Ensuring effective judicial review of EU soft law via the action for annulment before the EU Courts: a plea for a liberal-constitutional approach

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Judicial review of EU soft law – Liberal-constitutionalism – Principle of effective judicial protection – The liberal-constitutional jurisprudence of the European Court of Justice – Action for annulment – Formalistic understanding of the concept of 'legally binding effects' – Preliminary ruling procedure – Limitations of the preliminary ruling procedure in granting effective judicial protection in relation to EU soft law – A plea for a liberal-constitutional reading of Articles 263 and 288 TFEU in relation to direct review of EU soft law

INTRODUCTION

Since the entry into force of the Lisbon Treaty, EU soft law has become more prominent in the EU system. EU institutions are increasingly adopting soft law measures,[1] which may take the form, among others, of recommendations, notices, action plans, guidelines and opinions.[2] As observed by Stefan, the COVID-19 crisis has prompted the EU to adopt a plethora of EU soft law acts.[3] The growing issuance of these measures may find a justification in the light of the following characteristics of these acts. First, the adoption of EU soft law is less burdensome than the issuance of other instruments. Most EU soft law acts are not subject to strict procedural requirements and no extensive public debate is required for their adoption. Second, EU soft law may be issued virtually in any EU policy field, and even in areas where the EU does not have regulatory competences (yet).[4] The absence of features typical of EU legislative and non-legislative acts, such as procedural safeguards and limitations in terms of scope, signals the *sui generis* nature of EU soft law acts.

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[1] The notion of EU soft law is controversial. Snyder and Stefan developed a broad notion of soft law, defined as rules of conduct which, in principle, have no legally binding force but may have practical and legal effects. *See* F. Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations', in G. Winter (ed.), *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (NomosVerl-Ges 1996) p. 463; O. Stefan, 'European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects', 75(5) *MLR* (2012) p. 279. *See also* F. Terpan, 'Soft Law in the European Union – The Changing Nature of EU Law', 21(1) *European Law Journal, Wiley*, (2015), p. 68–96.

[2] *See infra.*

[3] O. Stefan, 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda', European Papers, European Forum, Insight of 3 June 2020, p. 1–8.

[4] The Treaties provide for specific cases in which EU soft law may be adopted. *See, for instance*, Article 36 TEU and Article 46(6) TEU. In this respect, it is open to debate whether EU soft law allows an expansion of the regulatory powers of the EU institutions, to the detriment of member states' competences. The potential adoption of EU soft law in any field of EU law was also acknowledged by O. Stefan, 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance', 21 *MJECL* (2014).

Not surprisingly, in recent years litigation over EU soft law measures has increased before the EU[5] and national[6] courts. In this context, a peculiar situation concerning the review of EU soft law before EU Courts may be observed. Recent EU case law has – almost systematically – excluded judicial review of these measures through the action for annulment (Article 263 TFEU). In a number of cases, the EU Courts reached the conclusion that the challenged EU soft law acts did not possess 'legally binding effect'. As a consequence, actions for annulment regarding EU soft law acts have been dismissed. Remarkably, the production of 'legally binding effects' by EU soft law has been assessed against elements such as the form of the document or the intention of the authors, rather than the substance and implications of the challenged EU soft law instruments.

The preliminary ruling procedure has only partially contributed towards ensuring effective check and balances in relation to these acts. Through the preliminary ruling requests, the Court of Justice has identified certain legal effects deriving from these measures and mainly concerning the issuing authority. At the same time, the EU judicature has overlooked the impact of these acts on individuals, thus appearing reluctant to identify legal effects of EU soft law on third parties. In turn, individuals could not obtain clarifications as to the implications of these measures on their positions, while having limited access to judicial review of these acts.

In the light of this overview, it may be argued that EU soft law is partially escaping the 'EU constitutional order'. In fact, EU soft law enables EU institutions to exert 'soft regulatory powers', currently not fully subject to the rules and principles of the EU, due to limited judicial scrutiny by the EU Courts.[7] However, so long as EU soft law measures are adopted, the need to ensure effective judicial review – namely, that the *sui generis* regulatory powers expressed through them comply with the EU constitutional framework – emerges powerfully.[8] The centrality of *effective* judicial review as an EU general principle is confirmed by its connection to the rule of law, one of the EU founding values protected under Article 2 TEU.[9]

This paper argues that the Court of Justice of the European Union should open the gates of Article 263 TFEU to ensure *effective* judicial review of EU soft law measures. For this purpose, the paper advocates the adoption of a *liberal-constitutional* reading of the Treaties, and in particular, of Articles 263 and 288 TFEU with regards to the scrutiny over EU soft law. Liberal-constitutionalism refers to a constitutional theory that assumes the expansive nature of constitutions. The main objectives of this framework are the creation of check and balances

[5] Stefan highlights that EU Courts are also increasingly referring to EU soft law measures. O. Stefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?', <http://www.ucd.ie/t4cms/08_wish_paper_Oana_Stefan.pdf>, visited on 3 September 2020.

[6] Recent cases on EU soft law include *Kotnik* and *Gauweiler*, discussed below.

[7] Tridimas has discussed the increasing uncertainty within the EU legal order. T. Tridimas, 'Indeterminacy and Legal Uncertainty in EU Law' in J. Mendes (ed.), *EU Executive Discretion and the Limits of the Law*, (Oxford University Press 2019) p. 40 and ff.

[8] Arnull has also raised concerns regarding the review of EU soft law. A. Arnull, 'EU Recommendations and Judicial Review – ECJ 20 February 2018, Case C-16/16, *Kingdom of Belgium* v *European Commission'*, 14(3) *European Constitutional Law Review*, p. 609.

[9] ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses* v *Tribunal de Contas*, Para. 36.

among the traditional 'state' powers (i.e. legislative, executive and judiciary)[10] and the judicial protection of individual liberties and rights.

Under a liberal-constitutional reading, Articles 263 and 288 TFEU could be interpreted to allow direct judicial review of EU soft law while relaxing the restrictive requirement of 'legally binding effects'. By subjecting EU soft law to effective judicial review via the action for annulment, the CJEU would safeguard effective judicial review and institutional balance in a coherent EU legal order. The direct review of EU soft law would offer the opportunity for the Court of Justice to mould the 'limits' of the EU constitutional order, both from a vertical perspective (EU–member states) as well as horizontal (among EU institutions). In this way, the *sui generis* regulatory powers of soft law would be put in check under the EU constitutional framework, and individuals, as well as member states and EU institutions, would be afforded more effective judicial review of these acts.

The paper is structured as follows. First, it provides an overview of liberal constitutionalism theory. Second, the paper demonstrates that the EU Courts case law is imbued with liberal-constitutional readings of the Treaties. The EU liberal-constitutional jurisprudence has focused on the centrality of judicial review and effective judicial protection of individual rights. Third, the paper discusses the loopholes in the current framework of review of EU soft law from the angle of the EU general principle of effective judicial review. Finally, the paper illustrates that possible drawbacks of extending the action for annulment to EU soft law fail to consider the centrality of effective judicial review in the EU, and do not constitute material risks for the efficiency of the EU institutions and the legitimacy of the EU judiciary.

What the paper does not wish to do is to argue for an *unlimited* judicial review for EU soft law acts. More modestly, it seeks to highlight some issues of the current review mechanisms applied to EU soft law and to offer the theoretical underpinnings to ensure direct review of EU soft law.

LIBERAL CONSTITUTIONALISM: AN OVERVIEW

Liberal constitutionalism is a constitutional theory characterised by three elements: first, the idea that the constitution is *not* statically sculpted in the wording of the law, but should be subject to the interpretation of the judiciary; second, the objective to rebalance the disequilibria existing between individuals and other state powers; third, powerful judicial control systems, with courts being the less intrusive power to draw the boundaries between the protection of individual rights and the scope of administrative action. The central objective of liberal constitutionalism is to limit 'the inconvenience of [a]bsolute power'.[11]

According to Loughlin,[12] liberal constitutionalism finds its origin in The Federalist no 78, where Hamilton suggested that the US Supreme Court should be entitled to have the power to

[10] It has been suggested in literature that the traditional division of state powers may not grasp the nuances of contemporary legal orders, including the international organisations such as the EU. C. Zilioli 'Justiciability of Central Banks' Decisions and the Imperative to Respect Fundamental Rights', ECB Legal Conference 2017, 4–5 September 2017, p. 91.

