



Title: Eurostat, Soft Law and the Measurement of Public Debt: The Case of Public-Private Partnerships

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Abstract:

Budget stability seems to be mainly regulated through hard law, but in order to measure public debt, Eurostat has had to complement many aspects with informal instruments such as decisions in press releases, manuals, recommendations or decisions on particular cases contained in letters to the national statistical authorities. The aim of this paper is to analyse the legal status of these instruments and to comment on their main limitations. In order to do this, we will focus on the case of public-private partnerships, which have frequently been criticised for being used to hide public debt and whose accounting treatment on or off the government's balance sheet depends mainly on the criteria published by Eurostat.

EUROSTAT, SOFT LAW AND THE MEASUREMENT OF PUBLIC DEBT: THE CASE OF PUBLIC-PRIVATE PARTNERSHIPS

Alberto Vega *

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1. INTRODUCTION

Soft law, understood as those instruments which are legally non-binding but which have the purpose of influencing the conduct of Member States without formally containing rights and obligations,¹ plays a very important role in the activities of the European Union. Until now, the use of soft law has been analysed mainly in fields such as competition policy,² state aid control,³ employment,⁴ social policies,⁵ taxation⁶ or general economic policy coordination.⁷

In the area of economic governance and, in particular, in the framework of the Economic and Monetary Union and the Stability and Growth Pact, it is also possible to observe the use of soft law as a complement of hard law. In this sense, Hodson and Maher consider that soft law, such as non-binding recommendations enforced through peer pressure, was an adequate complement to achieve the objectives established in hard law provisions.⁸ Moreover, after the reform of the Pact in 2005, Schelkle noted that even though some of its elements seemed to have softened, for instance through the introduction of escape clauses, the increasing role of soft law in fiscal surveillance by the Commission may render hard law more effective.⁹

The main purpose of this article is to focus on an aspect which has not received enough attention in the literature despite its practical relevance: the use of soft law by Eurostat in the context of the elaboration of the statistics on public deficit and debt. Thus, this paper does not try to present or reinterpret the broad existing literature on soft law,¹⁰ something which has already been made by other authors.¹¹ Instead, this article considers the generally accepted views on the notion of soft law and on the main advantages and risks of this type of instrument, and tries to apply them to the particular area of the work of Eurostat on public finance statistics.

¹ This is the conception of soft law of Karel C Wellens and Gustaaf M Borchardt, 'Soft Law in European Community Law' (1989) 14(5) *Eur L Rev* 267, 285. A similar approach is followed by Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 112-113.

² See eg Håkon A Cosma and Richard Whish, 'Soft Law in the Field of EU Competition Policy' (2003) 14(1) *Eur Business L Rev* 25.

³ See eg Michael Blauberger, 'From Negative to Positive Integration? European State Aid Control through Soft and Hard Law' (2008) MPIfG Discussion Paper 08/4 <http://www.mpifg.de/pu/mpifg_dp/dp08-4.pdf> accessed 18 October 2013; and Michelle Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime' (2001) 8(2) *J of Eur Public Policy* 192.

⁴ See eg David M Trubek and Louise G Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination' (2005) 11(3) *ELJ* 343.

⁵ See eg Gerda Falkner *et al.*, *Complying with Europe – EU Harmonisation and Soft Law in the Member States* (CUP 2005).

⁶ See eg Hans Gribnau, 'Soft Law and Taxation: EU and International Aspects' (2008) II(2) *Legisprudence* 67.

⁷ See eg Dermot Hodson and Imelda Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination' (2001) 39(4) *J of Common Market Studies* 735, who see the open method of coordination as a type of soft governance of economic policies.

⁸ See Dermot Hodson and Imelda Maher, 'Soft Law and Sanctions: Economic Policy Co-ordination and Reform of the Stability and Growth Pact' (2004) 11(4) *J of Eur Public Policy* 799.

⁹ See Waltraud Schelkle, 'EU Fiscal Governance: Hard Law in the Shadow of Soft Law?' (2007) 13 *Columbia J of Eur L* 705.

¹⁰ For more details on the issue of soft law, see eg Richard R Baxter, 'International Law in "Her Infinite Variety"' (1980) 29(4) *Intl and Comparative LJ* 549; Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) *ICLQ* 850; Michel Virally, 'La valeur juridique des recommandations des organisations internationales' (1956) 2 *Annuaire Français de Droit International* 66; and Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77(3) *AJIL* 413.

