Where soft law meets CILFIT: is a court ever obligated to refer questions on soft law?

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Considering the contradiction at its core, soft law is a lawyers' gift that keeps on giving. Like Schrödinger's cat, it is both binding and non-binding at the same time, i.e. both legally dead and legally alive. This contribution focusses on one of the so far unexplored legal puzzles that the soft law conundrum creates for academics and judges alike: can a court ever be legally obligated to refer a preliminary reference to the Court of Justice of the European Union (CJEU) on a formally *non-binding* piece of soft law?

After all, one of the privileges and headaches of judges ruling in last instance is the potential obligation to refer. This obligation requires a balancing act. On the one hand, the effectiveness and uniformity of EU law relies on the faithful referral of relevant cases.[952] On the other hand, referral carries real costs, for all parties involved. What is more, national high courts are of course rather used to dealing with legal uncertainty, well placed to determine the correct interpretation of EU law in a way that fits the national rules involved, and do not want to overburden the CJEU with unnecessary questions.

In the spirit of mutual respect, collaboration and accepting reality, the CJEU therefore leaves significant discretion to national high courts to determine if a reference is required.[3] Regarding soft law, moreover, the CJEU has clarified that national courts always have a *right* to refer a preliminary reference, despite the non-binding nature of soft law.[953] What has not been clarified yet, however, is if there can ever be an *obligation* to refer a question concerning soft law.

From one perspective, an obligation to refer could exist to safeguard the effectiveness and uniformity of EU law. As soft law exerts a *de facto* influence on how EU law is interpreted, the CJEU has an interest in ensuring its correct and uniform interpretation. From another perspective, it seems illogical to impose a

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[952] See for example CJEU 4 October 2018, C-416/17, ECLI:EU:C:2018:811 (*Commission v. France*) or CJEU 6 March 2018, C-284/16, ECLI:EU:C:2018:158 (*Achmea*). [3] Of course, the picture is diff erent on questions of validity, see already CJEU 22 October 1987, C-314/85, ECLI:EU:C:1987:452, par. 9 (*Foto-Frost*).

[953] This fi ts with the overall approach of the court to provide an absolute and maximal freedom for all courts to involve the CJEU where they want to, see for example CJEU 22 June 2010, C-189/10, ECLI:EU:C:2010:206 (*Melki and Abdeli*).

legally binding obligation to refer questions of non-binding soft law. Why would you need to refer if you are not even under a legal obligation to apply the norm in question? Of course, similar conundrums may play where a national court wants to pronounce on the correctness or 'validity' of a piece of soft law, to the extent that this is logically possible. Under EU law, only the CJEU can declare EU law invalid.[954] Yet can or need one ever question the validity of a piece of soft law? And if so, would doing so require a referral to the CJEU?

Because many judges, and even some good professors, prefer to avoid overly abstract discussions, let us make this legal problem more concrete. Imagine, hypothetically obviously, you are a judge at the highest Dutch administrative court, and an expert in Dutch and EU subsidy law. You are faced with a decision of the Dutch Enterprise Agency refusing to grant aid for 'environmentally sensitive permanent grassland' of a Dutch farmer. The agency finds the agricultural parcel not eligible for an EU subsidy. It refers to article 2.15 of the Dutch *Uitvoeringsregeling rechtstreekse betalingen GLB*, which provides that on sensitive permanent grassland only 'light tillage' is allowed. This provision transposes nonlegally binding guidance of the Commission, the so-called 'permanent grassland guidance'.[955] The Dutch Enterprise Agency holds that the ploughing carried out by the appellant cannot be considered 'light tillage' as defined in the Commission guidelines. The appellant naturally disagrees.

The permanent grassland guidance of the Commission complements article 45 of Regulation 1307/2013 that provides for the 'ban on ploughing' on environmentally valuable permanent grassland. The guidelines have been published at the somewhat mystical Wikicap website of the 'Joint Research Centre' of the European Commission.[956] The permanent grassland guidelines acknowledge that '[a]s a principle, the ban on of ploughing should be strictly maintained', yet also seem to allow for an exception to this rule. According to the guidelines '[t]he use of light tillage on the designated sensitive permanent grassland could be accepted provided it is with the only purpose of preparing the soil to restore the grass'.[957] This exception to the ban on ploughing is, as said, transposed in the *Uitvoeringsregeling rechtstreekse betalingen GLB,* a legally binding Ministerial regulation.

You, still our hypothetical judge, have some questions. First, is a national court bound by Commission guidelines at all, and can the Dutch paying agency use the guidelines as a 'shield' to support its decision? Second, how should the

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[954] Of course, most national constitutional courts disagree, at least as far as 'their' legal order is concerned, see most recently and spectacularly the judgment of 5 May 2020 of the German *Bundesverfassungsgericht,* ECLI:DE:BVerfG:2020:rs20200505.2b vr085915, (*Weiss*).

[955] Provided by the DG Agri's Commission services in document DS/EGDP/2015/02Rev1.

[956] https://marswiki.jrc.ec.europa.eu/wikicap/index.php/Main_Page.

[957] DS/EGDP/2015/02-Rev1, p. 9.

Commission guidelines be interpreted? For what does it mean that 'light tillage' is allowed, even though the 'ban on ploughing should be strictly maintained'? Third, do the guidelines not conflict with Regulation 1307/2013, which does not mention 'light tillage', and, if so, should you declare the guidelines 'invalid' despite their non-binding nature? Are you obligated to refer to the CJEU?

To help answer these questions, this contribution is structured as follows. We first provide a brief overview of the phenomenon of Commission guidance and how Dutch courts currently deal with guidance and preliminary references (paragraph I and II). Subsequently, we explore whether there can ever be an obligation to refer questions on formally *non-binding* guidance. To do so, we set out a 'triangle of EU principles' that govern the duty to refer. Balancing these principles, we argue that, *generally* speaking, there should be no obligation to refer questions of soft law (paragraph III). This general rule, however, then needs to be nuanced due to the Schrödinger-cat like properties of soft law. One must therefore distinguish between *different categories* of guidance documents. By discussing four key examples, we show that whether an obligation to refer arises largely depends on the *degree* of binding legal effect a guidance document has.[958] Briefly put, the more binding, in law or in fact, the stronger the case for an obligation to refer (paragraph IV). Finally, the conclusion (paragraph V) spells out some indicators that could trigger 'an obligation to refer' for a specific guidance document. These indicators, however, need to be further refined and clarified by the CJEU and further research. Therefore, our most important advice to a hypothetical judge is to refer a question to the CJEU as to whether there is an obligation to refer questions on soft law (and cite this contribution). The CJEU could then perhaps bring some further clarity, unless it chooses to leave the cat in the box….