[11] R. Schütze, 'Constitutionalism and the European Union', in S. Peers and C. Barnard (eds.) *European Union Law* (Oxford University Press 2017), p. 86.

[12] M. Loughlin, 'What Is Constitutionalisation?', in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press 2010) p. 47. According to Loughlin, constitutionalism key principles

annul all acts that are contrary to the tenor of the US constitution. This constitutional paradigm promotes the authority of an independent group to interpret and enforce the terms of the text of the constitutional document. According to Hamilton's views, the limits of the constitutional text are flexible and subject to judicial interpretation; the Hamiltonian view leads to a position in which the Constitution is what the judges say it is. Such a conception was enshrined in the pivotal US Supreme Court's judgment *Marbury v. Madison*,[13] establishing the US Supreme Court's power of judicial review to limit the legislative and executive branches of the government.

The liberal-constitutional paradigm has been studied and substantively developed by Hayek.[14] This author speaks[15] of a 'liberal constitutionalism,' the chief aim of which is 'to provide institutional safeguards of individual freedom' and 'to secure individual liberty by constitutions.' In the reconstruction of Hayek, individual liberty (typical of liberal systems) and democracy could be reconciled when 'all authority is restrained by long-run principles which the opinion of the people approved'. Courts are the most appropriate *fora* to set the limits of state authority and to say what the law is.[16] The advantage of liberal constitutional systems, in Hayek's theory, is that they provide a notion of the law as a limit to power. The law is not a static entity, but rather malleable: judicial interpretation seeks to achieve equilibria between the individual and the central power under the oversight of the judiciary.[17] Ultimately, liberal constitutionalism ensures the flexibility of constitutional orders with the view to applying supreme principles of constitutional law to acts and conducts adopted within a system.[18]

Therefore, there is overall consensus in literature that judges and, in particular, constitutional courts, are the key actors in liberal constitutionalism: first, they identify principles and values restraining the reach of public powers; and second, they apply the constitution to *sui generis* regulatory actions not envisaged under the basic norms of the legal order of reference. A crucial element contributing to liberal constitutionalism is the enforceability of fundamental rights. Being amongst the supreme rules of a legal order, fundamental rights[19] may bind all actors of a given legal system, be they institutions, individuals or companies[20]. In this sense, fundamental rights may be used as a sword when striking down invalid legislation or executive actions, and as a shield when protecting or granting individual rights.

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are independence of the judiciary, separation of governmental powers, respect for individual rights, and the promotion of the judiciary's role as guardians of constitutional norms.

[13] US Supreme Court 24 February 1803, *Madbury* v *Madison.*

[14] F.A. Hayek, *Law, Legislation and Liberty, Vol. 1 Rules and Order* (University Chicago Press 1978).

[15] F.A. Hayek, *supra* n. 14, p. 1; see also V. J. Vanberg, 'Liberal Constitutionalism, Constitutional Liberalism and Democracy' (2011) 22 Constitutional Political Economy 1.

[16] Hayek, *supra* n. 14.

[17] R. Hamowy, 'F.A. Hayek and the Common Law', 23 *Cato Journal* (2003) p. 241.

[18] The notion of liberal constitutionalism has been discussed also by Warren, who refers to the combination of constitutional devices – separation of powers, checks and balances, civil liberties, and civil rights – that protect against illegitimate political coercion against persons and which guarantee public influence over political decision makers. As for the previous authors, Warren's liberal constitutionalism is also a system relying on limits to powers combined with flexible interpretation of the law, typical of common law systems. M. Warren, 'Liberal Constitutionalism as Ideology: Marx and Habermas', 17 *Political Theory* (1989) p. 511.

[19] See the inclusion of the bill of rights in the US constitution, or the inclusion of the protection of fundamental rights among the objectives of the EU.

[20] This is not undisputed. In the United States, fundamental rights do not apply in horizontal situations. S. Gardbaum, 'The "Horizontal Effect" of Constitutional Rights', 102 *Mich. L. Rev.* (2003) p. 387.

As a matter of fact, supranational bodies increasingly exercise public powers in parallel to national authorities.[21] Transnational arrangements cover topics such as financial regulation, competition, energy and trade policy, environmental protection, crime and security, and so on. At national level, the emergence of authorities with regulatory powers has entailed the adoption of new measures and acts whose consequences are often uncertain.[22] These developments, such as the emergence of quasi-governmental bodies whose competences are often not captured by existing accountability mechanisms, undermine the claims of modern constitutions to be comprehensive in their reach.[23] One response to this situation has been to loosen the 'anchorage' of constitutional norms, including fundamental rights, for the purpose of extending their application.[24] In this context, liberal-constitutional interpretations highlight a detachment of constitutions both from the idea that they are formalistic documents as well as from the 'traditional' state structure.

Therefore, liberal-constitutionalism may lead to interpretations of the law going beyond its wording. Such readings of the law have been applied with different degrees of intensity also beyond the United States[25] and on a wide range of matters. In adopting liberal-constitutional interpretations of their respective constitutions, courts have ensured checks and balances, as well as protection of individual rights, in their respective legal orders. It may be argued that liberal-constitutional interpretations aim to enhance coherence in the constitutional order and also respect of the supreme legal principles when it comes to *sui generis* governmental actions. As a consequence, liberal-constitutionalism does not merely entail judicial empowerment, but also effective judicial protection of individual positions vis-à-vis new regulatory powers. Overall, liberal constitutionalism signals the prevalence of the substance over the procedure in legal orders, under moral conceptions of fairness and justice.

Liberal constitutionalism has also shaped international legal orders.[26] A prominent example of a liberal-constitutional system where flexible readings of the basic laws have significantly occurred with the objective of ensuring checks and balances is, interestingly, the EU.[27]

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[21] M. Simoncini, 'EU Agencies in the Internal Market: A Constitutional Challenge for EU Law' Sant'Anna Legal Studies Stals Research Paper 1/2017 <http://www.stals.sssup.it/files/simoncini%20stals.pdf>, visited 3 September 2020.

[22] A recently published research note by the CJEU has discussed the review of soft law in national Courts, and the challenges related to judicial control over these instruments. https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-06/ndr-2017-007_synthese_en_neutralisee_finale.pdf, visited on 3 September 2020.

[23] The effectiveness of current mechanisms to assert the accountability of EU institutions has recently been questioned, for instance, in relation to the supervision powers of the European Central Bank. For a discussion, *see* A.H. Türk and N. Xanthoulis, 'Legal Accountability of European Central Bank in Bank Supervision: A Case Study in Conceptualizing the Legal Effects of Union Acts', 26(1) *Maastricht Journal of European and Comparative Law* (2019), p. 138–151.

[24] An example from EU law is given by the *Ledra* judgment, in which the ECJ declared that the Charter applies to the EU institutions when they operate under the ESM Treaty. ECJ 20 September 2016, Cases C-8/15 P to C-10/15 P, *Ledra Advertising and Others* v *Commission*.

[25] *E.g.* the development of 'principes généraux' in French administrative law. A similar process has also taken place in Italian administrative law.

[26] R. Arnold, 'European Constitutional Law: its Notion, Scope and Finalities', in A. Bakardjieva Engelbrekt (ed.), *New Directions in Comparative Law* (Edward Elgar 2009); J. Hunt, 'The End of Judicial Constitutionalisation?' 3(3) *Croatian Yearbook of European Law and Policy* (2007), p. 135 and ff; D. Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' 21(4) *European Law Journal* (2015) p. 460–473.

[27] Both scholarship and EU case law acknowledge that the EU is a constitutional order. For EU case law, *see* ECJ 30 April 2017, Opinion 1/17, Para. 57. Schütze has offered an analysis of the constitutionalisation and liberal-constitutionalist features of the EU; Schütze, *supra* n. 11.

