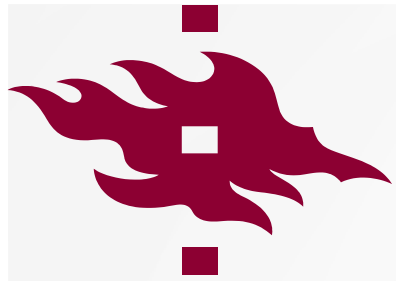


EUROPEAN SUPERVISORY AUTHORITIES AS SHADOW RULEMAKERS

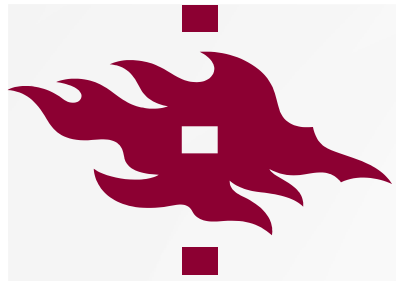
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5 December 2022

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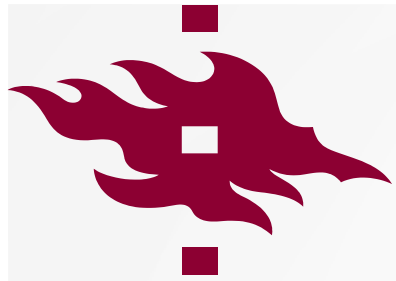
AGENDA

1. European Supervisory Authorities' (ESMA, EBA, EIOPA) regulatory powers and the Meroni doctrine
2. Soft and not-so-soft law
3. Judicial oversight of soft law after 2021



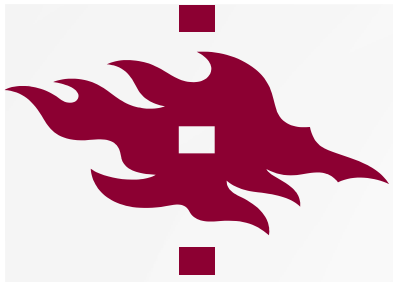
ESA'S REGULATORY POWERS

Instrument	Characteristics	Legal base (primary / secondary)
<p>Draft Regulatory Technical Standards (RTS) and draft Implementing Technical Standards (ITS)</p>	<p>ITS and RTS are binding Union acts adopted by the Commission as regulations or decisions.</p> <p>RTS non-legislative acts of general application that are to ensure “consistent harmonization” (may supplement or amend the delegating act).</p> <p>ITS adopted when “uniform conditions for implementing Union acts” are needed (cannot supplement or amend the delegating act).</p> <p>Technical” in nature; cannot entail strategic decisions or policy choices.</p>	<p>Arts 290 and 291 TFEU</p> <p>ESMA Regulation arts. 10 and 15</p>
<p>Other delegated and implementing acts drafted by the ESAs</p>	<p>The ESAs may draft delegated and implementing acts also on invitation by the Commission where power has been delegated to or conferred on the Commission.</p> <p>The Commission’s role is less restricted in comparison to RTS and ITS procedure, where the ESAs preparatory role is mandatory.</p>	<p>Arts 290 and 291 TFEU</p> <p>Implementing acts subject to the comitology procedure</p>



ESA'S REGULATORY POWERS

Instrument	Characteristics	Legal base (primary / secondary)
Executive decisions	<p>Last resort intervention powers subject to differing control and accountability mechanisms</p> <p>Decisions are binding and they prevail over any previous decision adopted by the competent authorities on the same matter</p>	<p>ESMA Regulation art. 17 (breach of Union Law); art. 18 (emergency actions); arts 19-20 (binding mediation between national authorities).</p> <p>ESMA Regulation art. 9(5) (binding temporary action on own initiative)</p> <p>No explicit Treaty basis but indirectly derived from the Lisbon Treaty's enhanced judicial protection framework (ESMA/Short selling case).</p>
Guidelines and recommendations	<p>Non-binding acts that contribute to establishing consistent, efficient and effective supervisory practices; ensure a uniform and consistent application of Union law.</p> <p>Addressed to competent authorities or financial market participants; "Comply or explain".</p>	<p>ESMA Regulation art. 16</p> <p>Fall under the general framework of Art. 288 TFEU</p>
Other soft law acts	<p>Miscellaneous "convergence acts" (opinions, statements, Q&As) with varying degrees of institutionalisation.</p>	<p>"Article 29 acts" (art. 29); Questions and answers (art. 16b), No action letters (art. 9a).</p> <p>Fall under the general framework of Art. 288 TFEU</p>



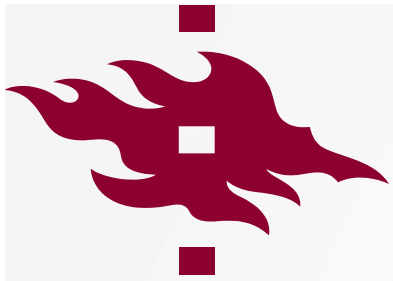
MERONI “NON-DELEGATION” DOCTRINE IN A NUTSHELL

Case 9/56, *Meroni*

- delegation acceptable if restricted to ‘**clearly defined executive powers** the exercise of which can [...] be subject to **strict review** in the light of objective criteria determined by the delegating authority’
- delegation is illegal if it implies a ‘**wide margin of discretion**’ that makes possible the execution of actual economic policy
- **Note:** powers cannot be presumed, must be delegated by express decision.