1. The phenomenon of soft governance

In the EU, guidance documents and other soft, non-legally binding instruments have proliferated.[10] EU soft governance takes various forms, such as (joint)

[958] In this contribution we understand legal eff ects as the capacity of guidance documents to indirectly aff ect rights and obligations of their addressees or third parties. Compare T.C. Hartley, *The Foundations of European Community Law*, Oxford: Oxford University Press 2014, p. 351 and O. Stefan, *Soft Law in Court: Competition Law, State Aid, and the Court of Justice of the European Union*, Alphen aan den Rijn: Wolters Kluwer 2013, p. 16. [10] Advocate General Bobek speaks of a 'rise of soft law'. See his opinion to the judgment CJEU 12 December 2017, C-16/16P, ECLI:EU:C:2017:959, (*Commission v Belgium*), par. 81; See also Stefan 2013, p. 1.

declarations or communications that initiate and shape policies,[959] guidelines of EU agencies that promote effective supervisory practices, [960] as well as Commission guidance documents that assist Member States in the implementation of Union law.[13] Commission guidance documents form the focal point of this contribution, as national courts regularly use Commission guidance to interpret or apply provisions in EU hard law, or to assess implementing practices of national authorities.[14]

Guidance documents of the European Commission are characterised by informality. The documents formally lack legally binding force, are not issued following a transparent, standardised issuing process and are not always made accessible to the general public. [961] Guidance documents take various forms ranging from recommendations (mentioned in article 288 TEU) to even more informal documents such as handbooks, questions and answers documents, or letters to Member States.[16] Nonetheless, Commission guidelines exert strong practical and legal effects in practice. Guidance provisions can and do change the behavior of national authorities and other actors (practical effects).[962] They also do shape, through their application in practice, rights and obligations of

[959] Such as the Communication of the Commission on a 'Coordinated economic response to the Covid-19 Outbreak' COM(2020)112. See on the various soft law instruments adopted during the Covid-19 crisis, O. Stefan, 'COVID-19 Soft Law: Voluminous, Eff ective, Legitimate? A Research Agenda', *European Papers*, 5, 1, 2020,

[960] Such as the guidelines issued by the European Securities and Markets Authority. [13] See for a typology of diff erent guidance documents J.C.A. Van Dam, 'Guidance documents of the European Commission: a typology to trace the eff ects in the national legal order', *Review of European Administrative Law*, vol. 10, no. 2, 2017, p. 75-91. [14] See for an analysis of the use of Commission guidance documents by authorities and courts in the Netherlands J.C.A. van Dam, *Guidance documents of the European Commission in the Dutch legal order* (Dissertation, Institute of Public Law, Leiden Law School, Leiden University), Meijers-reeks nr. MI-337, 2020.

[961] See for a discussion of diff erent 'features' – and advantages – of informality of guidance documents Van Dam 2020, p. 33-36. See also J.C.A. Van Dam, 'Commission Guidance as Informal Implementation Tool: Fit for the Future? ', in: B. Steunenberg, W. Voermans & S. Van den Bogaert, *Fit for the Future? Refl ections from Leiden on the functioning of the EU*, The Hague: Eleven International Publishing 2016. [16] An example of a seemingly 'informal guidance document' is the 'permanent grassland guidance' document of the DG AGRI services referred to in the hypothetical case above.

[962] Such practical and legal eff ects arise, for instance, in the area of EU agricultural subsidies, where Dutch authorities regularly use Commission guidelines as if were binding rules. See Van Dam 2020, p. 135.

third parties (legal effects).[963] It is those effects that make many guidance documents a form of soft *law*, which can be defined as rules of conduct which have no legally binding force but which may have practical and legal effects.[964]

2. To refer or not to refer? The current practice of Dutch courts

Drawing on recent research, Dutch courts seem hesitant to refer questions on the interpretation or validity of guidance documents.[965] In three policy areas in which the role of Commission guidelines in judicial practices was studied, not a single preliminary reference was found on interpretation or validity.[966] This 'invisibility' of guidance documents in preliminary references stands in stark contrast to the frequent references to Commission guidelines in the rulings of Dutch courts. Dutch courts generally apply guidelines of the European Commission without giving further reasons for doing so, and without questioning their interpretation or validity.

There are, however, exceptions to this 'EU friendly' approach towards Commission guidelines. Exceptionally, a Dutch court 'overrules' or 'sets aside' guidance, for example in the 'fifty trees cases'.[967] In those cases, the Dutch paying agency applied the Commission's guidance that agricultural parcels with more than fifty trees are not eligible for aid. The Tribunal, however, held that the Dutch paying agency cannot strictly follow the Commission's 'fifty trees guideline', even where the guideline has been transposed in a legally binding Dutch Ministerial Regulation.[968] According to the Tribunal, the Dutch paying agency should take account of the individual circumstances as prescribed by the underlying EU direct payments regulation. The Tribunal thus 'overrules' the fifty trees guidelines, even though it does not question the validity of the Commission's guidance or refer a preliminary question to the CJEU.

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[963] See for a list of possible legal eff ects that soft law might entail F. Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations ', in: G. Winter, *Sources and Categories of European Union Law: A Comparative and Reform Perspective*, Baden-Baden: Nomos 1996, p. 463 and Stefan 2013, p. 16.

[964] L. Senden, *Soft Law in European Community Law*, Oxford: Hart Publishing 2004, p. 112.

[965] Van Dam 2020, p. 260.

[966] It concerns the following three policy areas: the area of the Habitats Directive 92/43/EEC, EU agricultural subsidies (direct payments) and the Citizenship Directive 2004/38/EC.

[967] CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425; CBb 22 June 2011, ECLI:NL:CBB:2011:BR2912; CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249.

[968] CBb 16 September 2013, ECLI:NL:CBB:2013:152.