Liberal constitutionalism in the case law of the Court of Justice of the European Union

The constitutional nature of the EU encounters the support of both the Court of Justice's case law[28] and scholarship.[29] Schütze,[30] especially, has discussed how the EU constitutional order incorporates various aspects of constitutionalism, in particular, liberal-constitutionalism. The Court of Justice has been a central actor in ensuring the progressive constitutionalisation of the EU as a whole.[31] A peculiar feature of EU constitutionalisation is its bi-directional impact: it operates vis-à-vis the national legal orders, and within the EU itself. In the first dimension, constitutionalisation sought to legitimise the EU as an emerging power, limiting national sovereignty. It enhanced the constitutional 'credibility' of the EU as an atypical constitutional legal order. In the second form, constitutionalisation constrains the action of EU institutions within the EU legal order, in the respect of EU general principles[32] and values.[33] All in all, the EU is the epitome of liberal constitutionalism.[34]

The most evident liberal-constitutional element in the EU is in regard to the development of EU general principles.[35] Under the umbrella of general principles, proportionality, effectiveness, equivalence, non-discrimination and effective judicial protection have made their entrance in the pantheon of the EU primary sources. The jurisprudential development of general principles of EU law led, in particular, to a double constitutionalisation: the EU legal order was expanded through the injection of moral-based values given by the general principles; and, further, actions both from the EU[36] and national authorities[37] have been reviewed and struck down because of incompatibility with the EU general principles. The Court of Justice's case law on general principles of EU law is an additional proof of the fluidity attached to the EU constitutional settings and the pivotal role exerted by that Court in bringing rationality and coherence in the EU order.

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[28] *E.g.* ECJ Opinion of 30 April 2019 1/17, *ibid.*

[29] *Among others, see* Schütze, *supra* n. 11 and Arnold, *supra* n. 26.

[30] Schütze, *supra* n. 11.

[31] See *supra* Arnold, n. 26, p. 99. Constitutionalisation is the process through which a legal system not provided with a constitution acquires features of a constitutional order. This occurs, among other, through the establishment of constitutional doctrines and principles 'to legitimise but also control […] authority'. See M. Poiares Maduro, 'How Constitutional Can the European Union Be? The Tension between Intergovernamentalism and Constitutionalism in the European Union' [2010] SSRN Electronic Journal <http://www.ssrn.com/abstract=1576145> visited on 15 September 2020.

[32] ECJ 17 December 1970, Case C-11/70, *Internationale Handelsgesellschaft mbH* v *Einfuhr-und Vorratsstelle für Getreide und Futtermittel*; ECJ 18 July 2013, Case C-584/10 P, *Commission and Others* v *Kadi*.

[33] ECJ 23 April 1986, Case C-294/83, *Les Verts* v *Parliament*.

[34] J.H.H. Weiler and J.P. Trachtman, 'European Constitutionalism and Its Discontents', 17 *Nw. J. Int'l L. & Bus.* (1996-1997) p. 354.

[35] T. Tridimas, *General Principles of EU Law* (Oxford University Press 2006); A. Cuyvers, 'General Principles of EU law' in E. Ugirashebuja, J.E. Ruhangisa and T. Ottervanger (eds.), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill 2017) p. 217–228.

[36] The famous *Kadi* saga has shown the power of EU fundamental rights, which are to be complied with by the Council with issuing restrictive measures against individuals. *See, in particular,* ECJ 18 July 2013, Case C-584/10, *Commission and Others* v *Kadi*.

[37] *E.g.* ECJ 15 May 1986, Case C-222/84, *Johnston* v *Chief Constable of the Royal Ulster Constabulary*; ECJ 22 November 2005, Case C-144/04, *Mangold v Rüdiger Helm*.

The acquisition of legally binding effects by the EU Charter of Fundamental Rights has not reduced the importance of general principles.[38] On the contrary, the scope of general principles of EU law has been amplified by the presence of the Charter.[39] What is more, following the path initiated with the development of general principles of EU law, the Court of Justice has given broad application to the Charter of Fundamental Rights by way of a loose interpretation[40] of Article 51 thereof, defining the scope of application of the Charter in relation to EU and national measures.[41] The Court of Justice was thus able to extend the compass of EU fundamental rights over national actions.[42]

Another liberal-constitutional feature of the EU is the centrality of the principle of effective judicial review, being an expression of the rule of law. In *Les Verts*[43] the Court of Justice, for the first time, relied on the principle of effective judicial review to allow scrutiny by EU Courts over acts of the European Parliament that are not listed in the Treaties among the acts amenable to judicial review. Ensuring control over all EU institutions' acts is, according to the Court of Justice, an expression of the rule of law in the EU.[44] The *Chernobyl* case[45] further stressed that the judicial review carried out by EU Courts was instrumental in ensuring institutional balance and, thus, effective separation of powers in the EU.[46] As a result of that case, the Parliament was deemed entitled to bring an action for annulment, although it was not listed among the entities authorised to bring such an action.

It is in the well-known *UPA* case[47] that the Court of Justice made explicit the link between effective judicial review and the rule of law. In particular, it affirmed that 'The European Community is *a community based on the rule of law*[48] in which its institutions are subject to

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[38] This view finds confirmation in the literature. T. Tridimas, 'The General Principles of Law: Who Needs Them?' 52(1) *Cahiers de droit européen* (2016) p. 419–441; C. Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Edward Elgar 2018), p. 147 and ff.

[39] *Juízes Portugueses* case, *supra* n. 9. In this case, the Court of Justice interpreted the content of the general principle of effective judicial protection in the light of Article 47 Charter, protecting, among others, the principle of judicial independence. Another case in which a general principle of EU law was strengthened by the presence of the Charter is *Test-Achats ASBL* (ECJ 1 March 2011, Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministers*). The Court found that national legislation providing for derogations to the EU principle of equal treatment for a potentially indefinite duration was not compatible with Articles 21 and 23 of the Charter.

[40] *E.g.* ECJ 8 November 2016, Case C-243/15, *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín*; ECJ 26 July 2017, Case C-348/16, *Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*.

[41] This latter provision specifies that the Charter may be invoked against the member states whenever they are implementing EU law. Yet, the EU case law indicates that the Charter may be invoked against member states subject to the condition that national measures fall within the scope of EU law, without a strict interpretation of the implementation requirement. ECJ 23 February 2013, Case C-617/10, *Åklagaren* v *Hans Åkerberg Fransson*.

[42] An example on the reach of the Charter in relation to national provisions which are not strictly implementing EU law is provided by the case law regarding member states' procedural rules. *See Sacko, supra* n. 40.

[43] ECJ 23 April 1986, Case C-294/83, *Les Verts* v *European Parliament*.

[44] *Les Verts*, *supra* n. 43, Para. 23.

[45] ECJ 22 May 1990, Case C-70/88, *European Parliament* v *European Communities (Chernobyl case)*.

[46] *Chernobyl*, *supra* n. 45, Para. 21 and ff. Both institutional balance and separation of powers are acknowledged to be aspects of the rule of law; *e.g.* R. Bellamy (ed.), *The Rule of Law and the Separation of Powers* (Aldershot 2005); J. Alder, 'Constitutionalism: The Rule of Law and the Separation of Powers' in J. Alder (ed.), *Constitutional and Administrative Law* (Macmillan Education UK 1999) <https://doi.org/10.1007/978-1-349-15077-9_4> visited 26 August 2020.

[47] ECJ 25 July 2002, Case C-50/00, *UPA v Council*, Para. 38.

[48] Emphasis added.

judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights'. The symbiosis between effective judicial review and the rule of law has been confirmed in recent EU jurisprudence. For instance, *Juízes Portugueses*[49] has indicated that the principle of effective judicial review is part of the essence of the rule of law, one of the founding values of the EU protected under Article 2 TEU.

Finally, a further indicator of liberal-constitutional elements in the EU order is the principle developed in the *ERTA* case,[50] according to which acts issued by EU institutions in the exercising of implied powers[51] that have legal effects may be subject to judicial review, even though these measures may not be listed as reviewable under the Treaties. This case law offers an additional example of the liberal-constitutional interpretations of EU Treaties and the need to ensure effective check and balances also in the attainment of the EU's objectives.

