority has gained a primary role in constantly developing and updating the relevant, applicable law for supervisory authorities and credit institutions. The costly and lengthy procedure that must be followed for approval of EU secondary legislation and the limited technical role of the Commission which could not exercise such role as a day-to-day regulator when considered in light of the pressing need for a harmonised regulation common to the entire internal market have resulted in

conferring the task of detailed regulation to the EBA. The reasons, the issues and the effects of this allocation of powers will be analysed.

Chapter 1 will provide a general assessment and analysis of soft law. Who issues it, the various and countless forms of law that can be included in the wide category of soft law and what are the legal effects it by it will be described. Then it will focus on the use of soft law in international financial regulation. It will look into the division of competences and powers in the various international Transnational Regulatory Networks (TRNs) responsible for drafting the relevant international standards and the mechanisms that ensure compliance is reached. A more detailed analysis will describe the normative output of the two most influential Networks: the abovementioned BCBS and the Financial Stability Board (FSB).

As the focal point of this research is soft regulation within the EU Chapter 2 will provide a detailed analysis of all the sources of banking regulation in the EU. It will highlight how the EU and its institutions and agencies participate in TRNs and help develop the international standards and how these become part of EU law. it will then focus on the regulatory activity of the EBA and, to a lesser extent, of the European Central Bank (ECB). It will become apparent that a significant part of banking regulation in the Single Market of the EU is composed by soft law, or at least hybrid law, that the EBA either directly issued or drafted.

Chapter 3 will instead analyse what are, currently, the guarantees and the checks and balances that balance such an important conferral of powers to the EBA. It will be explained how, while so much of EU law is subject to stringent controls and political scrutiny, in this case neither is sufficiently developed. Both internal controls as procedural safeguards that lead to adoption of soft law and, external ones as judicial and quasi-judicial review over the content of the approved act will be highlighted. Obviously, more importance will be given to the role of the CJEU, due to the paramount functions that the Treaties confer to it. In this light a specific analysis will be provided of a recent case that might have settled some of the most pressing questions over reviewability of soft law and whether these answers are sufficient or not.

CHAPTER I

I. "SOFT LAW" AS A SOURCE OF LAW

1. Definitions of Soft and Hard Law **2.** The Effects of Soft Law **3.** Soft Law in International Law **4.** Soft Law in International Financial Law **5.** The Examples of the Basel Committee and the Financial Stability Board

1. Definitions of Soft and Hard law

The inevitable starting point of any analysis or study on a human phenomenon is the definition of it; that will immediately make the reader aware of what will be included in the analysis, what instead lies outside the purpose of the research and what problems arise in relation to it.

Soft law is a relatively new concept and new development in the history of law. Unlike most other laws, rules, or acts having legal value you cannot find a universal definition of the instrument as a source of law given by another document having legal value, making it more difficult to define it in an exact and complete manner. Making reference to the positivist legal theory a rule can only be considered a legal rule when it stems from a procedure or an event that, in accordance with a certain legal system, has the subsequent effect of becoming a valid rule within that same legal system[1]. Without entering the discussion on what constitutes law which is beyond the scope of this analysis, that approach is useful in identifying the most immediate characteristic of soft law: the term makes reference to a heterogenous group of legally relevant acts that cannot be identified *a priori* so that one must look into existing acts of soft law to find the common features in order to assess the legal phenomenon[2].

In arguably all legal systems that aim to respect the rule of law, there is a prior act or statute, usually but not necessarily of a higher hierarchical grade, that specifies which are the sources of law, which are the effects of such sources, which organs have the rule-making and law-making power and according to which formal or informal

[1] Franco Modugno, "Ordinamento, Diritto e Stato" in Franco Modugno and Paolo Carnevale, *Diritto Pubblico* (2nd edition, Torino: G. Giappichelli, 2015), 22.

[2] R.R. Baxter, "International Law in 'Her Infinite Variety" (1980) 29 The International and Comparative Law Quarterly, 550-551.

procedures can an event become an act of valid law; normally this will be a regulated procedure to which one or more organs of the state participate but nothing prevents so called *mere facts* or *natural facts* to become legally binding rules within a certain legal system[3] . That is the case with national constitutions, especially in civil law countries. In the Italian Constitution[4], for example, article 72 regulates how parliament can adopt statutes while articles 76-77 lay out the conditions according to which the government can adopt the so called acts having the force of law; further articles establish its validity, effects and relevance within the formal hierarchy of sources of law (which for all its flaws is still a relevant concept), namely that it must be consistent with the Constitution and that only a subsequent act of law can repeal or modify it. The features might be slightly different in common law countries, but it is still very much clear where the power to set rules resides and what are the effects of such rules.

The same logic applies in the international legal system: states will be bound because they signed a treaty thus explicitly consenting to be bound by it, or through practices that becomes customary international law (and could thus be defined as a form of implicit consent). In the case of the former a definition of what constitutes a treaty is enshrined in article 2 §1 (a) of the Vienna Convention on the Law of Treaties (VCLT)[5] making it a formal act that is a source of law in the international legal system. The latter instead is an example of a *natural fact* that nonetheless is, when the necessary conditions are met, a source of law: article 38 of the International Court of Justice (ICJ) Statute[6] gives a general definition of custom and through its case law the ICJ has further specified what gives rise to a rule of customary law. In both cases the same, abovementioned, procedure takes place: a legal document establishes what acts or facts will be legally relevant and will give rise to a valid and binding rule in the legal system to which the document refers to.

[3] Mathieu Carpentier "Sources and Validity", chapter in Pauline Westerman, Jaap Hage, Stephan Kirste and Anne Ruth Mackor, *Legal Validity and Soft Law* (1st edition. Vol. 122. Cham: Springer International Publishing, 2018), 77.

[4] Costituzione della Repubblica Italiana. 1/1/1948. (GU n. 298 del 27-12-1947).

[5] "*(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation"*. Vienna Convention on the Law of Treaties, art. 2, May 23, 1969. 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

[6] Charter of the United Nations and Statute of the International Court of Justice, art. 38 June 26, 1945, 59 Stat. 1031; T.S. No. 993; 3 Bevans 1153. According to it the court will only apply treaties, customs, and general principles thus leaving out both jus cogens and soft law.

Another more complex example that threads the needle between national and international legal systems can be found in international organizations. For example, the European Union is an organization that was created through an international treaty signed by its member states. They intended to give some of its organs the power to approve laws having varying effects on those same member states and its citizens. the Treaty on the Functioning of the European Union (TFEU)[7] sets out a list of what are the sources of law within the EU legal system and whether they only bind the member states or have direct effect on the rights and obligations of its citizens.

Unlike the examples listed above soft law is a category that has been attached to a plethora of possible existing legal acts and documents to which scholars have been struggling to give an exact and universal definition; there is no consensus on what constitutes soft law yet, but rather there is more consensus on what does not constitute soft law. The most common method is to make reference to examples, and you will find different lists according to different authors[8]. Some common examples include: United Nations' General Assembly Resolutions, Memoranda of Understanding (MoU) between states that will not constitute a formal treaty, codes of conduct or self-regulation provided by private organisations.

A sufficiently comprehensive list of soft instruments generally used in international law includes[9]:

- Provisions contained in binding instruments formulated as suggestions or recommendations formulated in such vague terms that they cannot come to generate an obligation.
- Provisions containing specific obligations enshrined in a non-binding instrument.
- General principles that do not indicate specific actions on how to achieve them and do not have any enforcement mechanism.
- Soft law instruments kept attached but separate from other acts of hard, binding law.

[7] See article 288 ff. TFEU. Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

[8] Carpentier (3) 20.

[9] Ian Johnstone "Law-making through the Operational Activities of International Organizations" (2008) 40 George Washington International Law Review, 87-122, chapter in Edward Kwakwa, *Globalization and International Organizations* (Aldershot; Burlington, VT; Ashgate, 2011), 383.

This explains why traditionally soft law has been identified as everything that neither falls under the categories of traditional law, intended as fully binding *hard law* nor can be traced back to legally irrelevant facts or acts that lie outside the legal system[10]. It has been defined by some international law scholars as an *infinite variety*[11] of legal instruments that are neither fully binding nor completely non-binding. Therefore, it must first be defined what constitutes law and what constitutes the so-called *hard law* (which is, per definition, binding).

A thorough analysis and what is the role of the state and the public authority and what gives them the legitimacy to impose rights and obligations upon natural and legal persons would require an entire thesis, but a general overview is needed to introduce the concept of soft law.

Legal systems that aim to respect the rule of law and aim to achieve legal certainty must give themselves rules on rule-making and on the effects that rules enacted in accordance with such provisions will have. That means defining, within the legal system, who has the power to generate laws, who has the power to enforce them and what checks and balances are put into place to make sure that such rules are respected and that authorities do not overstep their respective powers. This generally designed system, is made up to allow those who are subject to such rules to understand what rules are binding upon them and which rules instead do not constitute law as they do not meet the criteria set forth in the established rules on rule-making process. Examples of this latter type are behavioural or moral rules which are not legal norms, not because they lack a sanction (though they do lack a sanction), but rather because they concern circumstances that the legal order has no interest regulating through its legislative power. Rules of behaviour carry a certain hortatory content but are not legal rules by any means. A comparable situation is found in the International Legal System as states will only be bound by those rules to which they gave consent to, either by agreeing to a treaty or through general practice that leads to custom. Within a legal system, rules that stem from the bodies to which law-making power is granted will constitute law anything else is not law at all.

[10] Andrew Guzman, "International Agreements", chapter in *How International Law Works: A Rational Choice Theory* (Oxford Academic, 2008), 142.

[11] Baxter (2), 566.

Throughout the history, legal scholars have developed several theories on what the defining and comprehensive characteristics of legal rules are: some focus on the content of laws, aiming to find one or few common topics that, to varying degrees are present in laws whatever legal system they belong to; on the other hand, some other theories aim to find a common formal and logical structure that can apply to legal norms regardless of what aspect of the world they regulate.

These are the most common theories used to define what constitutes a legal rule[12], when it comes to defining them according to their structure rather than their content:

- Some argue that what sets apart legal norms enacted by the state or another public authority and belonging to the legal system from, for example, moral norms or behavioural norms is the provision of a consequence in case of breach. This reasoning notices that both kinds of rules regulate human behaviours and the interactions between individuals and the role of individuals within a society. But while for moral norms there is no direct consequence in case an individual doesn't follow such rules, so that every individual can freely determine whether he will be complying, that is different for legal norms. The legal system will necessarily set up a system of sanctions in cases of breaches of its rules and mechanisms to enforce the rules and said sanctions.
- Shifting the definition on the formal features of legal rules some theories focus on its intrinsic formulation. Lon Fuller, for example, argued that a law must possess *"generality, clarity, public promulgation, stability over time, consistency between the rules and the actual conduct of legal actors, and prohibitions against retroactivity, against contradictions, and against requiring the impossible[13]"*.
- A narrower version of the definition above is that a for a rule to be incorporated in a law it must be formulated in a general and abstract way. This means that even when its wording brings to a necessarily narrow scope and application it is still impossible to determine *a priori* to whom and in how many situations it will be applied. Potentially it will be applied as many times as the situation,

[12] N. M. Korkunov, W.G. Hastings (Translator), *General Theory of Law* (New York: Augustus M. Kelley, 1968, originally published, New York, The Macmillan Company), 79-115.

[13] Lon L. Fuller, *The Morality of Law*, 2nd revised edition (New Haven: Yale Univ. Press 1969) Chap. 2. Cited in: "Brian Z. Tamanaha, "Formal Theories", chapter in *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 91-101".

described in general and abstract terms in the statute, will happen in the real world[14].

- Finally, the most formalistic approach, labelled as legal positivism, foregoes a definition based on its content or formal characteristics altogether and instead focuses on the rule-making process. All rules that are enacted by the competent authorities and according to all the applicable rules establishing a certain procedure are laws. All the rules approved in accordance with the laws regulating the legislative process are therefore legal rules, regardless of what it aims to regulate. This theory is able to explain how the same rules can apply to such a great variety of subject matters. However, it falls short in explaining how, in some cases, a process that is not formally regulated is still in the end able to produce binding laws (e.g. a national constitution when a new state is created, or customs)[15].

The debate on what issues law should regulate will be set aside as it is outside the scope of this research. An analysis on what are the logical and formal features of any given rule is instead helpful for this purpose. Since soft law could, as a matter of principle and from a purely theoretical perspective, regulate whatever issue might arise this analysis will only focus and the formal aspects of soft law: what constitutes it, who has the power to enact it, under what conditions and what are the effects of soft law.

There are examples of categories of rules which necessarily have a certain structure and produce a certain effect. A criminal statute, for example has the necessary effect of limiting the personal freedom of citizens as it renders one or more conducts of an individual unlawful. Rules governing the exercise of a specific administrative power necessarily have the effect of creating such power for a public authority and establishing, to a wider or narrower degree, when, how and for what purposes it shall be exercised. Such rules either regulate those issues or they necessarily belong to a different category.

Soft law instead has no such limitations. This is unless there is an external limitation provided by a treaty or by an act of domestic law that while conferring to some body

[14] Franco Modugno "Le Fonti del Diritto" in Modugno (1), 93-94.
[15] Carpentier (3) 22-25.

the power to emanate soft law it also sets forth its limitations and conditions. But since soft law is not binding there is no real legal consequence if such rules are not respected. One can argue that there is a difference with hard law regarding this matter as soft law usually provides recommendations or general suggestions instead of a precise obligation[16], but this is not a necessary characteristic, even though it is usually the case. As explained above, from a theoretical standpoint soft law has no limitations regarding the topics that it regulates, so ultimately the difference comes down to what effects soft and hard law produce respectively.

For all the different subject matters law can regulate no one questions the fact that it is binding upon those to whom the law applies. Almost always the law will provide for a mechanism for it to be enforced either through the judiciary power or through some other avenue provided by it.

Again, I will use a few examples from the Italian legal order: the Italian Civil Code (C.C.) gives a definition of the conditions that need to be met for two or more natural or legal persons to conclude a valid contract[17]. Then it explicitly provides that a valid contract has the same effect of a law between the parties which concluded it (by this also implying that a law is always binding)[18]. In case of a breach of the obligations arising from a valid contract the law provides either specific mechanisms of compliance or, if they are not applicable, the right to recover the damages that the breach has caused through monetary payment[19]. To see to that the damaged party can resort to the judicial system and ultimately to the public force that will force the performance of the obligation.

The government and all public offices in general, when exercising a power must respect the rules regulating the procedure and the conditions for the exercise of public powers in general[20] and the requirements for the specific act in question. If those rules are not respected those affected can again resort to a judge to see the applicable rules, binding on the Public Administration enforced and/or to recover damages.

[16] Baxter (2) 550, 561, 565. Also in Jan Klabbers, "The Redundancy of Soft Law" (1996) 65 Nordic Journal of International Law, 178.

[17] Art. 1321 C.C. REGIO DECRETO 16 Marzo 1942, n. 262 [Approvazione del testo del Codice civile. (042U0262)]. (GU n. 79 del 04-04-1942).

[18] Art. 1372 C.C.

[19] Art. 1218 C.C.

[20] See Legge 7 Agosto 1990, n. 241. (GU n. 192 del 18-08-1990).

Even Constitutional norms regulating the allocation of powers between the various branches provide solutions for cases of violations or non-performance of the procedures. Though the remedy usually is not as straightforward as in the abovementioned cases as there are limits to how much the judicial branch can meddle into issues relating to the other powers of the state, the State is most certainly not indifferent as to whether those rules are respected and has envisioned systems of checks and balances to ensure compliance.

The same rationale applies to international law: treaties validly signed by states are binding upon them according to the Vienna Convention on the Law of Treaties[21]. The same treaty also regulates the consequences of non-performance by any signatory party[22].

So not necessarily a legal norm must provide a sanction: even if statistically that is often the case, laws exist that do not provide sanctions. The examples cited, though, provide a clear pattern: almost always a legal rule will also have one or more avenues to ensure compliance and to prevent and remedy to violations of such rules. This signals the fact that, the legal system, once it enacts a rule will resort to all the avenues that are available to it to push for or force compliance; that includes, when necessary the use of tribunals, the judicial power and the public force.

When the remedies provided are ineffective so that compliance cannot be ensured the legal system is failing to apply the law it has enacted, making it unable to ensure compliance even though it expected such law to be complied with. When the legal system does not provide any remedy available it is a choice of the legislator to not establish any. In both cases, either by choice or by mistake, there is no judicial or extrajudicial remedy available in cases of non-compliance. However, this does not affect the binding nature of the rules in question: it is a factual rather than formal quality of the rule in question which remains binding, but is, due to external factors, not applied or complied with.

It is one thing to claim that a rule is ineffective or that lacks consistent application or that it can be easily circumvented. It is entirely different to claim that a rule has, by design, no effect on those to whom it applies. In the former case a rule will lack

[21] Art. 26 VCLT.
[22] Art. 60 ff. VCLT.

efficacy and will not be able to influence the behaviour of the legal or natural persons to whom the rule in question concerns. Still, it will be a perfectly valid rule, from a formal perspective. This reasoning is defined as *source validity*[23] and it aims to separate the formal validity of a statute to the effects that it produces in the real world. As explained above, any rule that is enacted in accordance to the rules establishing and regulating its source is valid, is part of the legal system and can and must be applied to the extent of its meaning. If a rule is enacted by a body that was not competent to regulate or it is in violation of a constitutional principle then it will, in principle, not only not be applied but it will be entirely unable to produce its intended effects.

On the other hand, if the wording of a rule is such that it can be disregarded without consequences, or if the judicial remedies are ineffective that only regards its efficacy. Nothing affects its validity intended as its being a rule part of the legal order. There Is no question that it is in theory a rule capable to produce its full effect. In short there is no formal or structural issue that prevents it from being fully binding and effective, instead there will be an external cause for its ineffectiveness.

Other theories instead tend to equate validity and efficacy. They point to the fact that what ultimately needs to be looked at is whether a rule is capable of producing its effects not in theory but in reality. If it is not able to impact behaviours and have a considerable rate of compliance, then it can hardly be labelled as valid. This more realistic approach focuses not on what its effects are according to its source, but on what effects it is able to produce in the time and space where it should be applied. Its bindingness is not a formal quality but a fact[24] that either happens or, to varying degrees, does not happen. According to this theory though, if a rule is not binding or is not capable of affecting human behaviours then it is not valid at all. So by being a law a rule is either binding or not law at all[25].

This is what sets law apart from, for example, moral or social norms: those will be more or less capable of influencing people's choice and will have higher or lower levels of compliance. However, there is no reaction by the legal order if such rules are not respected. Their ability of being complied with results not from its formal effects

[23] Carpentier (3) 24.
[24] Carpentier (3) 21.
[25] Klabbers (16) 167.

as stated in law but from outside factors. Crucially compliance will always be voluntary, there will not be any enforcement mechanism and there will not be any sanction if that is not the case.

Both theories are relevant in explaining what a soft law instrument is. Soft law is fully valid within the legal system according to the first theory: they are rules that are enacted according to established procedures and by the competent authorities. They lack a binding effect because they were never intended to be binding rules not because they are somewhat less valid.

With regards to the second approach instead, the analysis gets trickier. Its legal status never change, soft law will always remain non-binding otherwise it would become hard law. However, they can still generate a fairly high rate of compliance. So, you will have a soft rule that is by design non-binding and therefore can be complied with but cannot be enforced; the legislator (soft legislator in this case) always envisioned it not being binding so the level of respect it generates is dependent on outside factors and not on any enforcement system. However, such soft law instrument may never or rarely incur in breaches despite the fact that it is not binding, because the subjects to whom it applies are committed to respecting and applying it. In either case the legal and formal nature of the act does not change, it is still a non-binding legal act.

From this analysis it follows that, in principle, there is no difference between *hard* and *soft* law regarding their respective content and structure. Both are rules that describe one or more situations that may or may not take place in the future. They describe such situations in general terms and lay out what the effect will be in case that event takes place. The difference is then in what will the consequences be for the recipients of such rules. For hard law it will create binding obligations, for soft law it will aim to influence them to compliance, but what is certainly true is that it is not binding.

Critics of soft law argue that either the law is hard law because it constitutes a binding obligation that can be enforced or is totally irrelevant for what concerns the legal system[26]. According to that argument soft law is either outside the scope of legal norms and the legal system or it will be enforced through various mechanisms which

[26] Klabbers (16) 179.

have the common feature of "*transforming"* or "*hardening"* it into hard law. In the former case it is essentially the same as behavioural, social or moral norms as it lies outside the legal system. In the latter case instead, since it is not a legal instrument at all it shall somehow turn into hard law to produce any effect and to be applied or enforced[27].

In other words, the argument goes that soft law can never be applied in a domestic or international court as such because it is a somewhat lower and lesser type of rule that is not entirely legal. In the end a court's decision cannot be based on such a provision[28].

Instead, soft law implies exactly that there are various intermediate levels of bindingness[29]. Soft law includes everything that is in between: it is neither binding in the common sense nor not binding as in not legal. Arguing that such effect does not exist would be ignoring a reality that is, at this time, well established.

Ultimately the definition and description of soft law relies on whether one focuses more on the word *"soft"* or on the world *"law"*. If one relies on the adjective soft, then they want to highlight the fact that by being different from law then it is not really relevant and it should be avoided or ignored, from the standpoint of a legal analysis. Those who instead point to the word law stress the fact that while not being a legally binding rule it is still a valid legal rule.

To sum up then and to give a general definition of soft law it must first be stressed that a definition is imprecise and cannot possibly capture all the different aspects of the subject matter of this study. Soft law acts usually defines acts that have *some* legal effect that can come in various forms. They are not binding but neither they are irrelevant, there is no direct sanction in case of breaches but neither does breaching it come entirely without consequences and they come in many different forms, in many different legal system and with different purposes.

2. The Effects of Soft Law

If giving a definition of soft law was difficult enough, describing its effects might possibly be even more difficult. It is certain that it is not binding otherwise it would be

[27] Ibid.
[28] Klabbers (16), 172 ff.
[29] Guzman (10), 144.

law without any need to specify it is soft. It is equally certain that it does produce *some* effects. Claiming the contrary would be tantamount to agreeing with those who try to downplay the role of soft law as something that is either irrelevant or that needs to be somehow attached to hard law to produce any effect.

The effects are, yet again, variable, depending on who and for what purposes enacts soft law. In general, it can be said that soft law creates the expectation that it will be complied with by its recipients or by the actors those who enacted it[30]. It is sometimes labelled as *quasi-legislation* because it does not generate compliance through the threat of sanctions or through enforcement but rather through influence and voluntary submission[31].

To deny this basic assumption would be equal to claim that soft law has no effect at all. While it is true that generally it does not have a binding effect and there are no enforcement mechanisms, it does not follow that it has zero effect. If it had no effect regulators would not put effort into enacting it and scholars would not put effort into studying it from a legal perspective. And most importantly, if it had no effect, one would assume that there would be very little compliance, but reality clearly shows that this is not the case.

As was stated in the previous paragraph giving a general definition of soft law is a challenging task. Either it is too generic so that it ultimately includes so many things that such definition is useless, or it ends up leaving out some situations that would need to be considered[32]. So much so that most descriptions of soft law in general are limited to a list of instruments from various settings that are generally considered to fall within that category[33].

In analysing the legal consequences of soft law though, it will be helpful to at least divide it into different sub-categories to describe them more accurately and to get a clearer understanding of the varying effects.

Unlike formal *hard* law, whose effects are well established, the effects of soft law are unclear. It falls short of being binding and it includes what are almost non legal but

[30] Tadeusz Gruchalla-Wesierski, "A Framework for Understanding 'soft law'" (1984) 30 McGill Law Journal, 46.

[31] Greg Weeks, "Defining Soft Law", chapter in *Soft Law and Public Authorities: Remedies and Reform* (vol. 11, Portland; Oxford, Hart, 2016), 13.

[32] Ibid.

[33] Ibid, 18. Also in Gruchalla-Wesierski (30) 44 and Klabbers (16) 168.

rather acts of political nature (both domestically and internationally)[34] and everything in between these two extremes[35]. It can eventually lead to having effects comparable to hard law, though not due to its binding nature, or it can be used as a tool to support and help interpret and clarify a previous act of hard law. Dividing it into subcategories according to the various settings in which soft law comes from helps looking into its effects.

In addition to those not being clearly laid out, it is said that not all soft law is created equal: different instruments may fall under this big label but there are "variable degrees of softness[36]". Soft law rarely instruments rarely specify they are intended as soft law[37] (at most it could affirm that it is "not binding[38]"). That is because they are often hard to establish a priori and because sometimes the soft nature can only be deducted from outside factors and not outright from its nature or approval process[39]; some soft law instruments may have a higher influence, some others may be so soft as to almost be considered as *non-law*[40].

In traditional international law soft law mostly comes in the form of agreements signed by states that did not intend to sign a binding treaty. This would include bilateral or multilateral agreements that do not possess all the qualities required by the VCLT[41] to create a binding treaty and must therefore be considered as some sort of atypical commitment which does not create a legal obligation[42]; if they were considered *treaties* according to that definition, they would be binding upon the parties, there could be sanctions or retaliation in case of non-performance and they could be subject to interpretation and jurisdiction of the ICJ or other international tribunal.

These informal agreements instead usually contain general commitments rather than specific obligations and there is an agreement between the contracting parties that they will not give rise to binding obligations. There is no question that this practice is

[34] Guzman (10) 142, Baxter (2) 550.
[35] Ibid, 19.
[36] Weeks (31) 19.
[37] Klabbers (16) 171.
[38] See again Art. 288 TFEU.
[39] Klabbers (16) 171.
[40] Gruchalla-Wesierski (30) 47.
[41] Art. 2 §1(a) VCLT.
[42] Baxter (2) 550-551.

lawful: even the most sceptical agree that if states can agree to be bound they can most certainly agree not to be bound[43].

There are various reasons on why states would find it desirable to conclude agreements in which they agree not to agree so they remain free, and they will be discussed in the following paragraph.

Another common source of soft regulation is international organisations. This is either due to the lack of formal rule-making powers afforded to it by the treaty establishing it that forces the organisation to use soft instruments[44], or when states explicitly agree to only give the organization power to enact informal rules or documents. States will be more willing to be a party to the organization because they will not necessarily be bound by whatever decision they made; if that was the case some states may be more reluctant and opt not to participate in such organization; at the same time they will still be expected to cooperate and respect its rules.

Often, bodies both at the international and national level adopt so called *codes of conduct*, by which they enact minimum standards in carrying out certain activities. These instruments have also been labelled as soft law but their peculiarity resides in the fact that they aim to regulate the behaviours of private actors or even natural persons, rather than states[45].

Finally, there is production of soft law at a domestic level. It is akin to delegated legislation or secondary legislation enacted by the government or administrative bodies in general. It follows the trend that has progressively taken away the legislative power from parliaments with an increasing role of the administrative state in setting rules on more and more subjects[46].

However, unlike delegated legislation or regulatory power that follows clear procedures, has clear limits regarding their subjects matter and produce the effects established in other sources of law, soft law often (though not always) results in atypical instruments that fall outside the scope of powers which have explicitly been granted to the executive or administrative branch.

[43] Klabbers (16) 169.

[44] Jan Klabbers, "The Normative Gap in International Organizations Law" (2019) 16 *International Organizations Law Review*, 272.

[45] Gruchalla-Wesierski (30) 46.

[46] Weeks (31) 25 ff.

One could wonder why a state would resort to non-binding legislation when it has all the power to enact hard law and can use its authority to enforce it. States and the public administration in general do not suffer from the same constraints that limit international organizations or the same need for compromise that characterizes bilateral relations between states. They could be inclined to rely on soft law though, as a tool that does not necessarily need to follow the formal procedures usually set forth for formal rule-making powers and do not need previous approval by the competent legislative body (safeguards usually provided specifically because of the binding and therefore relevant consequences they produce); soft acts can more easily be approved, more easily be modified or can be used to shed light on previous binding acts that remain unclear.

In any case soft law departs from the traditional analysis on the formal and substantial effects of law. In the positivist doctrine a rule, if enacted in accordance with the sources of the legal system, is valid; if it is valid then it is binding; if it is not effective that does not affect its validity or its bindingness from a formal perspective, it concerns a different aspect of rule-making[47].

Having established that it is not binding it must be analysed what effects it produces. It has been defined as "rules and other instruments which guide and influence behaviour but have neither statutory nor contractual force[48]". As a general and preliminary look one could argue that[49]:

- It signals an expectation from those who enacted the rules that they will honour their commitment (if it comes in the form of an international agreement) or that the recipients of the instruments will comply with it (if enacted unilaterally).
- The validity and legitimacy of the rule as such will not be contested again. It is not binding but one could not claim that the rule did not exist or that it was invalid.
- The lack of sanction in cases of breach does not mean that it is not a rule and that it is not part of the legal order.

[47] Bart van Klink and Oliver W. Lembcke "A Fuller Understanding of Legal Validity and Soft Law", chapter in Westerman (3) 147 ff.

[48] Mark Aronson, "Private Bodies, Public Power and Soft Law in the High Court" (2007) 35 Federal Law Review, 1,3, Cited in Weeks (31) 20.

[49] Joseph Gold, "Strengthening the Soft International Law of Exchange Arrangements" (1983) 77 American Journal of International Law, 443.

- Conducts carried out in accordance with soft rules cannot be considered as unlawful.

As previously stated the effects vary across a broad spectrum that goes from effectively binding to non-legal instruments, thus the precise effects must be analysed on a case to case basis.

On one hand of that spectrum there is at least a case when soft instruments can be considered as legally binding. When international organizations approve rules or, more often, guidelines or recommendations or codes of conducts those same organisations shall be bound by it and must respect the rules that they themselves have approved. Founding treaties would usually provide procedures and conditions and the competent organs under which the organisation can enact rules binding on its members. Outside of those cases, when the conditions for the use binding powers are not met or an agreement cannot be reached on its content, they will rely on a variety of soft instruments such as communications, recommendations, standards or declarations.

While those cannot be binding on their member states they are considered to be binding on the same agency or organisation that has enacted them, so that they have to comply with in carrying out its functions. It would be unreasonable to think that a subject could be able to ignore the rules that it has previously adopted; as a secondary consideration it would lead to a loss of credibility in the activity of such organisation, something that is of paramount importance for them[50].

In relations between states an agreement that it is not binding upon them, either because it has not been ratified or because it is only intended to be a political commitment or because its obligations are so generic that they could not create legally enforceable obligations anyway, can be one of the factors that ultimately give rise to custom. Though the International Court of Justice had previously gone so far as to hold that signing up to a non-binding treaty actually signalled the intention of objecting to the creation of custom[51], there are other factors that must be considered.

Reaching an agreement between a bigger number of actors will be easier if they know they are not signing up for a binding obligation (with the side benefit of having

[50] Gruchalla-Wesierski (30) 52.
[51] Colombian-Peruvian asylum case, Judgment of November 20th 1950: I.C.J. Reports 1950, p. 266.

easier procedures for approval[52] and not requiring broad approval in parliament domestically as it usually does not need ratification); by agreeing to commitments, however informal they may be, the signing party are at the very minimum signalling the intention that they expect to honour them and would expect the other parties to the agreement to do the same. This subjective intention if followed by consistent practice could eventually give rise to a fully binding customary rule in international law whose content would only partly be determined by the agreement in question and in part by the following behaviour[53].

Still in in international practice, some soft acts are sometimes defined as having a so-called "qualifying effect[54]": in this case they are not meant to create a regulatory framework for a certain subject but they are meant to support other acts of *hard law*. This way, from a previous act of binding law it will be possible to add rights and obligations or to further specify and clarify its content without having to modify the original act every step of the way. Through this avenue states sometimes also pursue the objective of avoiding creating disputes and submitting the interpretation of a binding agreement to a third party and instead reach an informal agreement to clarify what is the actual content of such instrument.

This use makes subsequent soft law almost binding just as much as the previous act of hard law; one could go as far as to say that it becomes a part of the already existing obligations, even though they arise from an act of law having a different source and a different degree of bindingness[55].

Other agreements between states are only meant to be political declarations and as such only have a political effect. They could have a great deal of influence and breaches of such agreements could have great consequences, but those only operate at a political level with possibly political sanctions. They cannot be considered as law from this perspective[56].

A slightly different consideration must be made from soft law production arising from independent or technical authorities both at the national and international level.

[52] Gruchalla-Wesierski (30) 42.
[53] Ibid.
[54] Ibid, 58.
[55] Ulrich Fastenrath, "Relative Normativity in International Law" (1993) 4 European Journal of International Law, 314.
[56] Baxter (2) 550.

In this case the addressees are not the states, but individuals or businesses or other entities. That happens either directly with soft law production at national level, or indirectly with law enacted at an international level that states are then supposed to approve through their own regulatory instruments.

This approach to rule-making is hardly consistent with the traditional divisions of power, mechanisms for accountability of regulators and judicial review. Normally the exercise of legislative powers by administrative bodies is first authorized by parliaments (or an equivalent democratically elected body) and administrative powers are restrained by the rules setting the conditions for the use of such powers. Through soft law on the other hand authorities can completely drift away from this scheme.

Soft law can be enacted even in absence of regulated and established procedures and can escape the limits that otherwise would be imposed[57]. There is then no indirect or direct, prior or subsequent control by the legislative or judiciary branch, unlike for the other forms of exercise of public authority[58]. The reasoning goes that by not being binding and not having direct legal effects those safeguards can be forfeited. This approach though, fails to recognize the effect that, notwithstanding the lack of bindingness, soft law might have[59]; a guideline or an explanation or a public announcement of policy coming from an official authority that can also exercise binding powers cannot simply be ignored and will often lead to high rates of compliance, just as much as binding acts would.

Another possible effect that some soft law instruments have is the so-called *comply or explain* mechanism. Under this type of rules the recipients of the indications will face a choice: to either comply with the rules (often formulated as guidelines or suggestions) or give the regulator and the public an explanation as to why it considered that the rules did not apply to it or it feels it does not need to follow such rules[60].

[57] Weeks (31) 42.

[58] In Italy that is a constitutional right and it is also protected by the Charter Fundamental Rights of the European Union and the European Convention of Human Rights.

[59] Well explained by "RE Megarry, "Administrative Quasi-Legislation" (1944) 60 LQR 125, 127" Cited in Weeks (31) 24.

[60] Marcello Clarich, "La funzione di regolazione e le fonti del diritto", chapter in *Manuale Di Diritto Amministrativo* (4th edition, Bologna: Il Mulino, 2019), 98.

3. Soft Law in International Law

Many aspects of soft international law have been illustrated in the previous paragraphs, but further assessment is needed.

International lawyers have, willingly or reluctantly, come to terms with the category (that has been extensively treated in literature but not quite as much in case law) of so-called "informal international law-making (or IN-LAW)[61]". By that term its authors meant all normative output that has relevance in the international legal system that does not have binding force and that does not fit under any of the traditional categories of international law: either because is enacted by bodies that cannot be considered included in the traditional notion of international organisations, or enacted through processes in which the traditional state actors are replaced by different informal representatives, or because they result in acts that do not fall under any of the traditional sources of international law (as in art. 39 ICJ Statute)[62].

Under the positivist approach described in 1st paragraph[63] acts or facts, formal or substantial, could only be part of the international legal order if envisioned by another valid rule (its source). For a long time international lawyers identified the existence of a source as a *conditio sine qua non* for a legal norm to be valid. Any rule that did not fit into the formally regulated categories mentioned above and that is in some way informal, should not be regarded as being law at all[64].

It is not valid, therefore it is not part of the legal order, therefore it is impossible for it to produce its usual binding effects and to inform and direct the behaviour of the actors whom it addresses. However, this notion ignores the fact that there are various tools and instruments that have a legal nature but whose effects are unclear and not previously determined, despite being, by all means, valid.

More recently though soft law and IN-LAW have been accepted as a source of law despite not following the traditional structure of law, especially due to its increasing and widespread use. Ignoring it or denying its relevance would lead to having an

[61] Joost Pauwelyn "Informal International Lawmaking: Framing the Concept and Research Questions", chapter in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, *Informal International Lawmaking* (1st edition, Oxford: Oxford University Press, 2013), 15-22. Its authors treat IN-LAW and soft law as two separate categories, but for the purpose of this research they will be considered together as they present similar issues.

[62] Ibid, 22.

[63] See supra at page 10.

[64] Carpentier (3) 76 ff.

incomplete view of how international law works and how it is manifested. IN-LAW might not come with the forms of traditional sources of law, but if it produces similar effects to traditional law it must be analysed regardless. Doing otherwise would mean limiting the study of law to what ought to be rather than what actually is[65].

As previously explained IN-LAW come with an element that drifts away from what would otherwise constitute one of the established sources of international law.

From the standpoint of so-called "output informality[66]" the difference is in what ultimately ends up being the legal act. Arguably in every legal system there are some formal requirements that must be present in order for a rule to be a legal rule (see for example article 73 of the Italian constitution which requires the enactment of the President, the lack of which prevents a statute from being valid even if regularly approved by parliament[67]). In the absence of the required formalities a rule should be considered at least as non-legal and not legally binding.

However, if states become bound by law by giving their explicit or implicit consent even in other cases, does it really matter by signing an agreement this one has all the formalities required by the Vienna convention or not[68]?

In at least one case the ICJ has found that if states have concluded an agreement, they will be bound by it through the consent they have given even if the agreement does not amount to a formal treaty and must then be considered as an informal instrument of soft law[69].

