Judicial review of soft law before the European and the national courts - A wind of change blowing from the member states?

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A Wind of Change Blowing from the Member States?

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I. INTRODUCTION

What are the legal effects of EU soft law? To what extent is EU soft law 'binding' upon its addressees, be it the Member States or the European institutions? These are thorny issues that have been addressed by earlier research,[1] as well as by many chapters in this volume.[2] While there is no unequivocal answer to these questions, there is a consensus in the literature (and the findings of this volume confirm this) on the fact that EU soft law generates some legal effects for the Commission and the national

[1] The literature on this subject is vast. Without any attempt at completeness, see, eg, O Ştefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (Deventer, Kluwer Law International, 2012); L Senden, *Soft Law in European Community Law* (Oxford, Hart Publishing, 2004); Z Georgieva, 'Competition Soft Law in French and German Courts: A Challenge for Online Sales Bans Only?' (2017) 24 *Maastricht Journal of European and Comparative Law* 175; Z Georgieva, 'The Judicial Reception of Competition Soft Law in the Netherlands and the UK' (2016) 12 *European Competition Journal* 54; T Devine and M Eliantonio, 'EU Soft Law in the Hands of National Authorities: The Case Study of the UK Competition and Markets Authority' (2018) 11 *Review of European Administrative Law* 49. A comprehensive account of the literature can be found in O Ştefan et al, 'EU Soft Law in the EU Legal Order: A Literature Review', https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346629.

[2] See all the national contributions in this volume, as well as the chapters by G Gentile and N Xanthoulis (chs 5 and 18 in this volume, respectively).

competent authorities, and guides the administrative discretion at the EU and national levels.[3]

Taking this observation as a starting point and keeping in line with one of the overarching questions of the European Network of Soft Law Research (SoLaR) project, this chapter investigates the possibilities of judicially controlling the validity of EU soft law. If EU soft law is capable of producing legal effects in a 'Community based on the rule of law',[4] it should then be possible to bring judicial review claims to control its validity.

The judicial review of EU soft law was the focus of the 2018 *Belgium v Commission* ruling by the Court of Justice of the European Union (CJEU),[5] in which the Court did not follow the opinion of the Advocate General (AG) Bobek pleading for a relaxation of the admissibility requirements applicable in annulment actions at the EU level, which have traditionally excluded judicial review of soft law measures in most cases. Remarkably, AG Bobek relied on comparative law to show that at the Member State level, a growing trend can be observed towards the relaxation of the rules applicable to direct challenges of *domestic* soft law measures. Judicial review of national soft law and the emergence of less strict admissibility rules have therefore been used as a benchmark to assess the extent to which the CJEU is upholding an overly restrictive approach to the control of EU soft law.

In December 2019, the question of judicial review of EU soft law came again before the CJEU through a preliminary question by the French Council of State, with the relaxation of rules concerning the judicial control of domestic soft law again taking centre stage. In particular, the French highest administrative court asked the CJEU whether a set of guidelines issued by the European Banking Authority (EBA) could be subject to an annulment action under Article 263 of the Treaty on the Functioning of the European Union (TFEU).[6] The case concerns a claim against the act through which the French Prudential Control and Resolution Authority (Autorité de contrôle prudentiel et de resolution) has declared to comply with the EBA's guidelines. Having concluded that in light of the recent jurisprudential developments, the opinion of the French authority – albeit a soft law measure – can be subject to judicial review, the Council of State asked whether the EU soft law in question can be reviewable in an annulment action. In order to justify the need to have an answer to this question, the French court used the 'ploy' of the *Textilwerke Deggendorf* case law,[7] on the

[3] O Ştefan, '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* 359, 367–68.

[4] Case C-294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] EU:C:1986:166, para 23.

[5] Case C-16/16 P *Belgium v Commission* [2018] EU:C:2018:79.

[6] Conseil d'État, 9ème–10ème chambres réunies, 4 December 2019, no 415550, ECLI:FR:CECHR:2019:415550.20191204, registered as Case C-911/19 *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)* (pending).

[7] Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] EU:C:1994:90.

basis of which an act which can 'without any doubt' be challenged directly in a direct action cannot subsequently be challenged indirectly through a preliminary question of validity. Considering that it needs to have an answer in relation to the possibility of directly challenging the EBA guidelines in order to make a determination as to whether an indirect challenge is available to the applicant, the Council of State 'cornered' the CJEU into giving an answer on the question of the judicial review of EU soft law.

The opinion of AG Bobek in *Belgium v Commission* and the pending preliminary ruling question show, on the one hand, that the discussion concerning the admissibility requirements is far from settled and, on the other hand, that this discussion is inextricably linked to that concerning the judicial review of domestic soft law. In light of this, this chapter provides a comparative law perspective to the criteria applicable to the judicial review of domestic soft law measures, and applies those findings to the measures covered by the SoLaR research, with the aim of evaluating the CJEU's approach vis-a-vis its national counterparts. Although EU soft law can also be reviewed indirectly through the preliminary question of validity under Article 267 TFEU and – in the case of domestic soft law – through a direct challenge of an administrative measure based on that soft law instrument, this chapter is exclusively focused on the *direct* judicial control of EU soft law. The system of indirect review of EU soft provides an additional avenue for litigants; however, as highlighted by AG Jacobs in the *UPA* ruling,[8] it is not an adequate substitute for the lack of direct actions. Because of the present focus on the direct judicial control of EU soft law, the analysis at the national level will be limited to the rules on direct actions against domestic soft law measures.