¹¹ See eg Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2(1) *J of L Analysis* 171; and Hartmut Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10(3) *EJIL* 499.

The mere concept of 'soft law' has been controversial in the literature and it has been used to refer not only to those non-binding instruments which are published with the aim of influencing the behaviour of States, but also to refer to legally binding instruments which are vague or which lack the mechanisms to ensure their effective enforcement.¹² In fact, some authors even consider that the mere notion of 'soft law' is redundant and undesirable.¹³ However, in this paper, we will follow the most common view in the literature, which identifies soft law with certain non-binding instruments (such as guidelines and recommendations) and which considers that it has become a relevant instrument for the regulation of international affairs, even though it may also entail several risks.¹⁴

In general, the interaction of soft and hard law in the context of European integration has been frequently welcomed given that it may facilitate the achievement of the objectives of the European Union.¹⁵ However, the use of non-binding instruments also involves risks from the perspective of democratic legitimacy, the rule of law, the division of powers and transparency.¹⁶

With respect to the role of soft law in the area of European budget stability, even though it may seem that this field is dominated by hard law, in practice there are many aspects which have had to be complemented by Eurostat, mainly with soft law. In order to assess the importance of the role of Eurostat we will analyse the issue of public-private partnerships (PPPs) for the provision of public services or the construction of infrastructures. As we will see later in more detail, in this type of project it is fundamental to determine whether the assets and the associated liabilities should be recorded by the public party (increasing public debt) or by the private partner. In this context, the opinions of Eurostat are decisive, but their legal nature is frequently controversial and have even given rise to some processes before the Court of Justice.

Thus, the aim of this paper is to clarify their legal status and to comment on some of the main limitations of the decisions of Eurostat on PPPs, both from the perspective of their form and their content, since they are a controversial instrument which could be used as a mechanism to hide public debt. In this sense, we will begin with a general presentation of the hard law framework dealing with budget stability and after that we will concentrate on the different instruments which have been used by Eurostat, such as general decisions published in news releases, the *Manual on Government Deficit and Debt*, the recommendations expressed during dialogue visits and the decisions on particular cases contained in letters to the national statistical authorities.

2. THE EUROPEAN HARD LAW FRAMEWORK OF PUBLIC DEBT

The objectives of budget stability seem to be an example of governance through hard law, such as treaties, protocols and regulations. Moreover, public accounting rules have also been given a legally binding character. This section will briefly present the hard law dealing with this subject, which is necessary to perceive later why Eurostat had to draw upon soft law to interpret or complement many aspects.

¹² See eg Kenneth W Abbott *et al.*, 'The Concept of Legalization' (2000) 54(3) *Intl Organization* 401.

¹³ See eg Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67(4) *Nordic J of Intl L* 381.

¹⁴ See eg Christine Chinkin, 'Normative Development in the International Legal System' in Dinah Shelton (ed), *Commitment and Compliance* (OUP 2000) 21.

¹⁵ See Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (5th edn, OUP 2011) 107-108.

¹⁶ See eg Senden (n 1) 477-498.

2.1. General Framework of Budget Stability

The Treaty of Maastricht introduced several convergence criteria for the Economic and Monetary Union and, among other requirements, the following conditions have to be respected: the ratio of the annual government deficit to gross domestic product (GDP) must not exceed 3% and the ratio of gross government debt to GDP, 60%. In order to check the fulfilment of these criteria, Eurostat has played a central role.¹⁷

Currently, Article 121 TFEU (ex Article 99 TEC) foresees the multilateral surveillance of the economic policies of the Member States, which will be carried out by the Council on the basis of reports submitted by the Commission. More specifically, Article 126 TFEU (ex Article 104 TEC) states that Member States shall avoid excessive government deficits and requires the Commission to monitor the budgetary situation and debt levels of the Member States, focusing on the ratios of government deficit and debt to GDP. These ratios should not exceed the reference values included in Protocol No 12 on the excessive deficit procedure,¹⁸ which establishes that the reference values are 3% for the ratio of the planned or actual government deficits to GDP at market prices; and 60% for the ratio of government debt to GDP at market prices. Moreover, the Protocol establishes that the previous statistical data will be provided by the Commission and defines some basic concepts such as 'deficit', 'debt' or 'government' by reference to the European System of Integrated Economic Accounts (ESA95).