The study on EU guidance in Dutch judicial practice also shows that *if* a reference to the CJEU is made, Dutch courts ask about underlying EU hard law provisions, not about the guidance documents that complement those binding provision. An example is the preliminary reference of the Dutch Council of State that led to the famous *Briels* judgment.[969] In its preliminary question the Council asked, in essence, whether so-called 'mitigation measures' could be taken into account for an appropriate assessment in the sense of article 6(3) of the Habitats Directive. Even though the Commission's Habitat guidance documents give extensive guidance on 'mitigation measures', the Council of State did not mention any of the Habitat guidance documents, either in its reference or in its eventual ruling.[970]

Dutch courts, therefore, seem reluctant to refer questions on Commission guidelines. At the same time, the legal status or legal effects of Commission guidelines in Dutch law remain highly uncertain. In some rulings, Commission guidelines are referred to as an 'interpretation aid having certain legal effects',[971] or as 'policy reference point' that can be taken into account by the Dutch Minister. [972] In most rulings, however, Dutch Courts refer to Commission guidelines without giving further explanation at all. Yet the question whether, or to what extent, Dutch authorities and courts are bound by Commission guidance seems eminently suited as the subject of preliminary reference. This is shown by the *ACM vs KPN* ruling of the Dutch Trade and Industry Appeals Tribunal.[973] In this ruling, the Tribunal asked the CJEU whether and to what extent the Tribunal was permitted to deviate from the Commission Recommendation on the calculation method for telecommunication costs.[974] As we will see in the next paragraphs, such (exceptional) preliminary references asking for a clarification of the legal effects of Commission guidelines, lead to rulings of the CJEU that are relevant for the analysis whether an obligation exists to refer a question to the CJEU. Before delving deeper into the obligation to refer for specific forms of soft law, however, it is necessary to first set out the *general* framework governing the obligation to refer, which forms the backdrop for our more specific discussion.

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[969] ABRvS 7 November 2012: ECLI:NL:RVS:2012:BY2504 (*Briels e.a.*) and CJEU 15 May 2014, C-521/12, ECLI :EU:C:2014:330 (*Briels et al. v Minister van Infrastructuur en Milieu*).

[970] From interviews with State Councillors it became clear that Habitat guidance documents are consulted regularly, yet that this does not necessarily lead to explicit references in the rulings issued by the Council of State.

[971] See for instance ABRvS 6 September 2011, ECLI:NL:RVS:2011:BS1678, par. 2.4.1 (*2011 ruling*).

[972] CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425, par. 2.6.

[973] CBb 13 January 2015, ECLI:NL:CBB:2015:4 (*ACM v KPN*).

[974] Commission Recommendation 2009/396/EC.

3. The triangle of EU principles

Where the case law does not provide a clear answer on the duty to refer, we must return to the legal principles underlying and framing the duty to refer. Arguing from these first principles, we can then devise further arguments as to whether an obligation to refer questions on EU soft law exists or not. Considering the very nature of legal principles, which have legal weight and argue in a certain direction, but do not provide binary answers, this analysis will not provide a simple yes or no answer.[975] Different principles argue in different directions, meaning ultimately a balancing act will be required.

Three key principles are primarily at stake when assessing a possible obligation to refer. The first is the effectiveness or *effet utile* of EU law.[31] The second principle is national procedural autonomy, which safeguards a certain legal space for national courts and national procedural law.[976] The third principle is the principle of conferral, which controls the division of competence between the EU and the Member States.[977] This third principle comes into play because the more binding soft law becomes, the bigger the challenge to the principle of conferral becomes as well. All three principles will be briefly set out below, after which some conclusions will be drawn on how to balance these principles against each other. The next section then applies this 'triangle of principles' to some concrete categories of soft law.

3.1 The duty of sincere cooperation and the effectiveness of EU law

The drive to protect effectiveness is deeply engrained in EU law. Where genes strive to procreate, EU law seems almost genetically engineered to strive for effectiveness. Or taking a less genetic and more psychological approach, a childhood of emancipating itself from 'normal' international law and pre-empting challenges from national law has made EU law somewhat preoccupied with uniformity and effectiveness. From *Van Gend & Loos* to *Achmea* and from *Zambrano* to *Bauer*, the CJEU has fought to ensure the overall effectiveness of

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[975] See on the fascinating nature of principles for example R. Alexy, 'On the Structure of Legal Principles', *Ratio Iuris* 2000, vol. 13, no. 3, p. 294 or R.M. Dworkin, *Taking Rights Seriously*, London: Duckworth 1978, especially chapters 2 and 3. [31] See in the procedural context already CJEU 6 December 1976, C-33/76, ECLI:EU:C:1976:188 *(Rewe*) par. 5.

[976] See generally on this principle K. Lenaerts et al., *EU Procedural law*, Oxford: Oxford University Press, 2015, p. 107.

[977] Article 4(1) and 5(1) TEU.

EU law, and to guarantee that rights under EU law become living realities instead of promises on paper.[978][979]

The duty to refer forms part of this overarching legal imperative to ensure effectiveness.[980] As indicated, the EU largely depends on national courts to apply EU law.[981] Hence it is essential that national courts enter into a dialogue with the CJEU on the validity and interpretation of EU norms that are not sufficiently clear. It is for this reason that the CJEU has consistently rejected *any* impediments to the right of national courts to refer.[982] Equally, the CJEU rejects international agreements that may 'rob' national courts of the jurisdiction to rule on questions of EU law, for example by giving exclusive jurisdiction to arbitral panels or other international courts.[983] Excluding national courts, after all, means excluding potential preliminary references and hence potential opportunities for the CJEU to ensure the correct and uniform application of EU law.

Preliminary references, moreover, form a key part of the EU's system of legal remedies. As direct actions in front of the CJEU are very limited, a preliminary reference often is the only possible route to Luxembourg. Time and again, the CJEU has reiterated that the EU has a 'complete system of remedies' in part *because* of the preliminary reference mechanism.[984] Leaving aside the real odds of getting a preliminary reference and the fact that the CJEU also maintains that asking a reference is a right of the national court and not of the parties,[40] limiting the obligation to refer therefore also limits the effectiveness of the EU's system of remedies. Consequently, the right to an *effective* remedy, as protected by article 47 of the Charter and the general principles of EU law including article 13 ECHR, also support a broad interpretation of the obligation to refer.[985]

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[978] See already CJEU 9 March 1978, C-106/77, ECLI:EU:C:1978:49 (*Simmenthal*), par.

[979] or CJEU 15 April 2008, C-268/06, ECLI:EU:C:2008:223 (*Impact*), par. 42.

[980] Cf. CJEU 24 May 1977, C-107/76, ECLI:EU:C:1977:89 (*Hoffmann-La Roche*) par. 5 and K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', *CMLRev* 2007, vol. 44, no. 6, p. 1645.