This chapter proceeds as follows. After introducing the case law of the CJEU on direct actions against soft law measures, it considers the SoLaR soft law measures and investigates whether, on the basis of the case law, they would be reviewable by the CJEU. The analysis shows that none of the selected measures would be readily reviewed by the Court of Justice in an annulment action, although some (especially in the financial regulation field) may stand a higher chance of passing the threshold than others. The chapter then moves on to discuss the rules applicable to the review of domestic soft law in four of the SoLaR jurisdictions: France, England, Germany and Italy. It examines whether national courts are more generous than the European courts in terms of admitting direct claims against soft law measures, and the extent to which the selected SoLaR measures would be reviewable by national courts. Apart from being part of the SoLaR jurisdictions, this sample of legal systems reflects the various 'families' (Romanic, Germanic and common law) of administrative law – and of judicial review – in Europe. Furthermore, France and Germany are interesting

[8] Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] EU:C:2002:197, Opinion of AG Jacobs.

because they have been included by AG Bobek in his comparative overview as legal systems which have witnessed an evolution in terms of openness towards the judicial control of soft law measures.[9]

On the basis of these findings, the chapter will conclude that the a wind of change is blowing from several Member States in respect to the judicial control of soft law. Moreover, the pending preliminary question from the French Council of State may well be the golden opportunity for transforming the 'wind of change' into a 'perfect storm' which will force the Court of Justice to revisit its restrictive approach.

II. SOFT LAW BEFORE THE EUROPEAN COURTS

A. The CJEU's Case Law on Judicial Review of EU Soft Law: 'Still Confused, But on a Higher Level'[10]

The notion of 'reviewable act' is key to determining the possibilities to judicially review soft law. Pursuant to Article 263 TFEU, 'the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties'.

At first sight, this provision seems to exclude the review of soft measures. However, the Court in the *ERTA* case expanded the scope of application of judicial review to all acts intended to produce legal effects. According to the Court, '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'.[11] In the *IBM* case, the Court explained that legal effects are deemed to exist where the measure is 'binding on, and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position'.[12] Furthermore, according to the Court, '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'.[13]

On the basis of this case law, the *ERTA*/*IBM* threshold – that is, the capacity to produce legal effects, which is the 'gateway' to reviewability in actions for annulment – has been held to be met, as far as soft law is concerned, when

[9] Case C-16/16 P *Kingdom of Belgium v European Commission* [2017] EU:C:2017:959, Opinion of AG Bobek, para 84.

[10] This quote is commonly attributed to Enrico Fermi.

[11] Case C-22/70 *Commission v Council* [1971] EU:C:1971:32, para 42.

[12] Case C-60/81 *IBM v Commission* [1981] EU:C:1981:264, para 9.

[13] ibid.

guidance is construed as introducing a new obligation,[14] where a soft law measure determines the way in which an EU institution intends to exercise its discretion[15] or where the measure at stake has been produced in cooperation with the Member States.[16]

Because of the limited circumstances in which these criteria are met, there has been a call from academics for 'more stringent control',[17] arguing that such limited access to court with respect to soft law measures 'fails to acknowledge important consequences that soft law can have on the rights and obligations of individuals'.[18] Matters are further complicated by the vagueness of the *ERTA*/*IBM* case law, because the notions contained therein (such as 'capable of affecting the interests of a person', 'bringing about a distinct change' in a person's 'legal position') are not consistently applied by the Court, so that it is not easy to foresee when a soft law measure will be considered reviewable.[19]

An additional layer of uncertainty is added by the Court's criteria to assess whether an act produces legal effects, namely 'the wording, the context, the substance of the act, as well as the intention of its author'.[20] These terms are in themselves unclear and the relative weight of each of these factors has never been fully clarified by the Court. Furthermore, in the analysis of the wording and context of the act, more attention is increasingly given to the perception of the addressees of a soft law measure.[21]

Yet another source of uncertainty is generated by the inconsistent approach of the Court with respect to the use of the phrase 'legal effects'. As observed by AG Bobek,[22] there has been a shift in the case law with respect to this point. In the earlier case law, the requirement for reviewability was that the act in question was intended to produce 'legal effects', whereas in the more recent case law, the requirement has become that of an act intended to have 'binding legal effects'.[23]

[14] Case C-366/88 *France v Commission* [1990] EU:C:1990:348. Along the same lines, see Case C-325/91 *France v Commission* [1993] EU:C:1993:245.

[15] Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* EU:C:2005:408, para 211.

[16] Case C-311/94 *Ijssel-Vliet Combinatie BV v Minister van Economische Zaken* [1996] EU:C:1996:383.

[17] L Senden, 'Soft Post-legislative Rulemaking: A Time for More Stringent Control' (2013) 19 *European Law Journal* 57. See also J Scott, 'In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law' (2011) 48 *Common Market Law Review* 329; Ştefan (n 3); M Eliantonio and O Ştefan, 'Soft Law before the European Courts: Discovering a "Common Pattern"?' (2018) 37 *Yearbook of European Law* 457; J Alberti, 'Challenging the Evolution of the EMU: The Justiciability of Soft Law Measures Enacted by the ECB against the Financial Crisis before the European Courts' (2018) 37 *Yearbook of European Law* 626; AH Türk and N Xanthoulis, 'Legal Accountability of European Central Bank in Bank Supervision: A Case Study in Conceptualizing the Legal Effects of Union Acts' (2019) 26 *Maastricht Journal of European and Comparative Law* 151.

[18] Ştefan (n 3) 369.

[19] See Xanthoulis, ch 18 in this volume.

[20] *Commission v Council* (n 11).

[21] Eliantonio and Ştefan (n 17).

[22] Joined Cases C-463/10 P and C-475/10 P *Deutsche Post AG and Germany v Commission* [2011] EU:C:2011:656.

[23] This is noted in the Opinion of AG Bobek in *Kingdom of Belgium v European Commission* (n 9) paras 69–70. He notes that in *ERTA*, the court stated that 'an action for annulment must … be

This has led commentators to conclude that 'it has been difficult to predict with certainty when Union acts can be subject to judicial control and in which judicial forum'.[24]

B. Through the Looking Glass: SoLaR Soft Law before the CJEU

The above section has shown that the approach of the CJEU has been restrictive and highly unpredictable with respect to the possibility of judicial control of soft law measures. This conclusion is now tested with regard to the SoLaR soft law measures.[25]

In the field of financial regulation, all four soft law instruments studied were guidelines authored by the European Securities and Markets Authority (ESMA) and addressed to national supervisory bodies as well as directly to financial market participants. These soft law measures, while not being formally binding, have an in-built comply-or-explain mechanism, on the basis of which national authorities are required to notify ESMA and justify their action in case they decide not to follow them.