The application of the Protocol on the excessive deficit procedure has been developed by Council Regulation (EC) 479/2009,¹⁹ which also defines certain basic concepts (such as 'government deficit' and 'government debt') by reference to the accounts of ESA95. Moreover, it details the obligation of the Member States to periodically report information to Eurostat on their planned and actual government deficits and levels of government debt, as well as information on other economic variables such as their gross domestic product (Articles 1 – 7). The quality of this information is assessed by Eurostat, which verifies compliance with the rules of ESA95, paying particular attention to problematic aspects such as the delimitation of the government sector, the classification of government transactions and liabilities, and the time of recording (Article 8). In this sense, it should be noted that Eurostat can express reservations or amend the data (Article 15), which can be seen as a tool to exert political pressure and promote compliance.²⁰

If, according to the assessment of Eurostat, the levels of public deficit and debt do not respect the limits of Protocol No 12, Article 126 TFEU foresees a series of steps that can end up with the imposition of sanctions. To begin with, the Commission will prepare a report on which the Economic and Financial Committee will formulate an opinion. After that, the Commission will address an opinion to the affected Member State and will also inform the Council. If the Council, taking into account the proposal of the Commission and

¹⁷ Art 104 c of the Treaty of Maastricht did not specify the reference values, which were detailed in the Protocol on the Excessive Deficit Procedure.

¹⁸ Protocol (No 12) on the Excessive Deficit Procedure [2008] OJ C115/279.

¹⁹ Council Regulation (EC) 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community [2009] OJ L145/1. This regulation was amended one year later by Council Regulation (EU) 679/2010 of 26 July 2010 [2010] OJ L198/1.

²⁰ See Annika Östergen Pofantis, 'Eurostat – Watchdog of European Public Finances' (2008) 3 Sigma – The Bulletin of European Statistics 11. Reservations usually take the form of a footnote in the press release in which the data is reported (see Lena Frej Ohlsson, 'Statistical Implications of the Stability and Growth Pact: Creative Accounting and the Role of Eurostat' (2007) Göteborg University School of Business, Economics and Law Working Paper in Economics 268, 32 <<http://hdl.handle.net/2077/7374>> accessed 18 October 2013).

the observations of the Member State, considers that an excessive deficit exists, it will make recommendations to correct the situation. Finally, if the Member State fails to implement the recommendations, the Council can decide to impose more serious measures, including fines.²¹

Other related aspects have been regulated by Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; and Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, both of which have been recently amended in the process of reform of the Stability and Growth Pact. Moreover, Council Regulation (EC) 1222/2004 of 28 June 2004 deals with the compilation and transmission of data on the quarterly government debt; and Council Directive 2011/85/EU of 8 November 2011 regulates the requirements for budgetary frameworks of the Member States. Finally, in this review of the hard law on budget stability it is also important to mention the recent Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed on 2 March 2012, which strengthens budget discipline and reinforces the monitoring function of the European Commission and, thus, the central role of the statistics provided by Eurostat.

2.2. The European System of National and Regional Accounts (ESA95)

The European System of National and Regional Accounts (ESA95) was approved by Council Regulation (EC) 2223/96,²² following to a great extent the System of National Accounts adopted by the United Nations in 1993 (SNA93). Since then, ESA95 has been modified by several Regulations, such as Commission Regulation (EC) 1500/2000 on general government expenditure and revenue, or Commission Regulation (EC) 113/2002 on revised classifications of expenditure according to purpose. From September 2014 onwards, ESA95 will be substituted by ESA2010, which was approved by European Parliament and Council Regulation (EU) 549/2013.²³ Thus, this paper will focus on ESA95, which is still applicable, but reference will also be made to the main changes introduced by ESA2010.

ESA95 is an accounting system which includes a series of definitions, nomenclatures and rules of accounting methodology which are applied by the Member States when drawing up their national accounts and economic statistics. Moreover, its importance is also due to the fact that it is also followed for the application of the excessive deficit procedure.

The issue of PPPs is not directly addressed by ESA95, that is to say, it does not give any particular criteria to determine whether the assets involved in those operations should be classified as government assets or as assets of the private partner. In fact, ESA95 does not even mention the expression ‘public-private partnership’.²⁴ It only deals with classifications and accounts which may be affected by PPP operations, such as those on general government sector, intermediate consumption, gross fixed capital formation, consumption of fixed capital, saving, net borrowing/net lending or fixed assets; or with certain types of

²¹ This aspect has been developed by European Parliament and Council Regulation (EU) 1173/2011 of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1.