Overall, the considered jurisprudence extended the reach of the EU constitutional order and ensured the rationality and coherence of the EU legal order via flexible interpretations of the Treaties and judicial review: this is an intrinsically liberal-constitutional case law. The same approach, however, does not seem to apply in the EU case law on the judicial review of EU soft law.

JUDICIAL REVIEW OF EU SOFT LAW: RECENT JURISPRUDENTIAL DEVELOPMENTS AND THE NEED FOR EFFECTIVE DIRECT JUDICIAL REVIEW

As mentioned above, EU soft law is the expression of *sui generis* regulatory powers. In this sense, EU soft law is one of the facets of the EU atypical action. The increasing issuance of EU soft law was already highlighted by Stefan in 2014, and this trend is continuing.[52] Statistics show that between 2019 and 2020 EU institutions have adopted 138 soft law instruments in the form of opinions and recommendations.[53] More recently, with the raging of the COVID-19 crisis, EU institutions have made extensive recourse to EU soft law. In particular, the Commission has issued a communication on a coordinated economic response to the COVID-

[49] *Juízes Portugueses, supra* n. 9.

[50] ECJ 31 March 1971, Case C-22/70, *Commission* v *Council (ERTA)*, Para. 42. It should be pointed out that the application for annulment of the act in question was rejected in so far as the Court of Justice found that the Council had not breached its duties under Community law.

[51] This means that whenever the member states had attributed to the EU the duty to attain a certain goal, the EU institutions should have the powers. This interpretation of the implied powers doctrine has been embraced in the ECJ 9 July 1987, C-281/85, *Germany* v *Commission*. A narrow reading of the implied powers doctrine provides that the provision of a given power in the Treaties entails the existence of any other power that is reasonably necessary for the exercise of the former. ECJ 16 July 1956, Case C-8/55, *Fédération Charbonnière de Belgique* v *High Authority*. For an analysis of the codification of the EU case law on the implied powers' doctrine, *see* T. Konstandinides, 'EU Foreign Policy Under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations' 39(4) *E.L.Rev* (2014) p.1.

[52] Stefan, *supra* n. 3.

[53] The exact reference period is from 1/01/2019 to 08/06/2020. Data available at <https://eur-lex.europa.eu/search.html?orFM_CODEDGroup=FM_CODED%3DRECO,FM_CODED%3DOPIN&qid=1598262303778&DTS_DOM=EU_LAW&typeOfActStatus=OTHER&type=advanced&lang=en&SUBDOM_INIT=LEGISLATION&date0=ALL:01012019%7C08062020&DTS_SUBDOM=LEGISLATION>, visited on 3 September 2020.

19 outbreak,[54] dealing with the immediate response to the crisis, followed by two roadmaps by the Council and the Commission[55] on strategies and measures to end the lockdowns.

Scholars[56] have observed that EU soft law may induce certain individual behaviours and even modify normative reality.[57] Prime examples are the Press Release No 144/16 concerning the EU–Turkey's agreement on migrants, or the Euro Group Statements issued in the context of the bail-in measures adopted in Cyprus and concerning certain banks. These instruments have been adopted as part of the implementation of EU actions at international and member states' level and have thus impacted third parties.[58]

Interestingly, the latest developments in the EU case law indicate that these measures are subject to an 'incomplete judicial scrutiny' by the EU judicature. While the European Court of Justice has interpreted EU soft law through the preliminary procedure, the EU judicature has been reluctant to directly review EU soft law through actions for annulment.

After discussing the admissibility criterion of 'legal effects' under Article 263 TFEU, the following section will discuss, first, the latest decisions on the reviewability of EU soft law, both via actions for annulment and the preliminary ruling procedure, and second, the drawbacks of the current approach as to judicial scrutiny of these measures by EU Courts.

Judicial review in the EU: the notion of 'legal effects'

Currently governed by Article 263 TFEU, judicial review of EU acts is initiated before the General Court at first instance, and, on appeal, before the Court of Justice.[59] A central element for the assessment of whether an act could be directly scrutinised by the EU judicature is linked to the production of legal effects towards third parties.[60] In this regard, the Court of Justice of the EU has adopted a 'substance over form' approach, whereby the substance of an act should determine whether it produces legal effects. This case law is a further example of liberal-constitutionalist case law in the EU.[61]

The *ERTA* judgment[62] illustrates these points. In that case, the Court of Justice held that 'an action for annulment must […] be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.'[63] The Court found that the proceedings of the Council for the adoption of the *ERTA* agreement aimed

[54] Communication COM(2020) 112 final of 13 March 2020, from the Commission on a coordinated economic response to the COVID-19 outbreak.

[55] European Commission, European Council, The Joint European Roadmap towards lifting COVID-19 containment measures, ec.europa.eu; Council, Roadmap for Recovery, www.consilium.europa.eu, visited on 3 September 2020.

[56] Snyder, *supra* n. **Error! Bookmark not defined.**; Stefan, *supra* n. **Error! Bookmark not defined.**.

[57] In *Grimaldi*, the Court has explained the circumstances in which recommendations may be adopted: they 'are generally issued by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules'. ECJ 13 December 1989, Case C-322/88, *Grimaldi v Fonds des maladies professionnelles*.

[58] Interestingly, the EU judicature has considered these acts as deprived of legally binding effects. *See infra*.

[59] Article 256 TFEU.

[60] Article 263 TFEU. The previous versions of this article do not contain any difference in this respect.

[61] *See infra*.

[62] *ERTA, supra* n. 55.

[63] *ERTA, supra* n. 55, Para. 42.

to 'lay down a course of action binding on both the institutions and the member states'. The Council's submission – arguing that the member states' coordination in negotiating the *ERTA* agreement was only 'voluntary', and not compulsory – could not affect the production of legal effects of the Council's proceedings. As a result, the latter produced legal effects and could be reviewed by the EU Court.

Similarly, in *Commission* v *Council*,[64] the Court of Justice found the production of legal effects by a decision of the Council, providing the member states with voting powers at the UN. The fact that such a vote had implications on the relationships between the Community, the member states and the international order was liable to attribute legal effects to that act. Once again, the submission of the Council, which argued that the decision had only a procedural nature and was not binding, did not affect the presence of legal effects.

The irrelevance of the form or intention of the author of an act in determining the production of legal effects was confirmed in *France* v *Commission*.[65] The Court of Justice held that 'an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects. This applies to a Commission communication which sets out to specify the manner of application of Article 5(2) of Directive 80/723 on the transparency of financial relations between member states and public undertakings, which was published in the C Series of the Official Journal and was notified to each member state.'[66] By detailing the way in which a directive provision had to be applied by the member states, the Commission's communication was deemed to produce legal effects.

In *IBM*,[67] it was further specified that 'any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void. However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that article.' In the same case, the Court of Justice considered 'the purpose' of the EU act at stake (i.e. a statement of objection by the European Commission in the context of competition proceedings), to determine the legal effects and nature of the act. Since the act in question could not have a direct impact on the position of third parties, it could not be considered to produce legal effects.

Remarkably, the approach of the Court of Justice of the European Union as to the admissibility of direct actions concerning EU soft law seems to have (at least in part) departed from this well-established case law.

Direct judicial review of EU soft law: recent (restrictive) developments

When considering the admissibility of actions for annulment concerning EU soft law, in recent cases the EU Courts have set high thresholds for the production of legal effects. In so doing,

[64] ECJ 19 March 1996, Case C-25/94, *Commission of the European Communities* v *Council of the European Union*.

[65] ECJ 16 June 1993, Case C-325/91, *French Republic* v *Commission of the European Communities*.

[66] *French Republic* v *Commission of the European Communities, supra* n. 69, Para. 9.

[67] ECJ 11 November 1981, Case C-60/81, *IBM* v *Commission.*

they have especially focused on the intentions[68] and the powers[69] of the authors, as well as the form[70] of the EU soft law acts.