When it comes to "process informality" that is in relation to either international networks of regulators or agencies that do not constitute a proper International Organization and act through lightly regulated settings or instances of formal International Organizations that lack formal law-making power or act outside the scopes for which law-making power is afforded. This leads to the adoption of acts that

[65]Joost Pauwelyn, Ramses A. Wessel and Jan Wouters "Informal international law as presumptive law", chapter in Rain Liivoja and Jarna Petman, *International Law-Making: Essays in Honour of Jan Klabbers* (1st edition, Abingdon: Routledge, 2014), 76.

[66] Ibid, 79.

[67] Art. 73 Italian Constitution.

[68] Joost Pauwelyn "Is It International Law or Not, and Does It Even Matter?" chapter in Pauwelyn (60), 130-135.

[69] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, para. 132–50.

have no formal recognition in other acts of law and whose effects are not precisely defined[70].

Its informality can also come due to the actors participating in the law-making progress: while traditionally treaties could only be concluded between certain figures that had the power to represent and commit the will of a state (they effectively act as agents in this case)[71] most informal agreements come from other actors such as independent domestic agencies, state representatives within international organisations with no decision making powers, or even private organizations or private actors participating as stakeholders in public settings. This could create some confusion as to who is capable of setting rules and what effects does it have for the involved actors[72].

A preferential setting for IN-LAW that is worth analysing further is the rule-making activity of transnational bodies that are not traditional International Organisations ("IO") and whose normative outputs does not fall under the traditional sources of international law.

This development in international cooperation is increasingly relevant and it follows two trajectories[73]:

- The confine between national and international law-making activity is becoming increasingly blurred as regulators from domestic regulatory authorities contribute to decision taken at the international level. These bodies in turn enact acts whose legal value is unclear. And there is also increasing activity from organisations operating at regional levels (namely the EU).
- A more and more important collaboration between those informal networks and private entities such as associations representing the interested businesses or other stakeholders.

These international agencies or bodies have been defined as "harmonization networks[74]": usually they have an informal internal organisational setting made up by representatives of domestic administrative bodies. Unlike traditional IOs where the

[70] Pauwelyn (61) 17-19.
[71] Art. 7 VCLT.
[72] Pauwelyn (61) 19-20.
[73] Ibid, 37-39.
[74] Ibid, 39.

representatives are either heads of states, or member of governments or diplomats here they often work as technical and independent regulators. Unlike IOs they do not have a founding treaty, but they are established by informal agreements between states, or even between national agencies themselves[75]. And most notably the guidelines or standards or other legal tools of such organizations are non-binding on member states or the national competent authorities or on the other stakeholders. However, they are all expected to comply and studies have found that some organizations bear so much influence that even states that are not members ultimately follow the guidelines[76].

Ultimately the main issue is: if a certain rule or a set of rules does not have binding effects but it is perceived by the concerned parties as being equal to a formal and binding rule, so much so that private actors would find it preferable to comply and domestic public authorities could reproduce and/or apply such rules with no margin of discretion should it then be considered as a formal act of hard law? In other words is the distinction between hard and soft law relevant if the effects are equal? And if through soft law national and international actors can achieve the same ends as traditional law, should more safeguards or tools to ensure accountability be provided?

3.1 And in the European Union

Soft law has acquired a predominant relevance in the European legal order. The use of soft law in financial and banking regulation will be discussed in chapter II; this subparagraph is meant to describe the general framework in the European Union and where soft law stands as of now.

The European Union is a peculiar in the landscape of IOs as it enjoys vast administrative and legislative powers, compared to other IOs. As such it enjoys almost state-like powers on an array of matters conferred to it by its founding treaties. So much so that as early as 1963 the European Court of Justice affirmed that the treaties had created "a new legal order of international law for the benefit of which the states have limited their sovereign rights[77]".

[75] Ibid, 42.
[76] Ibid, 41. Making reference to the Basel Committee.
[77] Judgment of the Court of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26-62, ECLI:EU:C:1963:1.

The founding treaties empower the Union's institutions with broad law-making powers and, crucially, list[78] the sources of law and the effects they produce[79]. The Treaty on the Functioning of the European Union provides that *"recommendations and opinions shall have no binding force[80]".* While it does not explicitly create the source of soft law it effectively envisages the enactment of soft legal acts in the framework of EU law. Of course, soft law production is not limited to acts based on such treaty provisions and while in some cases the treaties make reference to further barely regulated acts that that shall be considered within the category of soft law (but at least have a treaty provision as its legal basis) other acts are based on secondary law or have an even more precarious legal basis[81].

Soft law in the EU has been defined as[82]:

> "Community soft law concerns the rules of conduct which find themselves on the legally non-binding level (in the sense of enforceable and sanctionable) but which according to their drafters have to be awarded a legal scope, […] and have as effect (through the medium of the Community legal order) that they influence the conduct of Member States, institutions, undertakings and individuals, however without containing Community rights and obligations"

Through this definition one could find a possible, albeit subtle difference between soft law in the International legal order and within the EU: while in the former it is established that the acts do not constitute binding obligations and states are only expected to comply because they committed themselves to it, in the EU it is the drafters that when enacting a rule expect third parties to respect such rules giving it a quasi-binding nature despite the lack of formal binding effects.

Not only legal scholars but, notably, the European Court of Justice (ECJ) itself has admitted and affirmed that while soft law instruments do not have a formal legally

[78] Art. 288(1) TFEU "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions".

[79] Art. 288(3-4-5) TFEU.

[80] Art. 288(5) TFEU.

[81] Linda Senden "Introduction to the Concept of Soft Law in EC Law", chapter in *Soft Law in European Community Law* (1st edition, London: Bloomsbury Publishing (UK), 2004), 107-108.

[82] G.M. Borchardt & K.C. Wellens, "Soft Law in European Community Law" (1989) 14 European. Law Review 267, 270. Cited in Senden, ibid, 112.

binding force still have legal effects that cannot be ignored. In its *Grimaldi*[83] judgment the court went on to say that soft law "cannot be regarded as having no legal effect[84]" and that in that case "national courts are bound to take recommendations (i.e. the soft law act) into consideration in order to decide disputes[85]"; even though it did not explain what "taking into consideration" means it affirmed that soft law can and will produce legal effects (albeit unclear ones) and that soft law production must then be regarded as being legal acts that are part of the EU legal order.

Keeping in mind this consideration it is easy to understand why the Union's institutions have grown more and more reliant on soft law: it is faster and easier to enact, requires fewer procedural safeguards and need to compromise, and at the same time not subject to the same standards of ex post control and judicial review as binding acts[86].

Considering only soft law that comes directly from the EU's institutions and agencies (i.e. it comes as an administrative or legislative act, but lacking the usual binding effects) a variety of instruments can be found. EU soft law generally comes as either[87]:

- Akin to international soft law, adopted in intergovernmental procedures, generally contains policy declarations or non-binding commitments on part of member states. They will act as guidance for future activity both for member states and for EU institutions.
- Soft law as part of the administrative activity that does not result in binding decisions. Its main actors are the Commission but also many other agencies and authorities. They are comparable to administrative acts and their object is usually previous hard law that they aim to clarify, specify, or make more effective.

[83] Judgment of the Court (Second Chamber) of 13 December 1989, Salvatore Grimaldi v Fonds des maladies professionnelles. Reference for a preliminary ruling: Tribunal du travail de Bruxelles – Belgium, Case C-322/88, ECLI:EU:C:1989:646.

[84] Ibid, para.18.

[85] Ibid.

[86] Corina Andone and Florin Coman-Kund, "Persuasive rather than 'Binding' EU Soft Law? an Argumentative Perspective on the European Commission's Soft Law Instruments in Times of Crisis" (2022) 10 Theory and Practice of Legislation (Oxford, England), 25.

[87] Senden (81) 115.

The distinction above, however, is not a strictly legal one, in fact it is based on an analysis made ex post by scholars, is not provided by another legal act. The non-binding acts of the EU legal order often are not based on any treaty provision (or they do not indicate any), sometimes they do not indicate what type of act is being enacted and often the various possible soft acts (recommendations, guideline, notices, white and green papers, declarations) are used interchangeably so that it is hard to establish what separates each category from the others[88]. What makes it even more confusing is that sometimes the formal outlook and the imperative wording of such documents make them quite similar to directives or other binding acts[89].

The most common instances in which EU institutions will resort to soft law are[90]: when it aims to regulate a subject over which it has no competence to enact hard law, when it cannot reach an agreement among member states, in Inter-Institutional Agreements agreeing on methods and procedures for cooperation among the EU's institutions, enacted by single institution again committing itself to respect self-imposed rules, procedural or substantive, related to the exercise of its powers. In this case it is thought to be binding on the institution at hand, but it is also noticed that it is sometimes used to announce broad policy objectives. Last, the Action Plans, paving the way for future legislation or intervention on the matter; if included in an action plan a certain policy field is internalised and will be used as base for future intervention by the Union.

4. Soft Law in International Financial Law

This paragraph will analyse how financial and banking regulation is agreed at the international and transnational level, what are the institutions governing it and the reasons why, unlike for other fields of international law there is an outsized production of soft and informal regulation.

In comparison to other matters of International Law that are still dominated by formal treaty law-making and rely on International Organizations having full legal personality and representatives of Member States that are either members of

[88] Senden (81) 115-117.
[89] Andone (86) 33-35.
[90] See the list in "Damian Chalmers, Gareth Davies, and Giorgio Monti, *"Lawmaking*", chapter in *European Union Law: Text and Materials* (4th edition, Cambridge: Cambridge University Press, 2019), 117".

governments or have a direct link to governments, international financial regulation has developed under a different path. It developed mostly through a "network" of organizations lacking a formal legal status, where rules and standards and practices are agreed upon by administrative regulators rather than political representatives and where the normative output comes in the form of non-binding, soft law[91]. Furthermore, instead of committing the signing states the commitments are made between domestic or regional regulatory agencies aiming to regulate private actors[92].

Taking a step back for a second and considering finance within the wider category of international economic law one can point to different methods of governance[93].

First there are formal binding treaties establishing legal organizations with regulatory binding powers and often with adjudicatory bodies or methods to sanction non-compliance. The most relevant of these is the WTO, that possesses all the formal characteristics that financial IOs lack[94]; it enjoys almost universal membership and has all the above-mentioned binding powers even for the exercise of its regulatory competence. Other IOs set up by treaties like the International Monetary Fund or the World Bank do not enjoy much regulatory power but rather are considered as so-called "monitors[95]" responsible for overseeing and evaluating the compliance with international standards set elsewhere. Other decision makers are forums of some states that coordinate and communicate with each other as, for example the G7 and G20. Ultimately then, there is the wide category of informal law-making and informal organizations and forums that have been labelled as the "transnational regulatory networks (TRNs)[96]". These usually come up with policies, standards, best practices or guidelines, all instruments that are not binding in nature and are agreed through informal agreements rather than settled formal rule-making processes[97].

[91] Chris Brummer, "Introduction: The Perils of Global Finance" chapter in *Soft Law and the Global Financial System: Rule Making in the 21st Century* (New York, Cambridge University Press, 2011,2012), 3.

[92] Chris Brummer, "Why Soft Law Dominates International Finance: And Not Trade" (2010) 13 Journal of International Economic Law, 627. \

[93] Emilios Avgouleas, "The Evolution of Global Financial Governance and Development of International Financial Regulation", chapter in *Governance of Global Financial Markets: The Law, the Economics, the Politics*, (Cambridge: Cambridge University Press, 2012), 158.

[94] Brummer (92) 626.

[95] Chris Brummer, "The Architecture of International Financial Law." Chapter in Brummer (91), 90 ff.

[96] Avgouleas (93) 157.

[97] Brummer (92) 627.

A system of global governance for international banking and finance can be traced back to the Bretton Woods accords originally (1946)[98]. From the 1990s a new liberalist regulatory approach emerged: it was based on deregulation, the easing of cross-border movement of capitals and services and labelled as the New International Financial Architecture (NIFA)[99].

The pursue of deregulation and free markets made investments and cross-border flow of capitals easier, contributing, among other factors, to give finance a global dimension[100]. On the other hand, this logic also led to an increased power given to informal regulators: it included national bankers, agencies, finance ministers, bureaucrats in general and private lobbies and regulators. International rules are more and more often agreed through bodies and procedures that are far and away from the political process and the control of elected political representatives[101].

Ultimately the deregulation and market-friendly policies, the technological development, and the rise in financial instruments like derivatives that allow to instantly transfer the risk connected to certain operations all contributed to create a global dimension and an unprecedented rise in cross-border activity, rendering financial regulation and oversight a fully international matter that required increasing collaboration and coordination[102]. However, the governance structure as it was failed to prevent the 2008 global financial crisis which made clear that the financial system was so interconnected that risks and subsequent crisis could not be managed at a national level but would inevitably spill over to all other countries[103]. It is argued that this was both the result of policy decisions and the regulators' inability to keep up with the technological innovations[104]. This has led to an increased and more transnational oriented regulatory effort, including with more monitoring bodies and compliance mechanisms.

As said previously this has resulted in several TRNs, a term used to describe the financial organizations that come in all sorts of formats: some are formal some more

[98] Avgouleas (93) 160.
[99] Aaron Major, "Neoliberalism and the New International Financial Architecture" (2012) 19 Review of International Political Economy, 537-538.
[100] Brummer (91) 10.
[101] Major (98) 540-541
[102] Brummer (91) 10-11.
[103] Ibid 15-16.
[104] Emilios Avgouleas, "Introduction" Chapter in Avgouleas (93) 3.

informal, some have binding powers some only encourage compliance, some are standard setters others are in charge of monitoring compliance, some are fully public others are private. And for all these alternatives between the two options there are other organizations that fall somewhat in between the two.

Unlike other subjects of international law that are mainly administered through formal treaties and in official settings with diplomatic states' representatives, financial regulation mainly relies on soft law and informal forums. The comparison in often made with trade that, despite affecting international economic law just like finance, has a far different structure: a treaty instituted the WTO (an IO having legal personality)[105] and has a system to enforce its rules that are meant to be binding[106].

TRNs are usually not set up by an "international agreement" (as defined in the VCLT) but rather by informal agreements through which an internal charter of the network is also agreed. Its decision making process is more flexible and can vary over time, the network does not retain the power to interpret its own rules through dispute settlements that bind the parties and national countries are mostly represented by regulators and administrative authorities like central bankers or securities agencies rather than heads of state or official diplomats[107] as it is a rather technical subject that requires thorough expertise it is best kept in the hands of technical regulators that have developed such expertise at a domestic level[108]. In addition to that there, are numerous networks with different tasks.

Generally, the various TRNs carry out one of three tasks[109]: they are either in charge of developing guidelines or standards or best practices: soft rules that are meant to be enacted by regional or national authorities to regulate the activity of banks, insurances, and investment firms. Or they should oversee how such standards are complied with both from the standpoint of the competent authorities and from the standpoint of the businesses involved. Or they help enforce agreements regarding cooperation between states.

[105] See supra at page 30.
[106] Brummer (92) 626.
[107] Brummer (95) 63-65.
[108] Ibid 69.
[109] Avgouleas (93) 158.

The first group, broadly defined as the "agenda setters[110]", includes those networks that are in charge of developing common rules aimed at regulating both the activity of national competent authorities and of market participants. As will be further analysed below they come in the form of recommendations or general objectives or guidelines or standards that are non-binding. Among these there is the G-20 which the more political organisation as it comprises finance ministers and central bank chiefs from 20 systemically important countries that has no permanent setting and no permanent staff and organisation. It usually produces communiques or declaration of agreements reached through consent as there is no formal voting system or settled rule-making procedure[111]. Other agenda setters have a broad mandate like the Financial Stability Board or have a narrower scope like the Basel Committee on Banking Supervision[112], the IOSCO[113] that develops general principles for common regulatory choices for domestic securities commissions and supports cooperation for effective enforcement and the IAIS[114]. One other option that is worth mentioning for the purpose of this analysis is the IASB[115] as it is effectively a private body operating as a private company that develops accounting standards that retain great influence.

The task of monitoring the implementation of international standards is either carried out by the same organization setting such standards or by a centralized authority ("monitors[116]"). Monitoring is mostly conducted through two formal International Organizations grounded in International Law: the World Bank and the IMF[117] through assessments and reports of enforcement activity by national authorities. Though this role has been strengthened after the 2008 Financial Crisis it still often amounts to little more than a "peer review[118]" as there is no direct sanction or consequence for non-compliance.

All this being the general framework of TRNs and international financial law, what are the reasons behind such widespread use of soft law? From the perspective of

[110] The following list relies broadly and extensively on Brummer (95) 70-90.
[111] Ibid 70-72.
[112] The activity of the FSB and of the Basel Committee will be discussed in the following paragraph.
[113] International Organization for Securities Commissions.
[114] International Association of Insurance Supervisors.
[115] International Accounting Standards Board.
[116] Brummers (95) 90.
[117] International Monetary Fund.
[118] Brummers (95) 91.

international relations, some argue that the lack of formalities and transparency in decision making helps the countries that wield the most economical and political influence advance their agenda[119], leaving poorer, smaller countries forced to accept rules that are detrimental to their economy despite not being formally bound[120].

However, the reasons are more complex. The most popular theory (that goes under the label of "contractarian interpretation"[121] is that agreeing to informal law requires fewer "sovereignty costs[122]" than agreeing upon common rules to be part of formal treaties. By that it is meant that once a country enters into a treaty it is prevented from making its own policy choices potentially for years on the matter. A possible breach of binding international law bears relevant consequences and states will refrain from doing so lightly. That can be avoided if states agree to informal agreements: while they will be expected to comply, it is argued it does not bear the same consequences. Sovereignty costs are at its highest when a treaty establishes a formal international organization with monitoring, binding powers over compliance of its member states[123].

Other consequences are also somewhat related to the "sovereignty costs". As rules for financial supervision must be quickly and constantly changed to keep up to speed with the evolution of the global markets[124]. Informal agreements do not require the involvement of heads of states nor the often lengthy negotiations that come with it. States and their representatives will be extra careful before agreeing to a binding commitment that will potentially handcuff them for years to come[125]; furthermore, in many cases treaties will require ratification by national legislatures forcing Heads of State to secure political support internally before agreeing to any rule[126].

On the other hand, agreements reached in through TRNs and administrative bodies can bypass political considerations and produce common standards through their expert, technical knowledge: such rules will have more persuasive power as they are

[119] Ibid, 108. Also in Emilios Avgouleas, "The Softness of Soft Law and Global Financial Governance." Chapter in Avgouleas (93) 228-230.
[120] Avgouleas (119) 221.
[121] Brummer (92) 631.
[122] Brummer "A Compliance-Based Theory of International Financial Law." In Brummer (91) 129.
[123] Brummer (122) 130.
[124] Ibid, 131.
[125] Brummer (95) 64.
[126] Brummer (122) 129.

not based upon political negotiation but because they are deemed useful by the most expert administrative agents who are used to working with each other.[127]

States may be inclined not to enter into an agreement or to leave the most contentious parts out if they fear a certain clause could prove costly; such practices limit the effectiveness of treaty-making and in that respect soft law provides a useful alternative as commitments can be formulated in less stringent terms[128]; in addition to that, while regulators signal the intention of complying and enforcing the standards that they agreed to and it is often possible to do so right away, without further cooperation from domestic legislatures[129].

Lastly the informal setting has developed a stronger and direct cooperation in the rule-making process between regulators and the private sector, business and lobbying groups, bypassing the traditional "two-level[130]" model where special interests and business group would lobby domestic regulators who would in turn lobby the respective networks. That makes the rules more effective as they rely on the knowledge of experienced market participants and will benefit from a higher acceptance of such rules from the regulated businesses[131].

Different networks have different organizational setting and more importantly different functions and areas of competence, as explained above[132]. While their regulatory output comes in many different forms, it tends to come in one of few normative types[133]:

- *Best Practices* aim to regulate and implement common rules of behaviour or requirements of various types. They can take the form rules regarding sound business conducts or desirable governance structure thus being directed at the private parties that take part in a certain market or activity. Or they come as agreements between regulators generating shared principles and rules of behaviour in exercising their supervisory activity and authority. Either way they implement minimum common standards and practices while at the same time

[127] Brummer (95) 66.
[128] Brummer (92) 633.
[129] Avgouleas (119) 222. Also in Brummer (95) 66.
[130] Abraham Newman & Elliot Posner, "Structuring transnational interests: the second-order effects of soft law in the politics of global finance" (2016) 23 Review of International Political Economy, 779.
[131] Avgouleas (119) 223-225.
[132] See supra at pages 30 and 33.
[133] Categories drawn from Brummer (122) 121 ff.

leaving open the possibility of diverging practices in specific cases and under certain circumstances.

- *Regulatory Reports*: though reports do not have regulatory effects as they do not prescribe certain behaviour but rather are more of a recollection of facts or data, they still carry important consequences. As they report the analysis of a certain authority or network, they also explain its position and official opinion on the state of the markets or on the activity of the regulators. They then point to more or evident hints at what is considered a desirable course of action both from the standpoint of market participants and regulators. Thus, they will make future activity more predictable and will help domestic authorities adopt the right supervisory practices.
- *Information Sharing and Enforcement Cooperation*: these sorts of agreements take the form of MoU between two or more domestic agencies or between domestic agencies and an international organization. Through the former they commit themselves to provide each other with the information needed to carry out their supervisory activity, information that regulators would not have the power to recoup otherwise. The latter is meant to provide direct assistance or help facilitate the discharge of their enforcement activities. Both cases are meant to making transnational cooperation smooth and effective.

But just how effective is international financial law? Every legal system suffers a certain degree of non-compliance from its actors so one should not make the wrong assumption that only binding law is respected and one should not assume that the only path to effectiveness is making coercive rules. What it true is that soft law and informal organizations will have to resort to different avenues to ensure standards are complied with.

First of all, it must be considered that even hard international law lacks the sanctioning mechanisms and the enforcing authorities associated with domestic law[134] and that often regulators agree to soft standards not because they do not intend to fulfil them but because they lack the power to agree to a treaty which would require the involvement of governments and national legislatures[135].

[134] Brummer (122) 141.
[135] Ibid.

Under *hard* international law, states would traditionally resort to different ways to remedy a breach of a legal obligation from another state. Among them the practice of not performing a reciprocal obligation: if a state does not perform its obligations towards another state, the latter will be automatically released from its obligation to carry out the same provision that has been infringed[136]. Others include so called retorsion[137]: that amounts to taking action which will be detrimental to the party which is not complying with an obligation and is especially common in the framework of the WTO[138].

One consequence of non-compliance that holds true equally for *hard* and *soft* agreements is the reputational damage[139]. A state that has backtracked from an obligation or a commitment that it had agreed to, will have a harder time finding willing partners to strike other agreements in the future. In addition to that, a non-compliant state will see its influence in the rule-making process of TRNs diminished as regulators will tend to strike bargains among trusted parties and it will not be able to lobby for the adoption and enforcement of further standards when it has been unwilling to do so itself[140].

Reputation is the most obvious compliance pull but it is not the only one. The adoption of international standards and the effectiveness of its action contribute to the decision market participants and investors may make on whether to invest in a certain jurisdiction rather than a different one, the so called "market reputation[141]". A regulator that has a reputation for enforcing sound regulatory standards may be able to attract more investors as it is perceived to be a solid market. That pushes some regulators to comply with such standards even though they are not bound by them. So much so that in certain instances even jurisdictions that take no part in a certain TRN and took no part in the rule-making process feel that they are better off adopting certain standards[142].

[136] Jan Klabbers, *International Law* (Cambridge: Cambridge University Press, 2017), 181.
[137] Ibid, 183.
[138] Brummer (122) 127.
[139] Ibid 125.
[140] Ibid 145.
[141] Ibid 148.
[142] Ibid 150.

Finally, standard setters and monitors networks have tools they can use that, while do not amount to formal sanctions, are designed to achieve compliance by national regulators. Countries that receive financial assistance from an international body will need to comply with certain standards and implement the policies agreed to with such body or risk seeing the funds they receive cut off; this is mostly the case of the IMF and the World Bank[143]. Or they can resort to the "name and shame[144]" practice through which the unwillingness of a certain jurisdiction to comply is publicly and loudly exposed by an organization. Lastly an international body can suspend some of the rights and powers that a state enjoys as a member of that organization if they do not deliver on enforcing the commitments that they agreed to[145].

This demonstrates that while most of the international financial organizations do not carry the same formalities and the same binding powers there are avenues to make soft law agreements somewhat *harder* and to ensure that the commitments are agreed to and subsequently implemented at a national level. The biggest issues that remain with this framework twofold. On one hand the fact that often such commitments are worded in rather generic terms, making it difficult to establish when exactly there is an infringement and what deviations constitute an actual breach[146]. On the other hand, only a swift and effective monitoring system can identify states that are in breach, but TRNs often lack the resources and powers to collect data and verify compliance of member states[147].

5. The examples of the Basel Committee and the Financial Stability Board

This final paragraph will focus directly on two prominent international standard setters and how they constitute an example of informal law making in the international financial area: the Basel Committee on Banking Supervision (BCBS) and the Financial Stability Board (FSB).

[143] Ibid 152-154.
[144] Ibid 155.
[145] Ibid 162.
[146] Ibid 146; Gruchalla-Wesierski (30) 49, 71; Guzman (10) 142.
[147] Avgouleas (119) 231.

5.1 Basel Committee on Banking Supervision

The BCBS is the primary forum for cooperation and standard setting on prudential regulation of banks and on supervisory practices. It aims to create a stronger financial system by improving the regulation, supervision and practices of banks[148]. The committee first convened in 1975 after the failure of Herstatt Bank[149] in Germany made clear the need for the enhancement of transnational supervisory cooperation[150]. This led to the establishment of the Basel committee aiming to establish a comprehensive supervision of all or at least most banks around the world and that supervisory authorities in different countries would be effective and consistent in their practice[151]. The first document that was issued was the so-called "Concordat" that later became known as "Principles for the Supervision of Banks' Foreign Establishment". This mainly focused on sharing on information and supervisory tasks between home and host authorities relating to international banks with branches in multiple countries[152]. The most relevant acts it produced are the ground-breaking capital accords known as Basel I (1988) and II (2004) setting minimum capital requirement standards and regulating disclosure and supervision by banks. Lastly after the global financial crisis a new slate of standards regulating risk management, capital and liquidity have been approved, resulting in Basel III.

The Charter explicitly mandates member of the committee to pursue the interest of the global financial system[153]. However, the committee has always represented a rather small fraction of the world being originally founded by the G10 economies and subsequently growing 45 different institutions from 28 different countries[154]. It goes without saying that in relative terms all the most economically relevant countries are indeed members, leaving out smaller or less developed economies. States are represented by either their central banks, their supervisory authorities or both; however, they do not act as ambassadors to their respective state interest, but rather as

[148] BCBS Charter art. 1, available at https://www.bis.org/bcbs/charter.htm?m=3070.
[149] Brummer (95) 75.
[150] History Of The Basel Committee, available at https://www.bis.org/bcbs/history.htm.
[151] Ibid.
[152] Ibid.
[153] Jan Wouters and Jed Odermatt, "International Banking Standards, Private Law, and the European Union" Chapter in Marise Cremona and Hans-W Micklitz, *Private Law in the External Relations of the EU* (Oxford: Oxford University Press, 2016), 183.
[154] Basel Committee Membership, available at https://www.bis.org/bcbs/membership.htm?m=3071.

members of the committee in charge promoting global financial stability[155]. Such feature further reinforces the idea that the Committee does not function as an intergovernmental forum but rather as a hub made up by experts and bureaucrats to use their expertise to come up with solutions and exchange ideas.

The BCBS was not set up by a treaty nor it can be considered as an organ of an IO[156]. Therefore, it does not have rule-making powers: states have not given it a formal mandate to regulate banking supervision and set standards[157], yet governments have consistently taken part in the rule-making process making it the *de facto*[158] most influential standard setter in the banking sector.

Internally, the Committee has a loose structure: its charter has provisions[159] on the governance structure, duties of its members and division of tasks and responsibilities but, as said, the charter is not a treaty and is not enforceable. Moreover, the discipline laid out in the charter is narrow, limited and does not go into detail allowing the actual functioning and the real allocation of powers to be determined by practice[160]. It cannot rise to the level of Charters of formal IO (such as the UN Charter) as it does not constitute enough of a safeguard against divergent practice and it does not give enough insight to outsiders on how the BCBS works and produces its regulatory output.

The BCBS is made up by the Committee, its Groups (and working groups, virtual networks, task forces), the Chair and the Secretariat[161].

Much of the rule-making process, the preparatory work and drafting of standards is made by its groups that submit proposals[162] directly to the Committee that has set them up[163].

[155] Enrico Milano and Niccolò Zugliani, "Capturing Commitment in Informal, Soft Law Instruments: A Case Study on the Basel Committee" (2019) 22 Journal of International Economic Law, 166.

[156] Ibid, 167.

[157] Legesse Tigabu Mengie and Alessandra Arcuri, "The Global Financial Regulatory System and the Rule of Law: An Appraisal of the Regulatory Process Under Basel III" (2019) 23 Law, Democracy & Development, 154.

[158] Jonas Niemeyer, "Basel III – What and Why?" (2016) 1 Sveriges Riksbank Economic Review, 62.

[159] Section IV ("Organisation") of the BCBS Charter.

[160] Mengie (157) 167-168.

[161] Art. 7 BCBS Charter.

[162] Niemeyer (158) 63.

[163] Art. 9 BCBS Charter.

Ultimately though, it is the Committee itself as "the ultimate decision-making body of the BCBS with responsibility for ensuring that its mandate is achieved[164]". Each member and observer of the BCBS can appoint one representative to serve on the Committee. The work of the committee is directed by its Chair named by the "Group of Governors and Heads of Supervision" (GHOS) among its members. Through the years the role of the Chair has become increasingly important as higher profile members were appointed and they were given more freedom to operate and more autonomy in shaping the Committee's work[165]. The GHOS is the oversight body of the Committee which reports to it and seeks approval of its decisions; conversely the GHOS gives "general direction" to the Committee's work[166].

And lastly, there's the Secretariat whose staff is provided by the Bank for International Settlements (BIS) and is hosted by the BIS in Basel[167]. The secretariat has a supportive role in helping and assisting the committee and assuring smooth information flow between domestic regulators and governments and the Committee[168].

The acts that the committee will adopt are listed in section V of the Charter. They are divided into Standards, Guidelines and Sound Practices: standards are general prudential and supervisory rules that the committee's members are expected to comply with by giving them legal status through domestic (hard) law; guidelines help define and give "additional guidance" to standards, while sound practices regard the actual supervisory activity to help make that activity common and effective among member states. So, the informal sources of law are established as if they were binding acts. However, the actual decision-making process and the procedure that is followed internally to adopt such acts is only briefly considered by its charter and does not amount to a formal regulatory process with ex ante and ex post procedural safeguards. In approving standards, the committee has adopted the "Public Consultation[169]"

[164] Art. 8 BCBS Charter.

[165] Charles Goodhart, "Modus Operandi: Chairmen; Secretariat; Members; Structure of Meetings", chapter in *The Basel Committee on Banking Supervision: A History of the Early Years 1974–1997* (Cambridge: Cambridge University Press, 2011), 51-52.

[166] Art. 6 Section III ("Oversight") BCBS Charter.

[167] Catherine R. Schenk "The Governance of the Bank for International Settlements, 1973-2020." edited by Claudio Borio, Stijn Claessens, Piet Clement, Robert N. McCauley, and Hyun Song Shin, chapter in *Promoting Global Monetary and Financial Stability: The Bank for International Settlements After Bretton Woods, 1973–2020* (New York: Cambridge University Press, 2020), 50-52.

[168] Art. 11 BCBS Charter.

[169] Art. 17 BCBS Charter.

procedure to get feedback from market participants and industry associations. By taking into account the comments of interest groups the standards will have a higher legitimacy and in turn higher compliance. This process used to be obscure insofar as it happened mostly behind the scenes; from the 1990s though transparency has been increased regarding the role of lobbying and interest groups[170] whose comments are now made public. Attempts to increase legitimacy have also come in the form of the expanded membership and an enhanced dialogue with jurisdictions that are not members and are not represented within the committee, namely through the Basel Consultative Group[171] forum.

To sum up the approval process of standards is as follows: the subcommittees draft a proposal which is then sent out for public consultation. Following the period of consultation and following the political input given by the G20[172], the Committee approves the final document containing standards not through a formal voting procedure but rather by consensus and informal agreement[173]. On one hand this means that every member approves or at least does not oppose standards, on the other hand it does not disclose what was the bargaining process that led to the final agreement.

Overall while not being a representative and strictly regulated process from the standpoint of traditional sources of law it must be considered as legitimate enough: all member states are represented and have the possibility to influence the agreement, the private sector and industries have a chance to intervene as well as other stakeholders that have the resources and expertise to take part in the public comments procedure, leading to rules that are in theory and at least in part shared and agreed upon by all the affected and interested parties, both private and public.

As explained above the normative output of the BCBS is not binding: domestic regulators and governments are in theory free to decide whether to comply with it. To affirm that they are completely free though, would amount to ignore the reality. There is an extremely high rate of compliance among members, which is, up to a point, expectable but interestingly enough authorities adopt Basel standards even when they

[170] Newman (130) 790.

[171] Matteo Ortino, "The Governance of Global Banking in the Face of Complexity" (2019) 22 Journal of International Economic Law, 195. For its composition see Basel Committee Groups at https://www.bis.org/bcbs/mesc.htm.

[172] That happened for example in Basel III. See Mengie (157) 160.

[173] Niemeyer (158) 63. See also Milano (155) 166.

are not part of the Committee and have not given any kind of consent or made any kind of commitment[174]. The standards developed by the BCBS do not rely on sanctions or strict enforcing mechanisms retaliation (which would be impossible as the standards regulate the market as a systemic entity instead of relationship between states[175]). On the contrary they rely on expertise, influence, technicality and soft enforcement by virtue of endorsement of the most relevant and influential countries and markets[176]. Negative effects of non-compliance are informal just like its rules: for example, the judgment of a bank's governance and financial solidity may be based on how well it is adhering to the Basel III principles, so non-compliance could possibly lead to a bigger economic harm than gain[177], but there is no automatic or institutional sanction attached to it.

In addition to that various "monitoring reports" are produced, aimed at exercising a "compliance pull[178]" towards its members. Since there is no judicial review and no judicial enforcement or dispute settling by a quasi-judicial authority sanctions and consequences of violation of commitments will be informal just like the rule-making process and just like the normative output[179]. The BCBS cooperates with the IMF and the World Bank[180] who produce a joint assessment program that monitors and evaluates compliance with the Basel Standards as part of a wider evaluation of the stability of the financial systems of single countries[181] even if they are not members of the BCBS. The Committee also produces its own report making public who and to what extent, among its members, is complying with its standards[182].

As said, what instead is lacking is the possibility of a judicial or quasi-judicial review or a complete report evaluating the impact of the Basel Standards and possibly enacting or proposing changes aside from the BCBS Monitoring Report which does not constitute a thorough review and is based on confidential and voluntary

[174] Mengie (157) 163, Milano (155) 166.
[175] Mengie (157) 162.
[176] Emily Lee, "The Soft Law Nature of Basel III and International Financial Regulations" (2014) 29 Journal of International Banking Law, 606,610.
[177] Mengie (157) 163.
[178] Ortino (171) 201.
[179] Lee (176) 611. Mengie (157) 162.
[180] That is noteworthy as these two, unlike the BCBS, are formal international organizations with binding powers.
[181] Mengie (157) 162. Niemeyer (158) 66.
[182] Ortino (171) 202.

information submitted by banks and supervisors[183], so the BCBS has the only and final say on these matters.

This process highlights how the BCBS drifts away from traditional international law making: instead of having wide participation and formal declarations of political agenda it focuses on technical, sectoral and narrow rule-making through dialogue between expert regulators and stakeholders aimed at building consensus. Instead of seeking action from states it seeks to create a common set of rules that regulate the activity of private actors[184]. And the fact that it is not binding has not prevented it from exercising an immense influence and effectively stimulating compliance at a high rate[185].

5.2 Financial Stability Board

The FSB was established by the G20 in 2009 taking the place of the abandoned FSF[186] experiment. The FSF was established by the G7 in 1999 to improve international financial stability by being a forum for information sharing and shared supervision to avoid systemic crisis[187]. However, its fragile legal nature, limited mandate and membership and weak powers, in addition to the Global Financial Crisis (GFC) of 2007 quickly made clear that its structure needed reforming and reinforcing[188]. The previous FSF's structure was mainly a hub where national politicians, national supervisors and representatives of IFIs would meet. However, its mandates and tasks, in addition to providing a space for debate and discussions were fairly limited[189]. It did not have influence over standard setting processes, which were adopted by other TRNs[190], and did not have supervisory powers as the Financial Sector Assessment Program (FSAP) was executed by the IMF, with the FSF's role limited to compiling the set of standards relevant to evaluate compliance[191]. After seeing the magnitude and the impact of the GFC, both shortcomings have been in part addressed,

[183] Mengie (157) 162, 169.
[184] Milano (155) 174-175.
[185] Ibid 170.
[186] Financial Stability Forum.
[187] Avgouleas (93) 194.
[188] Ibid, 196.
[189] Julia Black, "Restructuring Global and EU Financial Regulation: Character, Capacities, and Learning", chapter in Eddy Wymeersch, Klaus J. Hopt, and Guido Ferrarini (eds), *Financial Regulation and Supervision: A post-crisis analysis* (Oxford: Oxford University Press, 2012), 20.
[190] Ibid, 22.
[191] Ibid, 24-25.

with the FSB now much more engaged in providing a framework to ensure international financial stability[192] and engaging in forms of monitoring exercising a soft push towards compliance (the Peer Review process will be analysed below).