²² Council Regulation (EC) 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community [1996] OJ L310/1.

²³ European Parliament and Council Regulation (EU) 549/2013 of 21 May 2013 on the European System of National and Regional Accounts in the European Union [2013] OJ L174/1.

²⁴ This is not the case of ESA2010, which has set out the principles for the treatment of public-private partnerships, an issue which is presented in ch 20 (government accounts).

operations, such as leases or concessions, which are related to PPP projects. However, in order to record an operation, it is first necessary to determine whether the PPP assets should be on or off the government's balance sheet following the interpretation of Eurostat.

This interpretative assistance of Eurostat is necessary because, as Jones has pointed out, national accounting definitions both of SNA93 and ESA95 of what is public and what is private are so vague that in practice they are empty, namely, the classification of an entity within or outside the general government sector is based on expressions, such as 'control', 'ownership' or 'prices that are economically significant', which are not further defined.²⁵ As a result, it would be relatively easy for public authorities to intervene in the sphere of production through institutional units which are not part of the general government sector and which are not normally identified with the public sector, such as corporations or non-profit institutions which fulfil certain requirements.²⁶ Thus, in a borderline field such as that of PPPs, Eurostat's guidance is particularly relevant because in practice it does not only interpret the vague or controversial concepts of the regulation establishing ESA95, but also fills its gaps.

2.3. Normative Framework of Eurostat

The basic legal framework of Eurostat can be found in Regulation (EC) 223/2009 of the European Parliament and the Council of the European Union of 11 March 2009 on European statistics, which defines in its Article 4 the European Statistical System as a partnership between the Community statistical authority, which is the Commission (Eurostat), and the national statistical institutes and other national authorities responsible in each Member State for the development, production and dissemination of European Statistics. For instance, in Germany these include not only federal institutions, but also the statistical offices of the *Länder*. With respect to the role of Eurostat, it ensures the production of European statistics and is the solely responsible for deciding on processes, statistical methods, standards and procedures, and on the content and timing of statistical releases (Article 6).

Eurostat is a Directorate-General of the European Commission and its main characteristics are regulated by Commission Decision 2012/504/EU,²⁷ which deals with aspects such as the independence of the Director-General of Eurostat when carrying out statistical tasks. After the revision of the Stability and Growth Pact in 2005, the role of Eurostat in the supervision of the quality of statistical figures reported by the different States was reinforced.²⁸ Currently, Council Regulation (EC) 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community states in its Article 8 that the Commission (Eurostat) will assess the quality of the data reported by the Member States.

²⁵ See Rowan Jones, 'Public versus Private: The Empty Definitions of National Accounting' (2000) 16(2) *Financial Accountability & Management* 177-178, who acknowledges that in some cases the definitions of ESA95 are more precise than those of SNA93. Moreover, it is important to mention that the notion of 'government assets' in this field is not equivalent to the concept of 'State resources' which is of relevance for the assessment of the existence of State aid also with regard to PPP projects (see eg *London Underground Public Partnership* (Case N 264/2002) Commission Decision C(2002)3578fin [2002] OJ C309/15).

²⁶ See Jones (n 25) 176.

²⁷ Commission Decision 2012/504/EU of 17 September 2012 on Eurostat [2012] OJ L251/49.

²⁸ See Schelkle (n 9) 716-717.

3. SOFT LAW AND THE MEASUREMENT OF PUBLIC DEBT BY EUROSTAT

The application of the hard law on budget stability has required the interpretative assistance of Eurostat, especially in relation to borderline cases such as PPPs. With this aim in mind, Eurostat has made use of different types of instruments which are or seem to be non-binding, such as general decisions in press releases, manuals or decisions on particular cases contained in letters to the national statistical authorities. In the following pages, the legal nature of these instruments will be discussed, focusing on the wide interpretative role of Eurostat in the area of PPPs.

3.1. General Decisions of Eurostat

In case of doubts on the correct application of the ESA95 accounting rules, the Member States can ask Eurostat for its position. In normal cases, Eurostat will communicate its view without requiring further advice to any other European institution or body, but in cases which are particularly controversial or which may be of general interest, Eurostat will take a decision after consultation with the Committee on Monetary, Financial and Balance of Payments Statistics (CMFB), which will be made public together with the opinion of the CMFB (Article 10 of Council Regulation 479/2009).²⁹ This type of decisions seems to go beyond the frequent interpretative character of soft law³⁰ and in practice its purpose is to fill the existing gaps.