While ESMA guidelines have never been the object of a direct action before the CJEU, a case could be made in favour of their justiciability before the CJEU. Ştefan and Petri have argued, with respect to guidelines issued by the Agency for the Cooperation of Energy Regulators, that market operators may well feel that they have essentially no choice but to comply with the soft law instruments.[26] These guidelines, because of their aim, wording and addressees, might well be compared to the ESMA guidelines at stake. Also, the ESMA instruments are written in a 'prescriptive' language[27] and the perception of prescriptiveness is further reinforced by the 'comply-or-explain' mechanism enshrined therein. If the perception of the addressees is to play a role in the equation, this mechanism certainly strengthens the bindingness of the measure in the eyes of competent authorities, which have to take an additional step if they want to disregard the guidelines. A fortiori, this perception of bindingness is confirmed when considering the perspective of market operators that see compliance with the guidelines as their only realistic option. Therefore, it is not out of the question that the Court of Justice would admit a claim against these measures, based

available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have *legal effects*' (para 60). On the other hand, in *Deutsche Post AG and Germany v Commission* (n 22), the Court referred to the fact that 'any measures adopted by the institutions, whatever their form, which are intended to have *binding legal effects* are regarded as acts open to challenge, within the meaning of Article 263 TFEU' (para 36), emphasis added).

[24] Türk and Xanthoulis (n 17).

[25] See Annex I to the Introduction for a list of the measures selected for the SoLaR project.

[26] O Ştefan and Marina Petri, 'Too Weak to Be Controlled: Judicial Review of ACER Soft Law' (2018) 37 *Yearbook of European Law* 525, 534–39.

[27] See, eg, the many 'Competent authorities should ensure that …' in the 'Guidelines on complaints-handling for the securities (ESMA) and banking (EBA) sectors' (2018).

on the case law according to which a soft law measure is considered as producing legal effects if it contains a new obligation vis-a-vis the hard law measure it is considered to concretise. This conclusion seems to be supported by the *Clearing Houses* case, in which the General Court (GC) admitted a claim against a 'policy' by the European Central Bank. In this case, the Court emphasised the very specific language used in the instrument – comparable to that used by the ESMA guidelines under examination – as well as 'the way in which the parties concerned could reasonably have perceived' it.[28]

In the field of competition and State aid law, the SoLaR project comprised 13 Commission-authored instruments, in which the Commission explains how it will enforce EU law. At first sight, these measures seem to be less prescriptive than the SoLaR financial regulation instruments. However, the Court in the *Dansk Rørindutri* case construed a 'comply-or-explain' mechanism for competition and State aid measures, which resembles the mechanism contained in the above-mentioned ESMA guidelines. On the basis of this case, soft law in this field has a 'self-binding' effect on the institution issuing the measures and can only be departed from if the authority duly provides reasons for doing so.[29] Nevertheless, this mechanism only applies to the issuing EU institution and not to the national authorities. In the *Expedia* ruling, the Court of Justice – departing from the AG's position[30] – stated that national competition authorities 'may take into account [Commission Notices,] but [are] not required to do so'.[31] On the basis of this case law, and applying the *ERTA* case law (possibly even 'corrected' by the increased attention towards the 'perception of the addressees' to establish whether a measure is intended to produce legal effects), it seems unlikely that any of those measures will be considered reviewable by the Court of Justice.

This conclusion seems to be corroborated by two rulings brought against one of the SoLaR State aid measures, ie, the 'Guidelines on State aid for environmental protection and energy 2014–2020'.[32] In these cases, the Court did not admit a claim brought against this soft law instrument, but rather than pointing out a lack of a 'reviewable act', it denied the claim on the basis of lack of 'direct concern' for the purposes of Article 263(4) TFEU. The Court did not discuss whether the guidelines constituted a reviewable act under Article 263(4) TFEU and proceeded to determine whether the measure was of 'direct concern' to the application, ie, whether it was liable to directly affect the legal situation of the

[28] Case T-496/11 *United Kingdom of Great Britain and Northern Ireland v European Central Bank (ECB)* [2015] EU:T:2015:133.

[29] *Dansk Rørindustri* (n 15).

[30] Opinion of AG Kokott in Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others* [2012] EU:C:2012:544.

[31] Case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* [2012] EU:C:2012:795, para 53.

[32] Case T-694/14 *EREF v Commission* [2015] EU:T:2015:915; Case T-670/14 *Milchindustrie-Verband and Deutscher Raiffeisenverband v Commission* [2015] EU:T:2015:906.

individual. This judicial attitude supports the literature which has observed the conceptual confusion in the Court's case law[33] between the notions of 'reviewable act' and that of 'direct concern', as they are both linked to the idea of a measure being able to produce 'legal effects'.[34]

For the environmental law field, the SoLaR sample included a number of interpretative soft law measures stemming from three environmental directives. These measures, coming with various names, publication and translation statuses, all aim at 'giving practical guidance in the implementation of technically complex pieces of legislation, including the interpretation of ambiguous legal terms'.[35] Because of their interpretative nature and despite the criticism expressed in earlier writings,[36] and more recently by AG Bobek,[37] it is unlikely that these soft law measures will be considered as producing 'binding legal effects' and thereby pass the 'reviewability act' test. This is because, first of all, these soft law measures constitute interpretative aid addressed to Member States. They do not contain statements of how the Commission is going to exercise its discretion. Furthermore, they have not been adopted in the framework of a *specific* cooperation obligation between the Member States and the Commission.[38] Finally, the environmental guidance documents contain disclaimers as to their non-binding nature and lack of intention to create any new obligations.