At the London leaders' summit of 2009, the G20 countries agreed to bolster the mandate of the FSF and turned it into the FSB[193] hoping to achieve higher influence through a wider membership and under more solid legal grounds. Though this did not result in binding formal legislation governments committed themselves to strengthening its institutional setup[194]. It was also thought that by including more members, its work would benefit, gaining more legitimacy and, in turn, becoming more effective[195]. That lead to both having the G20 instead of the G7 as its main backer (therefore being grounded in more solid and inclusive political ground), to more members within the FSB and the Charter explicitly envisioning further expansion in Art. 5 §2 that states that the Plenary will periodically review membership meaning that enlargement will at least be considered. The FSB now includes representatives from 24 different countries and 12 regional or international bodies and organizations. Members can be divided into 3 types[196]. First there are "jurisdictions": this category allows it to include both member states and regional/supranational authorities (so far it includes the European Central Bank and the EU Commission); states are represented through one or more of their domestic authorities, for example Italy is represented through its Central Bank (Banca d'Italia) its securities authority (CONSOB) and the directorate general of the Ministry of Finance, while other countries only have 2 or 1 of those represented. There are then 4 International Financial Institutions and 6 sectoral standard setting committees (among them the BCBS) [197]. It is noteworthy that it came

[192] Notably it has approved the "Key Attributes of Effective Resolution Regimes for Financial Institutions"

[193] "London Summit – Leaders' Statement, 2 April 2009, §15" available at https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf. See also the Press Release "Financial Stability Forum re-established as the Financial Stability Board", 2 April 2009, available at https://www.fsb.org/2009/04/financial-stability-forum-re-established-as-the-financial-stability-board/.

[194] Rolf H. Weber and Dominic N. Staiger, "Financial Stability Board: Mandate and Implementation of Its Systemic Risks Standards" (2014) 2 International Journal of Financial Studies, 85.

[195] Mario Giovanoli, "The Reform of the International Financial Architecture after the Global Crisis" (2009) 42 New York University Journal of International Law and Politics, 111.

[196] Jan Wouters and Jed Odermatt, "Comparing the Four Pillars of Global Economic Governance: A Critical Analysis of the Institutional Design of the FSB, IMF, World Bank, and WTO" (2014) 17 Journal of International Economic Law, 59.

[197] Ibid. For a complete list of members see "Members of the FSB" available at https://www.fsb.org/about/organisation-and-governance/members-of-the-financial-stability-board/.

to include both political and more technical authorities from various states and purely technical, formal and informal international organizations. As explained in the previous paragraph international finance is extremely decentralized with many bodies with sector specific tasks[198]; by having them all take part in the same forum, the FSB becomes an "umbrella organization[199]" that aims to set a centralized and coordinated policy[200]. This includes both setting standards on its own and develop coordination between sectoral standard setters[201].

The FSB is formally an association under Swiss law incorporated in Switzerland as it is hosted (like the BCBS) by the BIS which provides the secretariat. However, from the standpoint of international law it remains an informal institution, though it has been strengthened after the GFC and becoming the FSB. There have been calls to turn the FSB or replace it with a formal and autonomous organization as the WTO or the IMF, but governments do not seem to think it is desirable; in fact, they have reaffirmed their intention of keeping it a flexible institution whose tasks, membership and governance can be changed and adapt over time[202].

Originally the FSF's mandate was to assess vulnerabilities of the financial system, come up with actions needed to address such vulnerabilities and promote coordination and information sharing between competent authorities[203]. Those issues though, were not properly addressed as the FSF lacked clear means and specific tasks to achieve them[204]. The FSB was then charged with more precise assignments and tools to deliver on them. Its main objectives, as stated in Art. 1 of its charter is to coordinate the work of national authorities and international standard setting bodies (such as BCBS and IOSCO) to achieve financial stability through development and implementation of regulatory and supervisory policies. The FSB retains the original mandate of the FSF but in addition to that other specific functions have been listed while also focusing on

[198] For reference see Ortino (171).

[199] Stavros Gadinis, "The Financial Stability Board: The New Politics of International Financial Regulation" (2013) 48 Texas International Law Journal, 163.

[200] "Financial Stability Forum re-established as the Financial Stability Board" (195).

[201] Douglas W. Arner and Michael W. Taylor, "The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation?" (2009) 32 University of New South Wales Law Journal, 493.

[202] Wouters (196) 55-56, 66.

[203] Giovanoli (195) 111.

[204] Gadinis (199) 165.

how it will carry out its tasks[205]. Notably the FSB will now support supervision of the so-called Systemically Important Financial Institutions (SIFI), periodically carry out *peer reviews* of the financial system and relative regulatory framework of its members[206], and "set guidelines for […] the establishment of supervisory colleges[207]".

The FSB is therefore neither a standard setting body nor a supervisory authority; it does not possess the power to implement law, to create binding obligations upon its member nor to impose sanctions[208]. In turn members have committed themselves to pursue financial stability, maintain an open financial sector, implement agreed international financial standard and be subject to periodic peer reviews and monitoring of their implementation[209].

Internally the FSB is divided into different organs[210]. The Plenary is the forum of all its members (meaning that many states have more than one member on the plenary), according to Art. 8 of the Charter is the lone decision-making body of the FSB (§1) and takes decisions by consensus (§2). The progress of standard setting process undertaken by the various sectoral networks is reported to the plenary, which can also push for the approval of standards in relation to certain policy objectives or influence which path they will follow[211]. Formally the standard setting bodies are under no obligation to abide to the Plenary's instructions, but it will be hard for them to resist the unanimous opinion of a body to which they are part, even more so when you consider the mixed nature of the FSB Plenary that, unlike the other TRNs, includes both technocrats and political authorities[212]. Below the Plenary the "Steering Committee[213]" which supports and provides "operational guidance" to the Plenary, helping it organize its meetings and implement and monitor its decisions and agenda[214]. There are no formal criteria over its composition but according to the Charter the members of the Committee will be nominated by the Plenary, balancing

[205] For the complete list see FSB Charter Art. 2.
[206] Weber (194) 85.
[207] Gadinis (199) 165.
[208] Giovanoli (195) 110.
[209] Arner (201) 498. For the relative provision see FSB Charter Art. 6 §1.
[210] See Section III of the Charter. Art. 7 contains a list of the FSB organs.
[211] Gadinis (199) 167.
[212] According to Gadinis (199) 166, roughly 25% of the plenary members are political representatives.
[213] Art. 12-13 FSB Charter.
[214] Gadinis (199) 168.

maximum effectiveness in delivering on the FSB's work while representing different geographical areas and institutions.

There are then various "Standing Committees" set up by the plenary that have a narrower and specific task related to a part of the FSB mandate: the most relevant is the "Standing Committee on Standard Implementation (SCSI)" that prepares reports and gathers information which is then used for the peer review process[215]. Moreover, the Standing Committees may establish working groups that might include non-FSB members; examples of this are the Regional Consultative Groups (RGCs)[216] through which the FSB may dialogue and receive input from both non-member countries and private stakeholders[217].

The regulatory output of the FSB comes in various forms: it can publish reports aimed at lobbying the approval the soft law standards of other TRNs such as the BCBS or the IOSCO[218], or it can produce standards on its own if instructed to do so and according to the policy pursued by the G20 (through this process, for example, it has developed a set of guidelines on the supervision of SIFIs)[219].

Its most important work though, is arguably the monitoring of the implementation of International Financial Standards (IFSs) at the domestic legal level. Again, this is not a thoroughly formalized process but highlights how soft law can exercise a compliance pull even in the absence of sanctions or binding dispute settlements processes. Member states will be periodically subject to an assessment of their own financial system carried out by members of other jurisdictions and other international networks. A team assembled as such gathers information from the country under review and submits its findings to the country in question. The report then goes through the SCSI and after revision is put up for vote in the Plenary. Once the Plenary approves it the report is made public[220]. This process aims to "harden" the soft international standards by publicly exposing the countries that are failing to implement the standards that they agreed to which would make further cooperation difficult for them, not to

[215] Ibid. Weber (194) 87.
[216] Art. 20-21 FSB Charter.
[217] Wouters (196) 65.
[218] Examples of this can be found in Gadinis (199) 170.
[219] Ibid, 171-172.
[220] Gadinis (199) 174-175.

mention that it would be hard to push non-member states to comply with such sets of standards if even some of its members are unwilling to do so[221].

Overall, the FSB does not have the power to create binding rules but it does not provide any mechanisms for the review of the soft rules it enacts; the plenary may review and modify its output but does so on its own initiative and at its own discretion. This is in part balanced by the strong political legitimacy of the Plenary which, as said, has a considerable presence of political appointees within itself and will act on the input of the G20 (which is an entirely political forum) or at least with its consent. These two features also justify its role as a de facto, sort of apex of TRNs which supervises and influences the work of the other international financial bodies. To this respect all the standard setting bodies are somewhat accountable to the FSB; this does not result in formal accountability mechanisms or review process, but in its informality the FSB can exercise the influence that derives from the abovementioned factors.

Some argue that, considering the prominent role the FSB has come to play in the global economy it would be desirable to achieve a more formal institutional setting and decision-making process[222] however the ever-changing needs of finance regulation need quick, adaptable and informal decision making. Legitimacy and review of (all types, formal or informal, soft or hard) of legal rules must then come in different forms than traditional law-making processes. The FSB has made steps into this direction even if there is still room for improvement.

[221] Ibid.
[222] Wouters (196) 74-75.

CHAPTER II

II. Soft Law within the EU Banking Sector

1. How the EU participates in International Financial Institutions **2.** The Adoption of International Financial Standards in the EU Internal Legislation. The Case of Basel III **3.** The Single Rulebook and the European System of Financial Supervisors **4.** The (soft) Regulatory Activity of the EBA **5.** The (discussed) Regulatory Activity of the ECB

1. How the EU participates in International Financial Institutions

The previous chapter drew a general description on how soft law manifests itself in different legal orders and in the global financial decision-making hubs. At the same time, it aimed to explain and illustrate how soft law is extremely dominant in this policy field. This chapter instead, will analyse the framework of the banking and financial regulation in Europe and how soft law is used as a regulatory tool by the European Union (EU) in this field.

This paragraph will serve to bridge the gap between these two different issues: it will analyse how and to what extent the EU institutions and agencies participate in global or regional Standard Setting Bodies (SSB) that, as said, are tasked with regulating the global financial markets through soft law; it will then also look into what effects do global standards have in the single market and how the EU and/or its member states cooperate in implementing them.

These are extremely relevant issues in determining the division of competences between the EU and the member states and between the various institutions of the Union as the external representation is reflected in internal rule-making power. This creates a number of issues that have only in part been addressed so far: who is tasked with representing the EU at the different International Financial Institutions (IFIs)? Who has the power to enter into bilateral and multilateral informal agreements? Is it different from the procedure for the conclusion of binding agreements? How does the principle of conferral and the internal attribution of competences influence the external activity of the EU? To what extent do the institutions report back to the member states?

And on the other hand what if only some member states participate in certain IFIs? If rules agreed at that level are only implemented by some states that could hinder the single market and tilt the level playing field.

The framework in determining the scope and limits of the external power (both hard and soft) of the EU is extremely complex[1]. Since 1971, in the ERTA case[2] the Court of Justice of the European Union (CJEU) had affirmed the so-called *Principle of Parallelism* according to which policies that fall within the competences of the EU under the principle of conferral[3], gave the Union power to enter international agreements regarding those policies[4]. When the EU is granted internal law making power by the treaties it will also have the competence to enter international agreements with third countries[5] if necessary to achieve the objectives set out in the treaties[6].

After the amendments brought by the Treaty of Lisbon[7], this principle has also become treaty law as the new Art. 216(1) Treaty on the Functioning of the European Union (TFEU) now affirms:

> "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."

Notably the following paragraph 2 affirms that such agreements will be equally binding for both the EU institutions and its member states. Therefore, the EU now can enter formal International Agreements regulated by International law if so explicitly

[1] However, it will only be briefly analysed as it only marginally relevant for this research.

[2] Judgment of the Court of 31 March 1971, Commission of the European Communities v Council of the European Communities, European Agreement on Road Transport, Case 22-70, ECLI:EU:C:1971:32.

[3] Art 5(2) TEU, under which the "Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein."

[4] The judgment had a much narrower scope but has since become a general principle of the EU.

[5] CJEU (2) para. 23-27.

[6] Ugo Villani, "I Procedimenti Interistituzionali", chapter in *Istituzioni di Diritto dell'Unione Europea* (5th edition, Cacucci Editore, Bari, 2017), 242-243.

[7] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ C 306, 17.12.2007, p. 1–271*

envisioned by a treaty provision[8] or, in general, whenever necessary to attain its objectives or if so determined by a "binding Union act" (namely secondary law).

According to Art. 3(2) TFEU the EU will:

> "Have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

However, this provision is not as far reaching as it may at first look: first of all, some legal provisions, while giving express treaty making power to the EU, also specify that this does not exclude the competence of states to conclude their own agreements[9]. The two other cases envisioned by art. 3(2) TFEU must be interpreted in accordance with previous CJEU case law: consistent with the *parallelism principle* the EU will have exclusive competence over the conclusion of international agreements if it has a corresponding exclusive competence regarding internal law making[10], whereas it will have shared competence, so that member states will retain their power to conclude agreements in such areas, in addition to the power of the EU in the corresponding areas that the treaties establish as shared[11]. Even in such cases however, states must refrain from jeopardizing the Union's objectives and action[12] in accordance with the *principle of sincere cooperation*[13].

Unless otherwise envisioned by specific rules of the treaty the general procedure that must be followed for such agreements to be valid and binding is established by Art. 218 TFEU. Under a proposal from the European Commission, the Council shall adopt a decision authorizing the opening of the negotiations; the council indicates the negotiatior(s)[14] and can give them directives[15]; however, it cannot go as far as to give

[8] Such, for example are Art. 207 TFEU, Art. 217 TFEU or Art. 212 TFEU and so forth.
[9] Villani (6) 244.
[10] According to the areas listed in Art. 3(1) TFEU.
[11] Art. 4 TFEU.
[12] Villani (6) 245.
[13] Art. 4(3) TEU.
[14] Usually that will be the Commission itself. See for reference: Paula Garcia Andrade, "The Distribution of Powers between EU Institutions for Conducting External Affairs through Non-Binding Instruments" (2016) 1 European Papers, 120.
[15] Art. 218(3-4).

binding directives to the Commission[16]. While the Commission is the main negotiating actor[17], the Council, in addition to the functions above also authorises the signing of the agreements and their conclusion through a decision[18] (again on a proposal from the Commission). The council, barring exceptions, adopts all those decisions by virtue of a *qualified majority vote* (QMV)[19]. The European Parliament (EP) also has a role in the procedure: first it must be "immediately and fully informed at all stages of the procedure[20]". Then in the cases listed in art. 218(6) the EP must give its consent, prior to the Council's decision; that includes all "agreements covering fields" to which either the ordinary legislative procedure, or a special procedure requiring the EP's consent apply, consistent with the *parallelism principle*. In all other cases the EP will be consulted[21].

As one could perhaps expect the framework in relation to competence and procedure for the approval of soft agreements with third countries and organizations is not nearly as precise[22]; in fact, it is almost blank, leaving the EU institutions and the CJEU many holes to be filled to achieve some clarity[23].

The treaties do not establish which instruments can be concluded[24] and what legal effects they have (as, in theory, they have none). This shall not be interpreted though, as making soft law making free from being consistent with the treaties. The agency or institution that adopts a soft law instrument will have to draft it and implement it in pursue of the objectives established by the treaties; it will have to respect the *principle of conferral*, so that it cannot refer to issues completely outside of its competences,

[16] Villani (6) 250. See also Thomas Verellen, "On Conferral, Institutional Balance and Non-Binding International Agreements: The Swiss MoU Case" (2016) 1 European Papers, 1231. The latter cites a ECJ decision where the directives given by the council were partially annulled for being too detailed and therefore outside the scope of art. 218(4).

[17] Bart Van Vooren and Ramses Wessel, "Instruments of EU External Action", chapter in *EU External Relations Law: Text, Cases and Materials* (1st edition, Cambridge, Cambridge University Press, 2014), 45.

[18] Art. 218(2).

[19] Art. 218(8). See Van Vooren (17) 49.

[20] Art. 218(10). Principle reinforced by the 2012 Inter-Institutional Agreement between the EP and the Commission (OJ 2010 No. L304/47).

[21] Van Vooren (17) 49-50.

[22] Internal EU soft law stemming directly from its institutions has been discussed in §3 of chapter 1 and will be further discussed below. This paragraph only deals with soft law in external relations.

[23] Andrade (14) 117.

[24] Among them there are Conclusions. Communications, Resolutions, Action Plans, Reports. Other instruments are listed at Van Vooren (17) 37.

and it must always be consistent with the *principle of institutional balance*[25]. The CJEU has had few chances to rule on the issue; when it did, in France v. Commission it affirmed that art. 218 TFEU does not apply to non-binding agreements as such[26]; however, it still must be referred to in defining the distribution of competences between the various institutions[27]. In that case the Court ruled on the substance of the case, therefore implicitly admitting that an action of annulment on an agreement even if non-binding is admissible (though it did not give an explanation for such choice). It must be considered that in such instances the Court does not decide whether the agreement has any effect under international law but only whether the signing has any effect EU law-wise[28]. The Court decided the case at hand but did not establish a generally applicable rule. On one hand it affirmed that the fact that an agreement is not binding does not automatically give the Commission the power to adopt it[29] (demonstrating that art. 218 TFEU does exercise at least some influence). However, it did not annul the agreement as it found the institutional balance of powers to be respected in that specific case[30].

In cases such as this one the question revolves around, in addition to the general principles already mentioned, art. 16-17 TEU. While art. 16(1) TEU states that the Council holds general policy-making powers, under art. 17(1) the Commission must "ensure the Union's external representation", meaning that both institutions have a claim. In addition to that it must not be forgotten that art. 218 TFEU envisions a prominent role for the EP which is entrusted with "political control" and "legislative functions" according to art. 14 TEU. In light of the principle of institutional balance one could hardly claim that the EP can be entirely left out of these processes (even though that has so far been the case)[31].

[25] Art. 13(2) TEU, that defines it as "mutual sincere cooperation" between the Union's institutions. See Van Vooren (17) 37.

[26] Judgment of the Court (Full Court) of 23 March 2004. French Republic v Commission of the European Communities. Guidelines on regulatory cooperation and transparency concluded with the United States of America – Non-binding character, C-233/02, ECLI:EU:C:2004:173, para. 45.

[27] Andrade (14) 120-121.

[28] Ibid, 118.

[29] Ibid, 116-117, referring to para. 40 of the judgment.

[30] Van Vooren (17) 38.

[31] Verellen (16) 1225, 1233.

In the more recent[32] "Swiss MoU[33]" case the ECJ again did not elaborate on the question of admissibility[34] nor establish a general rule[35]. However, the judgment affirms that the Council's policy making power includes at least the authorization to start negotiations and their conclusion as they both involve an "assessment[36]". It follows[37] that in between those two policy decisions the commission will have a high degree of autonomy in negotiating the content of such an agreement. One could argue that the Commission could autonomously negotiate and conclude an agreement if it is a so-called administrative agreement, meant to only commit the Commission and not the EU as a whole[38]. Again, as is rightly pointed out by Verellen[39] that leaves out the EP completely, a position hardly justifiable if you consider that even those soft agreements are to an extent legally relevant.

This is the general framework of legislative and quasi legislative action in the EU external relations; the accession to and activity within International Organizations (IOs) can be considered as a special case of such general framework. The treaties envision such possibility in art. 211, 216(1) and 217 TFEU[40] (and also relying on art. 218 and the *parallelism principle* for what concerns the respective competences of the EU and member states). In order to join an IO two issues need to be assessed: on one hand what competences do the EU and its member states have in a certain policy field and on the other hand whether such IOs allows another IO to become a member. When it comes to informal networks[41] the latter hurdle seems to be cleared as their informality does not only accept formal representation by states but other kinds of regulatory, regional or even private bodies can participate; that leaves only the different allocation of powers between states and the various EU institutions to be

[32] Which, notably, applies the treaties in their current wording.

[33] Judgment of the Court (Grand Chamber) of 28 July 2016. Council of the European Union v European Commission. Action for annulment — The European Union's external relations […]. Case C-660/13, ECLI:EU:C:2016:616.

[34] Even though the Advocate general did in its opinion, see Verellen (16) 1227.

[35] Ibid, 1231.

[36] It adds that the assessment is made "irrespective of whether or not that agreement is binding". See CJEU (35) para. 39.

[37] And the Court has hinted at it, for example in para. 43 or by continually referring only to the "signing" in discussing the respective powers.

[38] Andrade (14) 121. Also in Van Vooren (17) 54.

[39] Verellen (16) 1233.

[40] See "The EU and international institutions", chapter in Van Vooren (17) 249.

[41] Like those discussed in § 4-5 of chapter 1.

settled. The EU can rightly claim it needs to participate in certain informal fora despite their lacking legal authority if such action is needed to achieve the objectives and exercise its competences. As there is not further indication in the treaties one must rely on the discipline and principles applied to infoormal agreements as explained above or on specific pieces of secondary EU legislation[42].

As an example on the division of competences, the EU has exclusive competences regarding trade and commerce and therefore is a member and in charge of taking policy decisions and positions in the WTO. The same cannot be said in other cases: financial regulation is still a shared competence between the EU and its member states[43].

Banking supervision is in theory a shared competence under art. 4(2)(a) and art. 114 TFEU but under the so called "pre-emptive effect[44]" it could also be claimed as a field where the EU should have exclusive external representation. Under this doctrine, once the Union has exercised its competences internally, the lack of a single external action could jeopardize its efforts so the EU must replace member states in external action to effectively exercise its tasks. It should be noted though, that, internally, the division of supervisory competences is between the ECB and National Competent Authorities (NCAs), with the contentious point being the direct conferral of powers to the ECB and the EBA through secondary legislation. Unlike the Commission, the ECB cannot claim exclusive external representation on its own initiative. The only path to make it happen is through an explicit conferral of exclusive competence over external representation in supervisory matters through a regulation under art. 127(6) TFEU[45] (but that is yet to happen). Another possibility would be to rely on art. 127(5) that establishes a limited competence over prudential supervision and financial stability, without specifying how it should be exercised. However, it merely states that the European System of Central Banks (ESCB)[46] shall "contribute" to prudential supervision and financial stability. In addition to the problems in relation to the

[42] Van Vooren (40) 248. Also in Jan Wouters and Jed Odermatt, "International Banking Standards, Private Law, and the European Union", chapter in Marise Cremona, and Hans-W Micklitz, *Private Law in the External Relations of the EU* (1st edition, Oxford: Oxford University Press, 2016), 172.

[43] Wouters, ibid, 174.

[44] Annamaria Viterbo, "The European Union in the Transnational Financial Regulatory Arena: The Case of the Basel Committee on Banking Supervision" (2019) 22 Journal of International Economic Law, 217.

[45] The same legal basis used to establish the Single Supervisory Mechanism (SSM), as will be explained below.

[46] That includes non-euro member states, unlike the SSM.

differences in participating member states this *contribution* task could hardly serve as a legal basis to establish exclusive external representation.

Instead, as of now, only some of its member states (and not the EU institutions) are full members of the Basel Committee on Banking Supervision (BCBS)[47]. In fact, it has been argued that the EU has so far not been able to live up to its market power in successfully lobbying as a unity and a single jurisdiction in Transnational Regulatory Networks (TRNs)[48]. This is mostly due to its member states trying to retain as much influence and autonomy as possible in trying to influence standard making. On the flipside that leaves the EU to legally implement standards to which only some of its members committed to[49].

The specific role and methods of participation of the EU within some of the most relevant TRNs will be used as examples.

The FSB internal structure and competences have already been analysed chapter 1. Regarding the EU's role, it is represented by the Commission and the ECB, consistent with the forum's activity of endorsing standards developed in other forums, monitoring implementation of standards and commitments developed at the G-20 level and identify priorities to achieve financial stability and its composition of both political and technical, national and transnational institutions. It will not go unnoticed that while the EU has 2 institutions sitting in the plenary, 5 of its member states are also members combining for a total of 13 institutions, effectively giving outsized imbalance in favor of some member states which will retain more power over the agenda setting activity[50]. If one also considers that the FSB has also influenced EU legislation and that the plenary takes decisions by consensus some member states can effectively influence law making within the EU from the outside instead of finding compromise with the other member states.

In the International Organization of Securities Commission (IOSCO) which is, again, a non-formal, quasi-public transnational organization tasked with developing

[47] As will be explained below.

[48] Wouters (42) 172.

[49] Julia Black, "Restructuring Global and EU Financial Regulation: Character, Capacities, and Learning", chapter in Eddy Wymeersch, Klaus J. Hopt, and Guido Ferrarini (eds), *Financial Regulation and Supervision: A post-crisis analysis* (Oxford: Oxford University Press, 2012), 34.

[50] Ibid, 178-179.

and approving standards for the supervision of financial firms and markets[51] the Commission is an associate member represented by the DG for Internal Market and Services along with the European Securities Market Authority (ESMA) that also is an associate member. Associate members may attend and speak at the Presidents Committee's meeting but do not have voting power[52]. It must also be considered that, crucially, the most relevant decision-making body within IOSCO is the Board[53] to which the Commission and ESMA are only observers[54]. This is in stark contrast to the fact that several of the member states' national securities authorities/regulators are full members with voting powers.

A more thorough analysis will be made regarding the EU involvement in the BCBS. The BCBS is the main network for banking regulation and supervision and does not limit its participation to national authorities making the Union's participation feasible. The Commission and the European Banking Authority (EBA), that in principle represent the entire EU, participate as observers whereas the ECB, both as a central bank and as the head of the SSM (so as a supervisory authority), are full members, representing the Eurozone and the banking union respectively[55]. Alongside those institutions, 8 Eurozone countries and one other EU member participate. However, the legal basis to justify the EU intervention and participation is disputed. Under art. 220(2) TFEU the EU can establish, in general, "all appropriate forms of cooperation" with international organizations; as repeatedly said before though, the BCBS is not an international organization, so only by analogy could that provision be used and so far nothing points to this interpretation[56].

Alternatively, art. 138 TFEU sets up an internal procedure to adopt a common position in external relations on "matters of […] economic and monetary union within the competent international and financial institutions and conferences". Through this procedure the Council, composed only by the states that have adopted the single

[51] Antonio Marcacci, "The EU in the Transnational Financial Regulatory Arena: The Case of IOSCO", chapter in Cremona (45) 207. Reference made to IOSCO By-Laws art. 1.1, available at https://www.iosco.org/about/?subsection=by-laws.

[52] Ibid, 210. See art. 30 of the By-Laws.

[53] Ibid, 213.

[54] Ibid, 215. Full membership available at https://www.iosco.org/about/?subsection=display_committee&cmtid=11.

[55] Viterbo (44) 212-213.

[56] Ibid, 215.

currency (art. 138(3)), after consulting with the ECB may establish a common position on an initial Commission's proposal. The use of this provision, though, is still questionable for a number of reasons: first it has been argued that it would not include TRNs such as the BCBS[57]. Secondly, the independence of the ECB from external influence in carrying out its tasks enshrined by art. 130 TFEU would not be respected in this case. Art. 130 affirms that in carrying out its tasks and duties under the treaties (meaning any task and duty) neither the ECB as an institution nor its members individually "shall seek or take instructions". It goes on to make a list of bodies (including national and European, public and private) that are forbidden from giving instructions, but the but the bottom line is that in carrying out its functions the ECB must be free from any influence either political or coming from the industry. The provisions ensures the role of the ECB as a technical body with an institutionalised task established by the treaties the must be executed completely free from political considerations or general policy objectives. So under art. 138, either the ECB would have to represent the Union under instructions from the Council (which composed by national political representatives, in contrast with art. 130), or one considers that the procedure in art. 138 only applies to the other representatives of the EU in Basel (EBA, Commission). The latter would raise other problems, that institutions that are to represent the whole EU would receive input only from the countries that have adopted the Euro and it would also be at odds with the cohesiveness of the external action of the EU established in art. 21 TEU[58].

The EU institutions (as stated above) could claim exclusive competence over banking supervision as it is an area of competence in which the EU has already adopted legislation internally and therefore must have exclusive external representation to ensure such legislation is not jeopardized. This principle, however, only explicitly applies to formal treaty making under art. 216[59]: so on one hand the EU would then need to follow the entire procedure established in art. 218 and on the other hand states

[57] Ibid. though the use of the word "conferences" could be broad enough to include informal conferences.

[58] Roberto Cisotta, "Le Relazioni dell'Unione Europea con le Organizzazioni Internazionali in Campo Economico, Finanziario e Monetario", chapter in *L'Unione Europea Nel Sistema Delle Relazioni Economiche e Monetarie Globali: Un'Indagine Giuridica* (vol. 21, Torino: Giappichelli Editore, 2018), 281-283.

[59] Viterbo (44) 216-217.

whose national authorities participate in the BCBS could claim that since such forum is informal in nature and does not create legal obligations nor binding law their activity could not be in contrast with their commitments at the EU level (though they would still have made a commitment, albeit informal). It has also been noted[60] that while the BCBS comprises central banks and supervisory authorities alike, those functions are kept in the EU treaties: regulation is shared between member states and the EU[61] while the activity of supervision is the sole competence of the ECB[62].

Ultimately then the provisions that most closely seem to envision EU's representation in the BCBS are to be found elsewhere: art. 8 of the SSM Regulation (SSMR)[63] and art. 33(1) of the EBA regulation[64], use similar wording to empower those organs to enter administrative agreements with (among others) regulatory or supervisory authorities, provided that they do not give rise to legal obligations for the EU and its member states and that they do not affect the competences of the EU or its member states. The wording of such provisions would seem to suggest and refer to cases such as the BCBS, but it should also be noted that they are secondary legislation[65] so they cannot enlarge the competences of the Union's institutions[66]. Keeping this in mind, it means that the general framework described in the first part of the paragraph (in relation with the cooperation between the Council and the Commission, the other EU institutions and between institutions and member states) must be respected. One possible avenue would be to consider the ECB as the Single Supervisory Authority according to 127(6) TFEU and then consider its external action necessary to ensure the discharge of its tasks accordingly. What's more is that the CJEU has already

[60] Ibid, 217-218.

[61] Through the ordinary legislative procedure, see art. 289 TFEU.

[62] Supervision of non-significant banks is delegated to national authorities, but the ECJ has established that it remains competence of the ECB. See Judgment of the Court (First Chamber) of 8 May 2019. Landeskreditbank Baden-Württemberg - Förderbank v European Central Bank. […], Case C-450/17 P. ECLI:EU:C:2019:372, para 37 ff.

[63] 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.*

[64] 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.*

[65] The SSMR has a more solid legal basis in this case, as art. 127(6) explicitly envisions the conferral of tasks to the ECB on supervisory matters, as will be analysed in §5.

[66] Viterbo (44) 218-219.

affirmed this principle regarding the internal division of competences between the ECB and NCAs[67] so it would only be an application of the *parallelism principle*; however it must be noted that the mandate and the activity of the BCBS is much wider than that established by the SSMR[68] so this common representation would only be possible for some of the activities of the BCBS while for others member states would still need to intervene, making it legally, politically and practically impossible.

From this analysis it is clear that the EU currently lacks a legal basis and a political will to express a single, common and cohesive voice and position in international settings. The Commission has raised the issue but with poor results so far. Possible solutions would include enhanced cooperation and/or interinstitutional agreements between the EU's institution to improve coordination and external policy making, since it is unlikely that a push will come from the member states to grant the EU more power to replace their own[69]. Such solutions would have to, as already pointed out above, include the EP which has so far been left out of soft external law-making process, but has expressed its discomfort with its marginal role as early as 2006[70]. Through consultation prior to participation in network's meetings, that would have to result in guidance of a political nature but could hardly be applied to the ECB without affecting its independence. It would also be hard to envision the Council giving up its policy making position established by art. 16 TFEU in favor of the EP. One option would be to include a report on the activity within the BCBS (or other fora) in the meetings that already occur between the ECB's representatives and the EP[71]. This would not provide the EP with the power to express its position and influence the EU's position beforehand but would create a mechanism of accountability and interinstitutional cooperation.

These issues are particularly relevant since, as we will see in the next paragraph, adoption of international standards often leads to enactment of EU legislation, making the EU's involvement important both to influence their content (as a unified voice will

[67] ECJ, Landeskreditbank (62).
[68] Viterbo (44) 223.
[69] Ibid, 222.
[70] Michael S. Barr and Geoffrey P. Miller, "Global Administrative Law: The View from Basel" (2006) 17 European journal of international law 36-37.
[71] Viterbo (44) 225-226.

have more lobbying power) and to ensure that agenda setting in the EU is not left to a handful of member states.

2. The Adoption of International Financial Standards in the EU Internal Legislation. The Case of Basel III

As briefly mentioned in §1 several of the internationally agreed soft financial standards adopted by SSBs have gone through a so-called "hardening" process and have become part of the EU legal order by reproducing soft international standards in formal, binding, internal law[72].

There are 2 main underlying theories explain the hardening of International Financial Standards (IFSs): one is the private actor governance, according to which the most powerful private market participants retain the most knowledge and expertise and in turn are able to exercise lobbying power effectively in framing the standards in the first place. Subsequent adoption by them will pressure smaller actors to comply for fear of being squeezed out of the market. The second theory instead relies on market power: allegedly if the jurisdiction that have the higher regulatory and enforcing capacity and represent the bigger markets adopt certain standards, then smaller markets will be more inclined to conform as well[73].

The incorporation of the International Financial Reporting Standards (IFRS) into EU law as mandatory requirements for all companies whose securities are traded on a regulated market in the EU[74] is a good example of this dynamic. Empirical evidence suggests that this was a decisive push in subsequent swift implementation in several other jurisdictions[75] because of the market size of the EU, that makes it able to exercise a big influence on the international stage when it is able to express a coordinated and common position[76].

When it comes to the Basel Accords agreed to by the BCBS forum the EU has taken upon itself to transport them into legislation in place of the member states: the treaties do not envision such power specifically, but the considerations made in §1 apply. The

[72] Abraham Newman and David Bach, "The European Union as Hardening Agent: Soft Law and the Diffusion of Global Financial Regulation" (2014) 21 Journal of European Public Policy, 430-431.
[73] Ibid, 432-434. The latter is also explained in Barr (70) 20-22.
[74] Newman (72) 438.
[75] Ibid, 437.
[76] Wouters (42) 198.

standards, as worded in the agreements, need implementation through national legislation due to their soft nature and wording[77] and lacking an automatic process that incorporates the Basel standards into legislation this has been done through ordinary legislation[78].

The accords do not establish rules thate are directed to private actors, namely banks and financial institutions[79] and that, once implemented, are directly applicable to them. In an interesting dynamic, the EU has gained the legitimacy and power to regulate this area thanks to an outside source[80]. Due to concerns related to the maintenance of a level playing field in the EU internal market and to the fact that some member states do not participate in the BCBS the transposition of those standards could not be left to member states; in addition to that, this has also led to what were worded as "floor" or minimum requirements in the Basel Accords (that states could decide to increase) to be instead mostly set as fixed rules in the EU, that member states could not modify even if it meant sounder requirements[81].

The first accord (Basel I, 1988) did not aim to create a comprehensive common framework for banking regulation but was instead focused on creating a common approach to risk management[82] and in particular to credit risk for banks operating in the signing states and especially for transnational banks that operated in multiple countries to minimize inefficiencies. The main innovation was to legally require banks to hold an amount of capital equal to or higher than 8% of the assets present on its balance sheet. Assets were given different valuation according to their riskiness and the percentage referred to assets calculated as such (so-called Risk Weighted Assets or RWAs)[83].

Basel II was agreed to in 2004 and subsequently adopted in the EU with the[84] Capital Requirements Directives (CRD). Rather than maintaining a single capital

[77] Marco Bodellini, "The Long 'journey' of Banks from Basel I to Basel IV: Has the Banking System Become More Sound and Resilient than it used to be?" (2019) 20 ERA-Forum, 85.

[78] Diane Fromage, "The (Multilevel) Articulation of the European Participation in International Fnancial Fora: The Example of the Basel Accords" (2022) 23 Journal of banking regulation, 58.

[79] Jeffery Atik, "EU Implementation of Basel III in the Shadow of Euro Crisis" (2014) 38 Review of Banking and Financial Law, 296-297.

[80] Ibid, 298.

[81] Ibid, 302,316.

[82] Ibid, 304.

[83] Bodellini (77) 86-87.

[84] David Howarth and Lucia Quaglia, "Banking on Stability: The Political Economy of New Capital Requirements in the European Union" (2013) 35 Journal of European Integration, 334.

requirement for all institutions, it allowed banks to use their internal programs to evaluate risks and the capital required accordingly, as it was thought they had better knowledge to assess the capital they needed[85]. Supervisors were in charge of judging and approving the soundness of such programs, while credit rating agencies (CRAs) would evaluate the risk attached to assets (therefore maintaining the RWAs). It was claimed that as an aggregate effect this actually reduced the capital levels[86] that European banks maintained and contributed to cause, or at least failed to prevent, the global financial crisis (GFC) of 2008[87].