For instance, a statement issued by the member state's heads of government that are reuniting in the European Council is not an EU act producing legal effects. This is what has been established in *NF and Others* v *European Council*,[71] a case concerning the judicial review of the EU–Turkey statement of 18 March 2016 regulating migrants' relocation between the EU and Turkey. Having recalled that EU acts are admissible for an action for annulment, subject to the condition that they produce legal effects vis-à-vis third parties,[72] the General Court considered whether the act could be attributed to the European Council. It observed that the choice of words utilised in the statement could not be liable to 'alter the content or the legal nature of the procedure to which it relates, namely, an international summit'. The General Court further highlighted that, in the light of the wording used, the act had the objective to inform the public on the EU–Turkey migration policies. Moreover, the 'inappropriate use of the expression "Members of the European Council" and the term "EU" in a press release' cannot in any event bind the European Union. In other words, the Members States' heads of government reuniting in the European Council did not have the intention to issue a document binding on the EU. The Court ultimately concluded that the statement could not be attributed to the European Council and, consequently, the action for annulment was rejected. The case was later confirmed on appeal.[73]

The General Court has also considered that an act issued by an EU body not possessing decision-making powers under the Treaties could not produce legal effects. In *Mallis*,[74] the claimants had challenged the validity of the Eurogroup statement of 25 March 2013 concerning the macroeconomic adjustment programme for financial assistance to Cyprus. Following the issuance of this statement, the Cypriot Parliament adopted a series of bail-in measures regarding national banks.[75] When considering the admissibility of the claim, the General Court observed that, according to the established case law, 'in order to determine whether an act or decision produces binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position, it is necessary to look to its substance'.[76] However, when carrying this assessment, the Court firstly focused on the competences of the Eurogroup – the author of the act – and found that this latter entity did not have decision-making powers pursuant to the Treaties. The Court then analysed the content of the document. Although it included 'categorical statements', the act of the Eurogroup could not be deemed as producing binding legal effects in the light of the 'context' of its adoption; namely, the lack of competences and powers by the Eurogroup set out in the Treaties deprived the act of any legal effects. Once again, the content of the act and its impact on third parties played a limited role in determining its effects. The Court of Justice dismissed the appeal lodged against the decision

[68] *NF and Others* v *European Council*, *infra*.
[69] *Mallis and Malli v Commission and European Central Bank* and *Czech Republic* v *Commission*, *infra*.
[70] *Belgium* v *Commission (appeal)*, *infra*.
[71] GC 28 February 2017, Cases T-192/16, T-193/16 and T-257/16, *NF and Others* v *European Council*.
[72] *NF and Others* v *European Council supra* n. 75, Para. 42.
[73] ECJ 12 September 2018, Case C-208/17 P to C-210/17 P, *NF and Others* v *European Council*.
[74] GC 16 October 2014, Case T-327/13, *Mallis and Malli* v *Commission and European Central Bank*.
[75] Para. 15.
[76] Para. 52.

of the General Court,[77] and concurred with the view that the statement in question did not create legal obligations.[78]

The reluctance of the EU Courts to engage in the direct review of EU soft law further emerges in *Czech Republic* v *Commission*.[79] The Czech Republic had challenged a letter of the Commission rejecting the request of that State not to make available to the EU budget some resources. The General Court recalled that the 'production of binding effects' is to be evaluated in the light of the substance of the act.[80] Elements to be assessed are the content of the act, interpreted in the light of the context and powers of the institution that adopted it.[81] Focusing on the powers of the Commission, the letter of the Commission was considered as deprived of legal effects, since that institution was not competent to adopt that act.[82] The action for annulment was therefore dismissed. This outcome is quite remarkable, for at least two reasons. First, the letter in question was phrased in prescriptive terms and so it was perceived to be from the Czech Republic, which brought an action of annulment against it. Therefore, the wording did not play any role in establishing the legally binding nature of the act in question. Second, the Court of Justice had previously established that the absence of competence for the EU to adopt an act does not exclude the reviewability of that measure.[83] The appeal against this decision is currently pending.[84]

The Court of Justice has also excluded EU soft law from the remit of actions for annulment in *Belgium* v *Commission*.[85] In this appeal case, the Court of Justice confirmed a judgment delivered by the General Court in the context of an action for annulment against the Commission's Recommendation 2014/478/EU, concerning consumer protection from online gambling. The Court of Justice found that the first instance court correctly evaluated the recommendation as non-legally-binding for the purposes of Article 263 TFEU, and thus rightly rejected the action for annulment as inadmissible.

At first instance, the reasoning of the General Court[86] was based on the wording of Article 288 TFEU, according to which recommendations and opinions of EU institutions do not have binding effects. As such, Recommendation 2014/478/EU was therefore excluded from the scope of application of Article 263 TFEU. Interestingly, the Court had applied the established case law according to which the production of legal effects of EU acts must be assessed in the light of 'the substance of that act and […] on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act.'[87] The General Court took the view that the document was worded 'mainly in non-mandatory terms.' It further noted that 'the content of

[77] ECJ 20 September 2016, Case C-105/15 P to C-109/15 P, *Mallis and Others* v *European Commission and European Central Bank.*
[78] Para. 58.
[79] GC 28 June 2018, Case T-147/15, *Czech Republic* v *Commission*.
[80] Para. 35.
[81] Para. 35.
[82] Para. 49.
[83] *ERTA, supra* n. 55.
[84] Case C-575/18, *Czech Republic* v *Commission* (pending).
[85] ECJ 10 February 2018, Case C-16/16, *Belgium* v *Commission (appeal)*; Arnull, *supra* n. 8.
[86] GC 27 October 2015, Case T-721/14, *Belgium* v *Commission (first instance).*
[87] ECJ 13 February 2014, Case C-31/13 P, *Hungary* v *Commission*, Para. 55.

the contested recommendation […] shows that that act is not intended to have any *binding legal effects*[88] and that the Commission had no intention to confer such effects on it'.[89]

On appeal, the Court of Justice distinguished the case at hand from the *ERTA*[90] and *Les Verts*[91] precedents. The Court held that the *ERTA* dictum, according to which admissibility for judicial review of a EU measure depends on whether it produces legal effects, could not be applied in the case at issue: the former case related to a Council deliberation recorded in the minutes of a meeting, and not a recommendation. Also, the principles established in *Les Verts* could not be relied upon,[92] in so far as that case concerned the lack of a provision under the Treaties regulating the reviewability of the EU parliament's acts, and not, as in *Belgium* v *Commission*, the interpretation of a Treaty provision excluding binding effects of EU recommendations.[93] As a result, the recommendation could not be amenable to judicial review under Article 263 TFEU.

This judgment has three implications. First, it established that EU acts, including EU soft law, are reviewable if they produce 'legally binding effects' under a combined interpretation of Article 263 and 288 TFUE. Second, the production of legal effects is significantly influenced by the intention of the author of the act. Third, the form of an act also has influence in determining the production of legal effects, more than the wording and the context in which the act was adopted, as well as its implications.

The outcome in *Belgium* v *Commission* significantly narrows the liberal-constitutional case law of the EU Courts on judicial review and the production of legal effects of EU acts. The joint reading of Article 288 and 263 TFUE that was followed in that case is problematic from a number of perspectives. First of all, this interpretation of Articles 288 and 263 TFUE automatically leads to the exclusion of recommendations and opinions from the acts that can be reviewed under the action for annulment before the ECJ. In *Belgium* v *Commission*, little if no attention was paid by the EU judges to the perception of the addressees of the recommendation and that of the implementing authorities at national level, nor to the impact of that act on individuals. As a result, the EU judicature falls within an interpretative loop, whereby the Court cannot find legal effects divergent from those already determined by the form of the measures.[94] This runs against the *ERTA* case law[95] and the principle according to which the form of an act should not determine its legal effects.[96]

Second, the exclusion of recommendations from the remit of judicial control, due to the absence of legally binding effects, is at odds with the production of binding effects by EU soft law on their author. It is indeed established that EU soft law measures may be binding on the EU institution that adopted them.[97] It is thus not clear, however, how the bindingness of an EU

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[88] Emphasis added.

[89] *Belgium v Commission (first instance) supra* n. 90, Para. 29.

[90] *ERTA, supra* n. 55.

[91] *Les Verts, supra* n. 43.

[92] This category of acts was not included under Article 173 EEC.

[93] Paras. 42–43.

[94] This approach might indicate that the Court is refusing to uphold the legitimacy of EU soft law, suggesting that member states and other operators are not bound by EU soft law measures.