Finally, in the social policy field, the SoLaR project has selected three soft law measures. The Buying Social guide provides guidance 'chiefly for public authorities' and encourages the consideration of social criteria for selecting tenders in EU public procurement law.[39] The document is non-prescriptive in its language and only suggests options for competent authorities and market players. The Commission recommendation on investing in children, much like the recommendation at stake in *Belgium v Commission*, acknowledges that 'policies addressing child poverty are primarily the competence of Member States',[40] but suggests that 'a common European framework can strengthen synergies across

[33] See, eg, *Deutsche Post AG and Federal Republic of Germany v European Commission* (n 22) para 38: 'Where … an action for annulment is brought by a non-privileged applicant against a measure that has not been addressed to it, the requirement that the binding legal effects of the measure being challenged must be capable of affecting the interests of the applicant by bringing about a distinct change in his legal position *overlaps with* the conditions laid down in the fourth paragraph of Article 263 TFEU' (emphasis added).

[34] Türk and Xanthoulis (n 17); see also Xanthoulis, ch 18 in this volume.

[35] See A Hofmann, ch 3 in this volume.

[36] Scott (n 17); Eliantonio and Ştefan (n 17).

[37] See Opinion of AG Bobek in *Kingdom of Belgium v European Commission* (n 9) para 104: 'Could it not be expected of a Member State, when implementing the original piece of EU legislation, to which the post-legislative recommendation is in a way "attached", to implement it in the way further clarified in that recommendation? If not, what is the recommendation then for? If yes, then the considerable and real legal effects of a recommendation can hardly be disputed.'

[38] *Ijssel-Vliet Combinatie BV v Minister van Economische Zaken* (n 16) para 44.

[39] European Commission, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement* (Luxembourg, Publications Office of the European Union, 2011), 5.

[40] European Commission, 'Commission Recommendation of 20 February 2013 Investing in children: breaking the cycle of disadvantage' [2013] OJ L59, para 16.

relevant policy areas, help Member States review their policies and learn from each other's experiences'.[41] It therefore only 'recommends that Member States organise and implement policies to address child poverty and social exclusion … in accordance with the following guidelines'.[42]

The third social policy soft law instrument is possibly the closest to the Recommendation which AG Bobek considered in his opinion. The Commission 'Recommendation on transparency in equal pay' builds on EU hard law and 'provides guidance to Member States to assist them in a better and more effective implementation of the equal pay principle in order to combat pay discrimination and to contribute to tackling the persistent gender pay gap'.[43] It does so in a fairly prescriptive language, by suggesting a number of measures which Member States 'should' implement.

However, none of the three comes close to the degree of precision and prescriptiveness displayed by the Commission Recommendation[44] at stake in the *Belgium v Commission* case. Nevertheless, the GC in the *Belgium v Commission* case confirmed that the wording of the Recommendation only contained an 'invitation' and that there was no intention on the Commission's part to produce binding legal effects.[45] However, as has convincingly been argued, 'the detailed prescriptive provisions of the recommendations contradict the idea that only suggestions are made and mere principles are outlined without the expectancy that Member States will also comply with the proposed recommendation'.[46] Be that as it may, the conclusions reached by the GC and reiterated by the Court of Justice in *Belgium v Commission* confirm that most probably, none of the SoLaR social policy instruments will be reviewable before the Court of Justice.

In conclusion, in all likelihood, none of the SoLaR measures would be readily considered as a reviewable act by the Court of Justice in an annulment action. The most likely candidates to pass the applicable threshold are the ESMA guidelines, if and only if the Court takes the 'comply-or-explain' mechanism and the role of the perception of the addressees seriously.

[41] ibid.

[42] ibid after para 17, 'recommends that Member States …'.

[43] European Commission, 'Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency' [2014] OJ L69, after para 24, I, 1.

[44] European Commission, 'Commission Recommendation of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online' [2014] OJ L 214/38. That the measure at stake has a very prescriptive and precise language is also the assessment of AG Bobek in *Kingdom of Belgium v European Commission* (n 9) para 128.

[45] The GC in Case C-16/16 P *Belgium v Commission* (n 5).

[46] F Coman-Kund and C Andone, 'European Commission's Soft Law Instruments: In-between Legally Binding and Non-binding Norms' in P Popelier, H Xanthaki, W Robinson, JT Silveira and F Uhlmann (eds), *Lawmaking in Multi-level Settings: Legislative Challenges in Federal Systems and the European Union* (Baden-Baden, Nomos, 2019) 188.

III. THE JUDICIAL CONTROL OF SOFT LAW BEFORE THE NATIONAL COURTS: VARIATIONS ON A THEME

The above section concluded that, with varying degrees of likelihood, none of the SoLaR soft law measures will be easily amenable to judicial control in an annulment action before the European courts. This section proceeds to examine the admissibility requirements for domestic soft law in order to evaluate the extent to which the selected SoLaR measures would be reviewable by the national courts. The aim of the analysis is not to provide a detailed examination of whether functionally equivalent domestic soft law measures in the national legal systems exist and have been or would be judicially reviewable, but rather to discuss the broader trends in the review of soft law at the national level in order to compare and contrast these trends with those sketched above with respect to the EU judiciary.

A. Italy: A Traditional (Yet Not Totally Deaf) Approach to the Judicial Review of Soft Law

In the Italian legal system, the main domestic soft law measures are the 'administrative circulars' (*circolari amministrative*), measures through which administrative authorities traditionally give instructions to hierarchically subordinated authorities.[47] Given their internal nature, the case law has consistently held that they cannot be challenged directly before the administrative courts, but only together with a subsequent single-case decision that is based on an allegedly unlawful circular. This is because, as internal measures, circulars are considered incapable of producing any concrete harm to an individual's legal position.[48]

However, this general rule finds an exception for those cases in which circulars display legal effects outside the administration, by concretely governing the activities of the addressees.[49] For example, a circular which explains how to submit an application to obtain funding under the Common Agricultural Policy[50] or a circular which provides for conditions on how to carry out driving examinations[51] has been considered reviewable.