Overall, the EU was considered to have faithfully and rigorously have implemented the Basel accords as it also helped the EU institutions to establish a single market and a harmonized set of rules for banks[88], but this was about to change with Basel III.

The 3rd Basel Agreement was signed in 2010 but subsequently updated and gradually phased in until 2019[89]. Fueled by the GFC its negotiations proved much more contentious, both in Basel and at the EU level regarding its implementation[90]. As the Basel Accords become and provide a more comprehensive framework the competence of the EU in the field consequently expands, in turn reducing the space that remains for national discretion. The GFC and Basel III was a decisive push in establishing the so-called Single Rulebook, a set of shared rules, for banks operating in the EU[91] the bulk of which is made up by Basel-implementing legislation. In Basel, the approval involved a tentative more transparent process which included the G20 endorsement of the initial BCBS proposal and the subsequent notice and comment phase, before final approval by the BCBS[92].

The new rules aimed at increasing capital levels that banks held and decreasing their leverage[93]. Regulatory capital is, in short, the amount of money, that banks are required by law to have available at all times to cover for the possible losses that they may

[85] Ibid, 87.
[86] Atik (79) 307,323.
[87] Bodellini (77) 87,89,91.
[88] Atik (79) 293-294.
[89] History Of The Basel Committee, available at https://www.bis.org/bcbs/history.htm.
[90] Howarth (84) 334.
[91] Fromage (78) 55-56.
[92] See Chapter 1.
[93] This is a brief description of the elements of Basel III. For a thorough and complete view, see the agreements at: "Basel III: international regulatory framework for banks" available at https://www.bis.org/bcbs/basel3.htm?m=2572.

suffer. Capital will ensure that in the event of a crisis a financial institution is still able to meet its obligations and keep the business afloat, thus also avoiding spillover effects[94]. In Basel III capital is divided in Tier 1 and Tier 2. Tier 1 capital includes Common Equity Tier 1 (CET1), made up by common shares, stock surplus, retained earnings, other sources of income and other reserves, and Additional Tier 1, mainly instruments issued by the bank not included in CET1[95]. Banks are thus obliged to hold different percentages of RWAs for, respectively, CET1, Tier 1 Capital and total capital.

Furthermore, for the first time, a mandatory maximum leverage ratio was introduced. Leverage is the bank's exposure (money owed to it through various sources such as securities, bonds and loans) divided by its capital. It was noted that the investments that lead to exposure are usually financed through debt rather than equity excessive leverage could threaten the ability of banks to meet its obligation in case of failure of a counterparty[96]. Therefore, banks must at all time have a Tier 1 Capital that is at least 3% of its exposure, not risk-adjusted[97].

In addition to that two other measures were approved to ensure that over periods of stress and crisis banks had enough liquid assets to match their short-term liabilities and avoid the creation of excessive imbalance due to their exposure to short-term liabilities while relying on long-term assets. The Liquidity Coverage Ratio (LCR) aims to allow banks to have "sufficient High Quality Liquid Assets (HQLA) to survive a significant stress scenario lasting 30 calendar Days[98]", while the Net Stable Funding Ratio (NSFR) requires them to have sufficient stable funding according to the liquidity of their assets and to possible "contingent liquidity risks" over a 1-year time-frame[99]. To finish, 2 new buffers will be requested: the capital conservation buffer and

[94] Bodellini (77) 82-83.

[95] Complete list in "Basel III: A global regulatory framework for more resilient banks and banking systems - revised version June 2011" available at https://www.bis.org/publ/bcbs189.htm. In particular paras. 49 ff.

[96] Bodellini (77) 83.

[97] Ibid. See also Emilios Avgouleas, "Regulatory and Supervisory Reform: US, EU, BCBS" chapter in *Governance of Global Financial Markets: The Law, the Economics, the Politics* (Cambridge: Cambridge University Press, 2012), 271.

[98] See "Basel III: The Liquidity Coverage Ratio and liquidity risk monitoring tools", para. 14; available at https://www.bis.org/publ/bcbs238.htm.

[99] Basel III (95) para 42. Avgouleas (97) 271.

countercyclical buffer will require the buildup of buffers during times of economic and credit growth to stay away from excessive risks and withstand future losses[100].

Several issues proved contentious in the intra-EU negotiations towards the implementation of Basel III, due to the different characteristics of the national financial systems of various countries that would lead to major distributive effects. Member States saw the process as an opportunity to renegotiate the balance that had already been struck in Basel and gain concessions[101].

Among the major economies, for example, UK banks relied much more on equity as a source of financing while German and French banks rely more on debt and public funding (especially German Landesbanken). Also, a lot of French banks are, at the same time, insurance companies and the new Basel framework forbid the so-called "double-counting" of reserves for insurances as Capital 1[102]. That means that the new capital requirement, as it refers to CET1, will disproportionately impact different banks in different countries. Therefore, the Commission proposal included, under certain conditions, state loans to be taken into account to calculate the capital ratio[103], as many banks would otherwise be forced to either shrink their RWAs[104] or raise a considerable amount of capital[105]. Or the issue of the leverage ratio which in Basel is framed in comparison to total assets but that Germany and France tried to keep only in relation to RWAs. Or how much do non-financial companies rely on bank loans for funding as opposed to securities markets and would then see their main source of funding hindered with few alternatives available in case of a swift imposition of mandatory leverage ratios (that is the case in Germany and Italy especially, but is generally much more common in Europe than, for example in the US). Also, much debate was on whether to seek maximum harmonization for capital ratios, which was eventually the case[106], or maintain the Basel framework that allowed the imposition of stricter capital requirements[107].

[100] Basel III (95) para. 122,136. Avgouleas (97) 324-325. Atik (79) 311.
[101] Howarth (84) 334-335.
[102] Atik (79) 327-329.
[103] Howarth (84) 336,340-341.
[104] Which would in turn lead to possible credit crunches in economies where undertakings rely heavily on bank credit rather than equity.
[105] Atik (79) 323.
[106] Ibid, 321-322.
[107] Howarth (84) 340-342.

Basel III became binding in the EU through the "CRD IV" legislative package[108] approved in late 2013 (and in subsequent years as some provisions were implemented gradually). As said above and as admitted by the Commission[109] itself the internal regulatory framework has, in more than one instance departed by the Basel rules[110]. The concern and the necessity to protect the single market through a single set of rules has led to a different rule-making approach. The rules in Basel III aimed had the clear intent to ensure the financial stability by avoiding possible "race to the bottom" situations of internationally active banks through minimum standards. The Union's legislator instead had to ensure financial stability while also preventing distortions and competitive imbalances within the single market. That was pursued through "maximum harmonization[111]" rules that were equally applicable in every member state with limited discretion left to member states and were equally applicable to all banks in the EU no matter their size and systemic impact[112].

The other issue was the so-called "Basel-a-la-carte[113]" tendency that has resulted, in some instances, to leave out and not implement some provisions contained in the agreements while instead autonomously adding different rules that were not included in the same legislative framework[114]. There are two main causes for this approach: first, the accords had to be transposed through EU legislative procedure (in this case art. 289(1) TFEU) that required broad political agreement within the Council and the EP leading to an intra-EU renegotiation of some provisions to find an acceptable compromise. The second is, as mentioned, the concern of the Commission of the possible effects that different rules through separated national implementations (even

[108] Which included the Capital Requirements Directive (CRD) (Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC Text with EEA relevance**,** *OJ L 176, 27.6.2013, p. 338–436*) and the C.R. Regulation (CRR) (Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 Text with EEA relevance, *OJ L 176, 27.6.2013, p. 1–337*).

[109] See Press Release, European Commission, CRD IV/CRR—Frequently Asked Questions 5 (Mar. 21, 2013), available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_690.

[110] Atik (79) 314-316.

[111] "(Dis-)Integration through Crisis (2008–2012)" chapter in Pedro Gustavo Teixeira, *The Legal History of the European Banking Union* (1st edition, London; New York, Hart Publishing, 2020), 178. Also in Howarth (84) 336.

[112] Ibid, 178. See also Commission (109), §2.

[113] Atik (79) 317, 327.

[114] Ibid, 318, Wouters (42) 194. See the examples mentioned below.

if limited to smaller banks) would have on competition[115]. This way though the EU legislator has perhaps overlooked that the aim of the new legislation was to deliver on a common global regulatory framework and the fact that it had made a commitment to do so.

An example is the fact that eventually Banks in the EU were allowed to keep counting capital as reserve to both its insurance part of the business and for banking activities even though Basel III indicated not to count it as CET1 capital[116].

The new legislation keeps the Capital requirements unchanged but increases the percentage that must be covered by CET1 (mostly common equity)[117] while also establishing common definitions of capital components[118]. Another example of selective implementation is a provision the CRR has introduced that allows to discount the risk weight of loans made to finance Small and Medium Enterprises (SMEs) which constitute an extremely relevant part of the business of many European banks[119]. As mentioned above[120] the new capital requirements would have an outsized impact on small and medium banks (which are widespread in several EU countries), so this provision helps them offset that, at least in part. It is worth highlighting that, despite being included in the CRR, it is totally unrelated to the Basel agreement and only served as an internal market provision on the initiative of the EU legislator[121].

Further strengthening the resilience of banks CRD IV aims to reduce the leverage exposure of banks. The newly introduced *leverage ratio* has the express function of adding a safety net that limits the overall increase of the balance sheet compared to capital available[122], as it does not depend on the relative RWA but is instead the capital to total exposures (on and off-balance sheet) ratio[123]. Initially it will be national

[115] Howarth (84) 337. Commission (109) §2
[116] Atik (79) 327-331.
[117] Commission (109), §5.
[118] Luca Amorello, "Europe Goes 'Countercyclical': A Legal Assessment of the New Countercyclical Dimension of the CRR/CRD IV Package" (2016) 17 European Business Organization Law Review, 148.
[119] Ibid, 164. Also in Rainer Masera, "CRR/CRD IV: The Trees and the Forest" (2014) 67 PSL quarterly review, 396.
[120] See the previous page.
[121] Amorello (118) 164.
[122] Masera (119) 405 quoting Commission (109), §2,7.
[123] Amorello (118) 150.

authorities that will decide whether to implement it while data is gathered on its effects[124].

Implementation of LCR and NSFR was initially postponed[125], but the Commission was charged with intervening with a delegated regulation that has since enacted[126].

Capital requirements were further strengthened through buffers provisions. The *capital conservation buffer* requires an additional CET1 of 2.5% of total exposures on top of capital requirements; the countercyclical buffer mandates bank to set aside additional capital in times of economic growth to avoid excessive lending that could deteriorate in recessionary periods; banks that are deemed to be systemically important according to the FSB will have a mandatory systemic risk buffer; last, not envisioned by Basel III but included in CRD IV, the systemic risk buffer of CET1 can be implemented by single member states. States will have to notify the Commission and comply or explain with the Commission's opinion for buffers set between 3 and 5% while they will need the Commission's prior approval to set it above 5%[127].

Finally, CRD contains new rules regarding the corporate governance structure of banks: maximum remuneration, diversity in composition of the board, separation of functions to ensure sound risk management and risk avoidance. These rules have become integral part of the single rulebook but were also not Basel-mandated; instead, they were autonomously drafted by the EU and implemented in the CRD IV package[128].

3. The Single Rulebook and the European System of Financial Superviasors

As briefly mentioned in the previous paragraph the CRD IV legislation and subsequent acts meant to implement Basel III constitute a big portion of the so-called "Single Rulebook" (SR). But what is the Single Rulebook? It is not a legal term per se but a descriptive term, that refers to both a structural project adopted by the EU institutions (Commission, Council, EP) and the result of such approach which is a

[124] Masera (119) 405, Atik (79) 332.
[125] Masera (119) 405-406.
[126] See "Implementing Basell III in Europe" available at https://www.eba.europa.eu/regulation-and-policy/implementing-basel-iii-europe.
[127] Commission (109), §10. Masera (119) 401-403.
[128] Commission (109), §2,11.

comprehensive and lengthy body of rules enacted through the years and at different levels that creates a single framework for bank regulation in the single market[129]. After the GFC and the sovereign debt crisis highlighted the shortcomings of the previous regime based on mutual recognition, minimum harmonization and home country control it was clear that further integration could only be achieved through shared rules, shared supervision and shared supervisory practices[130].

The SR is sometimes referred to as a complete harmonization of laws by the EU that has completely taken away the power to regulate the financial sector from states. However, that is not entirely accurate: while there was a sharp increase in the production of EU law regulating banking and financial sectors and mostly through regulations directly applicable on national supervisors and financial institutions in the entire EU the framework is more complex than that and has been described as a "multilevel" system of regulation and governance[131]. As it is not a single piece of legislation but instead several different sources of law that only considered together form a "rulebook" it will be up to the interpreter to identify what is part of the SR and what is not. Clues would be, for example, if such circumstance is affirmed in the recitals of a legal act or in other preparatory works or if it defines the space in which the European Supervisory Authorities (ESAs) must operate[132].

The first level is constituted by EU secondary law: that is Regulations of general application (art. 288(2) TFEU), or Directives which required subsequent implementation by the member states (art. 288(3) TFEU). In most cases the ordinary legislative procedure could be used, with adoption of the same text by the Council and the EP (art. 289(1) TFEU) Barring specific cases where there was a specific legal basis in the treaties (for example the 4 freedoms[133]) the basis that was used to justify further harmonization was the general clause of art. 114(1) TFEU regarding the establishment

[129] Asen Lefterov "The Single Rulebook: legal issues and relevance in the SSM context" (2015) 15 European Central Bank Legal Working Papers, 5-6.

[130] Stefano Cappiello "Il meccanismo di Adozione delle Regole e il Ruolo della European Banking Authority", chapter in Raffaele D'Ambrosio, *Scritti sull'Unione Bancaria* (Roma, Quaderni di Ricerca Giuridica della Banca d'Italia, numero 81, 2016), 38-41.

[131] Lefterov (129) 10-12.

[132] A list of "Level 1" legislation that forms the Single Rulebook is available on the EBA website: "Interactive Single Rulebook" https://www.eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook. It should be noted though, that the website itself specifies that the list does not have legal effect and that a myriad of different acts and sources are also integral part of the SR.

[133] Title IV of the TFEU.

and functioning of the single market, which obviously limited the width of the EU's action as there was not a specific conferral regarding banking regulation. Despite this fact, it has allowed to pursue maximum harmonization through the use of regulations[134]. In principle level 1 should be limited to general principles and general policy choices but as we will see these distinctions often blur[135].

Level 2 legislation is made up by delegated acts: the Treaty of Lisbon has introduced this possibility empowering in general the commission to adopt delegated acts whenever secondary legislation establishes it. In the SR these come in the forms of[136]:

- Delegated regulations, according to art. 290 TFEU that lays out the conditions for the exercise of this power.
- Implementing acts according to art. 291 TFEU, when they are necessary to implement level 1 legislation.
- Regulatory (art. 10 EBA Regulation) and/or implementing technical standards (art. 15). Through this process the standards formally come into a decision from the EBA recommending the standards. Since the EBA does not have the power to adopt delegated legislation these are then approved by the Commission and become binding regulation as in art. 290-291 TFEU.

Practice has shown that the difference between the different acts is narrower than it might seem at first sight. The Commission has adopted relatively few acts on its own, in contrast to the technical standards production that has been, both numerically and in relation to its relevance, predominant in shaping the content of the SR[137].

There is then Level 3 legislation. The EBA (as do the other two ESAs) releases soft, informal instruments that come in various forms. Most common are recommendations and guidelines but there are a lot of other instruments that are enacted[138]. The volume of rules that have come through level 3 legislation has been enormous in recent years and will be analysed in the following paragraph[139].

[134] Teixeira (111) 187. Lefterov (129) 6.
[135] Cappiello (130) 42. Lefterov (129) 8.
[136] Cappiello, ibid. Lefterov (129) 12 ff.
[137] Lefterov (129) 14.
[138] See the chart in Cappiello (130) 49.
[139] Ibid, 48.

The EBA, along with the European Securities and Market Agency (ESMA and the European Insurance and Occupational Pensions Authority (EIOPA) are the 3 ESAs that fit into the European System of Financial Supervision (ESFS) that has been established after the GFC.

The crisis exposed the weaknesses of the previous legislative and supervisory framework in the EU. The establishment of the single market meant that states had to refrain from obstructing EU banks in providing their services across the single market which is a right protected by art. 56 TFEU. But in the absence of positive harmonization through EU-wide legislation it allowed banks to seek regulatory arbitrage and some jurisdictions to provide extremely market-friendly rules to attract more business spiraling into dangerous "races to the bottom". Not only that but it was noted that different rules and practices created difficulties for supervisors even when there was not the intent to evade the rules behind it. That was an integrated market without common regulation and supervision where bank crisis caused tremendous "spillover effects" towards other banks in other countries and (as happened in the 2012 crisis) towards governments[140].

Those problems were highlighted in the comprehensive *De Larosiére Report*[141] that also proposed a new approach based on maximum harmonization and increased power for the EU[142]. The former resulted in the SR. The latter instead lead to the establishment of the European Systemic Risk Board (ESRB) charged with macro-prudential supervision and monitoring systemic risks that could be threats to the financial stability of the single market and the 3 ESAs tasked with micro-prudential supervision and oversight of financial firms[143]. The 3 ESAs were supposed to replace the previous "Level 3 Committees" that proved ineffective in tackling the crisis as they lacked powers to do so.

The legal basis that served to establish the ESFS was, again, art 114 TFEU: while that clause is often used to harmonize rules in relation to the single market (as was the case for the SR) there were qualms about its use in order to establish new agencies and

[140] Ibid, 38-39.
[141] Available at https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf.
[142] Teixeira (111) 159-160.
[143] Marco Lamandini and David Ramos Muñoz, "The Regulation of the European System of Financial Supervision", chapter in *EU Financial Law: An Introduction* (Wolters Kluwer, Milano, 2016), 138-140.

to afford them broad and sometimes binding powers, although the CJEU had already established that the purpose of harmonization of laws included various activities and recognized that in some cases these would be best carried out by a newly established agencies[144].

The ESRB was established to monitor the stability of the entire single financial market, since member states might not be in position to recognize systemic risks and might have been prevented from intervening due to the provisions on the freedom of services. However, as said, the legal basis was questionable at least as the ESRB did not pursue harmonization of laws[145]. Therefore, the ESRB was not established as an independent agency but is hosted and relies on the ECB and is chaired by its president[146]. The ESRB does not have binding powers and can only issue *risk warnings* of identified systemic risks to various national or European authorities, or *recommendations* concerning actions or regulation that should be adopted to address such risks. The addressees of those acts will either comply or provide a formal answer explaining how and why they chose to act differently, according to a *comply or explain* scheme[147].

The 3 ESAs have strong regulatory powers (which will be analyzed in the next paragraph) and supervisory tasks over private firms in their specific sector. They have 3 main tasks: powers delegated from other EU institutions, shared competences with National Supervisory Authorities (NSAs), that once activated bind the NSAs to comply and coordination and advisory powers[148]. Specifically, their tasks are, among others, to ensure the respect for EU law and deal with breaches from the), to contribute to cooperation between the NSAs and to develop common supervisory practices[149].

4. The (soft) Regulatory Activity of the EBA

The rule-making activity of the EBA in the SR framework fits within the wider category of rules approved through agencies in the EU. The purpose of agencies is to

[144] Judgment of the Court (Grand Chamber) of 2 May 2006. United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union. Regulation (EC) No 460/2004 - European Network and Information Security Agency - Choice of legal basis. Case C-217/04. ECLI:EU:C:2006:279. Cited in Lamandini (143) 142-143.

[145] Teixeira (111) 169, 173.

[146] Lamandini (143) 139.

[147] Teixeira (111) 175.

[148] Ibid, 167.

[149] Lamandini (143) 140-141.

provide technical knowledge in specific sectors and EBA as explained in the previous paragraph fits the description. What is relevant is that the powers conferred to those agencies are not envisioned in the Treaties, but in the secondary legislation that provides their establishment. Sometimes the source and the procedure for the exercise of such rulemaking powers is well defined in the relevant legislation, but often they engage in procedures that result in soft informal acts. Such soft law usually comes in one of these forms[150]:

- Acts adopted by European Agencies (EA) that the Commission usually relies on to then implement them into binding law according to powers granted to it by the treaties[151] or regulations.
- Acts adopted by the Commission with EAs that provide technical assistance in drafting them. The job of the agencies is purely technical and extremely helpful in sectors that require a high degree of expertise.
- Soft law enacted directly by the agencies with no further "hardening" act. This is either provided by the founding regulation (such as the EBA) or, because an agency is not provided with any formal rule-making power, it will only be able to address its counterparties through such informal acts (for example the European Medical Agency).
- So-called "information agencies" that do not exercise proper rule-making powers. They merely collect information to help coordination between national agencies or provide it through opinions to other EU institutions which will then decide whether to adopt legislative acts[152].

In some cases they operate through, a fairly institutionalised procedure, based on participation of the stakeholders (like NCAs or private businesses or lobbying groups), dialogue, transparency, publication and reasoning of the decision in the final act. In other cases though, namely when soft law is adopted, the procedure is rather fluid, with a low degree of proceduralisation, with only some limited general rules to be followed[153]. An agency could still adopt those rules to regulate itself internally but that

[150] Edoardo Chiti, "European Agencies' Rulemaking: Powers, Procedures and Asessment" (2013) 19 European Law Journal, 95-99.
[151] Reference to §3.
[152] Chiti (150) 98-99.
[153] Ibid, 101-104.

would still leave uncertainty until a single framework for administrative procedures for the adoption of soft law.

The EBA adopts a wide range of acts that fit within each of the categories listed above. As explained in §3 the SR for banking regulation consists in various layers of regulation. Level 1 is made up by regulation and directives, while level 2 comes through delegated regulation by the Commission. Within level 2 a specific type of delegated regulations require the cooperation of the EBA. Due to the institutional allocation of powers envisioned by the treaties the EBA does not possess actual and formal rule-making powers but has instead been defined as a "quasi rule-maker[154]". The EBA founding regulation states that "the *authority* shall be a Union *body* with legal personality". The treaties do not define either term, so EBA must be regarded as an *agency* (as in art. 263 TFEU), though they are not defined as one[155]. It has been noted, though, that they were created with the specific intent of affording them the maximum possible powers under the current framework[156] and have been defined as "Agencies Plus[157]". While the EBA has *hard* powers to execute its supervisory and adjudicatory powers it cannot be afforded the same kind of powers to deliver on its role as a general rule-maker (though the 2 functions sometimes overlap)[158].

The constraints on its rule-making activity stem from its institutional, constitutional limitations and with respect to the powers of the member states. The latter is outside the scope of this research, but the former must be briefly explained[159].

As the legislative power in the EU belongs to the EU's institutions and even the delegated legislative power under art. 290-291 TFEU is afforded to the Commission. The so-called "*Meroni* doctrine[160]", developed by the CJEU limits the possibility of delegating the legislative or broad executive powers to agencies. It states that only "clearly defined executive powers" can be delegated to agencies which per definition

[154] Madalina Busuioc, "Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope" (2013) 19 European Law Journal, 113.

[155] Kostas Botopoulos, "The European Supervisory Authorities: Role-Models Or in Need of Re-Modelling?" (2020) 21 ERA-Forum, 187-188.

[156] Busuioc (154) 115.

[157] Botopoulos (155) 188.

[158] Ibid, 182-184. Marta Simoncini, "Legal Boundaries of European Supervisory Authorities (ESAs) in the Financial Markets: Tensions in the Development of True Regulatory Agencies" (2015) 34 Yearbook of European Law, 323-327.

[159] It will be further analysed in Chapter 3.

[160] Judgment of the Court of 13 June 1958. Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community. Case 9-56 & 10-56. ECLI:EU:C:1958:7.

excludes general legislative tasks as they would necessarily include policy choices[161] and limits agencies' powers to merely "technical rules". Though this doctrine is not as absolute as it perhaps was and practice has shown that inevitably the EBA does engage in discretional choices[162], it explains the complex procedures that lead to the adoption of rules and why a relevant part of the activity of ESAs comes through soft law production.

When intervening through G&R, in addition to the procedural requirements which will be analysed in the next subparagraph, must make an assessment over the need to intervene in accordance with the proportionality principle (art. 5(4) TFEU), only intervening when compliance costs do not outweigh the benefits of regulatory intervention[163] and that the choice between different instruments must fall on the least intrusive one, unless it is necessary to do otherwise[164]. Despite recital 26 of the EBA regulation stating that G&R should be used "in areas not covered by regulatory or implementing technical standards"[165] this provision should be read as limiting delegated legislation to cases where intervention through soft law is insufficient. Another example is contained in recital 15 of the CRD which requires harmonisation to be "necessary and sufficient"[166]. While DTS contain, by all means, additional regulation that was left out in level 1 legislation and was delegated, G&R, should, in theory, merely adopt technical details that "mostly explain requirements for compliance with specific EU laws[167]".

4.1 Technical Standards

Whenever Level 1 legislation mandates for the adoption of delegated acts the Commission shall adopt them, subject to the limitations of art. 290-291 TFEU. However, the EBA founding regulation establishes a procedure that will be followed for level 2 regulation within the framework of the SR, that despite formally leaving

[161] Simoncini (158) 329.

[162] Cappiello (130) 44.

[163] Matteo Ortino, "Il soft law nella disciplina dei mercati finanziari", (2020) 1 Banca Impresa Società, 95.

[164] Luca Martino Levi, "The European Banking Authority: Legal Framework, Operations and Challenges Ahead" (2013) 28 The Tulane European and Civil Law Forum, 69-71.

[165] Ibid, 71.

[166] Marco Lamandini "Il diritto bancario dell'Unione", chapter in Cappiello (130), 19.

[167] Penelope Rocca and Mariolina Eliantonio "European Union Soft Law by Agencies: an Analysis of the Legitimacy of their Procedural Frameworks", chapter in Martina Conticelli, Maurizia De Bellis and Giacinto Della Cananea, *EU Executive Governance: Agencies and Procedures* (Torino: G. Giappichelli Editore, 2020), 185.

the Commission as the lone and ultimate decision-maker, *de facto* grants that power to the EBA[168].

The EBA has the exclusive "power of initiative" to propose and draft the wording of the *Technical Standards* (TS)[169]. Since they have no legal value as such they are named *draft* Technical Standards and they must obtain the endorsement of the Commission to acquire legal force. While formally the Commission has total discretion over whether to endorse them or not, the regulation strongly encourages and, under multiple avenues, makes pushes the Commission to endorse them as they are rather than amend or reject them[170]. Recitals 22-23 of the EBA regulation specifically point to the EBA as the body which is best suited to draft the SR and affirms that its drafts "should be subject to amendment only in very restricted and extraordinary circumstances".

There are two types of DTS:

- *Regulatory technical standards (RTS)* (art. 10 EBA Regulation): these standards must be pursuant to art. 290 TFEU, meaning that they can only "supplement or amend certain non-essential elements of a legislative acts" and the limits and scope of the delegation of power must be clearly defined in the underlining legislative act. The delegation may be revoked at any time by the EP or the Council. In addition to that art. 10(1) specifies that the DTS must "ensure consistent harmonisation in the areas specifically set out in the legislative acts referred to in Article 1(2) of this Regulation".
- *Implementing technical standards (ITS)* (art. 15): pursuant to art. 291 TFEU, the level 1 (or in some cases even level 2) acts shall confer the power to the Commission (and therefore to the EBA to draft) to establish "uniform condition for implementing legally binding Union acts". In the areas of the legislative acts referred to in art. 1(2) they shall "determine the conditions of application of those acts". These latter acts should be highly technical in nature and more limited in scope[171].

[168] Simoncini (158) 326.
[169] Busuioc (154) 115.
[170] Botopoulos (155) 182.
[171] Eddy Wymeersch "The European Financial Supervisory Authorities or ESAs", chapter in Wymeersch (49), 251,254.

Either type of DTS "shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based[172]". However, it has been noted that considering that the regulation itself proclaims the EBA as the more expert body which is best suited to make assessments and considering the limited space for intervention of the Commission, policy choices are all but inevitable[173].

Furthermore, recital 23 of the EBA Regulation states that the Commission should endorse the drafts without amendments unless "they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation". Practice has shown that the Commission has in fact limited amendments to exceptional circumstances further enhancing the perception and the role of the EBA as a *de facto rulemaker*. Though sometimes it makes slight changes without formally triggering the amendment process[174], most times the Commission will endorse the DTS as they are and enact them through a Regulation or a Decision (art. 10(4)).

According to art. 10(1) EBA Regulation if the Commission wishes to reject or amend in part the DTS it shall send the draft back to the EBA explaining the reasons for its decisions. It shall also send a copy to the EP and the Council, which in turn can invite the responsible commissioner or the Chairperson of the EBA for a meeting to "explain their differences" (art. 14). The EBA will subsequently have 6 weeks to adopt a new version of the DTS which will then send to the Commission, the EP and the Council[175]. That explains why the Commission has shown such apparent restraint in amending the drafts: in one instance it can "rubber-stamp" and adopt the TS or it can reject them but has to give reasons for it, sometimes on highly complex matters, and it also must involve the EP and the Council, something that it might be reluctant to do[176]. If the EBA, at the end of the 6 weeks period, does not change the DTS consistent with the Commission's amendments, the Commission can adopt a different version of the

[172] Art. 10(1) and 15(1) EBA Regulation.
[173] Botopoulos (155) 182.
[174] Eilis Ferran, "The Existential Search of the European Banking Authority" (2016) 17 European Business Organization Law Review, 295. Georgina Tsagas, "The Regulatory Powers of the European Supervisory Authorities: Constitutional, Political and Functional Considerations" (2016) University of Bristol Law School online publications, available at SSRN: http://dx.doi.org/10.2139/ssrn.3406738, 29.
[175] Wymeersch (171) 254.
[176] Busuioc (154) 123.

DTS, amending it at will, or can reject them without further regulatory intervention. In any case the regulation requires the Commission not to act "without prior coordination with the Authority (art. 10(3) and 15(1) EBA Regulation)"[177].

In case of inaction, the EBA shall inform the Commission, the EP and the Council if it will not submit the DTS (art. 10(2-3) EBA Regulation). This is noteworthy as, despite formally not being a rule-making body, it is called on by secondary legislation to explain and justify it has decided not to intervene with further regulation.

4.2 Guidelines and Recommendations

For the SR to be complete, the binding rules of level 1 and level 2 must be interpreted and applied in a "common, uniform and consistent" manner throughout the single market. To that end the EBA Regulation has established specific tools in the Guidelines and Recommendations (G&R) that the EBA uses to address NCAs or market participants (art. 16)[178]. They are an example of a "top-down" procedure and cooperation between authorities, they start at the European level and are subsequently incorporated by a domestic act by national authorities[179].

According to the founding regulation (art. 16(1)) the (G&R) must be used in order to achieve "consistent, efficient and effective supervisory practices" and to "ensure the common […] application of Union law". It was the Commission's view in its 2014 report[180] that those 2 objectives must be read cumulatively, so that all G&Rs should help achieving both[181]. Under this interpretation these acts should serve, at the same time, a supervisory function by helping develop common practices and a fully regulatory function, meant to complete and implement the SR as level 3 regulation[182].

[177] Wymeersch (171) 253.

[178] Edoardo Chiti, "In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum" (2015) 17 Cambridge Yearbook of European Legal Studies, 323.

[179] Diane Fromage, Mariolina Eliantonio and Kathryn Wright, "Soft law and multilevel cooperation as sources of (new) constitutional challenges in EU economic and monetary integration: introduction to the special issue" (2022) 23 Journal of Banking Regulation, 3. Also in Lamandini (166) 16.

[180] COM (2014) 509: REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS), pag 5.

[181] Tsagas (174) 29.

[182] It is worth noting that not every author shares the same interpretation. See as an example Chiti (178) 324. According to this article those functions should be kept separate so that only in some instances the G&Rs have a fully regulatory nature and function. It is also worth noting that the article was published after the Commission report of 2014.

Their approval, as we will see, is subject to only light procedural requirement, in comparison to level 1 regulation, making them easy to be adopted, repealed, changed and modified according to changing circumstances. As the evolution of the financial markets is rapid and sudden, their adaptability helps explain why the EBA has relied so much on G&R to further develop the SR[183]. Unlike DTSs, that have to comply with the strict requirements of art. 290-291 TFEU, G&R do not have any explicit treaty restriction. Level 1 legislation can confer a general power to adopt them not subject to time limits to the EBA, justified by their less intrusive nature[184]. However, this tends to overlook the impact that G&R have as the EBA will be bound to act consistently with the rules it has adopted and NCAs have demonstrated that they mostly comply with G&R[185], so much so that they are sometimes defined as "*de facto* binding[186]".

In the 2022 report[187], the Commission noted that the use of these tools was helpful and effective in achieving greater regulatory convergence. So much so that the results of the consultation that it conducted revealed that it was the stakeholders' view (and its own view as well) that there should not be any changes regarding the rulemaking tools and processes of the SR and that instead the EBA could achieve further integration and regulatory convergence through the use of the existing instruments. Also, neither of them supported further harmonization by using Level 1 legislation and instead were focused on continuing the current trend that sees Level 1 as a tool to establish essential elements while Levels 2-3 should deal with more granular rules[188].

The difference between the 2 different acts is, according to art. 16(1):

- Guidelines should be acts of general application that affect all competent authorities or all financial institutions equally. They usually contain more in depth and specific rules, in relation to the issue they focus on[189].

[183] Mariia Domina, 'The Broadening 'Soft Law' Powers of the European Banking Authority" (2022) 19 European Company Law Journal, 23.

[184] Levi (164) 71.

[185] This will be analysed in depth in chapter 3. It is also convenient for the EBA to respect its own rules or risk losing its influence. See Paul Weismann "The European System of Financial Supervisors", chapter in *European Agencies and Risk Governance in EU Financial Market Law* (New York; Abingdon, Routledge, 2016), para II.3.

[186] Ortino (163) 123.

[187] COM (2022) 228 final: REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL On the operation of the European Supervisory Authorities (ESAs), pag 4.

[188] Ibid, 5-6, 13.

[189] Lefterov (129) 17.

- Recommendations should address one or more of those. They often are used to provide temporary guidance in areas of EU law where Level 1 legislation is yet to be adopted. That is also due to the fact that they are easier and quicker to enact[190].

So, the Commission itself realizes that G&Rs not only explain and interpret existing rules but constitute a set of additional, more specific rules that become part of the SR. That is compatible with the treaties because such rules are not binding and can therefore include discretional choices. Furthermore, when drafting an act, the EBA must specifically point out an issue that has arisen or may arise in relation to the application of EU law and how the soft instrument helps deal with that; if that explanation is given the EBA should then have autonomy in drafting those rules, unless subsequent Level 1 or 2 legislation intervenes[191].

However, due to numerous features of the EBA Regulation, G&Rs do in fact produce legal effects that significantly *harden* those instruments. According to art. 16(3) the addressees of those rules "shall make every effort to comply with those guidelines and recommendations". When they decide not to comply, they will have to inform the EBA within 2 months and explain why the specific reasons for such choice[192]. While the duty to comply or explain applies automatically to NCAs, market participants are, instead, only required to do so when specifically indicated[193]. That is due to the possible involuntary market effects that the disclosure of non-compliance might have, with possible negative consequences for investors and consumers[194].

Furthermore, some authors claim that, by requiring to make "every effort", the Regulation has introduced a duty of "loyal cooperation[195]" and that the choice between compliance and non-compliance is not neutral: instead NCAs and financial institutions should comply, unless a specific reason (which must be stated) makes it not advisable[196]. In other words, NCAs have to demonstrate that applying the Guidelines or Recommendations in question would be detrimental for them[197]. *Loyal cooperation*

[190] Commission (187) 14.
[191] Chiti (178) 324-325.
[192] Wymeersch (171) 277, Busuioc (154) 118.
[193] Ortino (163) 122. Levi (164), 71.
[194] Levi, ibid.
[195] Chiti (178) 325.
[196] Cappiello (130) 46.
[197] Ortino (163) 121.

is a general principle of EU law (art. 4(3) TEU)[198] that applies to all relationships between the EU (including its institutions and, in this case its agencies) and member states. While the guidelines are not binding art. 4(3) most certainly is and has been applied by the CJEU as a provision that imposes specific obligations on member states[199]. Under this principle one could even argue that failing to comply with EBA's G&R in the absence of a valid reason would be in breach of the obligations arising from the treaties even when formally applying the *comply or explain* mechanism (though this has not happened so far).

Art. 16(3) also gives the EBA an incisive "name and shame" device. It requires the EBA to publish the fact that an authority has decided not to comply, but it leaves to its discretion whether to also make public the reasons that the NCAs attached to explain their choice. The EBA regulation, in recital 26, has explicitly defined the purpose of this practice saying that it ought to be used "in order […] to strengthen compliance"[200]. Also, an institution or an NCA could be further deterred from not complying due to the fact that while the EBA has the power to adopt binding decisions in the exercise of its supervisory functions[201].