[981] See for judicial recognition also CJEU 8 March 2011, Opinion 1/09, ECLI:EU:C:2011:123 (*Unifi ed Patent Court*), par. 80.

[982] See especially CJEU 22 June 2010, C-189/10, ECLI:EU:C:2010:206 (*Melki and Abdeli*), and the case law cited therein.

[983] See inter alia CJEU 8 March 2011, Opinion 1/09, ECLI:EU:C:2011:123 (*Unifi ed Patent Court*) and CJEU 6 March 2018, C-284/16, ECLI:EU:C:2018:158 (*Achmea*).

[984] CJEU 23 April 1986, C-294/83, ECLI:EU:C:1986:166 (*Les Verts*), par. 23 [40] CJEU 6 October 1982, C-283/81, ECLI:EU:C:1982:335 (*CILFIT*), par. 9.

[985] See amongst many others, already CJEU 19 June 1990, C-213/89 ECLI:EU:C:1990:257 (*Factortame I*), par. 21, even requiring UK courts to go against the established rule of national constitutional law that courts could not give an injunction against the Crown.

The duty of sincere cooperation and the meta-principle of effectiveness therefore argue in favour of an obligation to refer on questions of soft law. Since soft law plays an important part in EU law, the CJEU should retain the final say on the validity and interpretation of EU soft law.[986] What is more, since it will generally not be possible to challenge soft law directly under article 263 TFEU,[987] or to hold the EU liable where national courts or bodies apply EU soft law, a preliminary reference may be the only remedy left to challenge an EU norm that, no matter its official legal status, de facto affects the legal position and rights of parties.[988]

3.2 National (procedural) autonomy and the CILFIT approach

The EU cannot replicate or wholly take over the elaborate national legal systems on which it relies. This especially applies to national procedural systems, which are often unique to each Member State and can be hard to harmonize. EU law, therefore, respects national procedural autonomy to a rather high degree as long as the national rules sufficiently ensure that EU rights can be enforced.[989] Consequently, within the boundaries of equivalence and effectiveness, Member States are generally free to design their national procedural rules. In fact, national procedural autonomy seems to be one of the rare areas in which the CJEU clearly, if not explicitly, allows some limits to the supremacy of EU law. For example, judgments which violate EU law but have acquired *res judicatia*, in principle do not have to reopened, even if such a reopening would address a violation of otherwise supreme EU law.[990]

National procedural autonomy is generally discussed in the context of specific procedural rules such as the existence of a remedy, particular bars or requirements for using a remedy, the possibility for courts to provide interim relief or hold the state liable, or indeed the rules for reopening final administrative or judicial

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[986] See in this vein especially the *Grimaldi* approach of the CJEU, as discussed in more detail in section IV, CJEU 13 December 1989, C-322/88, ECLI:EU:C:1989:646 (*Grimaldi*).

[987] See for a critical discussion of the CJEU's strict interpretation of the term 'legal effects' in article 263 TFEU, the opinion of Advocate General Bobek to the judgment CJEU 12 December 2017, C-16/16P, ECLI:EU:C:2017:959, (*Commission v Belgium*).

[988] See on this 'gap' in more detail M. Fink, 'EU liability for contributions to Member States' breaches of EU law', *Common Market Law Review*, vol. 56, no. 5: 1227-1264.

[989] Cf. Lenaerts et al. 2014, p. 107 and for example CJEU 7 June 2007, joined Cases C-222/05 to C-225/05, ECLI:EU:C:2007:318 (*Van der Weerd*) par. 28.

[990] Cf. inter alia CJEU 16 March 2006, C-234/04, ECLI:EU:C:2006:178 (*Kapferer*). [47] For adminstrative decisions see especially CJEU 13 January 2004, Case C-453/00, ECLI:EU:C:2004:17, (*Kühne & Heitz*).

decisions.[47] We argue, however, that, in the context of the preliminary reference procedure, the principle can be seen a bit broader as providing significant leeway to national courts on the question of whether to refer a preliminary reference or not. We thereby see national procedural autonomy as a broad principle that allows national legal systems to organize how they protect legal rights, including EU rights, as long as they stick within certain boundaries.

From this broader reading, we understand the entire mechanism in article 267 TFEU as to which courts should refer or not as a balancing exercise between effectiveness and national procedural autonomy. For national courts against whose decisions a remedy lies, national procedural autonomy wins. No obligation to refer is therefore imposed on lower national courts. On questions of validity, or where no national remedy remains, however, the principle of effectiveness wins out, in principle leading to an obligation to refer.

Even *within* the obligation to refer, moreover, we can see the CJEU balancing effectiveness with procedural autonomy. Starting with *CILFIT*, the CJEU has consistently given significant discretion to national courts ruling in last instance to decide if a preliminary reference is required. First of all, the CJEU does not require a reference where EU law is not 'necessary' to give judgment.[991] No preliminary question is therefore required "if the answer to that question, regardless of what it may be, can *in no way affect the outcome of the case*".[992] Of course, this exception is directly relevant for the duty to refer questions on soft law, as the question must be asked if soft law can or should ever directly *affect* the outcome of a case. Secondly, the CJEU gave significant leeway via the *acte éclairé* doctrine and especially the *acte clair* doctrine, which holds that no reference is required where the "correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved".[993] In later case law, such as *Ferreira da Silva* and *X*, the CJEU clarified this leeway includes the power of national high courts to settle disputes on the correct interpretation of EU law between 'their' lower courts.[994]

We see the CILFIT doctrine as an application of the principle of national procedural autonomy. If a national high court is sufficiently confident it can solve a certain question of EU law itself, it may do so.[52] Of course this leeway flows

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[991] CILFIT par. 10.

[992] CILFIT par. 10.

[993] CILFIT par. 16.

[994] CJEU 9 September 2015, C-160/14 ECLI:EU:C:2015:565 (*Ferreira da Silva*) and CJEU 9 September 2015, Joined cases C-72/14 and C-197/14, ECLI:EU:C:2015:564 (*X*).