In light of this, the SoLaR soft law measures in the fields of competition law, environmental law and social policy, while not reviewable by the CJEU on the basis of the applicable case law, would also not meet the required threshold under Italian law. This is because these Commission measures are addressed

[47] See further J Alberti and M Eliantonio, ch 11 in this volume.
[48] TAR Lazio, Sez II, 30 August 2012, n 7395.
[49] TAR Lazio, Sez I, 13 February 2019, n 2800.
[50] TAR Lazio, Sez II Ter, 19 January 2015, n 802.
[51] TAR Campania Napoli, Sez III, 11 September 2007, n 7481.

to national competent authorities and so, should a claim against comparable circulars be brought before an Italian administrative court, the likely conclusion would be that these measures are of purely internal relevance, as they help authorities to interpret certain legislative terms, enforce the legislation or merely suggest a certain course of action. A different conclusion could instead be reached for the ESMA guidelines. Indeed, provided that the ESMA guidelines are explicitly addressed to market participants, they would fulfil the requirement, created by the Italian case law, on the basis of which circulars are directly challengeable when they display legal effects outside the administration, by concretely governing the activities of the addressees.[52] Therefore, while not much more open than the EU legal system, the Italian system does allow the direct judicial control of at least those soft law measures that *directly* regulate the conduct of individuals.

B. France: Towards a New Dawn for the Judicial Review of Soft Law?

Like the Italian legal system, the French legal system is also familiar with the notion of 'circulars' (*circulaires*), internal administrative measures with comparable features and functions to their Italian counterparts.[53] However, the notion of 'soft law' (*droit souple*) in France is a complex, diverse and wide-ranging phenomenon, which does not end at the – albeit fundamental – notion of circulars.[54]

The French legal system has witnessed a remarkable evolution with respect to the judicial control of soft law, which, as mentioned above, has been explicitly singled out as a 'best practice' by AG Bobek.[55] Indeed, until 2002 and on the basis of a long-standing case law (which started with the 1954 *Institution Notre-Dame du Kreisker* ruling), a circular could only be subject to an action for judicial review if it 'added to the legal system'.[56] In general, this was rarely considered to be the case for circulars, as their main function is to interpret the law and not to add new rules.[57] The *Institution Notre-Dame du Kreisker* ruling was itself a result of the evolution of an earlier jurisprudence according to

[52] See, eg, para 1 of Annex I of the 'Guidelines on the exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps', pursuant to which: 'These guidelines apply to investment firms, credit institutions, third-country entities, firms as referred to in point (l) of Article 2(1) of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments (MiFID).'

[53] See further N Rubio and O Ştefan, ch 8 in this volume.

[54] C Testard, 'Le droit souple, une "petite" source canalisée' (2019) 16 *Actualité Juridique de Droit Administratif* 934.

[55] *Kingdom of Belgium v European Commission* (n 9) Opinion of AG Bobek, para 85.

[56] Conseil d'État, Assemblée, 29 January 1954, n 07134 (*Notre-Dame du Kreisker*).

[57] R Chapus, *Droit du contentieux administratif* (Paris, Domat, 2008) 750.

which circulars could never be subject to judicial control. They were invariably considered 'interpretative' in nature and therefore incapable of 'adding to the legal system'. With the *Institution Notre-Dame du Kreisker* ruling, the Council of State recognised that circulars may sometimes be able to 'add to the legal system', namely that they may go beyond merely interpreting the law towards adding new rules. Those circulars were then regarded as challengeable in an action for annulment. In 2002, one further step towards a broader review of circulars was taken with the *Duvignères* ruling. In this case, the Council of State held that the main criterion to establish the reviewability of a circular is the presence of 'mandatory terms'. On this basis, a circular that merely reiterates the mandatory terms of a legislative provision, despite not 'adding to the legal system', can nevertheless be challenged.[58]

More recently, the focus of the Council of State moved from assessing wording to evaluating the perception and impact of the particular measure on the potential addressees. For example, the 2011 *Formindep* ruling evaluated the recommendations on good medical practices issued by the competent French authority.[59] The court did not examine the mandatory nature of the content of the measure, but rather looked at how the measure would be taken into account by health professionals in light of their deontological obligations. It is also noteworthy that the Council of State linked the 'weight' that the recommendation would have on its addressees to the fact that the measure was supposed to reflect the scientific state of the art.[60] Part of this 'cultural evolution' was a report issued by the Council of State in 2013 dedicated entirely to the phenomenon of soft law. The report had the twofold aim of increasing awareness on the proliferation of soft law instruments and giving public authorities conceptual tools for its appropriate use.[61]

The trend towards a broader control of soft law measures was further confirmed in 2016 with two Council of State rulings about a statement (*prise de position*) of the French Competition Authority and press releases of the French

[58] Conseil d'État, Section du Contentieux, 18 December 2002, n 233618 (*Mme Duvignères*); see also Conseil d'État, 4ème et 5ème sous-sections réunies, 8 March 2006, 275551 (*Fédération des conseils de parents d'élèves des écoles publiques*); Conseil d'État, 1ère et 6ème sous-sections réunies, 26 September 2005, n 270234 (*Conseil national de l'ordre des médecins*); Conseil d'État, 1ère et 6ème sous-sections réunies, 17 November 2010, n 332771 (*Syndicat français des ostéopathes*); Conseil d'État, 9ème et 10ème sous-sections réunies, 3 May 2011, n 331858 (*Société Voltalis*).

[59] Conseil d'État, 1ère et 6ème sous-sections réunies, 27 April 2011, n 334396 (*Association pur une formation medicale independante (FORMINDEP)*).

[60] On this point, see further M-L Moquet-Anger, 'Brevet de juridicité et contrôle de légalité des recommandations de bonne pratique de la Haute Autorité de santé (HAS)' (2011) 42 *La Semaine Juridique Administrations et Collectivités territoriales* 2321, with reference to the earlier case law on the role of science in the determination of administrative courts' decisions. A similar position was expressed with respect to the recommendations of the French Drug Safety Agency (Agence Française de Sécurité Sanitaire des Produits de Santé): Conseil d'État, 1ère et 6ème sous-sections réunies, 4 October 2013, n 356700 (*Agence française de sécurité sanitaire des produits de santé*).

[61] 'Etude annuelle 2013 du Conseil d'État – Le droit souple', https://www.vie-publique.fr/rapport/34021-etude-annuelle-2013-du-conseil-detat-le-droit-souple.