The compliance pull does not end there as recitals 28-29 of the EBA regulation provide a three-steps mechanism to further harden the G&R. In cases "incorrect or insufficient application of Union law" the EBA will investigate and issue a recommendation (under art. 17(3)) indicating steps that need to be taken to comply[202]. While art. 17(1) refers only to missed or incorrect application of binding level 1 and 2 legislation, one could consider that since G&R specify the interpretation and application of relevant Union law, non-compliance with them is indirectly also non-compliance with the applicable binding law, if there is a sufficiently close link between the two.

If the NCA does not comply with the issued recommendation, the Commission can adopt a "formal opinion" based on the EBA's previous recommendation.it has been noted that both these acts are generally worded in quite strongly and prescriptive terms,

[198] It affirms that "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".
[199] For a detailed analysis on the case-law of this principle see Villani (6) 108-115.
[200] Ortino (163) 122.
[201] Busuioc (154) 119.
[202] Ortino (163) 127.

not merely suggesting what they consider to be appropriate for the correct application but indicating what is "necessary" to comply. The NCA will respond to both the recommendation and the opinion indicating the steps it has taken or that it intends to take. While neither act is binding, recital 29 indicates that "in exceptional circumstances" issue a decision towards a market participant to achieve compliance. Also, they could become subject of the procedure under art. 17(6) EBA regulation or also, since the Commission is involved, of an infringement procedure under art. 258 TFEU[203]. These procedures highlight why often it is more convenient to comply, instead of going through a public clash with the supervisory authority even in the absence of binding effects[204].

Provided that the regulation through guidelines and recommendations does not rely on strict obligations and enforcement, it would, if used correctly, add an element of "dialogue" and "negotiation" to achieve rules that are shared and approved by the various stakeholders (European regulators, national regulators, market participants), in line with the principles of *better regulation*[205] and will be respected as such[206]. As of now though, the comply or explain and the other mechanisms, seems instead more designed to act as a threat to try to force compliance with much more attention put on the obligations (albeit soft) and compliance pull[207]. This is also due to the fact that while the content of G&R is not binding, the "comply or explain" mechanism is a specific, binding EU Law obligation, and cases of non-performance may carry consequences, including sanctions[208].

4.3 National Implementation

When G&R are directed at NCAs they usually comply by adopting them through an internal administrative act that will be then directly applicable and enforceable by supervisory authority. That means that both the ECB and the NCA will apply it in their

[203] Ibid, 128.
[204] Ibid, 125.
[205] Linda Senden and Ton Van der Brink, "Checks and Balances of Soft EU Rule-Making*"* EPRS: European Parliamentary Research Service, 10-11. Available at https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_ET(2012)462433. See also Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1–14.
[206] Ortino (163) 100,122.
[207] Ibid, 100. Chiti (178) 326.
[208] Simoncini (158) 327.

respective sphere of competence (see §5)[209]. The Bank of Italy has both the power to issue regulatory acts or general administrative acts and to issue internal or non-binding acts. In relation to financial regulation the competent authority[210] has mainly adapted them through guidelines ("orientamenti") or communications ("comunicazioni"). Neither of them is a binding act having regulatory value; however, it has been noted that while judges can hardly apply them directly, the competent Alternative Dispute Resolution bodies have applied EU or internal soft law directly to decide controversies[211]. The bank of Italy adopts an array of informal acts with quasi-regulatory or interpretative function[212] and adopts binding regulatory acts within the limits established by law.

On its website, the bank of Italy has pointed out 3 types of acts that it will adopt as interpretative guidelines in its role as a supervisory authority[213]:

- "acts having regulatory force" (§3.1.A)) when the relevant primary law allows it and provided they are consistent with relevant primary law[214]. These are binding acts and are generally and directly applicable. They are used to enact EBA soft law in the domestic legal system when that is allowed. Arguably, an act such as this one, if it reproduces an EBA guideline could disregard limits imposed by primary law as it is delivering on an obligation established by EU law which is above primary law. The Communication indicates that this act will be used when G&R cannot be applied as they are worded but need further

[209] Lefterov (129) 40-41.

[210] Which is, broadly speaking, the Bank of Italy for banking or the CONSOB for securities and financial markets regulation. The division of competences is indicated in art. 5, LEGGE 28 dicembre 2005, n. 262. Disposizioni per la tutela del risparmio e la disciplina dei mercati finanziari. (GU n. 301 del 28-12-2005 - Suppl. Ordinario n. 208). So-called TUF.

[211] Jacopo Alberti and Mariolina Eliantonio "Judges, Public Authorities and EU Soft Law in Italy, How You Cannot Tell a Book by its Cover", chapter in Mariolina Eliantonio, Emilia Korkea-aho, and Oana Stefan, *EU Soft Law in the Member States Theoretical Findings and Empirical Evidence* (vol. 8, Oxford, Hart Publishing, 2021), 191,193.

[212] Marcello Clarich, "La Funzione di Regolazione e Le Fonti Del Diritto", chapter in *Manuale Di Diritto Amministrativo* (4th edition, Bologna: Il Mulino, 2019), 97-98.

[213] "Comunicazione sulle modalità attraverso le quali la Banca d'Italia si conforma agli Orientamenti e alle Raccomandazioni delle Autorità europee di vigilanza" para 3. available at https://www.bancaditalia.it/compiti/vigilanza/normativa/orientamenti-vigilanza/index.html. Keep in mind that this one too is an informal non-binding act and it could hardly be enforced in court.

[214] In the hierarchy of sources in the Italian legal system they are labelled as acts of "secondary law" as they are below the Constitution and primary law approved by parliament and must be consistent with both.

regulatory intervention to specify the steps that credit institutions need to take in order to comply.

- "Orientamenti" ("guidelines") (§3.1.B)) used in adoption of EBA G&R. The Communication specifies they are not binding but it mandates market participants to demonstrate, in case they decide not to comply, that they are still comply with all relevant, applicable, binding law.
- "Orientamenti" that the Bank of Italy adopts on its own initiative, also non-binding.

§3 of the Communication states that some G&R are adopted using both acts to implement different parts of the same EU act. The Authority keeps a website page with a list of all the EBA G&R indicating whether it complied or not and making available the subsequent implementing act[215]. Sometimes the domestic act is limited to stating that the EBA Guideline or Recommendation in question will be applicable starting from a certain date. Even when it is non-binding market participants are expected to make every effort to comply[216].

4.4 Procedure for Adoption

The regulation provides the steps that must be taken by the EBA before adopting the rule. Consistent with a proportionality assessment that involves more steps according to the level of bindingness and of discretionary power granted to the EBA by the relative legislative instrument.

- Art. 10(1) and 15(1), for draft technical standards, mandate the EBA to "conduct open public consultations", to "analyse the potential costs and benefits" and "request the advice of the Banking Stakeholder Group (BSG)" to which art. 37 refers. The EBA can skip the consultation and analysis[217] when they are "disproportionate in relation to the scope and impact of the draft" or when there is "particular urgency". Nothing is said as to how to ensure that the conditions

[215] Along with other information, see §3.2 of the Communication.

[216] See for example the recent "Nota n. 29 del 30/11/2022 Attuazione degli Orientamenti dell'Autorità bancaria europea "sui criteri per esentare le imprese di investimento dai requisiti di liquidità conformemente all'articolo 43, paragrafo 4, del regolamento (UE) 2019/2033" (EBA/GL/2022/10)" available at https://www.bancaditalia.it/compiti/vigilanza/normativa/orientamenti-vigilanza/elenco-esa/index.html.

[217] But from a textual analysis of the provision it would seem that the BSG must be involved regardless.

to avoid the consultation and analysis are met. So, in principle it would seem that the EBA does not have to provide reasons for its choice.

- Art. 16(2), for guidelines and recommendations, requires the EBA to conduct public consultations and cost-benefits analysis only "where appropriate" and allows the EBA to shape those procedures so that they are "proportionate in relation to the scope, nature and impact" of the relative instrument. The BSG also only needs to be consulted when appropriate. In these cases, however, the EBA must provide reasons when it chooses not to conduct the consultation or not to request the BSG intervention. Some have questioned whether the rules on consultation should be the same as those applying to the DTS, considering that although non-binding these instruments are legally relevant[218].

The BSG is composed by 30 members according to art. 37(2): 13 members representing financial institutions, 13 representing employees', consumers and users of banks and representatives of SMEs and 4 independent top-ranking academics. The members are appointed by the Board of Supervisors[219].

The regulation does not define how the consultations, analysis and advice from the stakeholders come into form. However, the EBA has made efforts to increase its transparency by adopting internal acts that give more insight into how decisions are adopted, though still remaining somewhat opaque[220].

First it adopted a decision by which the EBA Management Board committed itself to respecting general principles of good administrative practice (EBA Code of Good Administrative Behaviour[221], "The Code") that ought to be respected in every procedure the EBA carries out (even when it results in non-binding acts). While arguably these only specify general principle of EU law[222], the lack of general rules on EU administrative procedure requires further internal rules. However, many provisions are worded in the form of general principles and it is unclear whether and how they

[218] Busuioc (154) 119.

[219] One may question how effective of a safeguard can the BSG be, since the same organ which drafts the EBA regulation also appoints the members of the BSG (which in theory should be the counterparty and provide a different point of view to the rule-making procedure).

[220] Ferran (174) 300.

[221] Decision EBA DC 006, 12 January 2011. Decision of the Management Board on EBA Code of Good Administrative Behaviour.

[222] The decision refers to art. 1 TEU and art. 24 TFEU. One could also think of art. 2 TEU, art. 18 TFEU, art. 20,21,41 CFHREU.

could be enforceable on the Authority in cases of non-compliance. It is also noteworthy that numerous exceptions on its application are contained in the decision itself[223] and the Regulation[224].

In 2012 the Authority adopted a decision establishing a procedure for the adoption of DTS and G&R ("the Decision") and a public statement on "Consultation Practices"[225].

According to art. 3.1 of the Decision the authority identifies the areas that need regulatory intervention through its annual work programme[226]. In those cases, a project team[227] will assess whether a DTS or a guideline is more appropriate and will make a proposal to the Board of Supervisors (BoS)[228] which will decide on the need, form and timing of a possible regulatory intervention.

Art. 5 of the Decision requires the cost-benefit analysis to be carried out in accordance with the regulation and the EBA's internal procedure on the cost-benefit analysis. However, the regulation is silent on what elements should such an analysis consider and the procedure is not published on the EBA's website. By all means this analysis becomes an empty principle. Since the criteria that must be followed are not made public it is impossible to verify *ex post* whether the analysis has been effectively carried out or not. Furthermore, the analysis, as explained above, is not always mandatory and the Chairperson[229] can waive it when the regulation allows it or if the urgency of the matter requires it[230]. Effectively the only checks on the correct assessment of the facts can be carried out *ex ante* during by the public consultation process and by the BSG. However, another point of criticism that has been pointed out

[223] Unless otherwise specified in the decision. See for example art. 16 ff.

[224] Simoncini (158) 344-346.

[225] "EBA DC 030, 25 September 2012. Decision of the European Banking Authority adopting a Procedure for developing and adopting Draft Technical Standards and Guidelines and Recommendations". And "EBA BS 2012 182 (II) (EBA DC 57- Annex1), 25 September 2012. EBA Public Statement on Consultation Practices".

[226] Unless the drafting of TS is mandated in which case that discretion is taken away from the EBA as the assessment has already been made at the Level 1 Legislation. The annual work programme is published on the EBA website.

[227] Defined as the standing committee, sub-group, task force, or network responsible for the "technical content".

[228] Whose composition and role will be analyzed below.

[229] The person who is in charge of the project team according to art. 2 of the decision.

[230] See art. 1.2 of the decision. It is worth noting that the BoS must ratify the decision to waive some parts of the procedure.

is the lack of transparency regarding the composition of the groups that participate in the public consultation process and their influence on the final outcome[231].

Art. 6 of the decision regulates the Consultation[232], which begins with a call for evidence and, if broader discussion is needed, a discussion paper. They will be published on the EBA website and carried out according to the Consultation Practices ("the Practices") mentioned above. The aim of the Consultation, per art. 1 of the Practices, is to assess the existence and extent of a problem that may require regulatory intervention and to get feedback on the quality of the EBA's work through the contribution of various stakeholders such as market participant, consumers, users. The key to achieving that, reiterated throughout the document, is working with the maximum transparency and openness to obtain the relevant input and increase participation[233].

Stakeholders will be involved through:

- Call for evidence (art. 4.2 of the Practices) where they can submit documents relating to work that is underway for the EBA or on issues that are mandated to the authority.
- Release papers with questions or requests for comments (named Discussion Papers under art. 4.3) that are meant to be a preliminary step, prior to the opening of a consultation period.
- Release reasoned, thorough consultation papers (art. 4.4) containing in depth analysis and proposals for regulation. It is key that analysis, information and data are provided so that stakeholders can offer their opinion with a complete view on the matter.

The authority will then make public the responses it received and produce a reasoned explanation on all the major points that were raised (art. 5.2-3). In addition to the Consultation, art. 7 of the Decision and art. 37 of the Regulation provides the procedure for the request of advice from the BSG.

The responses to the consultation and the opinion of the BSG must be made public, analysed and taken into account in the final drafting of its documents (art. 8.1). If

[231] Simoncini (158) 345.

[232] It can be waived with the same procedure and conditions of the cost-benefit analysis, according to art. 6.6 and 1.2.

[233] See art. 2.2, 4.5.

significant problems arise a second round of consultation should be carried out (art. 8.2). Once the project team agrees to a proposal and the Chairperson approves it, it is submitted to the BoS (art. 8.4).

The BoS is composed by one member each from the 28 NCAs of the Union who are the voting members. Non-voting members are the Chairperson and a representative each from the ESRB, the 2 other ESAs, the Commission and the ECB[234]. To approve the DTS and G&R[235] a qualified majority is needed[236]. Art. 44 additionally requires that such QM includes a simple majority of the member states participating in the SSM and a majority of the member states who are not participating in the SSM.

Scholars have pointed out that, despite the provision of art. 42 of the Regulation that states that all members of the EBA shall act "independently […] in the sole interest of the Union", the current management structure is too reliant on member states representatives that inevitably will, at least in part, tend to defend their respective national interests[237]. That has lead to an undesirable development whereas the increased powers and enhanced role in rule-making within the EU of the EBA has not been followed by equal improvements on the front of transparency and independence. There are no real and effective mechanisms to ensure that members of the BoS act consistently with their mandate and are completely free from national influence and no effective mechanisms to prevent or deal with conflict of interest[238] making the lack of transparency of the process even more troubling[239].

4.5 Other Soft Law Acts of the EBA

In addition to the guidelines and recommendations the EBA is engaged in other delivering other quasi-regulatory acts and supervisory activities that nonetheless contribute to the harmonization of the SR[240]. Some tools have a quasi-judiciary function as they aim to give an official interpretation of the relevant law to help NCAs

[234] See art. 40(1) of the EBA Regulation.
[235] And other acts. A complete list is provided by art. 44(1) of the Regulation.
[236] Defined by art. 16(3) TEU. See art. 44 Regulation.
[237] Ferran (174) 301.
[238] Though the EBA has most recently adopted a procedure to deal with such instances of possible conflicts of interest. See EBA/DC/2020/308, 22-01-2020, Decision of the European Banking Authority on the EBA's Policy on Independence and Decision Making Processes for avoiding Conflicts of Interest (Conflict of Interest Policy) for Non-Staff.
[239] Busuioc (154) 120. Simoncini (158) 345.
[240] Cappiello (130) 46-49.

and businesses better adjust their behavior or help settle disputes[241]. Other tools intensify the compliance pull of soft law regulation and enhance information sharing[242].

The 2019 ESA Review has reformed the "Questions and Answers (Q&A)" tool giving it a more institutionalised feature. Q&As are an example of a bottom-up type of act where NCAs or, more often, market participants stimulate an answer from [243]the EBA. According to art. 16b(3) of the Regulation the Authority is charged with maintaining a page on its website that is both explanatory and that can serve to submit questions directly to the EBA, making it easily accessible[244]. The instrument is similar to the Commission Q&As. The rationale behind it is that just like the Commission is in charge of the consistent application of the treaties the EBA is responsible for the consistent application of the SR and is better equipped to interpret its provisions[245]. The interpretation the EBA can give is limited to the SR: art. 16b(1) lists the level 1 acts included in art. 1(2) of the Regulation[246] and subsequent level 2 and 3 legislation adopted pursuant to those level 1 legislative acts. Art. 16(5) leaves out questions that address matters of EU law interpretation which shall be forwarded to the Commission.

Under art. 16b(2) the Q&As are explicitly non-binding. The website additionally states that there is no "comply or explain" mechanism but, at the same time, stresses their "significance to achieve a legal playing field" and vows to scrutinize, together with the NCAs, their application recognising "peer pressure and market discipline" as factors that will enhance compliance with the answers. One could assume that the answers given will be binding on the EBA itself, regarding its interpretation and that acting consistently with them cannot be deemed unlawful.

Art. 16b(1) states that the EBA will publish answers to "admissible questions" and art. 16b(3) recognises the power of the Authority to "reject questions it does not intend to answer". In neither case further guidance or explanation is provided regarding possible criteria to define those concepts. The website tool provided reminds to a document published by the EBA offering "Additional background and guidance for

[241] Ferran (174) 304.
[242] See Wymeersch (171) 277-280.
[243] Ortino (163) 125.
[244] Available at https://www.eba.europa.eu/single-rule-book-qa.
[245] Cappiello (130) 47, Lefterov (129) 18.
[246] Additional level 1 legal acts that are included in the Q&A are listed on the EBA website.

asking questions[247]". In order to be answered §5 of the document invites to only submit questions that:

- Raise a material issue on a regulatory area that is within the EBA's remit.
- Are "relevant for a broad set of stakeholders"
- Regard an area that actually needs a common interpretation and are in some way unclear (so that they need further clarification).

It also specifies which questions are instead likely to be rejected such as asking a merely hypothetical question or asking about provisions that are only drafted or proposed and are not yet applicable.

All questions, along the answers to the admissible ones will be made public, unless that is in conflict with a "legitimate interest" of those who asked or pose a risk to financial stability (art. 16b(3)). Under §2 of the "guidance for asking questions" document, answers will be given within 9 months, and applicants will be informed of any delay (§19 of the document). Neither the regulation nor the document ultimately explain who is responsible for the answers. Art. 16b(4) allows 3 voting members of the BoS to have the BoS vote, through QMV, on addressing the matter of a certain Question through a Guideline or to request advice from the BSG or to review the answers already given at appropriate intervals. A 2019 report from the EBA[248] singled out the improvement of the review process of the answers as one of the main areas that needed to be addressed (see §5.1).

Overall, it will not be missed how this is a hybrid regulatory/judicial tool highlighted by the fact that even the "guidance for asking questions" document needed to remind, in §6, that only the CJEU can provide a fully legal, binding and definitive interpretation of the EU legislation. The Q&A tool though, is unique as the same agency that enacts rules (though formally not binding) then provides guidance and interpretation on the same rules (though, again, formally not binding). When one considers the limited space for intervention that stakeholders have in influencing the

[247] See https://www.eba.europa.eu/eba-makes-adjustments-single-rulebook-qa-process.

[248] Feedback on the Review of the Use, Usefulness and Implementation of the EBA Single Rulebook Q&A. available at https://www.eba.europa.eu/eba-publishes-feedback-on-a-review-of-the-use-usefulness-and-implementation-of-the-single-rulebook-q-a.

Q&A united with the narrow space to challenge EBA's acts in front of the CJEU[249] that arises more than one question on the legitimacy of such approach to rule-making.

Article 16a tasks the EBA with providing *opinions*: unlike the other acts mentioned above, opinions are a source of law explicitly envisioned by the treaties (art. 288 TFEU). While that provision recognises opinions as non-binding it also charges the Union's *institutions* to adopt them in exercising its competences. EBA's opinion will then have to be considered either as delegated acts or as a different autonomous source of law.

Under art. 29(1)(a) opinions contribute to build a common supervisory culture within the Union. Upon request from the EP, Council or Commission or on its own initiative the Authority can submit an opinion on "all issues related to its area of competence" to those same institutions. In preparation for the adoption of level 1 legislation the EP, Council and Commission can further ask the Authority for "technical advice" to better draft those instruments (art. 16a(4)).

Neither the regulation nor other documents provide any insight as to the procedure, rationale, approach and effects of those acts. The Authority, in the document "EBA at a Glance[250]", describe opinions as technical guidance and advice to policymakers in their legislative activity. The single opinions that are submitted are available on the EBA website under the respective issue that they address. Art. 16a(2) provides that a public consultation and a technical analysis may be included in an opinion. While Q&As serve to fill in gaps or resolve contentious issues that are left unclear by level 1 and 2 legislation, opinions address those gaps while also suggesting the EU's institutions on possible future intervention through level 1 legislation[251].

This lack of information regarding the opinions might be justified by the fact that they are, mostly, internal documents. They are directed at other institutions which will provide scrutiny and stakeholders will be able to influence the content at a latter stage. However, one can question whether political rather than technical institutions such as

[249] These aspects will be analaysed in depth in chapter 3.

[250] Available at https://www.eba.europa.eu/about-us/eba-at-a-glance, page 15. Note that this is only an informative document aimed at describing the activity of the EBA and does not have legal value, neither formally nor substantially.

[251] Cappiello (130) 47.

the EP or the Council are in a position to assess and challenge the opinion submitted by the EBA or if, instead, they will rely on it almost faithfully.

As explained the EBA does not have, under the current treaties and founding regulation, direct rule-making powers. However, a closer analysis shows that, in fact, it does exercise considerable power through its quasi-regulatory tools though formally not being afforded such powers. This current framework effectively circumvents the Meroni doctrine[252] while not establishing an adequate system of safeguards and controls to balance it.

5. The (discussed) Regulatory Activity of the ECB

While the increased regulatory harmonisation contributed to create a level playing field and ensured that, up to a point, all financial institutions within the EU would be subject to the same set of rules (hence the name Single Rulebook), further steps needed to be taken. Despite the fact that they were called *supervisory authorities* most of the day-to-day supervisory activities were still carried out by the NCAs[253]. The EBA has some supervisory responsibilities such as the "breach of law" procedure (art. 17 EBA regulation), the emergency actions (art. 18) and the "peer review" process (art. 30) but they are limited in scope and application. On one hand the mandate of the EBA was to create the conditions for a more coordinated supervision that would remain task of NCAs; on the other hand the EBA turned out to be mostly a regulatory authority focused on developing the SR[254]. That is confirmed by the recitals of the SSMR, that while praising the ESAs for having "significantly improved cooperation between supervisors[255]" recognises that in addition to creating a single set of rules through the SR, those rules should be applied by a single body at the EU level[256].

This led the Council, using the special legislative procedure under art. 127(6) TFEU, to adopt a regulation significantly bolstering the EU's exercise of supervisory tasks over banks, this time to be carried out directly and by the ECB. That is significant

[252] Though, as will be discussed in chapter 3, the CJEU itself has partly drifted away from it.

[253] Kern Alexander "The ECB and Banking Supervision: Does Single Supervisory Mechanism Provide an Effective Regulatory Framework?", chapter in Mads Andenas and Gudula Deipenbrock, *Regulating and Supervising European Financial Markets: More Risks than Achievements* (1st edition, Springer International Publishing, 2016), 259.

[254] Botopoulos (155) 182-183.

[255] Recital 7 SSMR.

[256] See recitals 5, 8, 11, 12, 15.

because unlike in the case of the ESAs, with article 114 TFEU only mentioning harmonisation of laws towards an enhanced single market, the treaty provision specifically mentions the ECB and the possibility of granting it "specific tasks […] concerning policies relating to the prudential supervision of credit institutions".

That provision is repeated in art. 1 SSMR which adds "contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union" as the tasks of the ECB within the SSM framework. Under art. 4(1) SSMR the tasks of the ECB are only supervisory in nature (at most they ensure compliance with rules that have been previously set), however, some provisions, in the SSMR and in the treaties, grant quasi-regulatory tasks to the ECB, making the existence and the latitude of such regulatory power highly debated and contentious[257].

Art. 3(1) SSMR states that the ECB shall cooperate with the 3 ESAs and the ESRB to "ensure an adequate level of *regulation* […] in the Union". Under art. 3(3) the ECB shall "carry out its tasks […] without prejudice to the competence and the tasks of EBA […]". Art. 4(3) seems specifically tasks the ECB with legislative duties mentioning guidelines, recommendations and decisions. In adopting any of these instruments art. 4(3) reaffirms that they must be "subject to and in compliance with the relevant Union law and in particular any legislative and non-legislative act, including those referred to in Articles 290 and 291 TFEU". The same provision also includes the DTS adopted by the Commission, the Guidelines and Recommendations adopted by the EBA and the European Supervisory Handbook adopted by the EBA.

With respect to the application of the EBA Regulation the ECB is, under art. 4(2)(i), to be considered as an NCA. The EBA exercises its powers, including regulatory powers, directed at the NCAs in charge of banking supervision across the Eurozone. As the ECB has become the authority with exclusive supervisory powers over *significant banks* (SIs)[258], in those instances, the competent authority to which the EBA refers its acts to is the ECB itself. That means that the ECB will be subject to all the binding acts and powers of the EBA and will be bound to the *comply or explain* mechanism under art. 16 of the EBA Regulation[259]. The Commission itself has

[257] For a complete analysis on the various views of the issue see "The Single Supervisory Mechanism (SSM)", chapter in Lamandini (143), 196-203.

[258] According to the definition of *less significant banks* (LSI) in art. 6(4) SSMR.

[259] Simoncini (158) 342.

recognised this institutional balance in a 2017 report. In it, it urged the ECB to keep complying with and applying the relevant law enacted by the EBA, to draft its own legal instruments while always considering the relevant EBA framework and to constantly coordinate with the EBA in the discharge of its functions[260], with the ECB reaffirming it is committed to do so[261].

This creates a complex division of competences and power. While it is normal from the standpoint of allocation of supervisory competences[262] it is instead difficult to explain in relation to the allocation of powers in the EU treaties. The ECB is, under art. 13(1) TEU, a EU institution whose powers include binding powers and are conferred to it directly by the treaties, consistently with the principle of conferral in art. 13(2) TEU. Art. 7 ESCB Statute[263] and art. 130 TFEU affirm the ECB independence in carrying out its tasks from, among other EU agencies. Art. 34 of the ESCB Statute and art. 132 TFEU grant rule-making powers to the ECB: such powers are not (as is the case for art. 290-291 TFEU) delegated; they are specific powers envisioned by the treaties.

When one takes into account the limitations on the binding powers of the EBA due to their nature as an agency established by secondary law it reveals the awkwardness of the current situation. An agency, through its soft and non-binding regulatory and administrative activity (tasks that are conferred by secondary law), effectively constraints the powers and the discretion of an Institution established by the treaties (primary law) and whose powers derive directly from the treaties[264]. What is more is that the wording of art. 4(3) SSMR almost seems to indicate that the soft law acts of

[260] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013, COM/2017/0591 final, page 15-16.

[261] ECB Annual Report on supervisory activities, 2021. Available at https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/index.en.html.

[262] And also as a safeguard for the level playing field in the internal market as the ECB can only make rules for the "participating member states" as in art. 2(1)(1) SSMR while the EBA exercises its tasks over all 28 countries of the EU.

[263] Consolidated version of the Treaty on the Functioning of the European Union, PROTOCOL (No 4) ON THE STATUTE OF THE EUROPEAN SYSTEM OF CENTRAL BANKS AND OF THE EUROPEAN CENTRAL BANK, OJ C 202, 7.6.2016, p. 230–250. The ESCB statute is part of the treaties and has the same legal value.

[264] Simoncini (158) 342-343. Raffaele D'Ambrosio "Il Meccanismo di Vigilanza Unico: profili di indipendenza e di accountability" chapter in D'Ambrosio (130), 103.

the EBA are binding on the ECB ("it shall be subject to")[265]. While this outcome is legally impossible it is noteworthy as to how far the EU legislator has gone in trying to force compliance with non-binding legal acts.

The ECB is conferred legislative powers under art. 132(1) TFEU and art. 34(1) ESCB Statute. It can make regulations, provided that they implement the tasks that the ECB has under, among others art. 25(2) of the Statute. That provision reproduces art. 127(6) TFEU by stating that the ECB can perform tasks in accordance with a Regulation approved on the basis of that provision. A textual analysis then suggests that it does not have a broad power to make regulations, using its discretion to evaluate whether they are necessary to implement art. 25(2) but that instead that power is limited by what the Council has affirmed through the SSMR. In the SSMR, recital 32 affirms that Regulation enacted by the ECB on the basis of art. 132 TFEU is subject to DTS approved by the Commission and soft law acts adopted under art. 16 of the EBA Regulation. Art. 4(3) further states that "The ECB may also adopt regulations only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation", suggesting a residual and fairly limited in scope legislative power. On this basis the ECB has adopted the SSM Framework Regulation (SSMFR)[266] that introduces rules on the cooperation and effective discharge of the respective functions of the ECB and the NCAs, as required by art. 6 SSMR.

It can also take decisions that, under art. 4(3) SSMR are to be subject to all relevant Union law, including "any legislative and non-legislative act", therefore including also any EBA act. Art. 34(1) of the statute includes recommendations and opinions among the ECB's legal acts. In principle these latter acts are not limited in scope to address the subjects listed in art. 34(1) first indent, as that provision is only mentioned for regulations.

[265] Enrico Leonardo Camilli "The Governance of EU Regulatory Powers in the Banking Sector", chapter in Edoardo Chiti and Giulio Vesperini, *The Administrative Architecture of Financial Integration. Institutional Design, Legal Issues, Perspectives* (Bologna, Il Mulino, 2016), 55.

[266] Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17). OJ L 141, 14.5.2014, p. 1–50.

A more extensive, albeit informal, list of the ECB legal tools is published on its website[267]: in addition to the abovementioned, it includes guidelines and instructions.

Decisions are legally binding and can come in two forms: they either specify to whom they are addressed (e.g. a single financial institution) in which case they will only be binding on those, or they are "general decisions" in which case they will have internal value and bind the ECB itself (to distinguish them from Regulations that have general application)[268]. ECB can adopt guidelines according to art. 4(3) and 5(1)(a) of the SSMR: unlike the EBA guidelines these are on one hand legally binding, but on the other hand they are not acts of general regulatory scope. They bind NCAs to follow the ECB's indication on how to interpret and apply the relevant rules in the exercise of their supervisory tasks. Art. 6(5)(a) SSMR empower the ECB to issue instructions to NCAs over their exercise of their competences in relation to LSIs; they are also binding under art. 6(3)[269].

Other acts are instead, non-legally binding and the ECB usually uses its website to make them public. They cannot impose an obligation on third parties, but they create an expectation that the ECB will act accordingly[270]. The ECB can issue Recommendations. Under art. 41 ESCB Statute they are directed at other EU institutions, recommending legislative intervention relevant for the SSM. Under art. 4(3) SSMR instead, they are directed either at NCAs to direct their exercise of options and discretions for LSIs under relevant EU Law or to credit institutions regarding activity which is relevant for the SSM mandate[271].

Under art. 127(4) and art. 282(5) TFEU the ECB issues opinions, stating its views on proposed or draft legislation. The consultation is mandatory for EU wide legislation or national legislation "within the areas falling within its responsibilities". This includes both monetary and supervisory policies. In addition to that the ECB may submit opinions on its own initiative under art. 127(4).

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[267] ECB Legal Framework, available at https://www.bankingsupervision.europa.eu/legalframework/ecblegal/html/index.en.html.

[268] Rinke Bax and Andres Witte, "The taxonomy of ECB instruments available for banking supervision" (2019) 6 ECB Economic Bulletin, 2-4.

[269] Ibid, 4-6.

[270] Ibid, 6.

[271] Ibid, 7. It notes that it has been used to address distribution of dividends of credit institutions. Most recently due to the onset of the Covid-19 Pandemic.

Among further informal, atypical instruments a mention must be given to the ECB's *guides*, that detail how the ECB will apply relevant union law through its supervisory activity or how such activity will be carried out from an organizational and procedural standpoint[272].

Legal acts are generally adopted, within the SSM framework, by the internal, independent body of the ECB in charge of supervisory functions: the Supervisory Board[273]. The ECB has also adopted a decision[274] regulating the procedure for the adoption of its legal acts. According to art. 26(7-8) SSMR regulations and decisions are drafted by the Supervisory Board and then adopted by the Governing Council (GC)[275] of the ECB[276]. Art. 17a(1) of the rules of procedure refers to art. 17 unless otherwise provided. Under art. 17(4) decisions and recommendations are adopted by the Governing Council or the Executive Board (EB)[277], merely requiring that they "state the reasons on which they are based"; art. 17(5) states that opinions are adopted by the GC while art. 17(6) provides that instructions are adopted by the EB. However, art. 13g states that the SB shall "propose complete draft decisions" in relation to the tasks of art. 4 SSMR. It does not explain whether this includes every legal act adopted in pursue of those tasks (using a broad interpretation of the term *decisions*, as in art. 26(8) SSMR) or if the application of that provision is limited to decisions adopted under the powers conferred to the ECB by art. 132(1) TFEU[278]. In general, it is the SB that drafts and approves the decision and the GC subsequently endorses them giving formal approval and providing their entry into force. Since the GC is provided with powers under the EU treaties while the SB is established through secondary legislation, this organizational setup allows the ECB to avoid the constraints of *Meroni* and exercise a wider discretion in carrying out its tasks[279].

[272] Ibid, 8. For further informal instruments see the list at page 8.

[273] According to art. 25 SSMR the supervisory functions will be maintained fully independent and separate from the other tasks of the ECB. See art. 26(1) SSMR for the SB's composition.

[274] Decision of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2004/2) (2004/257/EC).

[275] For its composition see art. 283(1) TFEU and art. 10 ESCB Statute.

[276] The procedure is more complex but outside the scope of the research.

[277] See art. 11 ESCB Statute.

[278] For the various possible interpretation of "decisions" within the SSM framework see Bax (268), 2-3.

[279] Paul Weismann, "Institutional change through the Banking Union", chapter in Weismann (185) para. II.2.

Differently from what the EBA regulation provides the degree of proceduralisation is rather limited as public consultation is only required for guidelines, while the other preliminary steps that the EBA is required to carry out are not mentioned. This difference can be partly explained by the nature of its powers which are more administrative/executive rather than properly legislative. However due to the unclear distinction between these 2 types of acts[280], to the considerable market effects that the ECB can cause whenever it makes its opinion public (even through informal and non legal instruments) a more transparent and open procedure would be advisable. Title 2 of the SSM Framework Regulation establishes general principles for "supervisory procedures", however it is unclear if and how they would apply in the adoption of acts of general application or in acts formally non-binding[281].

Ultimately, it is understandable why the SSMR has not changed the rule-making structure that was in place before. The SSM would only be able to make rules for the Euro adopting countries (while the EBA is relevant for the whole EU-28) and, as the SR is aimed at creating a single market and a level playing field for credit institutions, that would put the objective of full harmonisation in jeopardy. However, this current division of competences is, as explained above, far from ideal. From the lack of legitimisation of the rule-making organs to the possible overlap of function between different EU authorities and national one to the possible gaps in judicial protection, there is much room for improvement.

[280] See Lamandini (257) 194 ff. and Camilli (265) 52-53.
[281] Art. 25(1) limits the scope of application of that provision.

CHAPTER III

III. Judicial and Quasi-Judicial Review of Soft Law in the EU Banking Regulation

1. Reviewability of Soft Law Acts in the EU **2.** The *ex-ante* Controls: Internal Administrative Safeguards **3.** Reviewability of EBA Soft Law in the Single Rulebook Framework **4.** The FBF Case

1. Reviewability of Soft Law Acts in the EU

The previous chapter focused on the general architecture and the sources of the banking regulatory framework in the European Union (EU). It demonstrated how, often, the push for regulatory intervention comes from soft international standards (IFSs) developed within informal transnational regulatory networks (TRNs). They subsequently undergo a so-called *hardening* process by being adopted through binding legislative acts such as directives and/or regulations (with the latter becoming the preferred choice in recent years). The Single Rulebook for banks (SR) has been conceived as a multilevel system of regulation: level 1 general legislative acts, level 2 delegated legislation, level 3 soft law and, ultimately, domestic implementation of those acts. Throughout its building up process (and one can assume that this tendency will only increase in the future[1]) general principles have been the focus of level 1 legislation while more detailed and granular rules were left to the EBA to draft (for level 2) or adopt (level 3) so that they could more easily, readily, and quickly modified and adapted following new developments.

Chapter 1 analysed in what forms soft law manifests itself in international financial law while chapter 2 added a strong emphasis on how the SR is further shaped by soft regulatory acts. This chapter will instead analyse what effects does soft law produce in the EU and what are, under the current framework, the judicial and quasi-judicial remedies available. The analysis will draw from cases dealing with different types of

[1] As in the 2022 Commission Report the Commission itself, the EBA and the stakeholders agreed to continue on this path. See COM (2022) 228 final: REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL On the operation of the European Supervisory Authorities (ESAs). (23/5/2022), 13-15.

soft acts[2] through which soft law is present in the EU legal order and then focus on the reviewability of non-binding acts of the European Banking Authority (EBA), whether through judicial review or through administrative quasi-judicial bodies. This should provide a critical assessment of whether the current possibilities to obtain a review are proportional and consistent with the effects and impact that soft law has.