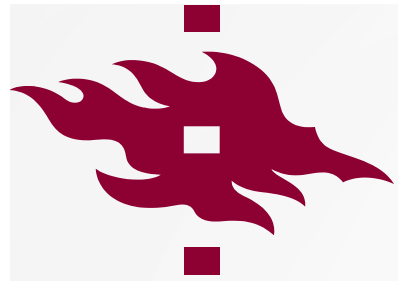
Case 270/12, UK v. Council and Parliament (Short selling)

- Delegation of powers to agencies to issue **legally-binding and generally applicable measures** possible, but within strict limits.
- Powers must be at least (a) subject to sufficiently delineating conditions and criteria limiting discretion and (b) amenable to judicial review.
- The Lisbon Treaty’s **constitutive effect** : the Treaty outdated the ban on delegating powers with ‘the effect of law’ (*Romano*) because “the institutional framework established by the [Treaty], in particular the first paragraph of Article 263 TFEU and Article 277 TFEU [enabling judicial review of agency acts], **expressly permits Union bodies, offices and agencies to adopt acts of general application.**”



ESA SOFT LAW ACTS

- Interpret and supplement virtually every piece of EU legislation falling under the ESAs broad mandates.
- The main instrument: ESA Guidelines and Recommendations (Art. 16):
 - Adoption based on statutory mandated or own initiative
 - The acts' addressees must “make every effort to comply” with them
 - National authorities must confirm within two months of the act’s issuance whether they comply or intend to comply with the act.
 - Closest thing to real regulatory powers among EU agencies (compliance rate + 95 %)
- Article 29 acts
 - “The Authority may, as appropriate, develop new practical instruments and convergence tools to promote common supervisory approaches and practices.”

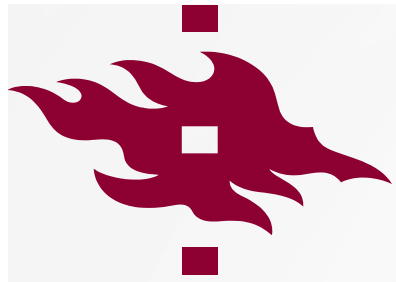


ESA SOFT LAW ACTS

- May bypass burdensome administrative procedures, such as cost-benefit analyses and public consultations, but also legislative procedures (**Meroni restrictions**)
- A risk that soft law is used

“as more than just tools for advancing policies that are politically (lack of consensus) or legally (no specific powers to that effect) gridlocked. They could also potentially be used as a tool to circumvent the same legislative processes.” Opinion of Advocate-General Bobek in ECJ, Case C-16/16 P, Belgium v. European Comm’n)

- How to ensure that the ESAs stay *intra vires* when adopting such acts?
- The 2020 ESA Reform
 - Updated and strengthened procedural requirements (*ex ante* consultation requirements and cost-benefit analyses)
 - Introduced a new administrative *ultra vires* mechanism placing the Commission as sole monitor
 - No changes to the scope of ESA Joint Board of Appeal (only binding decisions can be appealed)



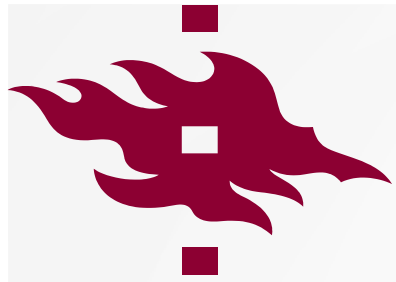
EXAMPLE: ESMA'S “NO ACTION STATEMENTS”

ESMA, *Statement to support the smooth introduction of the LEI requirements ESMA 70-145-401* (Dec. 20, 2017)

- European firms and their offshore clients were not ready to acquire a so-called “Legal Entity Identifier,” or LEI code, in the time specified in MiFID II / MiFIR
- ESMA set forth a transitional regime “to support the smooth introduction of the LEI requirements.” (market participants were late)
- **Would allow for a temporary period of six months during which the relevant firms could continue to service their clients using alternative compliance arrangements**

ESMA, *Clearing and trading obligations, Public statement ESMA 70-151-1773* (2018)

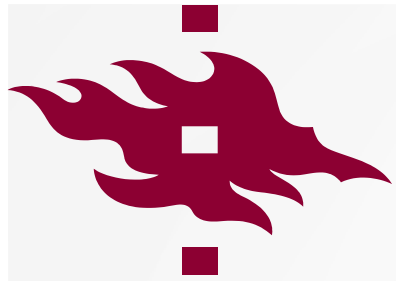
- In 2018, the foreseeable delay in finalizing the review of EMIR legislation risked triggering costly consequences in relation to the expiration of certain temporary derogations
- To avoid these costs ESMA informed the market that it “**expects competent authorities not to prioritize their supervisory actions**” towards certain entities benefiting from the derogations.