Financial Market Authority, respectively.[62] In these cases, the Council of State again departed from the imperative nature of the wording to instead look at the capacity of the measure to produce 'significant effects', especially of an economic nature, or to 'significantly influence' the behaviour of the addressees.[63]

This position has been followed in a number of later rulings concerning a statement and several press releases of the High Council for Audiovisual Communications (Conseil supérieur de l'audiovisuel),[64] an instruction for the use of a drug drawn up by the High Authority of Health (Haute autorité de santé)[65] or guidelines concerning the use of mobile networks issued by the Regulatory Authority for the electronic communications and postal services (Autorité de régulation des communications électroniques et des postes).[66]

The question that remained following these cases was whether this case law ought to be seen as specific for the regulatory agencies and therefore not generalisable to other acts of soft law. The answer to this question is also relevant for the present purposes. Indeed, on the basis of this case law, it seems likely that the ESMA guidelines would be reviewable before French courts, because of their particular weight in the regulation of the market and their capacity to influence the behaviour of the market actors on the basis of the comply-or-explain mechanism.

The question of generalisability of the case law has been debated in doctrine. Some have argued that there are elements that speak in its favour, especially because the above-mentioned 2013 Report by the Council of State concerned soft law in general and may be taken to show a general change of mentality in the French highest administrative court.[67] This suggests – as also hinted by AG Bobek in his Opinion – that all SoLaR soft law measures could in principle be subject to judicial review on the basis of this case law, because all SoLaR measures are capable of producing 'significant effects' or 'significantly influencing'

[62] Conseil d'État, Assemblée, 21 March 2016, n 368082 and Conseil d'État, Assemblée, 21 March 2016, n 390023 (*Société Fairvesta International GmBH*).

[63] See further A Sée, 'Le droit souple des autorités de régulation' (2016) 5 *Droit administratif Commentaire* 34, who relates this case law to the earlier case law on the *mesures d'ordre interieur*. The same is argued by L Benezech, 'L'affermissement de la justiciabilité des actes de droit souple devant le Conseil d'État' (2020) 2 *Droit Administratif* Commentaire 6. The case law has been confirmed, eg, with respect to a deliberation through which the High Council for the Audiovisual Sector (Conseil supérieur de l'audiovisuel) determined that a certain advertisement cannot be broadcasted: Conseil d'État, 5ème–4ème chambres réunies, 10 November 2016, n 384691 (*Mme Marcilhacy et autres*).

[64] Conseil d'État, 5ème–4ème chambres réunies, 10 November 2016, n 384691 (*Mme Marcilhacy et autres*).

[65] Conseil d'État, 1ère–6ème chambres réunies, 19 July 2017, n 399766 (*Société Menarini France et autres*).

[66] Conseil d'État, 2ème–7ème chambres réunies, 13 December 2017, n 401799 (*Société Bouygues Télécom et autres*).

[67] Sée (n 63); for a critical discussion concerning only the soft law of regulatory agencies, see L Calandri, 'La justiciabilité variable des actes de Soft Law des autorités de régulation: retour sur une jurisprudence en construction' (2020) 1 *Droit Administratif*, Étude 2; arguing for a restrictive approach, S von Coester, 'Les communiqués', *Revue Française du Droit Administratif* 2016, 497.

the behaviour of the addressees, whether in the form of the determination of the existence of environmental effects of a certain project or a violation of competition law, or the production of new policies in the workplace or in award procedures.

This conclusion has now been reaffirmed by a 2019 ruling of the Council of State, which concerned a non-binding declaration (*déliberation*) of the French High Authority for the Transparency in Public Life (Haute autorité pour la transparence de la vie publique) concerning Marine Le Pen's statement on her financial situation, as required by the applicable legislation.[68] The French court held that even if the challenged measure was not binding, it was neverthless liable to produce 'significant effects', notably in terms of reputation, for the applicant – effects which, in turn, were liable to influence the behaviour of those to whom the applicant addresses herself, ie, the voters.

Two more rulings confirm this trend. In one of these rulings, handed down in 2019, the Council of State departed from the notion of 'economic effects' that it mentioned in *Fairvesta* to consider that the determining criterion to assess if a recommendation of the French Drug Safety Agency can be subject to judicial control is whether the measure issued by an 'administrative authority'[69] is liable to 'significantly influence the behaviour of the applicants and holders of marketing authorisation, as well as of patients'.[70] This case law constitutes an extension of the earlier *Fairvesta* case law, not only because it concerns a type of soft law measure beyond the field of economic regulation and the activities of regulatory authorities, but also because it takes into account possible 'behavioural effects' which are very far removed from the measure at stake.

The difficulties surrounding the test (How can the capability of the soft law to influence or change the behaviour of the target addressees be determined? What effects should count as 'significant'? How to define the addressees?) have not gone unnoticed in French academia.[71] However, the trend described above

[68] Conseil d'État, Assemblée, 19 July 2019, n 426389 (Marine le Pen).

[69] See on this point, L Benezech, 'L'affermissement de la justiciabilité des actes' (n 63). He notes that the Council of State changed the terminology in this case from soft law issued by a 'regulatory authority' to soft law issued by an 'administrative authority'. He considers this a further signal that the Council of State is determined to open the judicial review of soft law measures broadly.

[70] Conseil d'État, 1ère–4ème chambres réunies, 21 October 2019, n 419996 (*Association française de l'industrie pharmaceutique pour une automédication responsable*). Similar considerations are made in a ruling of just a few days before: Conseil d'État, 10ème–9ème chambres réunies, 16 October 2019, n 433069 (*Quadrature du net*).