As explained in chapter 1, the only acts of soft law envisioned by the treaties are, under art. 288 TFEU[3], opinions and recommendations which can be adopted by the EU's institutions[4]. However, as we have seen, EU Agencies (EAs) engage in ample production of soft law, either empowered to do so by secondary legislation[5], or instructed to do so by another institution[6] or through atypical and informal instrument on their own initiative[7]. From this point of view the only possible legal basis for the adoption of soft law acts would be art. 296 TFEU, which states that "Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis", applied by analogy to agencies.

In comparison with the other formal sources of law they lack "procedural legitimacy[8]" because they lack enough procedural guarantees (though they vary between different acts and different bodies enacting them)[9] for those to whom soft law is addressed[10]. The procedures, just like the output, are often worded in general terms, are optional or provide no enforcement mechanism. Other factors that are relevant are

[2] See Oana Stefan, Matej Avbelj, Mariolina Eliantonio, Miriam Hartlapp, Emilia Korkea-aho and Nathalie Rubio, "EU Soft Law in the EU Legal Order: A Literature Review" (2019), King's College London Law School Research Paper Forthcoming, Available at SSRN: https://ssrn.com/abstract=3346629, 9-13.

[3] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

[4] Linda Senden, "Soft Post-Legislative Rulemaking: A Time for More Stringent Control" (2013) 19 European Law Journal 59, 62.

[5] In the case of EBA these will be Guidelines, Recommendations, Q&A.

[6] For example, Opinions that might be requested to the EBA or the ECB.

[7] Among these, one can mention Declarations, Press Releases, Public Statements. Chapter 1 highlighted how soft law, however informal, is still *law* and as such part of a legal order. While some of these instruments can hardly be considered part of the legal order, they nevertheless have some practical effects and are sometimes adopted with the specific intention to exercise some hortatory effect, so they must be considered for the scope of this research.

[8] Senden (4) 58.

[9] Edoardo Chiti, "European Agencies' Rulemaking: Powers, Procedures and Asessment" (2013) 19 European Law Journal, 101-102.

[10] Senden (4) 58, Stefan (2) 37.

the transparency of the decision-making process[11] or how the adopted acts are made public[12]. They also lack democratic legitimacy in the EU Constitutional Order; states, by ratifying the EU Treaties, empower specific institution with legislative powers. Such powers are limited to the institutions that are tasked by the treaties, through the acts and the procedures established therein, under the principle of conferral (art. 5 TEU[13]). The use of soft law can sometimes lead to "circumvent the properly competent legislative bodies[14]", due to its increasing use and its increasing impact. Soft law squeezes out political and elected bodies such as the European Parliament (EP) or the Commission. While this could be partially offset by an enhanced stakeholder participation to achieve more pluralism of views and more shared rules, this is not always the case as public participation is too informal and not always guaranteed[15].

The reason for this development is that they provide a quicker, more flexible and more effective way to tackle issues. The regulators are highly technical experts, there are no procedural hurdles, no need to reach a political agreement and can be easily modified again and again over time, as circumstances change[16]. By being capable to effectively address the issues that may arise soft law thus gains "substantive legitimacy[17]".

Two main categories of EU soft law have been identified according to Senden[18]: "interpretative acts" offering guidelines as to how other relevant EU law should be interpreted and applied. "Decisional acts", instead are meant to guide the discretion that a certain institution or authority enjoys towards a consistent application of EU law (in this sense it is said that it binds the issuing body) and in turn also influence national

[11] Which is often an issue, see Oana Stefan, "The Future of EU Soft Law: A Research and Policy Agenda for the Aftermath of COVID-19" (2020) 7 Journal of International and Comparative Law 339-340.

[12] The European Commission, for example, has published some non-binding acts on the Official Journal, while others are made available on its website (as is the case for the EBA too), see Senden (4) 68.

[13] Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390.

[14] Stefan (2) 35, referencing the "European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments (2007/2028(INI)), *OJ C 187E3, 24.7.2008, p. 75–79*".

[15] Oana Stefan, "Helping Loose Ends Meet: The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance" (2014) 21 Maastricht Journal of European and Comparative Law, 364-365.

[16] Ibid, 34. Chiti (9) 99-100.

[17] Senden (4) 58.

[18] Ibid, 60-61. Also in Stefan (2) 18.

authorities that may be called to apply it. The EBA issues both types in its activity as Guidelines and Recommendations (art. 16 EBA Regulation[19]) would in principle fall under the latter category while Q&A (art. 16b) and opinions (art. 16a) are more interpretative in nature. As we have seen in chapter 2, National Competent Authorities (NCAs) and market participants are not bound to follow these rules. However, outside factors and the combination with other, hard, legal provisions, do in some cases exercise a decisive *hardening* effect.

Soft law is not, by itself, able to directly produce *binding legal effects*, defined as affecting the rights and obligations of other natural and legal persons[20]. Despite this basic assumption it has been rightly noted that the reality is more complex. It is often able to exercise persuasion, to influence future policy choices of EU and national authorities and to affect the behavior of its addressees[21]. In many instances, credit institutions that operate in the single market and supervisory authorities that operate in a network will be inclined towards complying even if they are not strictly required to do so because of indirect market sanctions[22] and because, as the compliance by the other institutions increase, this turns soft law into rules that are perceived as "socially and politically binding"[23], which helps explain how sometimes high compliance is reached even in the absence of any direct enforcement mechanism[24].

Most importantly for the scope of this research is the undeniable fact that short of producing the same effects as *hard law*, soft law still produces *some* legal effects. In addition to direct effects such as the *comply or explain* requirement or the *name and shame* procedure that have been analysed in Chapter 2§4.2, other treaty or secondary norms may significantly further the reach of soft rules.

[19] 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*.

[20] Oana Stefan, "European Union Soft Law: New Developments concerning the Divide between Legally Binding Force and Legal Effects" (2012) 75 Modern Law Review, 881.

[21] Stefan (2) 22. Stefan (15) 360. Stefan (11) 343-344.

[22] See Matteo Ortino, 'Il Soft Law Nella Disciplina Dei Mercati Finanziari' (2020) 1 Banca, impresa, società 99, which also makes reference to Chris Brummer, "Why Soft Law Dominates International Finance: And Not Trade" (2010) 13 Journal of International Economic Law, 638-640.

[23] Stefan (20) 881. Stefan (2) 22-24.

[24] Stefan (2) 11,14. Also in Fabien Terpan, "Soft Law in the European Union: The Changing Nature of EU Law" (2015) 21 European Law Journal, 74-75.

Under the *principle of legitimate expectations*, drawn from the rule of law principle under art. 2 TEU, from the common constitutional traditions under art. 6(3) TEU and as a general principle of EU law[25], the Court of Justice of the EU (CJEU) has found that the publication of an act even when non-binding, binds the issuing authority[26]. In other words, a soft act creates among private parties the expectation that the same authority that has adopted a certain act will operate in accordance with it and when that expectation becomes a legally relevant situation it will be a right that can be protected in court. Therefore, according to the CJEU, in a situation such as this one it "Imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law[27]".

To further reinforce this reasoning the Court has also relied on the *principle of equal treatment*[28] under art. 9 TEU and art. 20 of the Charter of Fundamental Human Rights of the EU (CFREU)[29]. The *principle of consistency* under art. 13(1) TEU and art. 7 TFEU and the *principle of legal certainty* also reinforce a *self-binding* effect on soft law[30].

The CJEU has confirmed that such binding effect does not include National Competent Authorities (NCAs) that may be called to apply those same provisions[31]. However, in the same judgment, the Court has also established that under the principle of loyal cooperation (art. 4(3) TEU) "acts of 'soft law' […] are to be taken into due account by the Member States' authorities[32]". It could be argued though, that despite not being bound to strictly follow them NCAs should, at least, give a thorough and

[25] Stefan (15) 372.

[26] Giulia Gentile, "Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment Before the EU Courts: A Plea for a Liberal-Constitutional Approach" (2020) European Constitutional Law Review, 13.

[27] Judgment of the Court (Grand Chamber) of 28 June 2005. Dansk Rørindustri A/S (C-189/02 P) […]. ECLI:EU:C:2005:408, para 211, cited in Senden (2) 27.

[28] Judgment of the Court (Sixth Chamber) of 26 September 2002. Kingdom of Spain v Commission of the European Communities. […] Case C-351/98, ECLI:EU:C:2002:530, para 76, cited in Ugo Villani, "Le Fonti dell'Ordinamento dell'Unione Europea", chapter in *Istituzioni di Diritto dell'Unione Europea* (5th edition, Cacucci Editore, Bari, 2017), 325.

[29] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

[30] Senden (4) 63.

[31] Judgment of the Court (Second Chamber) of 22 September 2016. European Commission v Czech Republic […]. Case C-525/14. ECLI:EU:C:2016:714, para 38, cited in Stefan (2) 28.

[32] Ibid.

reasoned explanation as to why they decided to diverge from EU soft law[33], especially when a legitimate expectation has arisen.

1.1 Judicial Review of Soft Law in General

Under the current wording of the treaties judicial review of legal acts of the EU's institutions is both admitted by specific provisions and as a fundamental right of the citizens of the EU and a general principle of EU law.

The CJEU has long affirmed that, as the rule of law is one of the core values of the EU under art. 2 TEU, its respect necessarily implies the right to an effective judicial review of the activity of its institutions[34]. In addition to that, the CFREU, in art. 47(1) "enshrines the right to an effective remedy before a tribunal" to ensure the protection of individual's rights. These provisions and the establishment by the CJEU of an effective judicial remedy as a general principle of EU law[35] is extremely relevant as it allows to establish grounds for judicial review even when not explicitly admitted by the treaties or secondary legislation[36]. In addition to that, as it is a fundamental right and a core value of the Union, any provision that limits or makes access to courts and judicial review in any way difficult should be deemed as invalid and inconsistent with EU law[37].

The treaty provisions regulating the grounds to achieve judicial review of Union acts are:

- Art. 263 TFEU. Under §4 natural and legal persons to whom an act of EU law is either directly addressed or it nevertheless is of direct concern can institute proceedings to seek annulment. The acts included are those in §1-2 which lists legislative acts or other acts that are issued by the Council, Commission, ECB

[33] Stefan (2) 30. Also in Stefan (15) 374-375. These examples refer to competition law but the legal issues that they raise are similar and can be in principle applied to the EBA-NCAs relation too.

[34] Judgment of the Court of 25 July 2002. Unión de Pequeños Agricultores v Council of the European Union. Appeal - Regulation (EC) No 1638/98 - Common organisation of the market in oils and fats - Action for annulment - Person individually concerned - Effective judicial protection - Admissibility. Case C-50/00 P. ECLI:EU:C:2002:462, para 38. Cited in Gentile (26) 7-8.

[35] For a discussion on the nature of the general principles of EU law set through judicial interpretation see Villani (28) 269 ff. and Damian Chalmers, Gareth Davies, and Giorgio Monti, "Fundamental Rights", chapter in *European Union Law: Text and Materials* (4th edition, Cambridge: Cambridge University Press, 2019), 260-261. Also see pag. 374-388 of Chalmers for a complete list and analysis of general principles.

[36] As will be explained below.

[37] Gentile (26) 19.

or “bodies, offices, agencies”. This is, importantly, provided that the acts in question are “intended to produce legal effects vis-à-vis third parties”.

- Art. 277 TFEU allows the CJEU to declare the “inapplicability” of an act that it was bound to apply in a separate proceeding even if it was not instituted for the purpose of annulment.
- Under art. 267 TFEU national courts may (or shall, if they are courts of last instance) submit a question to the CJEU in relation to the interpretation or the validity of any act of “institutions, bodies, offices or agencies”.

The CJEU has had the chance, through the years, to establish the exact scope of application of those provisions. In relation to the objective test for admissibility, the ECJ, in *Les Verts*[38], established that it had jurisdiction to review an act of the EP (at the time not included among the bodies whose acts were reviewable) that was not among those explicitly reviewable because excluding the reviewability would be “contrary to the spirit and the system of the treaties”[39]. Earlier on, in the *ERTA*[40] case, the court admitted that it could review Union acts “whatever their nature or form[41]” if they were intended to have legal effects according to art. 263 TFEU[42]. Also, it has affirmed that in order to evaluate the “legal effects” it will not look at the formal, theoretical effects according to the letter of the Law. Instead in *UK v. ECB*[43] the Tribunal assessed “its wording and context […], its substance […] and the intention of its author” to evaluate “the way in which the parties concerned could reasonably have perceived that act to be assessed”. It therefore admitted the possibility to judge and subsequently strike down even acts that formally lack legal effects[44].

[38] Judgment of the Court of 23 April 1986. Parti écologiste "Les Verts" v European Parliament. Action for annulment - Information campaign for the elections to the European Parliament. Case 294/83. ECLI:EU:C:1986:166, para 22-26.

[39] Gentile (26) 7. Ugo Villani “Le Competenze Giudiziarie”, chapter in Villani (28) 361.

[40] Judgment of the Court of 31 March 1971, Commission of the European Communities v Council of the European Communities, European Agreement on Road Transport, Case 22-70, ECLI:EU:C:1971:32.

[41] Ibid, para 41-42.

[42] Villani (39) 365-366.

[43] Judgment of the General Court (Fourth Chamber), 4 March 2015. United Kingdom of Great Britain and Northern Ireland v European Central Bank (ECB). […]. Case T-496/11. ECLI:EU:T:2015:133, para 31-32.

[44] Villani (39) 366-367.

In those judgments the CJEU showed a willingness to expand its powers of judicial review beyond a literal interpretation of the treaties by looking at the substantial effects of an act, but this has not developed into a consistent case-law[45].

In relation to individual standing, art. 263(4) TFEU establishes that a natural or legal person shall have standing if the act is directly address to her, if it is a final implementing measure (excluding preparatory and intermediate acts) and if it is of direct concern[46].

Direct concern is present when a legal interest is directly affected as an immediate consequence of the Union act. This will exclude situations where an EU act will be implemented by a NCA that will retain a margin of discretion over whether and how to implement it[47]. Therefore regulatory acts, defined as acts of general application, will only be reviewable if they do not require national implementing measures (otherwise it would be the latter one that has to be challenged)[48].

1.2 Admissibility of Review of Soft Law

The analysis above is in sharp contrast with the general approach that the CJEU has adopted when considering the admissibility of actions of annulment of soft law acts, where the court has set a high bar to admit the production of legal effects[49]. The assessment on the substantial effects of certain acts has been set aside in favour of a rather formalistic analysis that focused on elements such as the form of the act or the intention of its authors (instead of the perception of its addressees as in *UK v. ECB*)[50]. In addition to the cases mentioned above the CJEU has maintained, in other instances, that the "the form […] is, in principle, immaterial as regards the question whether they are open to challenge" provided that they cause "a distinct change in the legal position" of the applicants[51].

[45] Gentile (26) 8-9.

[46] Damian Chalmers "Judicial Review", chapter in Chalmers (35), 389.

[47] Ibid, 391. This is especially relevant for the purpose of the EBA soft law.

[48] Ibid, 391-392. Individual concern for non-regulatory acts is of less relevance here as EBA soft law is regulatory in nature and when admissibility to review soft law has been denied that has been grounded on other reasons.

[49] Gentile (26) 10.

[50] Ibid, 2,6,10.

[51] Ibid, 10, referencing to "Judgment of the Court of 11 November 1981. International Business Machines Corporation v Commission of the European Communities. Competition - Annulment of the decision to initiate a procedure and of the statement of objections. Case 60/81. ECLI:EU:C:1981:264, para 9".

In the *Mallis*[52] case both the General Court (GC) and the ECJ in appeal have denied admissibility of an action for annulment over lack of binding legal effects. The challenged acts were a statement of the Eurozone ministers (Eurogroup) and a decision of the ECB and the Commission signing a Memorandum of Understanding (MoU) with Cyprus. The Courts did not review either of those as the ECB and the commission did not have the power to bind the EU through a MoU[53] while the Eurogroup was considered an "informal" gathering that was not a body of the EU and as such could not be conferred any power under the EU treaties[54]. In both cases the Court refused to assess the practical effects that nevertheless may have been produced or the fact that the MoUs were subsequently duly given execution and focused instead on the formal conferral of powers in the EU treaties, holding that, lacking explicit conferral, an act cannot be perceived as producing legal effects.

In *Belgium v. Commission*[55], instead, the ECJ held that recommendations issued by the Commission under art. 288 TFEU, despite being issued due to an explicit conferral of rule-making powers to an EU institution, could not be challenged because, according to art. 288(5) TFEU, recommendations "shall have no binding force" and that the court of first instance was correct in finding that "mere recommendations" are excluded from the application of art. 263 TFEU[56]. It admitted that, in theory, it would be possible, under certain circumstances, to annul a recommendation but in this case, it found that the intention of the Commission not to give binding effects was clear not only from the type of act chosen but also from the fact that it was "worded in non-mandatory terms[57]". However, in another instance it reached the same conclusion, denying admissibility to review an act that, despite being worded in mandatory terms, could not produce legal effects because the Commission did not have the competence

[52] Judgment of the Court (Grand Chamber) of 20 September 2016. Konstantinos Mallis and Others v European Commission and European Central Bank (ECB). […] Joined Cases C-105/15 P to C-109/15 P. ECLI:EU:C:2016:702.

[53] Ibid, para 53-58.

[54] Ibid, para 61.

[55] Judgment of the Court (Grand Chamber) of 20 February 2018. Kingdom of Belgium v European Commission. Appeal — […] Article 263 TFEU. Case C-16/16 P. ECLI:EU:C:2018:79.

[56] Ibid, para 27.

[57] Ibid, para 34-35.

to adopt it. Therefore, it could not be perceived as creating an obligation (regardless of whether it actually did)[58].

While the CJEU has been reluctant to admit and has mostly shielded away from reviewing and interpreting soft law acts under direct action of art. 263 TFEU it has been instead much more willing to interpret soft law (and assess its validity) in actions brought under art. 267 TFEU. According to art. 267(1)(b) the court shall rule on "the validity and interpretation of acts of the institutions, bodies, offices or agencies" when, according to §2-3, a national court asks such question during proceedings instituted before it. Notably, this provision is silent in relation to any requirement that links the admissibility of such question to the production of legal effects, with art. 267(2) only requiring that "the question is necessary to enable it to give judgment"[59]. In theory, using the same reasoning that has justified the denial of review under art. 263 TFEU, one could argue that an act that does not produce legal effects (for the various reasons mentioned above) could not be "necessary" for the judgment but could only, at best, help interpret and shape the exact decision supporting an actual legal act. However, this has not been the court's view[60].

In *Gauweiler*[61] the court admitted the review of an ECB Press release announcing a policy decision even though legal implementing acts were yet to be issued. Still, the Court admitted the preliminary reference and went on to review the merits of the case[62]; it claimed that for an act to be challenged there was no need for a "implementing measures adopted pursuant to national law[63]" and that the Court could review the press release directly. The ECJ equaled the press release to the actual

[58] Gentile (26) 12. Referencing to Judgment of the Court (Grand Chamber) of 9 July 2020. Czech Republic v European Commission. Appeal — […]. Case C-575/18 P. Not yet published.

[59] The CJEU case law has widened the admissibility requirements by excluding it when the meaning is plain, or if there is previous case law on the point of law in question, etc. for a thorough analysis see Chalmers, "The EU Judicial Order", chapter in Chalmers (35) 186-197. However, it has admitted review of soft law without much scrutiny on its supposed legal effects.

[60] Gentile (26) 14-16.

[61] Judgment of the Court (Grand Chamber) of 16 June 2015. Peter Gauweiler and Others v Deutscher Bundestag. Request for a preliminary ruling from the Bundesverfassungsgericht. […] Case C-62/14. ECLI:EU:C:2015:400.

[62] Though this is also due to the politically sensitive nature of the issue at hand and the ECJ wanting to avoid that the German Constitutional Court would take matters into its own hands and decide the case by itself without the Court intervening. For a thorough analysis see Marco Lamandini and David Ramos Muñoz, "The single supervisory mechanism (SSM)", chapter in *EU Financial Law: An Introduction* (Wolters Kluwer, Milano, 2016), 213-224.

[63] ECJ, Gauweiler (61) para 29.

execution of the programme and reviewed it as such, despite the fact that it was yet to produce (from a formal standpoint) any legal effect whatsoever[64]. In the *Grimaldi*[65] case the ECJ affirmed that art. 267 TFEU "confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception".

It has been noted though, that the preliminary reference cannot substitute actions under art. 263 TFEU. First, art. 263 TFEU is subject to strict time limits that allow to consolidate legal certainty once those limits have expired. Admitting review under art. 267 TFEU, instead, leaves a provision constantly at risk of being interpreted in a different way or be found incompatible with EU law, thus being contrary to the principle of legal certainty[66].

Secondly a reference can only be submitted by a national court if a proceeding is instituted before it; therefore, instead of having the same admissibility requirements for everyone (as is the case under art. 263 TFEU) these are different in every country, regulated by national rules.

Thirdly, even though a settled case-law has developed over when to issue a preliminary reference, it ultimately still is a decision of the national judge whether to issue it. Therefore, every single judge in the EU possibly has a say over whether to enable the CJEU to review a certain act.

Lastly if NCAs have already faithfully implemented a guideline (or a soft act in general) coming from an EU agency a ruling finding it inconsistent with EU law would not and could not eliminate all the effects that have already been produced. This latter argument applies equally to banks and credit institutions that might have already changed part of their business practice, their methods of accounting, or governance structure to comply with new rules so that switching back would actually be more costly than continuing with the changes already made. All these factors also contribute to *harden* soft law despite the path towards a judicial review of those acts being extremely narrow, uncertain and too difficult to be relied upon, possibly leading those concerned to comply with it regardless of its content.

[64] Ibid, para 30.

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

[66] Gentile (26) 16.

The reasons for this striking different approach in relation to actions brought under art. 263 TFEU and art. 267 TFEU might be that while the CJEU has been willing to admit that certain soft law acts have (undefined) "legal effects" it has been more reluctant to admit that they produce "legally binding effects"[67]. But what are these *effects* that the Court has sometimes found to have been produced?

1.3 Legal Effects Established by the CJEU

The most relevant cases on the issue are *Grimaldi*, *France v. Commission*[68] and *PTC*[69]. In *Grimaldi* the court had to assess what were the effects of Recommendations issued by the Commission 25 years prior to the judgment and with no subsequent implementing measure from NCAs. It found that they were "not intended to produce binding effects" and could not "create rights upon which individuals may rely before a court[70]", therefore confirming their lack of binding effects. However, it established that courts "are bound to take recommendations into consideration in order to decide disputes submitted to them[71]", possibly complicating the framework even more. On one hand it admitted that a Recommendation such as that one is not completely devoid of legal effects, on the other hand it did not establish what precisely are these effects, what consequences do they carry and it did not provide any guidance to NCAs or national courts as to what relevance to give them when deciding a dispute.

In *France v. Commission*, the Commission issued a communication (atypical act, with no binding effects) on the basis of a previous directive without indicating the legal basis on which such act was issued. Remarkably the Court, instead of holding that the communication lacked binding effects and declaring the appeal inadmissible, found that the act, as formulated, contributed to create new obligations on member states that did not stem from the directive[72], therefore implying a binding effect of it. However, it struck down the provision (therefore annulling a soft act) because it did not indicate

[67] Gentile (26) 16, also explaining why this distinction is far from convincing.

[68] Judgment of the Court of 16 June 1993. French Republic v Commission of the European Communities. Challengeable act. Case C-325/91. ECLI:EU:C:1993:245.

[69] Judgment of the Court (Second Chamber) of 12 May 2011. Polska Telefonia Cyfrowa sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej. Reference for a preliminary ruling: […] Case C-410/09. ECLI:EU:C:2011:294.

[70] ECJ, Grimaldi (65) para 16.

[71] Ibid, para 18.

[72] ECJ, Commission v. France (68) para 17.

its legal basis[73] (also implying that if it did the act would have been valid and binding)[74].

In *PTC*, the Polish Communications Authority implemented a regulatory act[75] using, as a legal basis, guidelines that were issued by the Commission under a previous directive. Interestingly the Court did not reject the possibility that those guidelines could impose obligations on individuals because of the nature of the act, leaving open the possibility of a soft act having binding effects even on third parties. It ultimately found this not to be the case in this judgment[76], but only after assessing the substance of the case. In the judgment the court seemed to hint at the distinction between binding effects, that can only be produced by hard law, and legal effects that are produced by soft law, and that it must be assessed on a case-to-case basis[77].

As in *Grimaldi* the Court has perhaps added on to the uncertainty and the confusion of the relevance and impact of soft law rather than shedding some light upon it. It admitted that the guidelines have some, unspecified, legal consequences, but it denied that they have direct legal effects on individuals. The guidelines themselves affirmed that their objective was "to ensure that NRAs use a consistent approach" and the Court allowed a national administrative authority to use them as a basis for a binding act[78]. If one was looking for an established rule that could be applied in future cases or used as guidance this cannot be found in the judgment.

Overall, soft law on one hand enhances transparency, which has become a general principle of administrative action in the EU, by giving guidance to administrative authorities and helping develop consistent interpretation of EU law. On the other hand, it might be detrimental to legal certainty as its effects are still unclear and they seem to differ from case to case with no apparent rationale behind it. If it is a tool that increases consistent application and makes administrative action more predictable vis-à-vis third parties, then it is only useful and positively adds transparency. If, instead, is used as a supplement to regulation to help fill gaps and make up for the lack of conferral of powers it is detrimental to the principle of legal certainty as it fuels

[73] Ibid, para 26-27.
[74] Stefan (15) 370
[75] Fully binding on its addressees as a general administrative act.
[76] ECJ, PTC (69) para 30. See Stefan (20) 885, 886, 890.
[77] Stefan (20) 887-889.
[78] Ibid, 891. ECJ, PTC (69) para 34.

suspicions of so-called "backdoor legislation", meaning regulation in the absence of competence and with limited and inconsistent judicial checks over it[79].

2. The *ex-ante* Controls: Internal Administrative Safeguards

In addition to judicial and quasi-judicial controls over EU soft law, there are other methods that may provide effective safeguards in ensuring that the boundaries over the exercise of soft powers are respected and, broadly speaking, achieve a high level of legitimacy in the normative output, so that the lack of an effective judicial review may become slightly more acceptable[80]. Conferral of powers to the ESAs has to strike a fine balance between ensuring they are given enough flexibility on one hand and maintaining an acceptable degree of legitimacy through procedural safeguards on the other[81].

A significant allocation of powers to the EBA is only justified, from a constitutional standpoint, if balanced by stringent and effective judicial remedies[82] or through other forms of legitimacy, namely political and technical, that make up for democratic deficit[83] which was and still is a major issue, despite having been addressed by the 2019 ESAs reform[84]. The other justification for this conferral of broad and lightly regulated powers was the fact that they were non-binding which helps explain why the procedure to issue soft law is still underdeveloped in comparison with the one set for Technical Standards (TS)[85]; yet, this characteristic should not be overstated as often its effects are far from soft in practice[86], thus making legitimacy issues very relevant[87].

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[79] Ibid, 890-892.

[80] Matteo Gargantini, Miroslava Scholten, "The past is the past. The future is all that's worth discussing" (Lord Baelish, The Game of Thrones). Some reflections on the non delegation doctrine and its impact on the ESAs powers after the CJEU decision on the FBF case" (2021) available at https://eulawenforcement.com/?p=8077, para. 9.

[81] Heikki Marjosola, "Shadow Rulemaking: Governing Regulatory Innovation in the EU Financial Markets" (2022) 23 German law journal, 186-187.

[82] And it will be seen that so far this has not been the case.

[83] Linda Senden and Ton Van der Brink, "Checks and Balances of Soft EU Rule-Making" (2012) EPRS: European Parliamentary Research Service, Available at https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_ET(2012)462433, 16.

[84] Which enhanced proceduralisation of the decision-making processes.

[85] Marjosola (81) 191. See also the chart at pag. 192.

[86] Senden (83) 23.

[87] Jakob Schemmel, "The ESA Guidelines: Soft Law and Subjectivity in the European Financial Market—Capturing the Administrative Influence" (2016) 23 Indiana Journal of Global Legal Studies, 474.

Higher legitimacy can be achieved through increased transparency, accountability, involvement of stakeholders, proceduralization and reasoning. These practices have been included in the so-called "second generation" principles of good governance[88].

The principle of openness and transparency, whose legal basis has been found in art. 15 TFEU, requires Union agencies to "ensure the participation of civil society" and to "conduct their work as openly as possible". This should result in active participation by relevant stakeholders and members of the public to the rule-making process and to widely available accessibility to documents of the EBA. The EBA has a page on its website listing all the documents that are accessible in accordance with the applicable law and its internal decision on access to documents[89].

Even more specific are the principles of "consultation and participation". Art. 11 TEU only refers to the work of the EU institutions. It remains unclear whether it also applies to soft rule-making and it is, at least, very doubtful whether these principles, despite being general principles of the EU and a relevant treaty provision, could be enforceable in Court. In light of the analysis of §1 it is hard to see the CJEU admitting a challenge to a soft measure on the grounds that it lacked consultation[90]. At most, this could result in an obligation to provide reasoning with specific reference to the input of participants to the procedure, according to art. 296(2) TFEU. This way such participation would have to be taken into account both when the views were shared by the regulators and when instead they were rejected.

In relation to civil society and stakeholders' participation this is carried out, as analysed in chapter 2, through public consultation and discussion with the Banking Stakeholders Group (BSG). Stakeholders' involvement should mostly involve individuals and entities that possess a high expertise and knowledge of the issues that are to be regulated, to enhance effectiveness in the rule-making process. Furthermore, early consultation is much more effective than allowing comments after an initial

[88] Senden (83) 18-19, 26.

[89] See https://www.eba.europa.eu/about-us/transparency-and-access-documents. Reference to EBA DC 036. 27 May 2011. Decision of the Management Board On Access to Documents, which is available on the website page.

[90] Senden (83) 28-30.

proposal as in this latter case they could be easily disregarded, despite the requirements to provide explanations and reasoning[91].

Chapter 2 analysed the involvement at various stages of the BSG and mentioned that concerns have been raised in relation to its composition and to the balance of the influence that the different groups it represents have, respectively. This puts it at odds with the principle of "equal treatment" (art. 9 TEU) that requires all different individuals and groups to be given the same attention and consideration when the Union carries out its administrative functions. In particular, concerns have been raised in relation to the outsized influence that representation of financial institutions has in comparison to consumers, due to imbalanced access to economic resources and higher expertise[92]. Another issue is who, ultimately, gets to represent users and consumers and whether they effectively represent their interests. In some instances, they have been represented by firms who provide services to those same financial institutions and have partially overlapping interests[93]. This is even more critical when one considers that there are no mechanisms of accountability between representatives and members of the represented interests[94]. When one considers that in some instances the requirements of public and stakeholders' consultations are only optional or not requested at all, it becomes clear that the current involvement of stakeholders is far from sufficient and effective[95].

As explained it is far from clear whether these principles apply to procedures issuing soft law. One possible avenue would be to rely on art. 41(1) CFREU that establishes the "right to good administration". The open-ended wording of the provision makes it, in theory, applicable to all type of acts issued by all types of Union bodies and agencies as it does not set other conditions for its application. It could thus include the respect of all the principles and provisions applicable to a certain

[91] Carmine Di Noia and Matteo Gargantini, "Unleashing the European Securities and Markets Authority: governance and accountability after the ECJ decision on the Short Selling Regulation (Case C-270/12)" (2014) 15 European Business Organization Law Review, 12-13.

[92] Fabrice Demarigny, Nicolas Robert, Jonathan McMahon, "Review of the new European system of financial supervision (ESFS). Part 1, the work of the European supervisory authorities (EBA, EIOPA and ESMA)" (2013) European Parliament, Directorate-General for Internal Policies of the Union, Publications Office, available at **https://data.europa.eu/doi/10.2861/2926**, 38-39.

[93] Schemmel (87) 476-477.

[94] Di Noia (91) 14.

[95] See, again, the chart in Marjosola (81) 192 and see the analysis in Chapter 2§4.4.

administrative procedure[96]. Art. 41(3) further establishes liability for the damages caused by the Union in the performance of its duties, which could be an alternative route when action for annulment is not viable. Either instance, however, is unlikely to happen as both cases would require the production of legal effects by a soft act, a conclusion that the CJEU has so far refused to reach.

Overall, the questions to the issues that arise in analysing the existent procedural safeguards can only be tentative. Do these principles of good administration apply to agencies? It is safe to say that they do, as general rules of EU law contained in the Treaties. Do they apply to soft law procedures? The answer is probably yes to this too. It is worth noting that the EBA has adopted internal rules and procedures to implement them[97]. However, these internal rules still fall short of what would constitute sufficient safeguards and the legal status of these documents is unclear. This leads to the next question: are these rules enforceable? This is at least doubtful because it is unclear if and to what extent the rules apply to soft law. It is certain that the provisions contained in the EBA Regulation and, in light of the self-binding effects of soft law, the internal documents apply too. Still, the CJEU is unwilling to review soft law unless it is proved that it has produced legal effects, making enforcement of such rules unlikely.

Some scholars have questioned whether making procedural requirements binding and enforceable is desirable at all. They claim that this would partly defeat the purpose of soft powers, which base their existence and the effectiveness on the fact that they enjoy a high degree of flexibility and exercise a wide discretion in choosing what procedure to follow. Furthermore, they risk raising the prospect of the EBA shifting to even more informal acts[98] as a response, in order to evade the procedural requirements. This would be detrimental to legal certainty as their status would be even more unclear than the Guidelines or Recommendations' one[99].

As of today, legitimacy concerns still persist, so it is still very much desirable that an effective judicial review is carried out. It is hardly tenable, from a constitutional

[96] Senden (83) 33-34. The author also highlights how it is possible to give a much narrower reading of the provisions that has so far been followed by the CJEU.

[97] See supra, pages 86-87 in Chapter 2§4.4.

[98] Namely Q&As or atypical acts such as communications and notices, issued under art. 29 EBA Regulation.

[99] Marjosola (81) 194-198.

perspective, that there are no *ex-post* checks on soft law just because it is not entirely binding. Even more so when one considers that it often is, *de facto*, all but binding.

3. Reviewability of EBA Soft Law in the Single Rulebook Framework

EBA acts, like every other act of EU law, can be challenged consistently with the general principles and the applicable law. How those apply to the regulatory acts of the EBA is the subject of the following paragraphs. In addition to judicial review, the EBA regulation has set up an adjudicatory, quasi-judicial body internal to the authority: the "Board of Appeals (BoA)". This is an established approach in the EU agencification process as more and more agencies have their own internal body for review[100], especially in the financial sector[101].

Its benefits are apparent as are its shortcomings, largely resembling the pros and cons of regulation through soft law. The BoA provides a highly technical and expert body (which is extremely relevant in a field characterised by complex and technical regulation) that can deliver quick decisions; on the other hand, it does not possess the authoritative effects that decisions issued by the CJEU can provide. It merely resolves the issue at hand without settling general questions of law and even if it affirms generally applicable principles, the CJEU can freely depart from them as it remains autonomous in interpreting EU law.

3.1 Board of Appeals

The BoA is a joint body of the three ESAs deciding complaints against any of the three. As the founding regulations of the three bodies largely mirror themselves, the questions of law that might arise are mostly similar. Art. 58-59 of the EBA Regulation regulate the appointment, composition, independence and impartiality guarantees, and internal procedure[102]. Additional rules are provided by the "internal rules of

[100] See the list at Jacopo Alberti, "The draft amendments to CJEU's Statute and the future challenges of administrative adjudication in the EU" (2019) 3 Federalismi.it, ISSN 1826-3534, 5-8. See also Marco Lamandini and David Ramos Muñoz, "The regulation of the European system of financial supervisors", chapter in Lamandini (62) 158-159.

[101] The Single Resolution Board has its own Appeal Panel and decisions of the ECB as a Single Supervisor can be reviewed by the Administrative Board of Review, though the latter has some peculiar features. For further analysis see Marco Lamandini and David Ramos Munoz, "Law and Practice of Financial Appeal Bodies (ESAs' Board of Appeal, SRB Appeal Panel): A View from the Inside" (2020) 57 Common Market Law Review, 120, 122-127.

[102] For an analysis see Lamandini (100) 159-160. Also in ibid, 150-153.

procedure" adopted by the BoA in accordance with art. 60(6). These rules are extremely relevant due to the dual nature of the BoA. It is an internal body of the EBA and as such is an administrative body that issues administrative decisions. However, it does exercise quasi-judicial and adjudicatory functions, so it is paramount that it is afforded quasi-judicial guarantees of procedural soundness and independence of its members.

It is still unclear whether challenge of EBA acts to the BoA is a mandatory step (when available) that has to be exhausted before initiating proceedings in front of the CJEU under art. 263 TFEU. The Commission proposal said that an appeal "may" be filed to the BoA, suggesting that is merely a possibility and an additional remedy with a distinct and separate function[103]; on the other hand, the final wording of the Regulation seems to suggest otherwise as art. 61(1) states that:

> "Proceedings may be brought before the Court of Justice of the European Union, in accordance with article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority"

The wording of this provision seemingly indicates that an act issued by the authority can only be challenged in front of the CJEU if the BoA cannot hear the case, whereas, in any other instance, it will be the BoA's decision that will be challenged in front of the CJEU and not the prior act of the authority[104]. As neither the Boa nor the CJEU have ruled on the issue it is not possible to give a definitive answer yet. However, art. 61(2) EBA Regulation states that action for annulment in front of the CJEU is available "against decisions of the authority" without specifying any further limitation. If actions for annulment were subject to the previous exhaustion of the administrative remedies art. 61(2) would be devoid of any possible effect, as an appeal to the CJEU was already made possible by art. 61(1). In addition to that, this interpretation would almost give the BoA the role of a court of first instance with the CJEU that would only review

[103]Sir William Blair, Grace Cheng, "The role of judicial review in the EU's financial architecture and the development of alternative remedies: The experience of the Board of Appeal of the European Supervisory Authorities", chapter in VV. AA, *Judicial review in the Banking Union and in the EU financial architecture Conference jointly organized by Banca d'Italia and the European Banking Institute* (Roma, Quaderni di Ricerca Giuridica della Consulenza Legale, n. 84, 2018), 23.