[52] This freedom is curtailed by eff ectiveness and the duty of loyal cooperation, but only limited remedies or sanctions apply. A choice not to refer can either lead to Member State liability or to an infringement procedure by the Commission, but neither are very likely to succeed. See for example CJEU 30 September 2003, C-224/01, ECLI:EU:C:2003:513 (*Köbler*).

from a combination of real trust and sheer necessity. On the one hand, the EU legal order is based on real trust in national legal systems and courts, which generally apply EU law in a competent and loyal manner. On the other hand, the EU simply has no choice but to trust national courts. With 81 judges in total, and with so far only 27 judges able to give preliminary answers, the EU judiciary simply does not have the means to settle all cases where some doubts may arise as to the correct interpretation of EU law.

The result of this balancing act is what Lenaerts calls a "particularly subtle compromise".[995] For our purposes, the main conclusion is that, when assessing the duty to refer, one must not only look at the principle of effectiveness, which generally pushes for an obligation to refer, but also to the principle of national procedural autonomy, broadly understood, which tends to push for more autonomy for national courts to decide by themselves. For the full picture, moreover, these two principles are joined by a third one, being the principle of conferral.

3.3 The principle of conferral and its possible circumvention via binding soft law

The EU is only allowed to adopt binding legal acts where the Treaties confer the power on it to do so.[996] Crucially, moreover, such binding acts can only be adopted by the institutions and through the procedures prescribed in the Treaties. For example, the EU can adopt binding legal measures on the environment under article 192(1) TFEU. Adoption requires a collaboration between the Commission, the European Parliament and the Council. The Commission, on the other hand, cannot adopt binding legal measures on the environment by itself, unless given the power to do so, for example under article 291 or 292 TFEU. What the Commission can do, however, without having been conferred any power to do so, is to adopt *non-binding* guidance instruments on environmental matters. Since guidance is non-binding, its adoption does not violate the principle of conferral, nor does it affect the institutional balance within the EU.

Of course, the tension between soft law and the principle of conferral increases where soft law acquires some *de facto* or *de iure* binding effect. The more binding soft law becomes, the more problematic the lack of a conferred power becomes. *De facto* binding soft law may also violate the EU institutional balance. After all, the net effect is that an EU institution or body can adopt (semi-) binding acts without the Member States ever having conferred this power on it or without other institutions being able to affect these decisions or protect their own conferred powers.

Consequently, giving soft law any form of legally binding effect creates friction with the principle of conferral. This is also where conferral and the obligation to refer meet. An obligation to refer questions on a norm of soft law

[995] Lenaerts et al. 2014, p. 100, par. 3.54.
[996] Article 4(1) and 5(1) TEU.

implies that this norm has some legal binding effect. After all, under CILFIT, there is no obligation to refer a question which is not in some way legally relevant for deciding the case. What is more, the judgment from the CJEU which interprets and applies any norm of EU law, including a norm of soft law, certainly is binding. An obligation to refer questions on EU soft law would therefore not only imply a certain level of bindingness of these soft law norms, but may also *make* the norm of soft law (more) binding through the authoritative act of the CJEU's interpretation.[997]

Considering the above, the principle of conferral argues against any obligation to refer questions on EU soft law. What is more, the principle of conferral is also linked to the EU system of democratic legitimacy. Each legal basis, for example, indicates the adoption procedure to be followed. It thereby determines, inter alia, the level of involvement of the European Parliament. Allowing a piece of Commission soft law to regulate an area where the Treaties envision the use of the ordinary legislative procedure, and hence the full participation of the European Parliament, therefore reduces the democratic legitimacy of this measure and of the EU system as a whole.[998]

3.4 Interim conclusion: Triangle says no… in general

Combining the three principles in our triangle, it becomes clear that effectiveness argues in favour of a duty to refer, whereas national procedural autonomy and conferral argue against. Unlike a soccer match, this 2-1 score does not necessarily determine the outcome. As indicated, principles provide arguments or 'weight' in a certain direction, but do not provide binary answers. What is more, the principle of effectiveness is not just any principle. It can arguably be described as the core or meta-principle underlying the entire EU legal order.[999] In addition, national procedural autonomy is always limited by the principles of equivalence and

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[997] If the underlying norm is not binding, one could argue that the national court is only bound by the interpretation of the EU soft law norm as given by the CJEU, but it is not bound to *apply* the norm as such. In reality, of course, it seems highly likely that a national court will simply follow the ruling of the CJEU.

[998] Note that the fact that the European Parliament could (co-)adopt an act over overrule the soft law does not solve this problem. Firstly, as long as the EP does not do so, the soft norm stands. Secondly, the EP depends on a proposal from the Commission and support from the Council, and in case either are lacking the soft law instrument stands.

[999] Starting with evergreens as CJEU 5 February 1963, C-26/62, ECLI:EU:C:1963:1 (*Van Gend & Loos*) to more recent examples such as CJEU 27 February 2018, C-64/16 ECLI:EU:C:2018:117 (*Associação Sindical dos Juízes Portugueses*).

effectiveness.[1000] It is a given, therefore, that effectiveness can be used to limit national procedural autonomy. What is more, the CJEU has already accepted several (indirect) forms of binding legal effect of soft law vis-à-vis Member States and national courts.[1001] Apparently, therefore, the CJEU sees quite some space within the principle of conferral to allow some level of bindingness for soft law.

Despite these factors, however, we believe that, on balance, the triangle of principles *generally* argues against an obligation to refer questions on soft law. First of all, the threat of not requiring a referral to effectiveness is rather limited. Remember in this respect that by its very nature, soft law is not binding. A wrong implementation of soft law, therefore, legally cannot affect the proper interpretation of binding norms of EU law itself, nor can it force national authorities into a wrong application of EU law as such. Misapplying a norm of soft law, in other words, is not the same as misapplying a binding norm of EU law. Crucially, moreover, where soft law is connected to a norm of EU law that is binding, say a guideline interpreting a directive, there will be an obligation to refer any questions on the correct interpretation and application of this underlying directive.

Where there is a relatively small threat to effectiveness, moreover, the principles of national procedural autonomy and conferral gain in *relative* weight, whereas there are already strong arguments to give sufficient weight to these principles of their own accord. To begin with, national procedural autonomy represents a vital bond of trust and collaboration between the EU and the national judiciary. Even where binding EU norms are involved, national courts are given a high level of trust and discretion on whether a preliminary reference is required or not. Where formally non-binding norms are involved, it would therefore generally seem excessive to nevertheless require national courts to refer. Most importantly and fundamentally, however, is that an obligation to refer would further strain the principle of conferral, and with it the already strained system of EU legitimacy. An obligation to refer questions on EU soft law comes at a real cost to conferral and legitimacy as it strengthens the legal binding effect of norms which have no basis in powers conferred on the EU by its Member States and Member Peoples, and have not been adopted by the agreed procedures, potentially excluding the direct and indirect representatives of EU citizens.[1002]

[1000] Lenaerts et al. 2014, p. 107: 'At the same time, however, the national legal systems are under an important '*obligation de résultat*', meaning that the enforceability of Union law rights must be ensured by virtue of the Union principle of equivalence and eff ectiveness.'