[95] *ERTA, supra* n. 55.

[96] This was also acknowledged by Stefan, *supra* n. 4.

[97] ECJ 28 June 2005, Case C-189/02, *Dansk Rørindustri e.a.* v *Commission*.

soft law act on the issuing authority may not also produce legal effects towards third parties. De facto, effects may also occur incidentally for individuals.[98]

Third, and most importantly, individuals and member states affected by EU soft law acts are deprived of judicial protection. On the one hand, the admissibility requirements for the purposes of the action for annulment are interpreted strictly, with no possibility to access review of these acts. On the other hand, since EU soft law is not subject to transposition duties, it may not be possible to challenge any national measure implementing EU soft law.[99]

As a result, it may be submitted that the EU Courts have adopted a 'formalistic' understanding of the notion of legally binding effects when it comes to EU soft law. In this context, they have focused on the intention and the powers of the issuing authority, or the form of the act, without considering the implications of EU soft law acts in relation to third parties. In turn, by excluding direct judicial review of EU soft law, this jurisprudence creates a gap in the EU judicial protection system in relation to such acts.

It should be further observed that, in the absence of direct judicial review, an action to establish the non-contractual liability of the EU could, nevertheless, be available for damages caused by selected EU soft law acts.[100] In *Ledra*, the CJEU found that the fact that the European Stability Mechanism is outside the EU legal order should not prevent the admissibility of a claim for damages created by the Commission and the European Central Bank in the process of adopting a memorandum of understanding.[101] Whether the dictum of this judgment extends to other EU soft law instruments is, however, unsettled.

Having considered the current limitations to bringing an action of annulment concerning EU soft law, we should now assess whether the indirect judicial review mechanisms available under the Treaties offer effective judicial protection in relation to EU soft law acts.

Indirect judicial review of EU soft law: gaps in the system of EU effective judicial protection?

Indirect judicial review of EU soft law may occur through the preliminary ruling procedure[102] or by pleading their illegality in the context of other actions brought before the EU Courts.[103] As observed by Türk, Article 277 TFEU allows indirect review of a wide range of acts,

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[98] Stefan, *supra* n. 4.

[99] Simoncini has offered a discussion of the judicial review of EU soft law measures, and concurs with the view that there is a gap in the judicial review of these acts. M. Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine* (Hart 2018), p. 164.

[100] The success rate of these actions is, however, limited by the complex judicial tests developed by the EU Courts to prove the subsistence of a damage. For a discussion on the case law on damages, *see* G. Gentile, 'The ECJ as the EU Court of Appeal: Some Evidence from the Appeal Case-Law on the Non-Contractual Liability of the EU', 13 *Review of European Administrative Law* (2020) p. 73.

[101] There is ample debate on the nature of the MoU. There is overall consensus that they have features of soft law in selected instances. T. Konstadinides and A. Karatzia, 'The Legal Nature and Character of Memoranda of Understanding as Instruments Used by the European Central Bank', 44 (4) *European Law Review* (2019) p. 444–464; *Ledra, supra* n. 24.

[102] Article 267 TFEU.

[103] Article 277 TFEU. The ECJ is currently deciding an appeal concerning the alleged liability of the Euro Group for the issuance of public statements in the context of the bail-in of Cypriot Banks, Case C-597/18, *Council* v *K. Chrysostomides & Co. and Others* (pending).

including notices of invitations to tender, staff rules or evaluation guides.[104] When examining the invalidity of EU law under Article 277 TFEU, the EU judicature does not require the production of legally binding effects.[105]

Similarly, under the preliminary ruling procedure, the question of the 'legally binding nature' of the act does not bear any consequence on the admissibility of the matters referred from national Courts.[106] An example of the approach of the ECJ in this respect is the *James Elliot* case.[107] The EU Court ruled that the lack of binding effects of harmonised standards does not preclude the Court from ruling on their interpretation.

Likewise, in the first reference for a preliminary ruling submitted to the Court of Justice by the German Constitutional Court,[108] the question arose as to whether the European Central Bank had the power to adopt a programme for the purchase of government bonds on secondary markets (Outright Monetary Transactions programme, 'OMT'), announced by way of a press release. Several governments had submitted that the question was inadmissible since the European Central Bank act was a preparatory act, and, in any event, did not possess legal effects.[109] In its judgment, the Court of Justice considered that the press release was not a preparatory act but, instead, a legal act, and thus rejected the inadmissibility plea. What is more, the Court did not explicitly assess the production of legal effects by the press release. Nevertheless, the judgment delineated with great detail the two major legal implications of that document. In so doing, the Court of Justice did not consider the form of the document, but instead its substance and effects on the EU economy.

First, the Court interpreted the objectives of the OMT programme as outlined in the press release. That programme was deemed 'capable of contributing to the stability of the euro area, which is a matter of economic policy'.[110] The press release and the policies outlined therein were therefore instrumental in the achievement of EU policies. Second, the Court explained that the programme required implementation to conclude 'outright monetary transactions on secondary sovereign debt markets'. Such transactions took place through 'one of the monetary policy instruments provided for by primary law'.[111] The meticulous analysis of the consequences of the European Central Bank's press release in *Gauweiler* is in sharp contrast to the approach of the EU Courts in *Belgium* v *Commission*. As discussed, in this latter judgment, the ECJ has considered the production of legal effects of the Commission's recommendation without taking into account the consequences entailed by that document.

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[104] A. Türk, 'Liability and Accountability for Policies Announced to the Public and for Press Releases', ECB Legal Conference (2017) https://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf, visited on 3 September 2020.

[105] *Ibid*, p. 53.

[106] In the context of this procedure, the ECJ has declared to have competence to also interpret non-mandatory instruments. ECJ 21 January 1993, Case C-188/91, *Deutsche Shell AG* v *Hauptzollamt Hamburg-Harburg*.

[107] ECJ 27 October 2016, Case C-613/14, *James Elliott Construction v Irish Asphalt Limited.*

[108] ECJ 16 June 2015, C-62/14, *Peter Gauweiler and Others* v *Deutscher Bundestag*.

[109] Para. 23.

[110] Economic growth is one of the objectives of the EU.

[111] Para. 54.

Through preliminary ruling interpretations, the Court of Justice has identified some legal effects attached to soft law measures.[112] In *Dansk Rørindustri A/S*,[113] the Guidelines on the method of setting fines were found to bind the discretion of the EU Commission. In *Expedia*,[114] the de minimis notice of the EU Commission bound the discretion of this institution and offered guidance 'to the Courts and authorities of the member states in their application of […] article [101 TFEU]'. Furthermore, in *Grimaldi*,[115] national courts were asked to take into account EU recommendations 'in order to decide disputes submitted to them'. In a subsequent preliminary ruling,[116] however, the Court held that the Banking Sector communication was not binding upon the member states but was merely limiting the discretion of the Commission.

It may be concluded that the Court of Justice's approach to EU soft law through preliminary rulings diverges from that followed in the action for annulment. On the one hand, in the context of indirect judicial review, the EU judicature has indicated that certain EU soft law acts may have legal effects, for instance, in the form of interpretative documents[117] or as a limit to the discretion of the issuing authority.[118] On the other hand, the EU Courts have often excluded these instruments from direct judicial review due to the lack of 'legally binding effects'.[119] Therefore, in principle, EU soft law may be found to have 'legal effects' or 'legally binding effects' (or none) depending on the action brought, and against whom the effects of EU soft law are tested. Whether the legal effects identified in the context of preliminary ruling questions are the same as 'binding legal effects', as required under Article 263 and 288 TFEU for the purposes of the action for annulment, is not settled. The case law suggests that legal effects and legally binding effects are two distinct categories.[120] Yet, questions may arise as to whether this distinction is sound and practical.

In the light of this discussion, it is submitted that the preliminary ruling procedure cannot ensure an effective judicial review of EU soft law measures for the following reasons. First, the preliminary ruling procedure is not subject to strict time limits and thus allows the consolidation of the legal effects of EU soft law. It is true that the Court of Justice has argued that the preliminary ruling should be available to individuals who would not have locus standi under Article 263 TFEU.[121] This procedure thus contributes to ensuring scrutiny over EU acts. However, the strict time limits of the action for annulment ensure that an act may be challenged before its extensive application, both at EU and national level. The action for annulment would better ensure the uniform effects of EU soft law in the member states.