[104] Andreas Witte, "Standing and Judicial Review in the New EU Financial Markets Architecture" (2015) 1 Journal of Financial Regulation, 246-247. Lamandini (101) 147-148.

decisions of the BoA and not directly acts of the authority (as the regulation does not indicate which acts cannot be appealed before the BoA[105]).

If this was the case, it would probably require the EBA and the EU legislature to strengthen the BoA to make it consistent with its role as a *de facto* Court. Stronger independence requirements, an increased budget, a stronger institutional organisation that would allow the development of a consistent case law, in addition to an enhanced cooperation with the CJEU (namely the possibility to submit a preliminary reference, just like national courts do) would all be necessary[106]. Furthermore, it is unclear what are the powers of review of the BoA, if it is limited to a control of strict legality or if it can substitute its judgment and carry out an assessment like the Board of Supervisors (BoS), if it can investigate the facts, and if it can issue a new act that replaces the original EBA act or is limited to strike it down and give indications to the BoS for a new decision[107].

In relation to what type of acts are subject to review and what are the requirements for standing and admissibility art. 60(1) of the EBA regulation seems to indicate that natural and legal persons (including NCAs) have three distinct possibilities for review[108]:

- Acts issued by the authority under art. 17-18-19 of the Regulation can always be challenged by anyone.
- Decisions directly addressed to a natural or legal person can be challenged by the addressee.
- A decision that despite not being addressed to a natural or legal person is of "direct and individual concern to that person".

It will not go unnoticed that the wording is almost identical to what art. 263(4) TFEU requires to challenge regulatory acts[109].

[105] Lamandini, ibid.
[106] Ibid, 145-149. Witte (104) 245-246.
[107] Ibid, 154-155. Witte (104) 245-246.
[108] Witte (104) 242-243.
[109] That thus are not directly directed to the appellant. The CJEU has confirmed that regulatory acts include "acts of general application other than legislative acts", see ibid, 255, referring to Judgment of the Court (Grand Chamber), 3 October 2013. Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union. […] Case C 583/11 P. ECLI:EU:C:2013:625. While a legislative act is issued according to the ordinary or special legislative procedures in art. 289, a regulatory act is an act of EU Law, of general application, that is outside the scope of art. 289 TFEU and not a legislative act.

In the case of Technical Standards appeal in front of the BoA is inadmissible as the EBA's draft act is merely preparatory and the final regulation or decision is adopted by the Commission and can thus be challenged as an act of the institution under art. 263 TFEU[110].

Guidelines and Recommendations are neither mentioned among the reviewable acts nor they are explicitly excluded, so one must assume that they are reviewable only as long as they meet the requirements of direct concern[111]. Again, the BoA has not directly ruled on this issue so there is not a definitive answer. In principle, the BoA would apply EU law as interpreted by the CJEU but the CJEU itself, as explained in §1, has not developed a clear and consistent case law. Two cases are relevant for this analysis and might give a hint as to what extent the BoA's powers of review extend.

The *SV Capital OU*[112] case is relevant for two reasons: first it should be noted that the BoA[113], while still relying on EU secondary law it almost applied Guidelines issued by the EBA, giving them relevance in interpreting EU law and using them to decide the dispute at hand[114]. Second it is relevant for the reasons the General Court used to declare the inadmissibility of the subsequent appeal. On one hand it declared itself not able to review the original decision of the EBA because the time limit established by art. 263(6) TFEU had expired[115], on the other hand it annulled the BoA's decision due to the fact that the EBA's original decision was not a challengeable act and as such the BoA itself should have declared the appeal inadmissible. In situations such as this one then, an appellant finds itself potentially without any remedy. That is because the GC reverses the BoA's decision and finds that the appeal was inadmissible from the start, while also declining to examine the prior act of the authority for expiration of the time limit.

[110] Witte (104) 241.
[111] Ibid, 240.
[112] Decisions of 24 June 2013 and of 14 July 2014, SV Capital v. EBA. Available at https://www.eba.europa.eu/about-us/organisation/joint-board-of-appeal/decisions/archive. And subsequent decision of the General Court Judgment of the General Court (Third Chamber) of 9 September 2015. SV Capital OÜ v European Banking Authority (EBA). […] Case T-660/14. ECLI:EU:T:2015:608.
[113] In the 2013 decision, see para. 46-57.
[114] Lamandini (101) 128.
[115] GC, SV Capital (112) para. 37-41.

In IPE v. ESMA[116] the BoA found the appeal inadmissible due to lack of "interest" of the appellant[117], but, interestingly, it analysed the general requirements for admissibility. It affirmed that, despite the similar wording, the bar for admissibility, in relation to individual concern, should be lower to obtain a decision by the BoA than it is for the CJEU[118]. It further said that a "review" (which is the task of the CJEU) is different than an "appeal" (defining itself as a "specialist body" rather than a court). However, it did not elaborate on the issue and leaving the question open.

Overall, the BoA could constitute a useful proceeding to obtain a judgment from an impartial body that can provide high expertise on the complex issues that financial regulation and supervision raise[119] in a timely and efficient manner. As it is currently designed though, it creates more problems than it solves.

If it is considered as a judicial body its powers are insufficient. It is hard to envision the BoA going into uncharted waters and admit a review of a soft act issued under art. 16 of the EBA regulation without the CJEU having given clearer guidance on the issue of reviewability. And even if it did, its judgment would then make the act in question invalid for the parties of the dispute but could not possibly produce *erga omnes* effects. One could envision the undesirable situation where a guideline would be struck down in an appeal brought by one or few NCAs with the other NCAs, that have already adopted implementing acts domestically, would find themselves *in limbo* as they would have to choose between "making every effort to comply" with G&R under art. 16 or comply with a BoA decision not directly addressed to them.

If, instead, it is merely an internal administrative body, it could not make a binding decision concerning a guideline or a recommendation for risk of running foul of the *Meroni*[120] limitations on agencies' rule-making powers. It would also be impossible to claim that the same binding powers that member states were not willing to afford to the BoS (which comprises national representatives from each member state) were instead conferred to a small, independent body such as the BoA.

[116] Board of Appeals Decision of 10 Nov. 2014, IPE v. ESMA. Available at EBA (112).
[117] Ibid, para. 50 ff. See Lamandini (101) 130.
[118] Ibid, para. 36-40.
[119] The lack of expertise is sometimes cited as a problem with respect to the role of Courts in judicial review in these fields.
[120] Judgment of the Court of 13 June 1958. Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community. Case 9-56 & 10-56. ECLI:EU:C:1958:7. See infra, pages 137-138.

3.2 Appeal to the Commission under art. 60a EBA Regulation

The 2019 reform of the EBA Regulation has provided another administrative, remedy to obtain a review of soft law issued by the EBA. While it has been noted that the tool is unlikely to make much of an impact[121] the wording and the rationale behind this provision is still relevant.

Art. 60a provides that, any natural and legal person may send a "reasoned advice" to the Commission if they suspect the EBA acted beyond the scope of its powers, in exercising the powers in art. 16 and 16b of the EBA Regulation (therefore including Guidelines, Recommendations and Q&As), including by violating the principle of proportionality in art. 1(5) of the Regulation. This signals an awareness of the EU institutions of the possibility of the EBA exceeding its powers even when using its soft powers and of the fact that is an issue that must be addressed[122]. In addition to that it is notable that the Union's legislator, instead of enhancing the powers of the CJEU's has provided another flexible and informal method of review.

The problem is that on one hand the Commission is under no duty to even consider and respond to the reasoned advice[123] and on the other hand, that the appellant in question must prove that the contested act is of "direct and individual concern" for it to be considered as an act exceeding the Authority's powers[124]. Therefore, either the Commission takes a much more liberal interpretation of the same exact words establishing the "concern" requirement than the CJEU has done[125] or this procedure effectively does not add anything new.

3.3 Court of Justice of the EU

In relation to the CJEU's possible scrutiny of EBA's acts of soft law, the case-law that the Court has developed over soft law in general, mentioned in §1, will be, in principle, applicable. As was explained, the lack of a settled case-law, along with the recent developments still leaves many questions open.

[121] Heikki Marjosola, Marloes van Rijsbergen, Miroslava Scholten, "How to exhort and to persuade with(out legal) force: Challenging soft law after FBF" (2022) 59 Common Market Law Review, 1539.
[122] Ibid.
[123] Marjosola (81) 202.
[124] Ibid.
[125] As advocated by some, see Filippo Annunziata, "The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni" (2021) 106 EBI Working Paper Series, 35-36.

Two issues need to be addressed: the first is the analysis over standing and admissibility. That is the extent to which the CJEU is willing to affirm standing in procedures challenging soft law acts. As explained in §1 passing the threshold for admissibility is tantamount to affirming that soft law does indeed produce legal effects, which is a prerequisite for admissibility under art. 263 TFEU. That explains why the most impactful judgments on the matter have so far come through the preliminary reference procedure under art. 267 TFEU: in this case the Court can escape the admissibility assessment and only interpret soft law and analyse its effects and validity. That leads to the second issue: what effects does soft law, issued by the EBA in the forms mentioned in Chapter 2, produces? And what are the grounds under which those acts can be challenged and, possibly, struck down?

According to art. 263(4) TFEU, a recommendation could be challenged by those to whom is directly addressed or, by proving that there is "direct and individual concern[126]" under the *Plaumann*[127] test. A Guideline, instead, must be considered as a "regulatory act[128]" so an appellant must only prove that is of direct concern[129]. Bringing about a direct challenge to the other soft acts mentioned in Chapter 2 such as Q&As, opinions, public statements or other acts adopted under art. 29 EBA Regulation is likely to result in the CJEU rejecting the plea that they are producing legal effects[130].

In either case, for the reasons just mentioned above, under the strict CJEU interpretation it would be difficult to prove that a non-binding measure is of direct concern as an appellant would have to prove that it is directly producing legal effects. Furthermore, in the case of a regulatory act, art. 263(4) TFEU requires that it "does not entail implementing measures" so the CJEU, even if it held that a guideline produces legal effects and is of direct concern, could argue that only subsequent national implementation meets the criteria for direct concern[131]. Indeed, the CJEU has

[126] Defined as cases where a "decision 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", see Witte (104) 229-230.

[127] Judgment of the Court of 15 July 1963. Plaumann & Co. v Commission of the European Economic Community. Case 25-62. ECLI:EU:C:1963:17.

[128] See supra n. 93, referring to Witte (104) 254-255. See also Marjosola (81) 200.

[129] For a brief but comprehensive explanation of the various different requirements for standing in relation to different type of acts see the chart in Robert Schuetze, "Judicial Powers I: (Centralized) European Procedures", chapter in *European Union Law* (3rd edition, Oxford, Oxford University Press, 2021), 374-375.

[130] Marjosola (121) 1537.

[131] Marjosola (81) 200.

so far refrained from carrying out a direct judicial review of soft law issued according to art. 16 EBA regulation. It has instead relied on national implementing acts being challenged in domestic courts and reaching the Court through art. 267 TFEU and directly rule on the validity of the original act of EU soft law[132]. Another avenue would be an incidental ruling under art. 277 TFEU: in a dispute where a soft law act was to be applied its invalidity can be invoked even if it was not or could not be challenged under art. 263 TFEU[133].

In reviewing the validity of guidelines and recommendations the CJEU cannot substitute its discretion for the issuing agency's one. The court is limited to a review of strict legality and can only annul a measure if it is incompatible with treaty law or secondary law establishing the limits of the agency's powers[134]. That can happen for two reasons: the first option is that the Court could find that a soft act exceeds the scope and the mandate given by acts of secondary law empowering the EBA to issue regulatory acts in the form of soft law. The EBA does not have a general power to issue guidelines but can only do so if empowered by the level 1 legislation listed in art. 1(2) EBA Regulation (art. 16(1) EBA Regulation). If a guideline goes beyond the mandate conferred by the empowering act, courts should be able to strike it down[135]. The other instance is if the soft act is not a "genuine" soft law measure but instead aims to create binding effects, therefore trying to circumvent the division of competences and powers[136].

In the landmark *BNB* case[137] the ECJ partially annulled a recommendation[138] even though it confirmed its non-binding nature[139]. Crucially, the Court ruled on the

[132] Annunziata (125) 46-47. The shortcomings of this arrangement will be discussed further below.

[133] Ibid, 5-6, 33.

[134] Sandra Antoniazzi, "Il controllo amministrativo e giurisdizionale sulle decisioni delle autorità europee di regolazione e di vigilanza bancaria" (2021) 2 Banca, Impresa, Società, 203-204.

[135] Marjosola (81) 198. See also Merijn Chamon and Nathan de Arriba-Sellier, "FBF: On the Justiciability of Soft Law and Broadening the Discretion of EU Agencies" (2022) 18 European Constitutional Law Review, 289.

[136] Ibid, 199. Also in Marjosola (121) 1526, 1534.

[137] Judgment of the Court (Fourth Chamber) of 25 March 2021. BT v Balgarska Narodna Banka. […] Case C-501/18. ECLI:EU:C:2021:249.

[138] Though one issued under art. 17(3) of the regulation instead of art. 16 it was still a non-binding recommendation so the legal issues can be considered the same.

[139] Marjosola (121) 1523.

interpretation and validity of the recommendation[140] after a preliminary reference (art. 267 TFEU) from a domestic court (in this case from Bulgary). It is noteworthy that both the Advocate General (AG) in its opinion[141] and the ECJ in its judgment did not avoid the issue of admissibility to jump straight to the substance of the matter as they could have. Instead, they both reminded that the same act whose validity was being assessed could not have been challenged in proceedings brought under art. 263 TFEU[142].

The referring court asked two questions: whether appellants in a national proceeding could rely on and see a recommendation applied in court even if they were not addressed by it and whether such recommendation was valid[143]. The first question is intertwined with the admissibility and the type of proceeding issues just discussed. The court reaffirmed that the recommendation was not intended to produce binding effects, highlighting how it belonged to a separate category of EU law that merely aims to "exhort and persuade[144]" its addressees. Nonetheless, making reference to *Grimaldi* it recognised that a national court must take it "into consideration" in resolving a dispute[145]. It highlighted how the recommendation was issued to recommend steps to be taken by the Bulgarian Central Bank to remedy to a breach of Union law that caused damages to the appellants. Therefore, it could be relied upon by the appellants, answering positively to the first question[146].

It followed that since it was an act of Union law and it was due to be used to resolve a genuine dispute, on one hand the ECJ had jurisdiction to interpret it, if it was the subject of a preliminary reference[147], and on the other hand that only the ECJ (and not the domestic court, according to the *Foto-Frost*[148] case law) had the power to declare

[140] Which was Recommendation to the Bulgarian National Bank and Bulgarian Deposit Insurance Fund on action necessary to comply with Directive 94/19/EC. EBA/REC/2014/02. 17 October 2014. Available at https://www.eba.europa.eu/regulation-and-policy/other-topics/recommendation-to-the-bulgarian-national-bank-bnb-and-the-bulgarian-deposit-insurance-fund-bdif-.

[141] Opinion of Advocate General Campos Sánchez-Bordona delivered on 17 September 2020. BT v Balgarska Narodna Banka. […] Case C-501/18. ECLI:EU:C:2020:729.

[142] Ibid, para. 82 and ECJ, BNB (137) para. 82.

[143] Giulia Gentile, "To be or not to be (legally binding)? Judicial review of EU soft law after BT and Fédération Bancaire Française" (2021) 70 Revista de Derecho Comunitario Europeo, 986.

[144] ECJ, BNB (137) para. 79.

[145] Ibid, para 80.

[146] Ibid, 81.

[147] Ibid, 82-83.

[148] Judgment of the Court of 22 October 1987. Foto-Frost v Hauptzollamt Lübeck-Ost. […] Case 314/85. ECLI:EU:C:1987:452.

it invalid[149]. Though the court did not explicitly reproduce this reasoning, any other conclusion would put a referring court in an impossible situation. It would either have to apply a recommendation whose validity it doubts or directly annul an act of Union law (which it cannot do), as noted by the AG[150]. The Court subsequently found the recommendations to be invalid as they wrongfully substituted an act that was solely for the NCA to be adopted, answering positively to the second question too[151].

Overall, *BNB* is a relevant case mostly because it admits that even people not addressed by a recommendation can, rely on it in court. However, it does not widen the scope of judicial review of soft law, nor does it clarify under what conditions it is available. In this case it incidentally reviewed it because the dispute at hand allowed the Court to do so, but it did not clarify what are the effects of an act such as the recommendation in question[152]. This leads to the other case that the Court has recently decided that might give more insight into the issue.

4. The FBF Case

The other judgment, that the ECJ has recently issued and that might shed some light over the current status of judicial review of soft law in the EU banking and financial sectors is the *FBF* case[153]. In this decision the Court addresses both the issue of admissibility and reviewability of soft law and the extent of the ESA's powers, thus potentially affecting the use of the other tools of soft law, beyond Guidelines and Recommendations under art. 16 of the regulation.

[149] AG, BNB (141) 100-102.
[150] Ibid. See also Gentile (143) 987-988.
[151] Gentile (143) 989.
[152] Chamon (135) 287-288.
[153] Judgment of the Court (Grand Chamber) of 15 July 2021. Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR). Request for a preliminary ruling from the Conseil d'État. Reference for a preliminary ruling – Articles 263 and 267 TFEU – EU act which is not legally binding – Judicial review – Guidelines issued by the European Banking Authority (EBA) – Product oversight and governance arrangements for retail banking products – Validity – Power of the EBA. Case C-911/19. ECLI:EU:C:2021:599.

4.1 Background and Context

In 2016 the EBA issued Guidelines[154] (GL) regulating "product oversight and governance arrangements[155]" of banking retail products[156]. The GL used four EU directives as their legal basis[157]; crucially those directives did not address the issue of *product governance* directly, but rather, regulated corporate governance. While other directives specifically addressed product governance, they were not included in the acts listed in art. 1(2) EBA Regulation and would likely have fallen within the ESMA's competence[158]. Yet, the EBA considered oversight of the commercialisation and distribution of financial products as an aspect of the system of internal controls of a company[159] and as such included in its mandate.

The "Autorité de Contrôle Prudentiel et de Resolution" (ACPR, the French NCA) subsequently issued a notice, announcing it complied with the GL and that institutions supervised by it were bound to respect them[160]. The "Fédération Bancaire Française" (FBF, a lobbying group representing French banks) appealed, in a domestic court, seeking the annulment of the notice on the grounds that they were based on an act (the GL) that was invalid under EU law as, it claimed, the EBA acted outside the limits of its powers and could not issue GL on product governance[161].

The French Council of State stayed the proceedings to the CJEU in order to resolve the questions over the interpretation of EU law that were instrumental to resolve the dispute at hand. It asked[162]:

1. Whether the GL could have been challenged under art. 263 TFEU (Q1.1) and if so, if a professional federation could challenge them (Q1.2).
2. If either of the questions above had a negative answer, it asked whether the CJEU had the power to review the validity of the GL after a preliminary

[154] EBA/GL/2015/18. 22/03/2016. Guidelines on product oversight and governance arrangements for retail banking products. Available at https://www.eba.europa.eu/guidelines-on-product-oversight-and-governance-arrangements-for-retail-banking-products.
[155] Ibid, para. 2.5.
[156] Annunziata (125) 15,21.
[157] See the list at ibid, 21.
[158] As affirmed by the Advocate General. See Opinion of Advocate General Bobek delivered on 15 April 2021. Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR). […] Case C-911/19. ECLI:EU:C:2021:294. Para. 68-69.
[159] Annunziata (125) 20-22. Chamon (135) 289-290.
[160] ECJ, FBF (153) para. 26.
[161] Ibid, para. 27-28.
[162] Ibid, para 34.

reference in accordance with art. 267 TFEU (Q2.1) and if so, whether it was possible for a professional federation to indirectly challenge them through a national court (Q2.2)

3. If the answer to Q2.2 was yes, it asked whether the GL in questions were valid or if the EBA had in fact exceeded its powers.

The admissibility test for a referral under art. 267 TFEU is much more relaxed than it is under art. 263 TFEU and it essentially comes down to[163]: a) there being a genuine dispute in front of the referring court[164] and b) there being a genuine doubt in relation to the validity or interpretation of ANY act of EU law (art. 267(1)(b)), provided that it is instrumental to rendering a decision (art. 267(2)). The first question is relevant when considering a possible application of the *TWD*[165] case-law, as reminded by the AG in his opinion[166]. If *TWD* was to be applied then the reference would be declared inadmissible because the appellant in the national proceeding should have challenged the initial act of EU law directly to the Union's courts. It is clear from the case-law referred to in §1 that this is not the case, as highlighted by the AG. However, the point is important as it prevented the Court from sidestepping the issue of the reviewability under art. 263 TFEU and forced it to elaborate on that[167].

4.2 The Advocate General's Opinion

As a preliminary remark the AG urges the Court to take a substantial approach and consider the case in the *specific context* rather than in abstract terms[168]. He suggests, almost provocatively, that by mechanically applying the general rules developed by the CJEU case-law, the judgment would be easy and immediate: question 1 (Q1) is inadmissible (for the aforementioned reasons), the answer to Q2 is yes as, under the *Grimaldi* reasoning, the CJEU can interpret any act of EU law in a preliminary judgment. So the only assessment to be made is regarding the validity of the GL[169].

[163] Ibid, para. 63-64.

[164] Thus avoiding cases created "ad hoc" to be referred to the EU court and to obtain a judgment where it was not admissible under art. 263 TFEU.

[165] Judgment of the Court of 9 March 1994. TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland. […] Case C-188/92. ECLI:EU:C:1994:90.

[166] AG, FBF (158) para. 112-120.

[167] As it otherwise could have done, see ibid, para. 31.

[168] Ibid, para. 36.

[169] Ibid, para. 31-35.

Those considerations help him highlight why, instead, an in-depth analysis of all three questions is necessary. As mentioned in page 124 an act of soft law is not challengeable under art. 263 TFEU if it is a "genuine" soft law act and does not disguise an attempt by the issuing agency to create binding obligations[170]. The AG criticises the test the CJEU uses to make that assessment and calls upon the Court to change it and recognise the effects that soft law ends up having regardless of its label[171]. The CJEU refers to *Belgium v. Commission* in which, in order to assess the potential bindingness of an act, it looked at the type of act and the intentions of its authors. The AG argues that this leads to a closed circle where the use of an act that is formally non-binding leads to presuming that there was no intention of creating binding effects. At the same time the genuine intention is made manifest by the use of a soft act[172]. It recognises that under this reasoning the GL must be considered as genuinely soft but encourages the Court to consider the full effects of the GL and admit that in between binding and non-binding there are various shades of legal effects that cannot be ignored anymore[173].

The AG notices how the GL formally address the NCAs but they have the clear aim of being implemented by the NCAs and then apply directly to financial institutions. It further notices how, once this step is completed, they are effectively binding for them and non-compliance might carry detrimental consequences both in relation to market reaction and to further supervisory activity[174].

The opinion addresses Q3 first. It agrees with the EBA insofar as the agency shall issue guidelines within the limits of the acts listed in art. 1(2) EBA Regulation or, according to art. 1(3) to address issues not covered by those acts but that nonetheless "*are necessary* to ensure effective application of *those acts*[175]". By looking strictly to those provisions, the AG is of the idea that the GL are invalid: even though the EBA claims that they help implement the directives listed in para. 2.6 of the GL (which are

[170] Ibid, para. 40-41.
[171] Ibid, 52-54. Also explained in Chamon (135) 291.
[172] AG, FBF (158) para. 54.
[173] See the analysis in Chapter 1.
[174] AG, FBF (158) para. 45-55.
[175] Ibid, 64-66.

also included in art. 1(2)), they actually regulate activities that are outside the scope of the directives and thus exceed the powers conferred to the Authority[176].

From a more systematic standpoint the AG adds reasons as to why GL should be subject to a narrow conferral of power and in turn a strict judicial review, just like binding acts are[177]. He also highlights the confusion that the Court's current interpretation creates. If soft law lacked legal effects, it could be simply ignored and there would be no need for any type of judicial review[178], nor there would be any need to establish limits over the conferral of *soft* power (as they do not produce legal effects anyway), nor would procedural guarantees or safeguards be needed in issuing soft law[179].

Instead, it finds that the ECJ itself has admitted that soft law does, in some instances, produce legal effects by establishing the assessment over whether an act is *genuine*[180]. Yet, there is a contradiction, as the same act that cannot be reviewed under art. 263 TFEU for a lack of legal effects, can be and will be declared invalid if judged by the Court in the context of a preliminary reference under art. 267 TFEU. This incoherent outcome would be avoided if the Court either refused to rule on the validity or framed it as a matter of interpretation. Both outcomes are undesirable though, as the former would be contrary to the *Grimaldi* rule[181] and would risk allowing national courts to eventually strike down EU soft law on their own initiative (contrary to the *Foto-Frost* case law[182]). The latter would create even more uncertainty as to what the effects of a certain act are[183].

In relation to Q1 and Q2 the AG questions the applicability of *Foto-Frost* to acts such as the GL. The rationale behind that the decision was that the CJEU provided an

[176] Ibid, para. 62, 66-67.

[177] Ibid, 84-89. Also in Chamon (135) 293.

[178] The reasoning goes is that what does not produce legal effects cannot be declared invalid as the result of a declaration of invalidity (annulment of its legal effects) would equal to the situation that was already in place. See Ibid, para. 89-90, 103.

[179] Uses art. 60a EBA Regulation as an example. Ibid, para. 92.

[180] Ibid, para. 91.

[181] According to which the Court has jurisdiction over "validity of all acts of the institutions of the EU without exception". See ibid para. 107.

[182] Ibid, para. 106, 123. Only EU Courts can declare acts of EU law invalid. If a national court questions the validity of an act it must refer that questions to the CJEU.

[183] Ibid, para. 105. In such a scenario an act would be interpreted as invalid but not declared invalid thus formally remaining valid albeit devoid of binding effects, but still producing some, unspecified, legal effects? That is clearly not tenable.

effective judicial remedy and, to ensure, the consistent application of EU law it was necessary to centralise the power to strike down EU legal acts and avoid national courts taking different approaches[184]. It questions how the Court can claim that there is a need for *uniform application* of acts whose effects have been denied by the same court (by refusing to review them under art. 263 TFEU) and that some national authorities can decide not to comply with (therefore leading to uneven application within the Union)[185]. It argues that if a national court struck down a GL (obviously with effects limited to that member state) it would be tantamount to the NCA of that country deciding not to comply with them under art. 16(3) EBA Regulation[186]. It also notices how some national courts allow the review of soft law while the CJEU denies it in most cases, thus creating a situation where the right to an effective judicial protection, enshrined in art. 47 CFREU, would actually be more protected under national law than under Union law as envisioned in art. 53 CFREU[187]. How can the CJEU claim that there is a need to centralise an insufficient judicial protection that would instead be better guaranteed at the national level[188]?

Finally, it addresses, what the AG describes as the initial parts of the first two questions (Q1.1 and Q2.1). Those address the relationship and the complimentary nature of judicial remedies in the EU legal system (art. 263, 267, 277 TFEU) as a supposed "complete system of remedies[189]". Art. 263 TFEU is designed to limit the direct review to acts which have legal effects, while art. 267 TFEU aims to allow the court to interpret (and declaring invalid, if necessary) all acts of EU law "without exception[190]". The AG acknowledges that this interpretation is compatible with the treaties but raises a few concerns and ultimately disagrees with it.

The restrictive interpretation of art. 263 TFEU is justified by the fact that an applicant who does not have standing and an act that is not reviewable can still reach the Court and be annulled under either art. 267 or 277 TFEU, which prevents an invalid

[184] Ibid, 122-123, 127. The decentralised system of judicial review is, for example, used in the USA. See Schuetze (129) 410-411.
[185] Ibid, para. 125.
[186] Ibid, para. 126.
[187] Ibid, para. 130.
[188] Ibid, para. 129.
[189] Ibid, para. 137.
[190] Ibid, para. 135, citing *Grimaldi*.

act from being applied and thus, as a whole, constitutes an effective system of judicial review compatible with art. 47 CFREU[191].

The issues he raises are: the structural incoherence created by allowing no one (not even privileged applicants[192]) to challenge an act under art. 263 TFEU yet allowing anyone (even a group of individuals, for example in *Gauweiler*, or an association, as in the present case) to challenge the same act through a national court despite the subject matter of the case and the outcome of the decision being identical[193]. In addition to that, the AG, yet again, highlights how the current interpretation of the ECJ would inevitably lead to either consider soft law somewhat binding and thus reviewable in both instances (263 and 267 TFEU) or non-binding and so "*not* reviewable" in either instance[194].

Ultimately, he argues that the analysis leads to a "trilemma[195]": *Foto-Frost*, *Grimaldi* and *Belgium v. Commission* (all three being established case-law of the ECJ) cannot be all upheld and one of them has to be set aside[196]. Either the admissibility requirements are equaled for direct challenges and preliminary references[197], or it could frame the annulment as a matter of interpretation[198]. The third option, which is the preferred outcome in the AG's opinions[199] is to revisit *Belgium v. Commission*: he claims the Court should explicitly admit the reviewability of soft law and explicitly admit that it does produce legal effects and review it both under art. 263 and art. 267 TFEU[200]. That would lead to finding the contested GL invalid, in the case at hand[201].

[191] Ibid, 138-140.

[192] Applicants listed in art. 263(2) TFEU (so-called *privileged*) do not have to show direct concern or any other requirement to challenge an act of EU law. He refers to *Belgium v. Commission* where standing was denied to a privileged applicant due to the non-binding nature of an act rather than due to the lack of direct concern. See ibid, 147.

[193] Ibid, 142-143, 146-147.

[194] Ibid, 144.

[195] Chamon (135) 294.

[196] AG, FBF (158) para. 149.

[197] This would resolve the structural incoherence highlighted above. It would set aside *Foto-Frost* as national courts would be prevented from making a preliminary reference if it regards the validity of a soft act. It would also partially overturn *Grimaldi* insofar as not all acts of EU law would be reviewable. See ibid, para. 152.

[198] Which would, again, set aside *Grimaldi*, ibid, para. 153.

[199] Ibid, para. 150.

[200] Ibid, para. 154.

[201] Ibid, para. 156.

4.3 The Decision of the Court of Justice

The ECJ, unlike the AG, addressed the referring questions in the same order as they were asked. In relation to Q1 it went through its "settled case law[202]": action for annulment under art. 263 TFEU is admissible against acts of EU law, regardless of their form (therefore looking into the substance), provided that they are intended to have binding legal effects, or else direct review is not allowed[203]. The substance must be assessed against a) the content of the act and b) its context[204]. The Court finds that the GL are worded in non-mandatory terms and are addressed only to NCAs, which are free to comply or explain, and as such, are non-binding for NCAs and certainly non-binding for financial institutions[205]. It seems that in this analysis the ECJ refused the exhortation from the AG to take a more dynamic approach in considering the nature and the effects of the GL and instead mechanically applied its previous case law through a formalistic interpretation of the letter of the applicable law. Through this interpretation it found the GL to merely "exhort and persuade[206]" and therefore, not challengeable under art. 263 TFEU[207].

As regards to Q2.1 the Court, differently from the AG, sees no incoherence and contradiction in reviewing the validity of a non-binding act only if it reaches the Court after a preliminary reference under art. 267 TFEU, while at the same time denying its reviewability if challenged under art. 263 TFEU[208]. Besides reaffirming that the Court's position is clear, the ECJ it does not give any explanation as to why and how it reaches this conclusion, nor does it answer the AG's legitimate doubts as to whether this interpretation is tenable or coherent.

The Court then framed Q2.2 as a question on whether the lack of "direct and individual concern" prevented a ruling on the validity of an act in a procedure under art. 267 TFEU just like it does under art. 263 TFEU. This is a crucial point of the ECJ's reasoning as it considers the two procedures not as separate entities but rather as two parts of a single system (that includes art. 277 TFEU). That entity is the complete

[202] ECJ, FBF (153) para. 36.
[203] Ibid, para. 36-37.
[204] Ibid, para. 38.
[205] Ibid, para. 39-46.
[206] Ibid, para. 48, recalling the wording previously used in *BNB* and *Belgium v. Commission.*
[207] Ibid, para. 49-50.
[208] Ibid, para. 51-55.

system of remedies and procedures that the EU legal order provides, protected by art. 47 CFREU[209]. It is an exclusive prerogative of each member state to regulate the conditions for standing and admissibility in front of national courts when challenging a national measure that implements an act of EU law. The only requirement is that national law is consistent with art. 47 CFREU and does not unduly restrict access to courts[210]. The only other issue is ensuring that national courts do in fact refer to the CJEU when the conditions are met[211]: the Court is silent on whether the *Foto-Frost* ruling applies to cases such as this one despite the AG analysing the issue extensively, therefore leaving the question open. In cases where the national court would illegally refuse to make a preliminary reference the appellant would have to pursue an action for damages for incorrect application of Union law[212]; liability would only arise if a reference was mandatory in the first place, making the question on the application of *Foto-Frost* to soft law even more important. Despite this, the Court has failed to clarify the issue and avoided ruling on it.

Last, for Q3, the ECJ ruled on the validity of the GL, therefore establishing that such acts are open for review if they reach the Court after a preliminary reference. It announced it would assess the extension of the EBA's power to issue soft law against a "stringent judicial review" and on the basis of the "objective criteria" set by the EBA Regulation[213]. That seems to suggest that the standard of review would not be, just like the AG suggested, any more relaxed than it is against binding acts. That would lead to apply the limits of *Meroni* and, more recently, the *ESMA*[214], cases on binding powers of the agencies to soft law too[215]. The ECJ further notices that allowing the EBA to issue guidelines outside the "specific framework" set in the founding regulation would "undermine the allocation of powers between the institutions, bodies, offices and agencies of the EU". The Court then, realises the importance of ensuring that the boundaries of the powers of the EBA are respected and enforced by the CJEU.

[209] Ibid, para. 60, 62.
[210] Ibid, para. 61, 63-65.
[211] See supra pag. 125-126.
[212] Schuetze (129) 435-436.
[213] ECJ, FBF (153) para. 67.
[214] Judgment of the Court (Grand Chamber), 22 January 2014. United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union. […] Case C-270/12. ECLI:EU:C:2014:18.
[215] Chamon (135) 309. This holding would create other issues which will be analysed below.

However, it effectively refrained from carrying out such stringent review and instead adopted a rather expansive and teleological interpretation that significantly expanded the scope of the powers conferred to the Authority[216]. This is even more striking when considering, on the other hand, the restrictive interpretation adopted by the Court in evaluating the legal effects produced by the GL. This way the ECJ has been able to avoid applying the *Meroni* doctrine as a standard to review the EBA's soft rule-making powers (there is no need since they are non-binding), while also widening the scope of such powers. This, however, is detrimental to legal certainty as it is not exactly clear what will be the standard of review for the Court going forward: will it execute a "stringent judicial review" as it vowed to do or will it instead apply the rather lax and flexible review that it, in fact, carried out?

The ECJ developed its analysis based on three points[217]. First it focused on the sources of the powers of the EBA. The Authority is tasked, by art. 1(2) EBA Regulation, to use the powers conferred to it by the Regulation, but only within the scope of a series of acts of secondary law (level 1 legislation, in the SR framework) listed in that same provision and any other act of EU secondary law based on those acts "conferring tasks on the EBA"[218]. Art. 1(3) further lists a series of areas (including corporate govenance) where the EBA can intervene even if they are not directly covered by the legal acts listed in art. 1(2). However, use of its powers based on this provision is only allowed as long as it is "*necessary* to ensure the effective and consistent application of those acts" (i.e. the acts in art. 1(2))[219]. This confirms the interpretation that the EBA regulation does not give a general power to issue soft law; on the contrary that power is objectively defined when conferred to the EBA by specific acts of EU law and the ECJ has the power to evaluate and ensure that the use of this power is exercised according to the limits set out therein[220].

[216] Annunziata (125) 22. Chamon (135) 309.
[217] Annunziata (125) 22.
[218] ECJ, FBF (153) para. 76.
[219] Ibid, para. 77.
[220] Ibid, para. 102.

The second point is to examine whether the legislative acts used as legal basis by the GL, do in fact confer such power[221]. Art. 74(1) of CRD IV[222] lists a series of "robust governance arrangements" that credit institutions shall have and art. 74(3) empowers the EBA to issue GL on that basis, regulating the internal governance and controls. The Court finds that the GL in question do not regulate product governance from the standpoint of the relation with consumers. Instead, they aim to establish internal practices integrated in the risk management process to ensure that the products are placed in the correct target market[223]. Still, even the Court admits that product governance and oversight are simply not mentioned in CRD IV[224]. However, the Court still finds the GL to have a sufficient legal basis because they were necessary to ensure effective application" of CRD IV and the other directives and therefore pass the proportionality test established by art. 1(5) EBA Regulation. It seems that the court relied on art. 1(3) EBA Regulation as a kind of general, open-ended clause that can stretch and significantly widen the scope of powers of the EBA beyond what is envisioned and explicitly mentioned in the applicable law[225].