[1001] Such as for instance CJEU 13 December 1989, C-322/88, ECLI:EU:C:1989:646 (*Grimaldi*) and CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 38 (*KPN v ACM*), 38. See for a discussion of these rulings below paragraph IV.II and IV.III.

[1002] See on the constitutional foundation of the EU more generally A. Cuyvers, 'Brexit and the Real Democratic Defi cit: Refi tting National and EU Democracy for a Global Reality', in: E. Ellian en R. Blommestijn (eds.) *Refl ections on democracy in the*

In general, therefore, we argue that there is no obligation to refer questions on soft law. However, this conclusion is based on a general balancing of the different principles involved. In some contexts, a different balance may have to be struck. In the next section, we will explore these different contexts, more particularly looking at four different types of guidance to demonstrate that sometimes, on balance, references on soft law may be required.

4. An obligation to refer? Differentiating along degrees of bindingness

As discussed, certain categories of Commission guidance can have a *de facto* or legal binding effect. For these categories, the case for recognising a certain obligation to refer becomes stronger. 'Binding' guidelines after all, can be relevant for the outcome of a particular case, imposing an obligation on the national court to ensure the correct and uniform application of EU law by referring a question to the CJEU. What is more, a refusal to refer may rob individuals of the only remedy they have left, as an action for annulment of soft law will usually not be admissible.[1003] Once soft law reaches a certain threshold of bindingness, therefore, the principle of effectiveness and the right to an effective remedy gain in relative weight, sometimes leading to an obligation to refer in spite of the principles of national procedural autonomy and conferral.

To support and illustrate this claim, this paragraph discusses four categories of guidance that have been identified in previous literature as exerting, to a larger or lesser degree, binding legal effects in the national legal order.[1004] The categories, organised on a scale ranging from a 'hard' to 'light' obligation to refer, are the following: 1) 'State aid guidelines' that exert binding effects on Member States, 2) guidelines that exert legal effects on the basis of EU secondary legislation, 3) guidelines that have been given binding force in national legislation and 4) Commission recommendations for which the *Grimaldi* formula applies. Of course, this 'list' does not provide an exhaustive overview. It is only a first step towards clarifying whether and for which Commission guidance documents there might be

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European Union, The Hague: Eleven Publishing, 2020 and A. Cuyvers, 'The confederal come-back: Rediscovering the confederal form for a transnational world' *European Law Journal* 2013, vol. 19, no. 6, p 711.

[1003] Indeed, the CJEU still applies the strict 'ERTA-test' that in order to be susceptible for judicial review under article 263 TFEU the act must be adopted with the *intention* of having binding legal eff ects. See for instance CJEU 20 February 2018, C0-16/16P, ECLI:EU:C:2018:79 (*Commission v Belgium*).

[1004] See for a discussion of diff erent ways in which guidance documents may become binding on national authorities and courts Van Dam 2020, p. 69-87 and p. 135-136.

an obligation to refer, and to try and find some common criteria for making this assessment, also for other categories of soft law with some degree of bindingness.

4.1 Category 1: State aid guidelines exerting binding legal effects

The first category of binding guidance can be found in the field of State aid. Since *IJssel-Vliet*, the CJEU recognises the binding effect of guidelines in the field of State aid.[1005] The Court derives this binding effect from two sources. First, from the specific duty of cooperation between the Commission and Member States laid down in article 108(1) TFEU. Second, from the acceptance of the guidelines in question by the Netherlands. In light of these elements, the Court considered that "a Member State, such as the Netherlands, *must* apply the Guidelines when deciding on an application for aid for the construction of a vessel intended for fishing".[1006] The *IJssel-Vliet* ruling leaves little to no room for national authorities to depart from Commission guidance. Consequently, national courts are also bound by these Commission guidelines which must be used as an aid or standard to assess the implementing practices of national authorities.[1007]

We argue that the (possible) binding legal effect of State aid guidelines leads to an obligation to refer. The binding effect means that these guidelines have legal relevance for the interpretation and application of the EU State aid rules. Uncertainty as to their interpretation can then affect the capacity of the national court to give judgment, necessitating a reference under the CILFIT logic. More generally, by not referring a question whilst uncertainty as to its interpretation exists, State aid soft law with binding legal effects poses a risk to the effective, consistent and uniform implementation of EU State aid rules. Applying the CILFIT formula by analogy, it follows that if the national court has doubt as to the correct interpretation of the recommendation, it should refer a question to the CJEU. If a question on validity arises, this question should always be referred to the CJEU, as the CJEU is exclusively competent to decide on the validity of acts of the EU institutions.[1008] Lastly, a preliminary reference is likely the only remedy left to private parties to challenge the interpretation or validity of the Guidelines at the EU level. Hence, if the CJEU were to declare these guidelines binding

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[1005] CJEU 15 October 1996, C-311/94, ECLI:EU:C:1996:383 (*IJssel-Vliet v Minister van Economische Zaken)*. See for a discussion of the binding legal eff ects of guidelines in the fi eld of State aid, Stefan 2013, pp. 188-191.

[1006] CJEU 15 October 1996, C-311/94, ECLI:EU:C:1996:383 (*IJssel-Vliet v Minister van Economische Zaken)*, par. 44.

[1007] See for further refl ections on the consequences of the *IJssel-Vliet* judgment for national courts, Van Dam 2019, p. 84.

[1008] As follows from CJEU 22 October 1987, C-314/85, ECLI:EU:C:1987:452, par. 9 (*Foto-Frost*).

without imposing an obligation to refer on courts ruling in last instance, the CJEU would in fact be undermining the 'complete system of remedies' it puts so much value on.