Second, the preliminary rulings on EU soft law have so far offered a fragmented interpretation of the legal effects of EU soft law measures, and only partially settled the legal uncertainty

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[112] Remarkably, there is overall uncertainty as to the legal effects of these acts, in particular in the EU case law. In the jurisprudence from member states, we may find cases where instead EU soft law instruments are relied upon. For a study on this topic, *see* G. Zlatina, 'Competition Soft Law in National Courts: Quo Vadis?' Tilburg Law and Economics Centre Discussion Paper No. 2016-038 (2016).

[113] *Dansk Rørindustri, supra* n. 101.

[114] ECJ 13 December 2012, Case C-226/11, *Expedia v Autorité de la concurrence and Others*.

[115] ECJ 13 December 1989, Case C-322/88, *Salvatore Grimaldi* v *Fonds des maladies professionnelles*.

[116] ECJ 30 September 2016, Case C-526/14, *Kotnik and Others v Državni zbor Republike Slovenije*.

[117] *Expedia, supra* n. 118.

[118] *See Grimaldi, supra* n. 119 and *Dansk, supra* n. 101.

[119] *E.g. NF, supra* n. 75*; Belgium* v *Commission supra* n. 90.

[120] For a detailed analysis of the notion of legal effects, *see* N. Xanthoulis, 'Administrative Factual Conduct: Legal Effects and Judicial Control in EU Law' 12 *Review of European Administrative Law* (2019) p. 39.

[121] ECJ 27 November 2012, Case C-370/12, *Pringle* v *Ireland,* Para. 41-43.

surrounding the implications of these acts. The Court of Justice has found such measures as binding only the author[122] but not third parties; in parallel, EU soft law may also offer guidance to courts and authorities.[123] In this regard, by finding that the EU soft law binds its authors, the Court of Justice seems to overlook the effects of such acts on individuals. The author should, in fact, respect the EU soft law measure during its interactions with individuals. As a result, third parties are (indirectly) subject to the consequences of EU soft law. The case law issued following preliminary rulings has therefore enhanced legal uncertainty and has not consistently taken into account how authorities and individuals have perceived or have been affected by EU soft law.[124] EU soft law indeed applies in both the EU and national legal order and may produce different effects depending on the perception of the authority in charge of implementing it.[125] Overall, the lack of clarity about the effects of EU soft law may have adverse effects on the protection of legitimate expectations and the uniform application of EU law.

Third, and as a consequence, the preliminary ruling procedure cannot effectively eliminate, amend or restore the consequences of EU soft law acts in the member states.[126] National authorities may perceive EU soft law acts as binding (or not) and thus apply them in different ways. For instance, whenever national authorities do consider themselves as bound by EU soft law, and such measures are later found not to have legal effects through a preliminary ruling decision of the ECJ, ensuring compliance at national level with the ECJ judgment may be challenging, and may go against the principles of legal certainty and legitimate expectations. In conclusion, it is submitted that the preliminary ruling cannot ensure the uniform application and effective judicial review of EU soft law.

Advocating for a liberal-constitutional stance as to the direct judicial review of EU soft law under Article 263 TFEU: ensuring institutional balance and effective judicial protection in relation to EU soft law

Although indirect judicial review through preliminary ruling requests has its virtues, the absence of direct judicial review over the *sui generis* regulatory powers expressed via EU soft law engenders disequilibria in the EU legal order. First, the absence of direct judicial review entails an imbalance in favour of the EU 'administrative/executive' power vis-à-vis the EU legislator. EU soft law may undermine the principle of institutional balance in the EU order, with the risk for executive agencies and institutions to take over competences left to the EU legislative power.[127] Second, the absence of direct scrutiny also upsets the relationship between individuals and the EU, based on the possibility of obtaining effective judicial protection in the fields covered by EU law.[128] Indeed, EU soft law may influence individuals' behaviour and their legal position vis-à-vis national and EU institutions, but they might not be subject to direct

[122] *Grimaldi, supra* n. 119 and *Dansk, supra* n. 101.

[123] *Grimaldi, supra* n. 119. However, *Kotnik* seems to have revised this case law, *supra* n. 120.

[124] *E.g.* GC 15 March 2006, Case T-15/02, *BASF* v *Commission*; *Dansk Rørindustri, supra* n. 101, Para. 211

[125] For an analysis of the legal effects of the national measures implementing EU soft law, *see* G. Gentile, '"Verba Volant, Quoque (Soft Law) Scripta?" An Analysis of the Legal Effects of National Soft Law Implementing EU Soft Law in France and the UK', in M. Eliantonio, E. Korkea-aho and O. Stefan (eds.), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (Hart Publishing, forthcoming).

[126] It is true that the ECJ has recognised the retroactive nature of preliminary ruling judgments. Yet, the Court has also not missed opportunity to mitigate this position and envisage the possibility to limit the *ex tunc* effects of preliminary rulings. ECJ 26 April 1994, Case C-228/92, *Roquette Frères v Hauptzollamt Geldern*; as well as the early judgment ECJ 15 January 1986, Case 41/84, *Pinna v Caisse d'allocations familiales de la Savoie*.

[127] *E.g.* Articles 48, 75, 78 TFEU.

[128] Article 19 TEU.

judicial review.[129] Finally, EU soft law creates friction between administrative and judicial powers. EU soft law measures tend to be considered as non-binding by their authors, and this has led the EU Courts to exclude the production of legally binding effects under Article 263 and 288 TFEU. Overall, the exclusion of direct judicial review over EU soft law measures has limited the role of the CJEU in addressing the question of constitutional relevance concerning these acts.

To solve these drawbacks, the view of the author is that the formalistic understanding of the notion of 'legally binding effects', for the purposes of the action for annulment, should leave space for a liberal-constitutionalist reading of Articles 263 and 288 TFEU, so as to also allow direct scrutiny over EU soft law. Direct review of EU soft law would address the limitations[130] of the preliminary ruling procedure discussed above: thanks to stricter time limits on the annulment action, the effects of EU soft law could be 'tested' before they consolidate in the member states; furthermore, scrutiny over the adoption of these measures could be better ensured, jointly with enhanced judicial protection.

The above views are not indented to hide that a more relaxed reading of the Treaties on the admissibility requirements for the judicial review of EU soft law may also have adverse consequences. For instance, a possible litigation flood concerning EU soft law may arise, with a negative impact on the effectiveness of the procedures before the CJEU. The risk of a litigation flood is also an underlying reason for the ECJ's restrictive approach to individual's locus standi under Article 263 TFEU.[131] However, there is extensive literature proving that this danger is not, in fact, a real one.[132] Furthermore, when observing the national systems where more relaxed requirements for judicial review exist, no significant litigation floods may be traced.[133]

Another possible drawback is that the judicial review of EU soft law could hinder the activities of the EU and thus block prompt responses to crises. The massive adoption of EU soft law in relation to COVID-19 suggests that the EU soft law is issued by EU institutions to also tackle emergencies. In these cases, triggering legislative procedures could slow down the institutional action in the EU, and EU soft law measures are preferred by the EU institutions to adopt swift manoeuvres. Therefore, it could be argued that, as a principle, EU soft law should be shielded from judicial review, with the view to achieve the effectiveness of the EU action.

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[129] A list of possible legal effects of EU soft law is provided in Snyder, *supra* n. 1.

[130] An interesting element of comparison is offered by national case law. After an initial period of resistance against the judicial review of soft law issued by national authorities, national courts are also engaging in scrutiny of these measures. *See* Directorate-General for Library, Research and Documentation of the European Court of Justice, 'Admissibility of Court Actions Against "Soft" Law Measures' (June 2017) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-06/ndr-2017-007_synthese_en_neutralisee_finale.pdf>, visited on 3 September 2020.

