Un Carrefour d'Impasses :
Judicial Review of EU Agency Soft Law in Composite Procedures

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Abstract:

The rise of agencification in the EU administrative apparatus combined with the continued apparent adherence to the *Meroni* doctrine, has led to a paradox: despite a constitutional framework that recognizes the power of EU agencies to take binding decisions and subjects those to judicial review, the present legal framework encourages them to rely on soft law and hereby escape much scrutiny. I argue that the study of judicial review of agency soft law in composite procedures exposes a junction of blind alleys in the European Court of Justice's case law that were particularly exhibited in the grand chamber's *FBF* case. This paper critically reviews these 'blind alleys' in view of the broader case law.

Firstly, the Court is sticking in the case of EU agency soft law to its stance on the legal effects of soft law measures, as clearly expressed in *Commission v Belgium*. As such, the Court not only discounts the nature of soft law measures, but also overlooks the differences in legal frameworks and the inherence of legal effects in the context of composite procedures. By consequence, the second blind alley relates to the complete system of judicial remedies against agency soft law in composite procedures, and the relationship between Articles 263 and 267 TFEU. While the preliminary reference procedure enables soft law measures to be challenges, the Court closes the door to challenges by privileged applicants under Article 263 TFEU. It is therefore incumbent on national courts to allow challenges by non-privileged applicants in the name of effective judicial protection. This interpretation has for result to undermine the (judicial) accountability of EU agencies, the third issue tackled in this paper. Although EU administrative law created mechanisms to further the judicial review and accountability of EU agencies' action, these remedies are not readily available against soft law. This is the case for procedures created pursuant to Article 263(5) TFEU, but also some other, rather esthetic, accountability mechanisms such as Article 60a of the ESAs Regulations, which creates a right to send a "reasoned advice" to the European Commission where it is believed that an agency has exceeded its competences. Fourthly, the Court's understanding and application of the judicial standard of review to measures of soft law is perplexing. Despite setting in principle a (justified) stringent standard of judicial scrutiny, this standard is not only unclear, but it is also at risk of being offset or at least undermined by the Court's flexible review *in concreto* carried out in cases where excessive discretion is left to EU agencies.

As a result, significant loopholes characterize the judicial review of agency soft law in composite procedures. Those loopholes are the Court's own doing, although the latter does not seem willing to recognize, *a fortiori* to address them. In conclusion, I make a few recommendations that could, to some extent, enable EU institutions to counterbalance the deficiencies of judicial review by a strengthening of agencies' political accountability.