In order to solve the methodological difficulties generated by the application of ESA95 to PPPs, a specific task force was established in 2003. The results of this work gave rise to the decision of Eurostat made public through press release 18/2004 of 11 February 2004. Previously, the Committee on Monetary, Financial and Balance of Payments Statistics had also endorsed the proposed interpretation. In particular, the Committee required the opinion of national statistical institutes and national central banks, and from the 27 replies which it received, only one was contrary to the proposed interpretation.³¹

In this decision, Eurostat recommends classifying the assets of the PPP as non-governmental assets if the private partner bears most of the risk of the project, which will be considered to be the case if both of the following conditions are met: a) the private partner bears the construction risk; and b) the private partner bears at least one of either availability or demand risk.

In this sense, 'construction risk' refers to aspects such as late delivery, non-respect of specified standards or technical costs; 'availability risk' covers the delivery of the service in the agreed conditions of quantity and quality; and 'demand risk' refers to the variations in demand which are independent from the activity of the private partner, that is, which derive from aspects such as the business cycle, new market trends, direct competition or technological obsolescence.³² Thus, when these risks are borne by the private party, the

²⁹ The CMFB has only advisory functions and its opinions, which are not binding, are followed in most of the cases, although there have been exceptions to this (Frej Ohlsson (n 20) 38).

³⁰ In relation to the use of soft law as an interpretative tool in the context of the UE, see eg Wellens and Borchardt (n 1) 318.

³¹ See the CMFB opinion on the treatment in national accounts of assets related to 'public-private partnerships' contracts, of 30 January 2004 (included as an appendix to Eurostat's press release 18/2004, of 11 February 2004).

³² For more details on the assessment of the risks, see EPEC – European PPP Expertise Centre, *Risk Distribution and Balance Sheet Treatment: Practical Guide* (EIB 2011).

Government will be able to suspend or reduce its payments if the conditions agreed in the contract of the partnership are not respected by the other party.

Summing up, in order to classify the assets of a PPP off the government's balance sheet, economic reality takes precedence over the legal form of the transaction and the construction risk must be borne by the private party, who, in addition, will also have to bear at least the availability or demand risk.

This general decision of Eurostat can be criticised both from the perspective of its form and its content. Thus, in the following pages these two aspects will be presented separately.

3.1.1. *Form*

With respect to the form, it is controversial whether the general decision of Eurostat on PPPs has a legally binding nature or, on the contrary, if it should be considered a mere advice or recommendation, that is, soft law. This is due to the fact that general decisions of this kind are published as news releases of Eurostat in a rather informal way instead of including them in the Official Journal. Moreover, the mere use of the term 'decision' does not necessarily mean that we are in front of a formal source of EU law.

After the Treaty of Lisbon, the number of European Union legal acts has been reduced to five: regulations, directives, decisions, recommendations and opinions, but only the first three are legally binding (Article 288 TFEU). Decisions can be directed at particular cases and, in contrast to the situation before the Treaty of Lisbon, they may also have an abstract and general character and may not specify a particular addressee.³³ In this later case they have to be published in the Official Journal, which increases legal certainty with respect to aspects such as their date of entry into force.³⁴ Moreover, it has been clearly distinguished between legislative acts (Article 289 TFEU), delegated acts (Article 290 TFEU) and implementing acts (Article 291 TFEU). Thus, it is important to note that an act, such as a decision, could have different functions.³⁵

Even though Eurostat has not been particularly clear, it seems that the general decisions taken on interpretative issues should be considered as legally binding.³⁶ In this sense, it is important to note that decisions do not require any particular form, that is to say, unless otherwise specified in primary or secondary legislation, they could be made in writing or orally and the relevant factor to determine whether a certain measure can be considered as a binding decision and could be thus subject to judicial review is its substance and not its form, which would exclude decisions with a mere preparatory character.³⁷

The initial informal practice of Eurostat of providing advice has been progressively regulated (it is now foreseen in Article 10(2) of Council Regulation (EC) 479/2009) and it seems that the clarifications expressed by Eurostat have to be followed by the Member

³³ See Herwig CH Hofmann, Gerard C Rowe and Alexander H Türk, *Administrative Law and Policy of the European Union* (OUP 2011) 625.