Another extremely relevant issue raised by the ECJ is the role, recognised by the Court itself, of the 2013 Joint Guidelines of the three ESAs[226]. The ECJ reinforces the argument that the contested GL have a sufficient legal basis by stating that they help implement a previous act of soft law, issued by the same authority that also issued the contested ones. While this was not the reason why they were ultimately declared valid, it is still noteworthy that they were even mentioned. The Court's reasoning seems to suggest that a soft act can contribute to create and consolidate the powers of the EBA by conferring tasks and objectives to itself[227].

The final point of the analysis finds the GL to be valid insofar as they contribute to the objectives set out in art. 1(5) EBA Regulation[228] and, as mentioned, are necessary

[221] Annunziata (125) 24.

[222] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions […], OJ L 176, 27.6.2013, p. 338–436.

[223] ECJ, FBF (153) para. 85, 109-110.

[224] Ibid, para. 111-112. Annunziata (125) 25.

[225] Chamon (135) 308-310.

[226] JC-2013-77. Joint Position of the European Supervisory Authorities on Manufacturers' Product Oversight & Governance Processes. Available at https://www.esma.europa.eu/document/joint-position-european-supervisory-authorities-manufacturers%E2%80%99-product-oversight-governance.

[227] Annunziata (125) 26, referring to ECJ, FBF (153) para. 128-129.

[228] ECJ, FBF (153) para. 130.

to ensure consistent application (art. 1(3)). It has been noted that the EBA effectively assessed the validity of the GL not against the specific provisions conferring power to it, focusing on the "objectives and aims" of such powers, instead. The Court did not look for a specific source of power in relation to the issue addressed by the GL. Instead, it found that if the GL do, broadly speaking, contribute to the achievements of the scopes listed in the founding regulation they will be valid[229].

Looking at this from this perspective, the EBA's powers to issue soft law seem to be all but general, with only extreme cases of macroscopic deviation from the EBA's scopes and tasks that could lead to a declaration of invalidity by the CJEU[230].

4.4 Analysis

The importance of the FBF judgment cannot possibly be understated. There are three main, interconnected areas on which it is likely to make a significant impact. First, the issue of the extension of the powers of the EBA: is the *Meroni* doctrine still valid? Do the same limits apply to soft law? And if not what are the limits? Second is the acknowledgment of the productions of *some* legal effects by soft law; while that is a positive step and can be assumed to constitute settled case law, questions remain as to what exactly are the effects it produces and what consequences does that entail. Third is the issue of admissibility of review for soft law. When is direct challenge possible and when instead one must rely on national courts making preliminary references? If only art. 267 TFEU is available (as it seems), does that really amount to a "complete system of remedies"?

1) On *Meroni* and the delegation of powers.

The limits on the lawful conferral of powers to the ESAs is to be found in the longstanding principles affirmed by the CJEU's *Meroni* and *Romano*[231] cases and further specified[232] in the *ESMA* judgment. As mentioned in Chapter 2§4, in *Meroni* the ECJ affirmed that only "clearly defined executive powers" can be delegated to

[229] Annunziata (125) 26-27.
[230] Ibid, 27.
[231] Judgment of the Court (First Chamber) of 14 May 1981. Giuseppe Romano v Institut national d'assurance maladie-invalidité. Reference for a preliminary ruling: Tribunal du travail de Bruxelles - Belgium. Social security - Applicable exchange rate. Case 98/80. ECLI:EU:C:1981:104.
[232] According to some partially overturned. See Georgina Tsagas, "The Regulatory Powers of the European Supervisory Authorities: Constitutional, Political and Functional Considerations" (2016) University of Bristol Law School online publications, available at SSRN: http://dx.doi.org/10.2139/ssrn.3406738, 23. Also in Kostas Botopoulos, "The European Supervisory Authorities: Role-Models Or in Need of Re-Modelling?" (2020) 21 ERA-Forum 188-189.

agencies. The ruling has meant that the delegated powers should be explicitly defined in the delegating act. The delegated powers must therefore be exercised within the limits set therein and, if they go beyond that scope, the CJEU shall be able to annul the relative act. Furthermore, "executive powers", by definition, excludes powers that result in a "wide margin of discretion", which, in turn, excludes general regulatory powers[233]. *Romano* added that EU Agencies cannot "impose methods, interpretative rules, or obligations to national administrations, but merely assist with the issuance of non-binding decisions" and that "acts having the force of law" cannot be delegated to agencies[234]. Finally, in *ESMA*, the Court still formally upheld the *Meroni* doctrine[235] but seemed to imply[236] that a *certain* margin of discretion could be conferred to the ESAs even in issuing "acts of general application"[237]. This was admissible and consistent with *Meroni* provided that those powers were exercised within "objective criteria and circumscribed conditions" and subject to judicial review[238]. Crucially, this case-law refers to the exercise of hard powers and it is uncertain whether and how it applies to soft law.

The *FBF* judgment does not refer to *Meroni* at all thus not clarifying if those limits apply to soft law or not. As noted above[239], the Court seemed to suggest it would apply the same standard of review, as it almost used the same words as in *Meroni* by saying that the power to issue GL is "delineated […] on the basis of objective criteria" that "must be amenable to stringent judicial review". As noticed, however, the subsequent review was very far from stringent. On one hand the concern of the Court is understandable: if it explicitly declared Meroni applicable to soft law that would be tantamount to declaring that GL are not that soft after all and are instead all but binding. If the *soft* power of the EBA is subject to the same limits of the *hard* powers of agencies under EU law, then there would be no need to envision the various *hardening* mechanisms such as the comply or explain or the name and shame. The regulatory

[233] Marta Simoncini, "Legal Boundaries of European Supervisory Authorities (ESAs) in the Financial Markets: Tensions in the Development of True Regulatory Agencies" (2015) 34 Yearbook of European Law 329-330. Annunziata (125) 48-49. Chamon (135) 300.

[234] Annunziata (125) 51.

[235] Which remains "good" applicable law, see ibid, 51-52.

[236] Though not explicitly, see Botopoulos (232) 189 and Tsagas (232) 21.

[237] Chamon (135) 301.

[238] Simoncini (233) 328. Annunziata (125) 52.

[239] See supra pag. 134.

powers of the ESAs were conferred as non-binding precisely to avoid trespassing the limits of *Meroni* and to allow them to exercise a wide margin of discretion. If the *Meroni* limits apply anyway then the same powers could be conferred as fully binding. This would also inevitably lead to allowing direct challenges to soft acts under art. 263 TFEU.

By, in fact, interpreting the scope of the EBA's powers in such a wide manner in *FBF*, the CJEU has raised a lot of issues. First, it is still unclear, going forward, what exactly are the limits of the EBA's powers as the Court has not developed a general test, applicable in future cases. The AG addressed the issue directly, wondering whether the conferral of powers (and in turn the judicial review) could be wider and allow for more discretion in the case of soft law. He did not support that view and was ultimately in favour of a strict judicial review along the lines of *Meroni*[240]. The court has neither embraced nor declined the analysis made by the AG, thus leaving the question open[241].

When analysing the review that the Court effectively carried out[242], it seems all but obvious that the standard of review is much more permissive than it is in *Meroni*. When an administrative body, both at the EU and national level, exercises a power conferred to it by law, the scope and the limits of such power are two separate conditions.

An agency, such as the EBA, exercises all its powers with the purpose of achieving the scopes and objectives established by the founding regulations[243]. It does so through the executive and administrative powers that are conferred to it by the founding regulation[244]. In conferring the single tools through which powers are exercised, the specific provisions governing them establish the limits within which each power must be exercised[245]. In other words when exercising a power, in this case the GL, the EBA

[240] AG, FBF (158) para. 76-94. Though the AG did not refer to Meroni either.

[241] Chamon (135) 311-312 who also mentions why the fact that the Court previously had struck down the recommendation in *BNB* should not be overstated. The author claims that the peculiarities of that case do not allow to draw a general rule from it.

[242] Regardless of its stated plea to execute a "stringent judicial review".

[243] Namely financial stability, consumer protection, consistent application of the SR.

[244] For example drafting technical standards, issuing Guidelines and Recommendations, using the Q&A to help foster a uniform interpretation of the relevant law.

[245] In the case of the GL, those are the effective application of the acts listed in art. 1(2) of the EBA Regulation and within the limits established by those acts or outside of those subjects but only as long as they are **necessary** to ensure effective and consistent application.

must act within the objective limits established by the applicable law while *also* helping achieve the scopes and objectives set by the Regulation.

Those two conditions must be then met *cumulatively,* as both need to be present for a lawful exercise of the powers. The ECJ, instead, seemed to interpret the EBA Regulation as requiring that the two conditions merely need to be *alternatively* met. So, even in an instance such as this one where the GL issued were clearly outside the limits of the relevant Level 1 legislation, the ECJ still found the GL to be valid because they aimed at achieving the objectives of the founding regulation[246]. A careful analysis inevitably leads to finding that, currently, this is the standard of review applied by the Court which is, obviously, much laxer than what the *Meroni* and *ESMA* cases established.

This approach further increases the chances of an overproduction of soft law by multiple agencies with partially overlapping mandates, as noted by the AG, without any guidance as to which would prevail. This would also create problems for NCAs which would have to make "every effort to comply" with possible divergent GL issued by different agencies. One possible solution would be to review soft law issued by the ESAs in light of the principle of *institutional balance*[247]. Though the treaty only refers to the activity of "institutions" the Court could establish it as a general principle of EU law that can be applied to every area of EU law. This approach would also allow the Court to annul soft law measures without using the *Meroni* limits on delegation as a parameter, but merely because they are detrimental to other agencies' competences and violate the *institutional balance* principle.

Obviously, this would create problems of its own. How could an agency claim that its competences are restricted by an act which has no binding effects? In addition to that, as the agencies are not *privileged applicants*, they could only challenge another soft act under art. 263(4) TFEU by proving that the act is of direct concern to it, a possibility that the CJEU has refused.

2) The production of legal effects by soft law.

[246] Annunziata (125) 26.
[247] Art. 13(2) TEU. Chamon (135) 301-302.

Chapter 2 already analysed what are the legal effects that are automatically, *ex lege* produced by soft law. After being applied and reviewed in *BNB* and *FBF* by the ECJ, do these judgments add clarity to the *actual* effects of soft law?

Besides reaffirming that the G&R are NON-binding and that they "exhort and persuade"[248] the ECJ does not say much. Although the AG raised the issue, the Court refused to consider the production of legal effects beyond what is formally established by the letter of the law.

The reality, however, is much different. Chapter 2 already discussed the reasons why NCAs are reluctant not to comply with soft law. The extremely high rate of compliance[249], in turn, creates, on financial institution, a presumption and an expectation that whatever soft act may be issued by the EBA, it will become binding, directly applicable and enforceable to them. Against this backdrop it is hard to argue that the GL are not perceived as binding by credit institutions[250]. The other issue that remains unresolved is the role that EU soft law plays in disputes in front of domestic judges: the Court upheld *Grimaldi*, so national courts must take it into account when deciding a case. It is unclear, however, if they can apply it directly or not. One should also keep in mind that, to admit that they are binding, the CJEU requires that the intention of the issuing authority is to create binding obligations[251], and clearly the Court found this not to be the case in the *FBF* judgment[252].

One further issue that is yet to be addressed is the status of the other soft tools of the EBA mentioned in chapter 2 such as Q&As and opinions. Do the court findings in relation to guidelines and recommendations apply to those too? In principle that should be the case, as there is no structural difference between the various acts. They are acts of EU law (thus reviewable according to *Grimaldi*), they have been subject to a recent reform that made the procedure for adoption more robust and institutionalised, they are non-binding but they probably have some legal effects too[253]. Their only difference

[248] The relevance of these findings is close to zero as it adds nothing to what was already known.
[249] See for example Chamon (135) 313. Also in Annunziata (125) 32.
[250] Gentile (143) 998. Annunziata (125) 11.
[251] Annunziata (125) 10.
[252] Although one can hardly claim that the Authority does not expect full compliance, considering that they MUST make every effort to comply.
[253] Annunziata (125) 28, 55.

could be found in their actual use by the EBA[254] but that should not factor in when assessing the reviewability and effects of those acts.

Overall, the picture is still very much unclear. Unless the CJEU accepts the AG's plea to recognise that there is an element of hybridity in soft law, the EU legal order will remain stuck to the binary theory according to which law is "either binding or not law at all[255]".

3) Art. 263 and 267 TFEU: a complete system of remedies?

Without repeating the divergent analysis made by the AG and the ECJ, the current rule on the reviewability of soft law seems to be as follows: non-genuine acts of soft law that somehow produce legal binding effects can be challenged under art. 263 TFEU. Genuine soft law acts that are non-binding can only be reviewed by the CJEU if they reach the Court after a preliminary reference under art. 267 TFEU in a dispute in front of a national judge, whose subject is either the review of a national implementing act or some other genuine dispute in which a soft act became relevant. A third avenue would be if an EU court was to apply a soft act and subsequently set it aside under art. 277 TFEU.

Despite the AG's claims that one of the three CJEU's precedents needs to be set aside this is not necessarily the case: soft law cannot be reviewed directly[256], but the CJEU still has the power to review the validity of any act of EU law[257]. Therefore, national courts are under a duty to make a preliminary reference when questioning the validity of a soft act and cannot declare it invalid without first referring the question to the CJEU[258].

This, however, risks putting in jeopardy the uniform and consistent application of EU law. The preliminary reference was a tool that allowed the CJEU to intervene and give a consistent interpretation, that could be followed by every court in the entire Union, not as a remedy for the Court's own unwillingness to provide an effective judicial review against certain acts of EU law. A reference would be subject to national

[254] More "decisional" in the case of G&R and more "interpretative" for Q&As. See Senden (4) 60-61.

[255] Jan Klabbers, "The Redundancy of Soft Law" (1996) 65 Nordic Journal of International Law, 167.

[256] According to *Belgium v. Commission*.

[257] According to *Grimaldi*.

[258] According to *Foto-Frost*.

rules on admissibility that may affect the access to judicial review domestically and the interpretation of the judge that may not find sufficient reasons to question the validity of the relevant act[259].

In *FBF* the Court seemed to suggest that this issue would be resolved by applying the CFREU. If national law or a national court restricted standing and reviewability of national implementing acts in a way that would prevent natural and legal persons to contest such act in front of a national court[260], such provision or practice would be contrary to EU law and thus, would have to be struck down as it does not provide an "effective remedy" according to art. 47 CFREU. The CJEU is therefore actively encouraging and effectively obliging member states to establish permissive rules on standing that allow national courts to easily be questioned the validity of EU soft law, contrary to what the CJEU itself does.

This still leaves open the question, as noted by the AG[261], as to what happens if a NCA decides not to comply. Does that mean that financial institutions established in that country are exempt from complying while those established in the other member states are instead bound, after national implementation? And how does that fit into the internal market and the EBA mandate of ensuring regulatory convergence and consistent application? Or it could be that they are still expected to make every effort to comply and could be sanctioned if they do not[262]. In that case to which judge and under what circumstances could they challenge the guidelines and the existence of such obligation?

Finally, it is unclear what is the role of the Court with respect to the ECB as the competent authority for Significant Institutions (SI). Annunziata highlighted two possible situations in reviewing a decision of the ECB executing national implementation of EBA GL[263]: if a NCA had complied, the CJEU would have to apply national law while also taking into consideration the GL according to Grimaldi. If instead a NCA had decided not to comply it would have to apply national law only,

[259] The chances of this happening are only increased by the lack of clear guidance given by the CJEU.

[260] Therefore also preventing the court from issuing a preliminary reference.

[261] AG, FBF (158) para. 49.

[262] After all, the GL in question included credit institutions among its addressees and specified that they too must make every effort to comply. See EBA GL (154) para. 1.1 and 2.11.

[263] Annunziata (125) 43. He reminds that the CJEU is the only competent judge to review decisions of the ECB.

without considering the GL at all. Due to the Court's own reasoning then, the CJEU would apply national law while refraining from applying EU Law at all or merely taking it into consideration.

It is at least doubtful that this situation amounts to a "complete system" of review compatible with art. 47 CFREU. National rules on standing, the dependance on national implementation, possible diverging interpretations over the need for a preliminary reference make the procedure under art. 267 TFEU far from automatic[264]. And even when that happens, as in the *FBF* case, it is hardly an effective remedy as is apparent from the fact that the GL were issued in 2016 and the judgment issued in 2021. The precise rationale behind such far-reaching use of soft regulation is the need for flexibility and to allow the Authority to quickly issue new rules and respond to new emerging issues. A review should be available that is just as quick, because otherwise, it is effectively useless. It is not imaginable for institutions to operate for 5 years without knowing what the applicable law is and that may ultimately force compliance, providing yet another hardening factor to the EBA's soft law.

[264] Marjosola (121) 1537-1539.

CONCLUDING REMARKS

The entire analysis carried out by this dissertation was based on an obvious, starting assumption: the financial and banking regulation rely extensively on a widespread use of soft law, both at the international and EU/national level. It went on to analyse the major issues and areas of concern that this situation creates. Law-making is, traditionally, accompanied by a wide array of guarantees that come in the form of:

- democratic legitimacy: legislative power is exercised by democratically elected parliaments or democratically accountable bodies (for example, the government is subject to the vote of confidence of the parliament).
- procedural legitimacy: there are established procedures to be followed that ensure the necessary consensus is reached and mechanisms that ensure transparency and accountability to the general public and voters.
- Ex post controls: these are ensured either directly, through judicial review of the legality of the rules that have been enacted, or indirectly, through general elections and, broadly speaking, political accountability.

Chapters 1 and 2 highlighted how, often, soft law lacks both forms of legitimacy and that checks and balances are insufficient. A wide array of Transnational Regulatory Networks (TRNs) adopts far reaching standards approved in international fora, composed by members of national independent authorities[1] that have no direct correlation to political organs. They often act without a clear mandate from national legislative and executive bodies (or without a clear conferral in the Treaties in the case of EU institutions) and with limited mechanisms of ex post reporting that might ensure scrutiny over the policy choices that have been made at the international level. National parliaments have been deprived of the possibility to have a say in the approval of International Financial Standards (IFSs).

The rationale behind this framework is based on three assumptions.

The first one is that banking and finance regulation is extremely difficult to draft and requires a high degree of expertise and technicality that political bodies do not possess. In addition to that, technical independent experts are free from seeking

[1] Such as Central Banks, Securites authorities, technical experts for accounting standards, etc.

political approval and can make unpopular but necessary policy choices. Also, some issues necessarily require a standardized global approach and cooperation between national bodies with regulation that cannot be simply left to national regulators.

The second claim is that the business practice of banks and investment firms is rapidly changing and constantly evolving because they have to react to sudden and instant developments of the real world. Regulatory intervention must, in turn, be just as quick and able to evolve in order to be effective. Negotiations that lead to compromise and the ratification process make traditional forms of international law ineffective. The same is true at the EU level where ordinary legislative procedure require the approval of the Commission, the qualified majority of the Council and of the European Parliament (EP). Regulatory powers could be delegated to the Commission but that would deprive national regulators of any influence (that they instead retain in the decision-making processes internal to the European Banking Authority (EBA)). Only technical regulators are able to quickly issue rules and keep up with the evolution of market practices. The impact of the Covid-19 pandemic, Climate change and the development and the new technological developments are primary example of this dynamic. The lengthy negotiations that would be necessary to intervene and regulate on this matters, at every level, would make regulation already outdated and useless by the time it is enacted.

The third assumption is that soft law does not have the same impact[2] on those addressed by regulation. Once binding law is adopted, credit institutions will have to comply with it and expect that it will remain binding for years, as binding law is not so easily changed. At the same time supervisory authorities will have to enforce it including by sanctioning those who do not comply. Soft law on the other hand, through fast procedures, can be easily adopted, easily changed, easily suspended from being applied and always allows regulated businesses and authorities to decide not to comply.

The first research question was to investigate the third claim. Is soft law really soft as it seems? Is it true that it can be easily ignored? The answer to this has to be a straight no. The research highlights how, at all levels formal and informal mechanisms

[2] In the form of sovereignty costs in the dynamic between TRNs and the EU and in the form of the impact on National Competent Authorities (NCAs) and credit institutions in the EU/national dynamic.

create a *compliance pull* that often does not leave that much choice to those addressed. Chapter 1 explained how networks of regulatory authorities create a strong expectation that standards will be complied with at the national level. Noncompliance creates both formal reactions[3] and informal ones[4] that effectively make compliance the most convenient choice. At the EU level, Chapter 2 explained the various mechanisms that ensure a high level of compliance. Again, this is achieved through legal effects and in the form of market sanctions, both for NCAs and institutions. Empirical research shows that these mechanisms are extremely effective; Chapter 2 §1-2 noted how most of the IFSs have become part of EU legal order by being reproduced in acts of secondary EU Law[5]. Soft law issued by the European Supervisory Authorities (ESAs) has a compliance rate of over 95%[6]. Compliance by NCAs make, in turn, those rules directly applicable and enforceable (i.e. binding) on credit institutions operating in the single market. From this analysis, it is clear that the relevance of the distinction between soft and hard law should not overstated, as it is able to exercise persuasive effects that make the difference between the effects of soft and hard law not as sharp as it might at first seem. Is it safe to assume that both at the international level and at the EU internal market level soft law exercises decisive effects that make it all but binding? This research finds that the answer is affirmative.

The second line of research that was developed is: under the current framework, are there enough checks and balances, both in the form of procedural guarantees and in the form of ex post review, to counterbalance the fact that soft law exercises similar effects to binding law? Is the legitimacy of soft law proportional to the impact that its rules have? And if not, are there any remedies that can operate *ex post*?

[3] Such as name and shame, comply or explain or possibly not having access to funds from international organisations.

[4] Meaning that they are not, strictly speaking, a legal consequence but nonetheless have an impact on the policy choices of a member state. These include reputational costs in negotiations of international agreements in the future, supervisory authorities being considered as conducting oversight on a non-reliable market, credit institutions creating the perception that they follow bad business practices with increased scrutiny from supervisors and possible negative reaction from investors and clients.

[5] Either binding on everyone and generally applicable (in the case of regulations) or binding on member states as to the result that must be achieved (in the form of directives).

[6] Heikki Marjosola, Marloes van Rijsbergen, Miroslava Scholten, "How to exhort and to persuade with(out legal) force: Challenging soft law after FBF", (2022) 59 Common Market Law Review, 1525.

Both in the case of the adoption of the Basel Accords by the Basel Committee on Banking Supervision (BCBS)[7] and in the case of the approval of the Guidelines and Recommendations by the EBA[8], the respective procedures establish stakeholders' involvement before final adoption. The importance of this involvement should not be overlooked: if democratically elected bodies are kept outside the rule-making process due to their supposed lack of expertise how can a sufficient degree of legitimacy be achieved? Allowing stakeholders to be represented and to influence the rule-making process could strike a balance between the two opposing needs. It allows all the relevant interests and groups to have their voice heard, while still not resulting in an excessively formalised procedure that would slow down the process. Furthermore, stakeholders, as people who are directly concerned by the issues discussed, possess the necessary technical expertise to positively contribute to the drafting of rules.

While this is in principle a positive practice, two issues need to be addressed in this context. The first one is ensuring that participation is effective, that there is an exchange of different views and that, ultimately, the opinions expressed by the various stakeholders are taken into account in the adoption of the final rules. The second one is ensuring that all the opinions expressed are given the appropriate importance while at the same time not being given *too much* importance. There have been instances (see Chapter 3§2) of certain interest groups being able to exercise much more influence than their counterparties. Stakeholders involve a wide variety of interest groups: credit institutions but also workers, clients, consumers, etc. Business interests are often able to exercise decisive influence due to their higher availability of economic resources, organised structure and technical knowledge. Also, some general interests that are common to everyone but not of special and direct concern to a single group of people might not get enough attention[9]. This leads to possible instances of regulatory capture whereas power is effectively exercised by a small group of regulators and major credit institutions. The chances of this happening are further enhanced if the procedures for adoption of the rules are not formalised, if there is not enough transparency as to how consensus is reached and TRNs or the ESAs are not accountable because they do not

[7] See Chapter 1§5.1.
[8] Chapter 2§4.2.
[9] For example, who gets to represent concerns related to climate change?

have to thoroughly explain and give reasons as to what factors determined certain policy and regulatory choices.

In the EU and the domestic legal orders, the lack of democratic legitimacy is balanced by the existence of a system of judicial review of executive and administrative activity. Parliaments, through legislation, confer powers to executive bodies and establish the limits within which powers must be exercised, while the judicial branch oversees the respect of such powers. In the EU legal order there is, however, a loophole in this dynamic. Non-binding acts cannot[10] be directly reviewed by EU courts. National courts cannot review the legality of the use of powers by EU agencies either and, in assessing the validity of internal acts of application, may rely on the fact that they are necessary to implement EU law.

Therefore, as of now, the procedural guarantees aimed at achieving legitimacy must be considered as insufficient. The judicial protection provided is, instead, almost non-existent[11]; a situation that is clearly inconsistent with the respect of the rule of law and system of effective judicial protection established by the EU Treaties.

A different view of the matter is of the opinion that this framework should not be changed. Adding procedural hurdles and reviewability would make soft law subject to the same conditions that have been established for hard law and this is not necessary when considering its more limited legal effects. Turning, instead, the current soft powers into binding powers is on one hand probably not possible under applicable law[12] and on the other hand would necessarily trigger that same additional scrutiny, procedural requirements and judicial intervention that regulators try to avoid. Currently, instead, regulators do not have formal and full regulatory powers, but the relative quickness and absence of procedural requirements still allow them to operate freely and with a wide margin of discretion.

Even if the pressing need for flexible regulation is accepted, the current situation, with lack of democratic controls, lack of procedural safeguards and lack of ex post judicial review cannot be considered as an acceptable situation. At least one of them (but preferably all) needs to be enhanced. That leads to the third and central question

[10] Except from rather limited circumstances.
[11] Despite the recent cases analysed in chapter 3§3.3-4.
[12] National regulators simply cannot conclude international agreements, while EU agencies cannot exercise wide discretionary powers, if they produce binding legal effects, see supra pag. 138.

of this analysis: how can the current impactful and discretionary soft powers of the EBA achieve an acceptable degree of legitimacy to become more consistent with EU law on conferral of powers and with national constitutional traditions on the exercise of administrative powers?

The most straightforward method would be for the Court of Justice of the EU (CJEU) to simply establish the admissibility of direct challenges to non-binding acts that affect NCAs or credit institutions. As was analysed at length in Chapter 3§4 the recent FBF case has highlighted the current problems of the reviewability in the EU legal order. Direct challenges are still not admissible and that principle has possibly been reinforced by the CJEU in its ruling. So, the only avenue to obtain a review is through a preliminary reference by instituting proceedings in a national court first. In addition to the expensiveness (both in terms of resources and in terms of time) of this two-step procedure it is clear from the judgment that, barring changes in the test that the Court carries out, the EU judges have adopted a very light touch approach, respecting the discretion of the EBA and implying that its (soft) powers are quite wide in their scope and use.

Concerns have also been raised in relation to the possibility that, to an increased scrutiny by the CJEU the EBA would respond by resorting to other soft tools, the exercise of which is even more lightly regulated than Guidelines and Recommendations. The EBA could, for example, issue Q&As (though this needs a prior input from the addressees), no-action letters, other instruments issued under the general clause of art. 29(2) EBA Regulation to achieve "common supervisory approaches and practices" and at the same time evade requirements such as public consultation and judicial scrutiny. What are now instruments that are only issued in situations of emergency that need immediate intervention, whose slim procedural requirements are justified by their genuine limited legal impact or that merely execute informative and fully interpretative functions could instead be increasingly used to exercise normal regulatory powers. This would have the additional negative consequence of having even less safeguards, both pre-approval and in relation to subsequent judicial review, for instruments that, under this scenario, would become fully regulatory in nature.

It is also true that the precise scope of such use of soft law by the ESAs is the fact that they can be quickly enacted and within the two months' notice given to NCAs to communicate whether to comply or explain the state of the law is settled. It is clear which authorities will apply those rules and which will not. Subjecting every single one of those acts to possible litigation in Court (and further appeal) would potentially leave the state of the law uncertain for years defying the whole purpose of the current allocation of powers. One could imagine a situation where when a guideline is finally declared valid by the CJEU it has already become obsolete and useless and a new act needs to be adopted.

A possible solution would be to enhance the powers of the Joint Board of Appeals (BoA) of the ESAs, though the legitimacy and democratic concerns would obviously still need to be addressed. Also, it would remain to be settled whether the BoA merely constitutes a preliminary review with possible subsequent appeal to the CJEU or if it would be the only possible avenue to obtain a review. In the former instance the BoA would not provide much help; actually, it could possibly have a negative impact as it would only add legal uncertainty to an already uncertain situation. The latter instance instead would obviously be inconsistent with EU law as it would contradict the *rule of law* principle and the *institutional balance* principle. An institution of the EU such as the Court of Justice would see its powers, conferred to it by the treaties, deprived and limited by secondary legislation.

It is clear that, under the current framework, an internal administrative body cannot substitute the CJEU. However, in theory, an agency should not be able to substitute the Commission and the EP either. Yet, as we have seen, this has effectively happened. Some authors have argued[13] that standard forms of judicial review might be undesirable and ineffective. It prevents quick regulatory and supervisory intervention where it might be needed, it is detrimental to the principle of legal certainty, as it leaves regulation *in limbo* for a long time, and it involves judges who, just like members of parliament, might not always possess a high technical expertise on these matters.

One may argue that it is unacceptable to empower an administrative body with *de facto* judicial powers, but is it any less acceptable than entrusting the EBA with such

[13] For example Niilo Jaaskinen, "Final Thoughts", chapter in Mariolina Eliantonio, Emilia Korkea-aho, and Oana Stefan, *EU Soft Law in the Member States* (1st edition, Reprint, Bloomsbury Publishing, 2021), 361.

far-reaching *de facto* regulatory powers? For starters it would task a highly technical body in reviewing highly technical matters. Secondly its only task would be to review the legality of the ESAs activities, unlike the CJEU which has to deal with a high caseload. It is also worth noting that some review and some checks are still better than no checks at all. It was mentioned in Chapter 3§3.1 that, with its current structure and powers the BoA does not provide an effective remedy. But the case could be made that with some changes and with enhanced powers and resources it might provide a useful tool. Fast, flexible and informal regulation would be paired with fast, flexible and informal dispute resolution.

The other avenue that might be sought is the enhancement of stakeholders' participation and public consultation in the drafting and approval of soft law, so that rules are not merely imposed on market participants but are, instead, somewhat shared and agreed to by the concerned parties beforehand. The risks that come with excessive involvement of private parties in administrative activities have been highlighted above in this paragraph. This also risks turning negotiations and dialogue between the various interest groups and regulators into lengthy processes that would resemble political compromise and thus, again, defying the purpose of soft regulation. Also, a fine line would have to be drawn that at the same time institutionalises the participation of interest groups but at the same time does not turn into requirements of formal approvals by those in the decision-making process which, ultimately, remains the sole responsibility of the Authority. It would not be admissible to think that the EBA or NCAs, which benefit of a great deal of guarantees that ensure their independence from undue interference from the political and legislative bodies, would subject to the approval of private parties who also happen to have a direct interest (and possibly direct benefits) at stake.

This approach would also raise a lot of concerns from the standpoint of constitutional and democratic principles. Effectively it would substitute the democratically elected legislative bodies with technical experts, based on the assumption that they are somehow better equipped to make policy decisions. It would be a revolutionary change in the practice and approach of law-making, whereas (indirect) approval from the general public that holds the executive and legislative bodies accountable would be substituted by dialogue between regulators and the

regulated business. Certainly, under the current procedural rules this is not admissible. Transparency in the decision-making process and in relation to stakeholders' involvement would need to be greatly enhanced as well as a general duty to provide reasons and explanation for the final choices. Also, an improved system of accountability mechanisms would be necessary.

The founding regulation already envisions methods to ensure accountability[14] but this could be enhanced, consistently with art. 3(1) of the EBA Regulation[15]. If, the assumption goes, banking regulation cannot rely on traditional, democratic methods of law-making because they are slow and ineffective, the EP could still be involved *ex post*. The role of the EP would not be the one of a regulator but rather to exercise soft forms of pressure and influence on the rule-making activity of the EBA. An increased and constant dialogue between the EP and the EBA could ensure that, while not formally being bound and directly instructed by Members of the Parliament (MEPs), these would still be allowed to make their priorities known so that they could be taken into account in subsequent regulatory activity. In addition to that it would greatly enhance transparency as regulators would be allowed to explain, in a formal and institutional setting what factors played into their discretionary choices, thus achieving some form of democratic legitimacy. Ultimately, the EP would exercise its influence not through coercive powers but rather by means of its authority, derived precisely from the democratic legitimacy that the EBA lacks.

It is true that all the possible solutions analysed above would, to different extents, affect the ability of the EBA to quickly adopt rules that subsequently become standardised and certain, one way or the other[16]. However, one cannot simply treat procedural safeguards, enhanced transparency, public intervention and judicial review as obstacles that get in the way of quick regulation. Procedural safeguards and dialogue with stakeholders do not only slow down the process of approving rules but serve as a guarantee that the rules are shared by all the concerned parties and that all the different views of an issue are taken into account. Judicial review is not merely an obstacle to

[14] For a thorough analyis see Carmine Di Noia and Matteo Gargantini, "Unleashing the European Securities and Markets Authority: governance and accountability after the ECJ decision on the Short Selling Regulation (Case C-270/12)" (2014) 15 European Business Organization Law Review, 1-57.

[15] Which states that "The Authorities […] shall be accountable to the European Parliament and to the Council".

[16] Through the comply or explain mechanism.

legal certainty that prevents rules from having their effects established. It is a fundamental right of the citizens of the Union and a long-standing principle of constitutional law common to all member states.

If the price to pay for effective regulatory intervention is sacrificing the fundamental rights of the regulated and involved entities, then one might question whether it is worth keeping things as they are. Ultimately the possible balance of all the interests at stake could be for the CJEU to overrule its long-standing stance on the *Meroni* doctrine. If it was finally admitted that technical EU agencies can exercise fully regulatory powers, with binding effects this could resolve a lot of the seemingly unresolvable problems that this research has highlighted. After all the answer to the first research question was that the effects that soft law produces already closely resemble those of hard law and Chapter 3§4 has demonstrated how the powers of the EBA are not so objectively defined and narrowly exercised as the letter of the law would at first suggest. It has been argued that the current conferral of powers of the Treaties and the current rules on delegation, in light of the *ESMA* judgment, already allow the conferral of discretionary, regulatory powers to the ESAs[17]. Still the founding regulations would also define the limits and the scope of such powers, as they do now for soft powers, consistently with the rule of law principle.

The current problem is that CJEU, still, refuses to carry out a review on grounds that soft law does not produce legal effects[18] and even when it carried out a review it has been unwilling to apply those limits. As of now, on one hand the EBA exercises its soft regulatory powers which, when considering their relevant impact, seem to be at odds with the principle of conferral and of institutional balance. On the other hand there is no effective judicial review contrary to what is required by art. 47 of the Charter on Fundamental Rights of the EU. Allowing the EBA to exercise discretionary, binding, regulatory powers would not result in giving it unlimited powers. In fact, it is the exact opposite. It would result in the limits and the checks on the exercise of those powers being enforceable and applicable by the CJEU, therefore resulting in *more* protection for the affected parties.

[17] See the analysis in Matteo Ortino, "The Case for Truly Independent EU Regulatory Authorities in the Field of Financial Regulation" (2018) 29 European Business Law Review, 487-495.

[18] Which, as explained, is a questionable assumption as they still produce very relevant legal effects.

Most likely, however, this would require a coordinated effort. The Commission, the EP and the Council would need to review the founding regulations of the EBA, turning soft powers into binding regulatory powers. In addition to that procedural guarantees would need to be greatly enhanced and, of course, making such regulation binding would expose it to judicial review, consistent with art. 263 TFEU. This would resemble the balance of powers that can be found, for example, in the United States where Congress, through legislation, defines the limits and scope of the regulatory intervention of the administrative agencies. It is then up to the Securities and Exchange Commission and the Federal Reserve to issue regulation which will be generally applicable. Obviously, they will be subject to judicial review consistent with the applicable administrative rules.

It is beyond doubt that some issues could hardly be addressed by the Council and the EP. Only as an example one could think of, broadly speaking, cryptocurrencies as an issue that most certainly needs quick technical intervention. However, it is the opinion of the writer that democratic and administrative principles cannot just be sacrificed, without an effective system of checks and balances in the name of swift regulatory intervention.

The other possible avenues that have been mentioned, namely enhance stakeholders' dialogue or establish the Board of Appeals of the EBA as the competent, *de facto* judicial body might be desirable from a practical perspective. As explained an unelected technical body already exercises regulatory powers, so adding mechanisms that would at least ensure that rules are commonly shared or that a second opinion (issued by a highly expert body) is provided in relation to the correct exercise of powers does not seem worse than the situation already is. However, under the current European constitutional framework it is impossible to envision that happening as it would require a fundamental rethinking of the general principles of balance of powers and allocation of legislative powers.

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