[71] F Chaltiel, 'Nouvelle extension de la justiciabilité du droit souple – À propos de l'arrêt du Conseil d'État du 19 juillet 2019' (2019) *Petites Affiches*, 30 October, 4; C Malverti and C Beaufils, 'Le Conseil d'État donne du mou au droit souple' (2019) 34 *Actualité Juridique de Droit Administratif* 1994, who argue that: 'Or, sur ce point, la jurisprudence est, semble-t-il, condamnée à entrer "dans l'ère de la casuistique pure"' ('Now, on this point, the case law seems to be entering a phase based purely on "a case-by-case approach"'; R Lanneu and A Sée, 'Recours contre un acte de droit souple – Souplesse du droit, souplesse du juge' (2017) 2 *Droit Administratif*, Commentaire 9, 5 who consider that: 'En effet, dès lors qu'une autorité agit dans le cadre de sa fonction, ne peut-on pas considérer que toutes ses actions pourront potentiellement créer des effets notables? Ou que le but de son action n'est pas d'influencer significativement le comportement des individus?' ('Indeed, when an

signifies a clear mentality shift on the part of the French highest administrative court and confirms the acceptance of soft law measures as an 'object' of judicial review in their own right.[72] Moreover, for the purposes of this chapter, it should be observed that this approach may likely lead to the possibility of judicial control of all SoLaR measures, including the 'softer' ones such as those in the field of social policy, because they all have the potential to influence the behaviour of those to whom the measures are addressed.

C. England: Much Ado about Nothing?

In the English legal system, domestic soft law measures are very common and have a variety of names such as 'guidance', 'policy', 'guideline', 'circular' and more.[73] The question *of whether* they can be judicially reviewed is not something that has been contentious or explicitly discussed in the case law. This is because the English system of judicial review is not dogmatic with respect to the doctrine of the 'forms of administrative action',[74] unlike many continental legal systems, and virtually any form of administrative action can be regarded as a 'decision' for the purposes of bringing a claim for judicial review.[75]

On this basis, for example, 'policies',[76] 'guidance',[77] 'instructions'[78] and 'circulars'[79] have all been held to be judicially reviewable.[80]

authority acts to exercise its functions, can all its actions not be considered as potentially able to create significant effects? Or can it not be considered the aim of its actions to significantly influence the individuals' behaviour?'); C Testard, 'Le droit souple, une "petite" source canalisée' (2019) 16 *Actualité Juridique de Droit Administratif* 934, who extensively unveils the unclarities and possible inconsistencies in the new test advanced by the Council of State.

[72] See also Malverti and Beaufils (n 71), who consider the implication of this new trend for the judicial review of French soft law in general; S Boda and B Pouyau, 'Actes de droit souple – Une extension majeure du domaine des actes de droit souple faisant grief: la justiciabilité des délibérations de la Haute Autorité pour la transparence de la vie publique' (2019) 12 *Droit Administratif*, Commentaire 51.

[73] See further M Dobbs and O Ştefan, ch 15 in this volume.

[74] For more on this, see M Eliantonio and F Grashof, 'Types of Administrative Action and Corresponding Review' in M Eliantonio and C Backes (eds), *Cases, Materials and Texts on Judicial Review of Administrative Action* (Oxford, Hart Publishing, 2019).

[75] According to r 54.1(2) of the Civil Procedure Rules: '(2) In this Section – (a) a "claim for judicial review" means a claim to review the lawfulness of (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function.'

[76] See, eg, *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710; *R (Suppiah) v Secretary of State for the Home Department* [2001] EWHC 2 (Admin).

[77] *R (Equality and Human Rights Commission) v Prime Minister* [2011] EWHC 2401 (Admin); *R (A) v Secretary of State for Health* [2009] ECA Civ 225; *R (Axon) v Secretary of State for Health* [2006] EWHC 37 (Admin); *R (Burke) v General Medical Council* [2005] EWCA Civ 1003; *Palestine Solidarity and Another, R (on the Application of) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16 (29 April 2020).

[78] *R. v City of Sunderland ex p Baumber* [1996] COD 211.

[79] *R v Secretary of State for the Home Department ex p Northumbira Police Authority* [1989] QB 26; *R v Secretary of State for Health ex p K* (1998) 1 CLLR 495.

[80] See further the case law mentioned in M Fordham, *Judicial Review Handbook*, 5th edn (Oxford, Hart Publishing, 2008) 2006–10.

Particularly interesting for our purposes is *Pfizer* – a case which concerned a government circular recommending that Viagra should only be prescribed by general practitioners in exceptional circumstances and on notice to the Department of Health, and advising health authorities not to support the provision of the drug out of NHS funds. In the context of the discussion of the effects of the guidance (and their justiciability), the court explicitly stated that 'advice or guidance promulgated by a public authority may be the subject of judicial review if it contains an error of law. This is particularly so *if it is likely to be acted upon by those it addresses*' (emphasis added).[81] In the rest of the judgment, the emphasis is, similarly to the French rulings discussed above, on the authoritative nature of the circular, the fact that it could reasonably be expected that doctors would conform to it, and how it was 'perceived' as having essentially binding effects by the press.

It might thus be concluded that virtually all SoLaR measures would in principle be reviewable by the English courts. However, because the English approach is open, 'pragmatic' and context-specific, it is hard to pinpoint and identify any 'lessons' for the European courts to learn with respect to the judicial review of soft law. In this sense, the lack of a dogmatic discussion on this topic renders – somewhat paradoxically – the English 'good practice' non-inspirational and difficult to export to the EU level.

D. Germany: Hardly a 'Good Practice'?

In the German legal system, domestic soft law most often takes the shape of 'administrative directions' (*verwaltungsvorschriften*), which have a similar function as the *circulaires* discussed above for the French and Italian systems. German doctrine divides administrative directions into three broad categories, namely, administrative directions guiding the exercise of administrative discretion (*ermessenslenkende Verwaltungsvorschriften*), interpretative administrative directions (*norminterpretierende Verwaltungsvorschriften*) and administrative directions 'concretising' legal provisions (*normkonkretisierende Verwaltungsvorschriften*).[82] While the first two types are considered incapable of producing effects outside the administration, the third category has been recognised as capable of producing direct legal effects as a form of 'anticipated

[81] *R Pfizer Ltd v Secretary of State for Health* [2011] EWHC Admin 504, para 26. In this same paragraph, earlier case law concerning a circular (containing advice) in the planning area is quoted, specifically *R v Worthing Borough Council and Secretary of State for the Environment ex p Burch* [1983] 11 WLUK 152. In this case, Mann J argued: 'In my judgment, it is quite unreal to suppose that a local planning authority would do otherwise then accept the opinion as decisive … So, in practice. I am quite satisfied that the procedure that is envisaged by the Circular does constrain the local authority.'