A binding effect similar to that of State aid guidelines has so far never been recognised in other fields of EU law. This could be explained by the special characteristics of EU State aid, including the exclusive power of the Commission to rule on the compatibility of national aid measures. The State aid guidelines indicate how the Commission intends to use this exclusive discretionary power. Hence, in the field of State aid an exceptionally strict hierarchy between the Commission and Member States exists than in other policy areas, which also reduces the tension between the *IJssel-Vliet* approach and the principle of conferral. In other policy areas, however, Commission guidelines usually concern discretionary *Member State powers* to implement EU law.[1009] Therefore, it is unlikely that a similar binding effect and an ensuing 'obligation to refer' can be extrapolated to non-exclusive EU policy areas. We therefore consider the *IJsselVliet* type of Guidance as a closed and clearly delineated exception to the main rule that normally there is no obligation to refer on questions of soft law.

4.2 Category 2: Binding effects through EU secondary legislation

The second category is formed by Commission guidelines that are given some legal effect by EU secondary legislation, for instance by stating that Member States take the 'utmost account' of a Commission recommendation.[1010] For this category of guidance, the CJEU acknowledges a 'comply-or-explain' obligation for national authorities. This follows from the *ACM vs KPN* ruling,[1011] which concerns a Commission recommendation for which the Framework Directive regulating telecommunication markets required national authorities to 'take the utmost account' of that recommendation. In this case, whilst elaborating on the *Grimaldi* formula that will be discussed below,[1012] the CJEU ruled that a national regulatory authority may only depart from the guidelines if it considers the model

[1009] In the literature this category of guidelines is referred to as decisional soft law, see L. Senden, 'Soft Post-Legislative Rulemaking: A Time for More Stringent Control', European Law Journal, vol. 19, no. 1, 2013, p. 60-61.

[1010] See for instance article 38 of the Directive establishing the European Electronic Communications Code 2018/1972/EU.

[1011] CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 38 (*KPN v ACM*), 38. See for a discussion of this judgment J.C.A. Van Dam, 'Het Hof van Justitie spreekt zicht uit over de bindende werking van een aanbeveling van de Europese Commissie ', *Nederlands tijdschrift voor Europees recht*, vol. 4, 2017, p. 84-90.

[1012] See paragraph IV.IV.

advocated by the recommendation 'not appropriate', whilst giving reasons for deviating from the recommendation based on facts of the individual case.[1013]

In the light of such a comply-or-explain legal effect on the basis of EU secondary legislation, it can be reasonably argued that a duty to refer arises where the interpretation or validity of the guidance is in question. This is not only due to the increased requirements of effectiveness and effective legal protection, but also due to the reduced tension with conferral. These guidelines now have a legal basis in a binding EU act that has been adopted following the legislative procedures spelled out the Treaties, and has thus also acquired a certain degree of democratic legitimacy. The comply-or-explain formula, moreover, offers at least some respect to national procedural autonomy. Therefore, it can be reasonably argued that if a question arises on the interpretation or validity of Commission guidelines in this category, this question is relevant for the outcome of a case, and hence the CILFIT obligation to refer applies by analogy.

4.3 Category 3: Binding effects through national implementing legislation

The above two categories concern the situation where binding legal effects of Commission guidelines on national courts and national authorities have been recognised by the EU legislator. But what about guidance documents that have been given binding force in *national* legislation?

In the situation where non-legally binding guidance has been transposed into national law, and where this was not required by Union law, it could be argued that a Member State in fact 'voluntarily' confines its autonomy or leeway to use Commission guidelines as it sees fit. Indeed, through its national implementing legislation, the guidance provision has now become relevant, and even 'binding', for the interpretation and application of the underlying EU legislative rule in the national legal order. From a viewpoint of the effective implementation of Union law, it then is all the more important that this 'guidance provision' is interpreted correctly and uniformly. Hence, it could be argued that such 'voluntarily' incorporation into binding national law leads to an obligation on a national court of last instance to prevent an incorrect or divergent interpretation of that provision, and hence an obligation to refer.

Further support for the argument that there is an obligation to refer in such situations could be found in the case law of the CJEU of the voluntary application of EU law in a purely internal situation. In *Leur-Bloem,* for instance, the CJEU considered that "in order to forestall future differences of interpretation" it has jurisdiction to give preliminary rulings where national law incorporates a

[1013] CJEU 15 September 2016, C-28/15, ECLI:EU:C:2016:692, par. 38 (*KPN v ACM*), 38.

provision of Union law in a purely internal situation.[1014] In the view of the Court it is in the Community interest that those concepts of EU law should be interpreted uniformly in order to "forestall future differences of interpretation".[1015] Applying this case law by analogy, it could be argued national courts also become 'bound' by article 267 TFEU in the situation where a provision of national law 'voluntarily' incorporates EU Commission guidance.

This finding is of course directly relevant for our hypothetical case, as discussed in the introduction. In our hypothetical case, Commission guidance allowing for 'light tillage' was transposed into a Dutch legally binding regulation. The dispute concentrated on the meaning of 'light tillage' as well as on the validity of the guidelines in light of the ban on ploughing in the underlying EU regulation. Furthermore, the interpretation and validity of this Commission guidance is relevant, if not determinant, for the outcome of the case. Indeed, whether the farmer's activities can be considered as 'light tillage' determines if she is eligible for an EU agricultural subsidy. Hence, in line with the above reasoning, it can be argued that in this hypothetical case the Dutch highest court is obliged to refer a question to the CJEU.

4.4 Category 4: Recommendations as mandatory interpretation aid

The fourth category is formed by recommendations of the European Commission which constitute a mandatory interpretation aid for national courts. In *Grimaldi* the CJEU held that a recommendation issued in the field of social policy could not be regarded as having no legal effects and that national courts were "bound to take the recommendation into consideration".[1016]

This *Grimaldi* formula has been reiterated in later rulings concerning Commission *recommendations.*[75] However, whether *Grimaldi* also applies to guidance documents other than Commission recommendations, is still uncertain. In *Baltlanta* the CJEU applied the *Grimaldi* formula 'by analogy' to *Guidelines* issued by the Commission in the area of EU structural funds, but this *Baltlanta* judgment has thus far been the only, and thus exceptional case, where *Grimaldi* is applied by analogy to Commission guidelines not laid down in a recommendation. Moreover, an indication that *Grimaldi* does not apply automatically to other guidance documents than recommendations is also given in the *Kreussler* judgment issued in 2012. In *Kreussler* the CJEU considered that national courts *may* take account of the 'guidance document related to the Medicinal Products

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[1014] CJEU 17 July 1997, C-29-95, ECLI:EU:C:1997:369, (*Leur Bloem*), par. 32. See also CJEU 17 July 1997, C-130/95, ECLI:EU:C:1997:372, (*Giloy*), par. 28.