EXAMPLE: ESMA'S “NO ACTION STATEMENTS”

Problem?

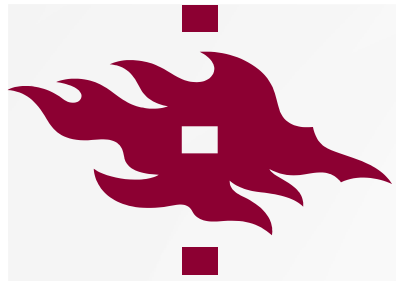
- The requirements were based on a binding EU regulation that did not specify alternative compliance arrangements;
- The statements were not issued to interpret legislation but to render a part of legislation ineffective;
- ESMA does not have formal forbearance powers (“no action letters” used extensively in the US);
- Enforcing compliance with the relevant acts not the responsibility of ESMA in the first place.



JUDICIAL REVIEW – DIRECT ACTIONS

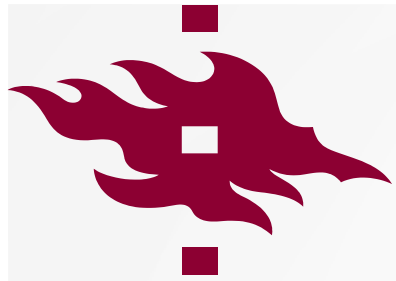
Action for annulment under Article 263(1) TFEU

- Admissibility for soft law acts governed by “**legal effects test**”: action available only for acts that *intend to produce binding legal effects vis-à-vis third parties*
- Validity not reviewed if the contested act qualifies as a “genuine soft law” measure
- Assessment focuses on substance over form, but acts easy to tailor to minimize the risk of triggering Art. 263 (for criteria see esp. C-16/16 P, *Belgium v Commission*)
- *Locus standi*: Individual applicants must also establish *direct and individual concern* (Art. 263(4) TFEU)
 - Measures of general application can meet the individual concern requirement only very exceptionally (Case 25/62 *Plaumann v. Commission*, ECLI:EU:C:1963:17, para. 107; Case C-309/89 *Codorniu v. Council*, ECLI:EU:C:1994:197, para. 19)
 - Slim chances of accessing the CJEU



JUDICIAL REVIEW – PRELIMINARY RULING PROCEDURE

- The preliminary ruling procedure under Article 267 TFEU a more promising route to European courts.
- The ECJ’s jurisdiction to give preliminary rulings on validity of legal acts covers **all acts of the institutions “without exception”** (Case C-322/88, *Salvatore Grimaldi v. Fonds des maladies professionnelles*)
- Only in 2016 did the Court admit a question regarding the validity of a non-binding instrument – a banking communication from the Commission (Case C-526/14, *Kotnik*)
 - The Court neither applied “the legal effects test” nor discussed the act’s character as a non-binding instrument.
 - Opened the door to the national courts raising questions of validity of soft law as part of Article 267 TFEU proceedings.
- The question remained: What about acts other than those issued by Union institutions?



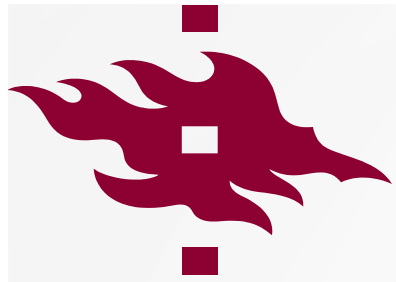
BREAKTHROUGH IN 2021

Balgarska Narodna Banka (C-501/18, 25 March 2021)

- In *Balgarska* the Court not only *reviewed* an EBA recommendation but *declared the contested act partly invalid*, despite finding the act a “genuine” soft law act.

Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR) (Case C-911/19, Grand Chamber)

- Concerned an EBA guideline dealing with bank product governance
- The French authority ACPR announced that it complies with the Guidelines (Art. 16 of the EBA Regulation)
- The notice of compliance, issued on the APCR’s website, was challenged by FBF before the French Conseil d’État
- Grounds for appeal: the EBA lacked competence to adopt the Guidelines on which the notice was based (claimed that the Guidelines dealt mainly with product governance issues, whereas the relevant directives only concerned corporate governance)
- Judgment: the question was admissible under Art. 267 TFEU (would not be under Art. 267 because a genuine soft law act) and FBF had standing to bring the claim (no need to be directly and individually concerned).
- The appeal did not succeed on merits, the Court’s review was not particularly strict (compare AG Bobek)



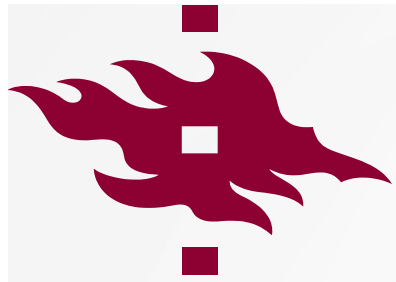
RELATIONSHIP BETWEEN ARTS. 263 AND 267 TFEU AFTER *FBF*

	Article 263 TFEU (direct action for annulment)	Article 267 TFEU (preliminary reference)
Privileged applicants (Member States, the European Parliament, the Council, and the Commission)	Admissible if the act intends to produce (binding) legal effects vis-à-vis third parties (the legal effects test) (Art. 263(2)-(3) TFEU)	Admissible regardless of the legal effects test, but access to the national court governed by applicable national procedural law.
Non-privileged applicants (natural and legal persons)	Admissible if the act meets the legal effects test and is either addressed to the person or is of direct and individual concern to the person (Art. 263(4) TFEU).	Admissible and national courts and domestic legal systems are under a duty to enable challenge. The legal effects test and standing requirements of Art. 263(4) do not apply.



A “COMPLETE SYSTEM OF REMEDIES”?

- The idea: claims that are non-admissible under Article 263 TFEU should be admissible before national courts, which can refer the question of validity to the ECJ under article 267 TFEU.
- Member States responsible for guaranteeing the fundamental right to effective judicial protection, filling gaps in the jurisdiction of Union courts where necessary (e.g. C-50/00 P, *Unión de Pequeños Agricultores v. Council*, para. 40.)



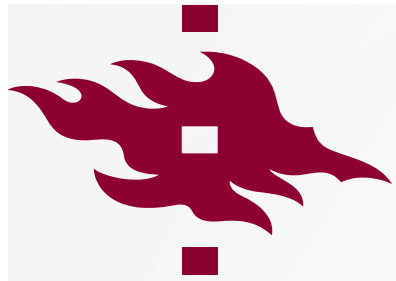
A “COMPLETE SYSTEM OF REMEDIES”?

- Effective?
 - MS under no obligation to provide for a free-standing action: there must be a “genuine dispute” to which the act pertains
 - The national judge is not obliged to invoke the Article 267 procedure unless a question of validity is raised in a case pending before the final courts.
 - Even final courts may decide to rule on the validity of a Union act by themselves if they consider the pleaded grounds to be unfounded (Acte éclair)
- The final(?) judicial piece in the EU soft law puzzle
 - Based on *Foto-Frost* national courts cannot declare an EU act invalid
 - Does the *Foto-Frost* duty to refer extend to non-binding Union acts?
 - AG Bobek: should not apply to genuine soft law acts.



CONCLUDING REMARKS

- After 2021 The EU legal order recognises a limitless number of soft law acts that have the ability “to exhort and to persuade” in a way that is legally distinct from binding legal acts, but which can still be declared invalid (at least through indirect action) just as legally binding acts.
- Based on FBF, *any private applicant* may seek to challenge, via a preliminary reference, the legality of *any non-binding act* – even acts that *no applicant could challenge via Article 263 TFEU*
- The scope of judicial review crucial for the development of EU agencies’ regulatory powers.
- Enhanced judicial review of validity of ESA soft law acts further legitimizes their role as regulatory instruments?
- Genuine soft law acts and Meroni restrictions?
- For more detail, see:
 - Marjosola, Heikki. “Shadow rulemaking: Governing regulatory innovation in the EU financial markets.” *German Law Journal* 23.2 (2022): 186-203.
 - Marjosola, Heikki, Marloes van Rijsbergen, and Miroslava Scholten. “How to exhort and to persuade with (out legal) force: Challenging soft law after FBF.” *Common Market Law Review* 59.5 (2022).



PIECE OF PROSE FROM AG BOBEK

“As a line from *Game of Thrones* has it, ‘what is dead may never die’. Thus, perhaps with the exception of White Walkers, what is dead also cannot be killed. However, can something that has never been alive (or rather never came into existence as a binding EU-law act) be annulled (or rather declared invalid) by the Court of Justice on a preliminary ruling? Alternatively, can the Court provide (binding) interpretation of a non-binding EU measure?”

(AG Bobek’s Opinion on FBF, point 1)

The point: Logic would have the act either binding and reviewable or non-binding and non-reviewable consistently under *both* Articles 263 and 267 TFEU.