[82] See further T Sauerland, *Die Verwaltungsvorschrift im System der Rechtsquellen* (Berlin, Dunker & Humblot, 2005).

legal advice' to the administration.[83] These are, for example, measures in the environmental law field that specify certain legal provisions contained in the legislation (eg, how much noise an installation needs to produce in order for it to qualify as a nuisance for the purposes of the legislation).[84] This type of administrative directions may be challenged in the special procedure for the control of general and abstract forms of administrative rule-making.[85] However, in order to be considered as capable of producing direct legal effects and, consequently, qualifying for judicial control, a number of conditions need to be met. First, the soft law measures must be adopted on the basis of a legislative empowerment and, second, they must be published in accordance with the publication requirements foreseen for legislation.[86]

On the basis of these conditions, none of the SoLaR soft law measures would be amenable to judicial control. Indeed, several soft law measures – such as those in the social policy field – are not adopted on the basis of a legislative empowerment and are instead a 'substitute' for rather than a 'concretisation' of legislative provisions.[87] Those for which a legislative empowerment can be found – such as the ESMA guidelines or the Guidance Documents linked to the implementation of the Water Framework Directive – lack the second requirement necessary under German law to bring a claim against a soft law measure, that is, a form of publication akin to that foreseen for legislation. Both these two sets of soft measures are only published on the official website of ESMA and the Commission, respectively, and not on the Official Journal as required for EU legislation.[88] However, this conclusion should not be taken to mean that the German legal system is in itself overly restrictive in its approach to the judicial review of soft law, but as a confirmation of earlier findings of how EU soft law falls short of fundamental publicity and accessibility criteria.[89]

IV. CONCLUSIONS

> It is apparent from the case law that, as the European Community is a community based on the rule of law in which its institutions are subject to judicial review of the

[83] Bundesverwaltungsgericht, 17. February 1978, AZ 1 C 102.76, BVerwGE 55, 250; Bundesverwaltungsgericht, 28 October 1998, AZ 8 C 16.96, BVerwGE 107, 338; Bundesverwaltungsgericht, 20 December 1999, AZ 7 C 15.98, BVerwGE 110, 216.

[84] See, eg, in the field of noise, *Technische Anleitung zum Schutz gegen Lärm*, 26 August 1998, GMBl n 26/1998, 503; in the field of air quality, *Technische Anleitung zur Reinhaltung der Luft*, 24 July 2002, GMBl n 25–29/2002, 511.

[85] The procedure to control by-laws and executive regulations (*Normenkontrollverfahren*) foreseen in §47 VwGO.

[86] Bundesverwaltungsgericht, 25 September 2012, AZ 3 BN 1.12.

[87] On this point, see A Hofmann, ch 3 in this volume.

[88] Namely, art 297(1) TFEU.

[89] See O Ştefan, ch 19 in this volume with the literature contained therein; see also the recommendations made by the SoLaR project in ch 1 of this volume.

> compatibility of their acts with the EC Treaty, the procedural rules governing actions brought before the Community courts must be interpreted in such a way as to ensure, wherever possible, that these rules are implemented in such a way as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law.[90]

Despite principled statements such as this, the European courts have been more than reticent to admit the judicial review of soft law measures and, despite the recent efforts made by AG Bobek to encourage the Court to 'modernise' its case law and find inspiration from the several national legal systems, the jurisprudential attitude of the Luxembourg Courts has remained unchanged.

This chapter investigated, on the basis of the current state of the case law, which of the SoLaR soft law measures would be reviewable in an action for annulment under Article 263 TFEU. It has concluded that, despite the legal and practical effects that these measures are capable of producing at a national level, none of them is *certainly* going to pass the required threshold, that is, the capacity of a measure to 'produce legally binding effects'. It then investigated the requirements applicable to the judicial review of domestic soft law measures in four SoLaR legal systems in order to compare them to those applicable at the EU level.

This comparative analysis has revealed that all legal systems, to various extents, admit the judicial review of soft law measures when these measures have relevance outside the administration. Even those legal systems which apply the most restrictive test, namely Italy and Germany, allow actions against soft law measures when they are not purely internal measures, but rather acts with external relevance. On the basis of these conditions, at least the ESMA guidelines would in principle be reviewable in Italy and Germany, were it not for the lack of 'official' publication, which is required by German law. At the other end of the spectrum exists the UK, which a-dogmatically admits judicial review of soft law and which would see no specific hurdle in the control of any of the SoLaR measures. The most spectacular evolution is certainly that of the French legal system, which has witnessed a remarkable process of opening up towards the judicial review of soft law. As things stand today, a French court, taking its cue from the case law of the Council of State, would allow for the control of all of the SoLaR measures. That it would be the same French Council of State which 30 years ago stated that soft law should be considered as a 'deterioration of the law'[91] that would be regarded today as a pioneer of the theory of normativity as a continuum[92] is certainly surprising.

[90] Case C-521/06 P *Athinaïki Techniki AE v Commission* [2008] EU:C:2008:422, para 45.

[91] Conseil d'État, Étude annuelle 1991, 'De la sécurité juridique'.

[92] According to this view, law ought to be seen as a continuum with two opposite poles, ranging from legal norms to non-legal norms, with shades of grey in between, represented, amongst other things, by soft law. See, eg, F Terpan, 'Soft Law in the European Union: The Changing Nature of EU Law' (2015) 21 *European Law Journal* 68.

What is even more unexpected is that the French Council of State is trying to bring this wind of change from Paris to Luxembourg by requesting the Court of Justice to determine whether a set of guidelines issued by the European Banking Authority could be subject to an annulment action under Article 263 TFEU.[93] Time will tell whether this wind is strong enough to change the course taken by the Court of Justice.

[93] *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)* (n 6).