[1015] CJEU 17 July 1997, C-29-95, ECLI:EU:C:1997:369, (*Leur Bloem*), par. 32.

[1016] CJEU 13 December 1989, C-322/88, ECLI:EU:C:1989:646 (*Grimaldi*), par. 18. [75] CJEU 3 September 2014, C-410/13, ECLI:EU:C:2014:2134, par. 64 (*Batlanta*).

Directive'[1017] – thus not referring to any obligation for national courts to apply this more informal guidance document.

Nonetheless, even if it would become settled case law that *Grimaldi* applies to Commission recommendations, the question still is what to 'take into consideration' exactly means. In the literature, the *Grimaldi* formula is generally understood and explained as establishing a role for soft law as 'mandatory interpretation aid', but not one that imposes an obligation for national courts to apply or act in line with the Commission's guidelines.[77]

Grimaldi thus means that – even if there is no obligation to apply guidance – Commission recommendations are *relevant* for the interpretation and application of provisions of EU law. So does this relevance translate into sufficient bindingness to create an obligation to refer? If Commission recommendations must be used as a judicial interpretation aid, then any uncertainty as to the interpretation or validity of a recommendation may hinder the capacity of a national court to give judgment in a specific case. After all, there is a binding EU obligation to take the recommendation into account, which is only possible when one knows what the recommendation says. Consequently, the *Cilfit* and *Foto Frost* obligation could be applied by analogy to recommendations falling under *Grimaldi* case law, as the effective exercise of the *Grimaldi* obligation may necessitate a reference.

At the same time, this *Grimaldi* category really pushes the effectiveness principle to its limits and raises serious questions about the balance with national procedural autonomy and conferral. After all, the effectiveness obligation here is not created by the EU legislator but by the CJEU forcing Member States to take recommendations into account when exercising their own discretionary powers. We therefore argue that *Grimaldi* is really the lower limit of the duty to refer on questions of soft law. This has two legal effects. First, *Grimaldi* only imposes what could be termed a 'duty-light' to refer: a duty that only applies when there are serious doubts as to the correct interpretation and where the different interpretations really lead to significantly diverging outcomes. Second, we should be very cautious before assuming that a *Grimaldi* duty to refer also exists for other guidance documents than recommendations. This not only follows from the fact that, as argued above, it is uncertain whether the CJEU's *Grimaldi* formula applies to other guidance documents than recommendations. Indeed, we should also keep in mind that recommendations are the most formalised type of guidance, as they are explicitly mentioned in article 288 TFEU. Other types of guidance are often much more informal, and have often not even been published.

[1017] CJEU 6 September 2012, C-308/11, ECLI:EU:C:2012:548 (*Kreussler*), par. 25,26. [77] See for instance J. Luijendijk & L.A.J. Senden, 'De gelaagde doorwerking van Europese administratieve soft law in de nationale rechtsorde', *Tijdschrift voor Europees en economisch recht*, vol. 7, 2011, p. 312-352, at p. 336.

Recognising a role as mandatory interpretation aid, and an ensuing duty to refer for those types of guidance is difficult to uphold, as this would encroach upon the principle of conferral and the principle of procedural autonomy to an unacceptable level to protect a level of effectiveness that soft law may not demand.

5. Conclusion

So is there an obligation to refer preliminary questions on non-legally binding guidance, or EU 'soft law'? The answer is not a simple yes or no, but requires a balancing act between a triangle of legal principles (effectiveness, procedural autonomy and conferral). This balancing act leads to the conclusion that generally speaking there is no obligation to refer a question on the interpretation or validity of soft law. However, for certain special categories, where guidance documents exert 'binding legal effects', an obligation does arise. We discussed four categories that depict different 'degrees of legal bindingness' of soft law instruments where, to a larger or lesser extent, an obligation to refer arises. These four categories do not represent an exhaustive list of situations where the binding effects of guidance may trigger a duty to refer. Nonetheless, from this overview it is possible to distill certain indicators that could 'guide'[1018] a national court to decide whether, for other kinds of soft law instruments not discussed here, an obligation to refer may exist. The first indicator is the situation where the Commission has been conferred 'implementing' or discretionary powers at the expense of Member State powers. This is illustrated by the 'binding effect' of State aid guidelines, which derives from the Commission's exclusive power to decide on the compatibility of state aid. The second indicator is the situation where secondary EU legislation or national (implementing) legislation in some way 'formalises' Commission guidelines, giving those guidelines a certain binding effect. In this situation, the guidelines become a relevant factor for the interpretation or application of Union law, which triggers the responsibility for national courts to refer a question to the CJEU if a correct and uniform interpretation of EU law is at risk. The third indicator is the degree of formalisation of a soft law document. As shown by *Grimaldi*, highly formalized forms of soft law may form a mandatory interpretation aid for national courts, leading to a duty, or duty-light, to refer.

These indicators could provide some general guidance to national courts as to when an obligation to refer questions on soft law exists. They may also provide a first basis for the further research required to determine when precisely an obligation to refer arises in relation to soft law. Could there be an obligation to refer, for instance, if guidance documents are applied by national authorities as if they were binding rules, without the guidance being transposed into a national piece of legislation? Does it matter if the bindingness of the soft law document in question derives from a legal fact or a practical effect? Does the *Grimaldi*

[1018] These indicators thus give 'guidance for guidance' to national courts.

obligation to refer apply only to recommendations, or also to other pieces of soft law that have a more formalised form and shape? And, is the obligation to refer dependent on whether a piece of guidance has been published? Such further research, and the legal certainty of litigants, would also be greatly supported by smartly designed preliminary references from practical judges with academic depth. For even though physicists may not be able to determine if their Schrödinger cat is still alive, lawyers may escape the quantum-uncertainty of soft law by simply asking the CJEU.

Author's note

The reader may not be extremely surprised when we admit that Willemien is the ideal blend of a judge and academic expert we had in mind when writing this contribution. Willemien guided the PhD research-project on guidance of one of the authors. She also guided the legal studies of the other author already at a very early stage as his lecturer in Dutch Administrative law, after which he *almost* ended up as her student-assistant, had the department of European law not hired him two days earlier. Serendipity, of course, because otherwise we could not have written this joint contribution from the perspective of administrative law and EU law! We thank Willemien for all her help and guidance, and hope and trust that she will continue to guide, encourage and inspire us and many others on the many different levels she excels in.