

ELB Blogpost 52/2022, 28 November 2022

Tags: C-911/19; FBF v ACPR; Soft law; Guidelines; EBA

Topics: EU Banking Law; EU Constitutional Law

Case C-911/19: the CJEU rules on EBA's Soft Guidelines

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Introduction

On 15th July 2021, the Court of Justice (CJEU) delivered its judgment in Grand Chamber case [FBF / ACPR](#), dealing with the impact of **soft law** within the EU legal order once again. Especially in the aftermath of the 2008 financial crisis, EU institutions and agencies strongly relied on soft instruments, whose nature and effects have been assessed by the CJEU in different occasions (on this point, see [Alberti](#)). Moreover, this approach has been consolidated over the time and still constitutes a reality for the EU financial governance. Indeed, the dispute at stake concerned a series of preliminary questions on the [Guidelines](#) of the European Banking Authority (EBA) on product oversight and governance arrangements for retail banking products.

The use of soft law within the Union is often linked to two peculiar situations. On the one hand, non-binding instruments are frequently used to overcome competence questions or to circumvent the difficulty to find political consensus on the adoption of binding rules. On the other hand, soft law is largely preferred in times of crisis, since it is fast, flexible, and easy to enact. The financial sector, furthermore, has always preferred soft forms of regulation, which easily adapt to the speed of change of market's conditions.

EBA's soft powers in the CJEU's case-law

According to [Regulation 1095/2010](#), the EBA shall provide Guidelines and Recommendations to the national competent authorities in order to establish common regulatory and supervisory standards. Enshrined in article 8, para. 2, of the regulation, these two instruments represent a typical and consolidated form of soft supervision within the financial sector. Moreover, such tools operate on the basis of a **comply or explain** mechanism: if a national authority does not intend to comply with a guideline or a recommendation, it shall inform the European authority, stating its reasons. This system, therefore, is suitable to restrict the discretionary power of the Member States' authorities, although only in a partial way.

The Court of Justice has dealt with the effects of these soft instruments in several cases. The concrete approach that the Court adopted, however, fluctuated over the time. Indeed, the CJEU came to different solutions over the years, in some cases by adopting a **substantive** approach and in others by using a more **formalistic** one. Hence, as underlined by authoritative [doctrine](#), it is extremely difficult to gain a clear framework of the issue at stake.

The substantial approach has often been privileged when dealing with the financial sector. This can be shown, for example, by the judicial saga concerning the Outright Monetary Transactions programme (OMTs). This programme was only announced through a [press release](#) of the European Central Bank, and it has never been implemented. The Court of Justice, however, established its jurisdiction and assessed the validity of the OMTs (on this point, see [Alberti](#)). In a recent [judgment](#), the CJEU went even further, recognising the **direct invocability** of an EBA's Recommendation on the measures necessary to comply with an EU directive. The Court held that individuals harmed by the breach of Union law 'must be able to rely on it [the Recommendation] as a basis for establishing, before the competent national courts, the liability of the Member State concerned' (para. 81). This solution allowed, in the present case, the invocability of the recommendation in support of an action for damages.

Case C-911/19: on the justiciability of soft law

As mentioned above, the decision in question concerns the validity and the justiciability of EBA's Guidelines. The national Court referred to the CJEU three different preliminary questions. Firstly, if these guidelines may constitute the object of an action for annulment under article 263 TFEU. Secondly, if these guidelines can be the object of a reference for a preliminary ruling under article 267 TFEU. Lastly, if the EBA acted *ultra vires* by adopting these guidelines.

On the first question (paras. 35-50), the CJEU recalled its previous case-law and held that an **action for annulment** can be brought only against binding acts. However, the Court claimed that the binding nature must be determined on the basis of a **substantial approach**, considering factors such as the effects, the content, the context and the issuing authority. After an analysis based on these criteria, the Court concluded that EBA's guidelines do not produce binding effects. Consequently, they cannot be challenged under article 263 TFEU. Thus, the Court did not recognise the 'comply or explain' mechanism as suitable to produce binding effects, even if it partially restricts the discretionary power of national authorities.

Regarding the second question (paras. 52-65), the Court concluded that the **preliminary ruling** mechanism can be activated also on the basis of a non-binding act. In this context, the crucial point becomes understanding the real value of the binding nature of acts as a **discrimen**. In other words, it is essential to establish what the *ratio* is, underneath the idea that a non-binding act can only constitute the object of an action for damages and not the one of an annulment action.

Case C-911/19: on the impact of European soft law

The third and last issue – whether the EBA acted *ultra vires* by adopting the contested guidelines – is interesting for multiple points of the CJEU’s reasoning. First of all, the Court highlights that Regulation No 1095/2010 has precisely delineated the EBA’s power to issue guidelines on the basis of objective criteria. Consequently, the exercise of this power must be object of a stringent judicial review and the non-binding nature of the guidelines cannot affect the scope of this review. The Court, therefore, recalls its previous case-law for which non-binding acts must respect the **principle of conferral**. It must be highlighted, however, that the practice of some European institutions reveals the existence and the persistence of a different paradigm, especially when adopting atypical soft law acts. The CJEU, in this context, has not always carried out a stringent judicial review (see, for example, [Gatti](#)).

Furthermore, the CJEU underlines that this type of acts is intended to exercise a power of **exhortation** and **persuasion** on the competent authorities, since those authorities must justify a position of non-compliance. Another potential consequence is that those acts ‘may lead to adopt acts of national law’ (para. 70). Finally, the CJEU reminds that it is also for the national courts to take into consideration EBA guidelines ‘in order to resolve the disputes submitted to them’, recalling the [Grimaldi](#) case-law explicitly (para. 71).

On this third preliminary question, the Court stresses the potential power of guidelines and recommendations. On the one hand, these acts can persuade national authorities, influence national laws and constitute a reference for national judges. All these dynamics, on the other hand, are not sufficient to qualify them as binding-acts and, thus, to challenge them in an action for annulment. Therefore, it remains extremely difficult to gain a clear framework of the impact of soft law within the EU legal order.

Conclusion

Soft law is suitable to produce numerous and diverse effects on the principles and on the structure of the EU legal order. It is interesting to notice that in this judgment the CJEU recalls different previous case-law on informal instruments, from the principle of conferral to the necessity of a **substantial** analysis. The Court, however, did not precise how breaches of these rules can be penalised, considering that an action for annulment is not permitted.

The constitutional and legitimacy **drawbacks** of non-binding instruments have been raised on several occasions (on this point, see [Stefan](#)). Indeed, the existing [literature](#) has largely demonstrated how soft law can be used to elude the set of rules, principles and guarantees that EU treaties provide for ‘traditional’ hard law. Against this backdrop, the CJEU has not always penalised these breaches, relying on a more **formalistic** attitude (see, for example, [Casolari](#) on the use of atypical informal instruments in the fight against irregular immigration).

The Court of Justice, in its recent [Achmea](#) case, focused again on the constitutional structure of the Union, by making a sort of recap of its main principles and values. It is desirable that both cases represent the beginning of a **new consistent attitude** of the CJEU towards a substantial approach. By doing this, the CJEU would avoid – as it happened in other policy areas – the use of informal instruments as a strategy to elude the *acquis communautaire*.