[131] For a discussion on the limited risks related to a more relaxed standing for individuals in the action for annulment, *see* A. Parfouru, 'Locus Standi of Private Applicants Under the Article 230 EC Action for Annulment: Any Lessons to be Learnt From France?', 14 *Maastricht Journal of European and Comparative Law* (2007) p. 364; M Rhimes, 'The EU Courts Stand Tehri Ground: Why are the Standing Rules for Direct Actions Still So Restrictive?' Vol. 9(1) *European Journal of Legal Studies* (2016) p. 156.

[132] *Ibid.*

[133] *See* M. Eliantonio and others, 'Standing Up for Your Right(s) in Europe' (2012) available at <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462478/IPOL-JURI_ET(2012)462478_EN.pdf>, visited on 3 September 2020.

This argument inevitably fails to take into account that any administrative or quasi-administrative measure should, in all circumstances, be mindful of individual rights and general principles of the EU legal order. Ensuring effective judicial review of EU measures is, as demonstrated, a corollary of the rule of law in the EU. Therefore, the effectiveness of the EU order should not prevail over ensuring its founding values. The achievement of policy objectives, even in situations of emergency, should be subject to rule of law guarantees,[134] courts having a crucial role in ensuring respect of such safeguards. Without the exercise of judicial review of EU soft law, the EU Courts cannot ensure compliance with these guarantees. As put by Curtin, 'judicial review, to a great extent, is a substitute for the lack of political representativeness, participation, transparency – or generally speaking – political accountability […]'.[135] This especially applies in relation to EU soft law measures, where democratic debate may not be ensured.

Finally, a further potential criticism is that a liberal-constitutional reading of Articles 263 and 288 TFEU to ensure judicial review of EU soft law may be a manifestation of judicial activism. In relation to this argument, two points should be raised. First, it should be observed that Articles 263 and 288 TFEU do not provide details on concepts, such as those of 'binding effects' and 'EU act', that are relevant to assess whether an action for annulment is admissible. Therefore, it is for the EU Courts to interpret these notions, in compliance with their duty to ensure observance of EU law.[136] Not engaging in the interpretation of these concepts may lead to a denial of justice. Second, and not surprisingly, the restrictive notion of 'legally binding effects' currently used by the EU Court does not result from the wording of the Treaties, being itself a judicial construct. It is true that Article 263 TFEU excludes recommendations and opinions from the list of reviewable acts. Yet, other EU soft law instruments, such as guidelines, statements and press releases, are not per se excluded from judicial review according to the wording of Articles 263 and 288 TFEU. In any event, it is for the EU judicature to identify EU acts amenable to scrutiny under Article 263 TFEU, and where a measure issued by the EU institutions has legal implications on third parties (i.e. legal effects), it should be considered as an EU reviewable act under Article 263 TFEU.[137] It follows that also this criticism should be dismissed, since the interpretation of notions such as 'binding effects' and 'EU acts' included in Articles 263 and 288 TFEU is left to the EU Courts. In interpreting these concepts, the EU judicature cannot be accused of judicial activism, and is entitled to adopt a liberal-constitutional approach in the absence of limitations to this effect under the Treaties.

To conclude, an enhanced judicial control by the EU Court of Justice over EU soft law via direct challenges contributes towards solving the uncertainty concerning the implications of EU soft law. Effective judicial review of EU soft law measures would bring the EU institutions' powers, expressed via soft law tools, under the EU constitutional framework. Direct review of EU soft law would offer a key instrument for the Court of Justice to subject EU soft law to the

[134] This view is shared by the Venice Commission <https://rm.coe.int/respect-for-democracy-hu-man-rights-and-rule-of-law-during-states-of-e/16809e82c0>, visited on 3 September 2020.
[135] D. Curtin, 'Linking ECB Transparency and European Union Accountability', ECB Legal Conference 2017, 4–5 September 2017, p. 86.
[136] Article 19 TEU.
[137] Lenaerts and Fons-Gutierrez have recently addressed the question of whether the Court of Justice of the EU is a judicially active Court. See K. Lenaerts and J.A. Gutiérrez-Fons, *Les méthodes d'interprétation de la Cour de justice de l'Union européenne* (Bruylant, 2020), p. 61 and ff.

rules and principles stemming from the Treaties.[138] What is more, extending a liberal-constitutional reading to Articles 263 and 288 TFEU would also be compatible with the established interpretative methodology of the European Court of Justice. Liberal-constitutional readings of the Treaties are numerous and well-settled in the EU case law. This case law is distinctive in so far as the European Court of Justice interpreted the EU constitutional order as *flexible*, thus as not strictly determined by the wording of the Treaties, with the consequent need to ensure judicial review over EU actions undertaken beyond the remit of the EU Treaties.

CONCLUDING REMARKS

This paper had finite but ambitious objectives: first, to discuss the issues related to the limited judicial review of EU soft law by the EU Courts; and second, to advocate for a liberal-constitutional interpretation of Articles 263 and 288 TFEU as to the admissibility of actions for annulment concerning EU soft law measures.

For these purposes, the paper has first discussed how EU soft law and the *sui generis* regulatory powers expressed therein currently escape the EU constitutional order. The paper has then delineated the notion of liberal-constitutionalism as a theory that ensures effective checks and balances on public authority and protection of individual rights and liberties through judicial review. Interestingly, the EU jurisprudence is imbued with liberal-constitutional readings. Examples of this methodology in the EU case law abound (e.g. the case law on EU general principles and the centrality of effective judicial review in the EU). These decisions have led to the 'expansion' of the EU constitutional order and, in parallel, the scrutiny of the ECJ over EU (seldom atypical) acts. Interestingly, the liberal-constitutional case law of the EU also includes a 'substance over form' approach as to the determination of the legal effects of EU acts for the purposes of the action for annulment.

Subsequently, the paper has analysed the recent case law concerning judicial review of EU soft law via actions for annulment. It has highlighted the formalistic notion of 'legally binding effects' employed to assess the admissibility of such actions. In this regard, the EU Courts have focused on the intention of the authors (e.g. *NF* v *European Council*) and their powers (*Czech Republic* v *Commission* and *Mallis*), as well as the form of the act (e.g. *Belgium* v *Commission*), to consider the challenged EU soft law measures as deprived of legally binding effects and thus not amenable to judicial review. The paper has highlighted how this case law diverges from the established EU liberal-constitutional jurisprudence; it has further discussed the adverse impact of these recent decisions on effective judicial review of EU soft law.

The paper has then moved on to the assessment of whether the preliminary ruling procedure can offer effective judicial protection in relation to EU soft law. After illustrating that the production of legal effects by EU soft law is irrelevant for the admissibility of preliminary rulings concerning these acts, the paper has answered negatively to this question for a number of reasons. Among others, the paper has identified the absence of strict time limits under this procedure and the impossibility for preliminary ruling decisions to repair or erase the consolidated consequences of EU soft law acts in the member states. In addition, indirect challenges of these measures by national courts allow for legal uncertainty to persist among individuals, national authorities and EU institutions.

[138] It could even be argued that EU soft law could be subject to constitutionalisation, as the powers expressed therein would be put under judicial control. More broadly, constitutionalisation of EU soft law would ensure respect of the rule of law in the EU, whose essence is expressed through effective judicial review.

To improve judicial protection in relation to EU soft law, this paper suggests that the formalistic stance of the ECJ on direct review of EU soft law should be abandoned to follow a more liberal-constitutional oriented interpretation of Articles 263 and 288 TFEU, with the view of allowing direct scrutiny of these acts through the action of annulment. Ensuring direct judicial review of these measures would allow the EU judicature to scrutinise the activities of EU institutions enshrined in EU soft law; additionally, individuals affected by EU soft law measures could obtain judicial protection. The paper has demonstrated that a more liberal approach towards judicial review of EU soft law would not affect the correct functioning of the EU judiciary and the effectiveness of the action of the EU, and would not entail judicial activism.

Additionally, applying a liberal-constitutional methodology to ensure the review of EU soft law under Article 263 TFEU would be in line with the EU Courts' settled case law. Considering the EU judicature's constitutional practice, no legal reason for excluding *effective* judicial review of EU soft law via the action from annulment may be identified. The substantial adoption of EU soft law in the context of the COVID-19 crisis might require a rethinking of the current reviewability of EU soft law.