³⁴ See Craig and de Búrca (n 15) 104–105.

³⁵ For more details, see eg Hofmann, Rowe and Türk (n 33) 94–97; Deirdre Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution* (OUP 2009) 121–124; Joana Mendes, 'Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design' (2013) 19 ELJ 17, 27–30; and Thomas Christiansen and Mathias Dobbels 'Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts' (2013) 19 ELJ 42, 43–45.

³⁶ This is also the view of Antonio López Díaz, 'La aplicación del principio de estabilidad presupuestaria: la prevalencia de lo económico sobre lo jurídico' (2011) 5 Crónica Tributaria: Boletín de Actualidad 29.

³⁷ See Hofmann, Rowe and Türk (n 33) 628; and Craig and de Búrca (n 15) 487–488.

States since otherwise Eurostat will end up amending their public finance statistics. However, we will see later that in the case of decisions of Eurostat with respect to particular cases, the Court of Justice has rejected their binding nature and they have been considered to be a mere advice in the framework of the cooperation among statistical authorities. Thus, given that there seem to be reasons both to argue that these general decisions should be considered as legally binding as well as mere advice, the current situation will not be completely clarified as long as the Court of Justice does not deal with this issue³⁸ or the normative framework is made more precise.

In this sense, the use of press releases to publish this type of general decisions seems clearly inadequate. Press or news releases should be aimed at the media and they should not be used as a source of law. As an alternative, the Commission (Eurostat) could use the following options.

To begin with, in a situation in which a legislative act (the regulation dealing with ESA95) has to be complemented in relation to certain technical aspects, a possibility would be to delegate to the Commission the power to adopt non-legislative acts of general application to supplement certain non-essential elements of the regulation on ESA95, following the requirements of Article 290 TFEU. With delegated acts, which lie between legislation under Article 289 TFEU and implementing acts under Article 291 TFEU,³⁹ the conditions under which the Commission may develop certain aspects would be clearer.

Another alternative is to regulate the statistical treatment of PPPs through an implementing act, such as an implementing decision. According to Article 291(2) TFEU, where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers to the Commission. With respect to the characteristics of the authorization to adopt implementing acts, in some cases the Court of Justice has interpreted that provisions which are too general or vague imply an authorisation for the authority to act.⁴⁰ It is therefore important to note that for the implementation of the Regulation on the European System of National and Regional Accounts (ESA95) the Commission has already adopted several clarifying decisions addressed to the Member States, such as Commission Decision 98/715/EC of 30 November 1998, which has been published in the Official Journal, a practice that increases legal certainty.

In any case, it is important to remember that formal decisions are not necessarily discussed in all cases by the College of Commissioners. Depending on the topic, the Commission may empower an individual Commissioner to make a decision or, in case of routine business, decision making may be delegated to directors general and heads of service, who will act on behalf of the Commission.⁴¹ Thus, the Commission could delegate to the director general of Eurostat the capacity to take certain decisions on technical issues.

However, given that delegated and implementing acts are subject to strict conditions and supervision by other European institutions or by the Member States, the easiest alternative for Eurostat would have been to rely on recommendations or opinions, which are clearly non-binding. In fact, one of the reasons why the Commission may have preferred to act

³⁸ With respect to the role of the Court of Justice in the review of administrative rulemaking, see Alexander H Türk, 'Oversight of Administrative Rulemaking: Judicial Review' (2013) 19 ELJ 126.

³⁹ For more details, see Andrea Biondi, Piet Eeckhout and Stefanie Ripley, *EU Law after Lisbon* (OUP 2012) 74–77.

⁴⁰ For more details on the case-law dealing with this issue, see *ibid* 78–79.

⁴¹ See Craig and de Búrca (n 15) 35.

through mere press releases, which in principle should not be legally binding, may be its interest in limiting the influence or supervision of institutions such as the Council, the European Parliament or the Court of Justice.⁴²

3.1.2. *Content*

With respect to the content of the decision of Eurostat of February 2004 on PPPs, the proposed criteria were considered to be very weak and insufficiently strict by the International Monetary Fund, since in practice the private party usually bears the construction risk and the availability risk (which is usually low), while the public party bears the demand risk, which facilitates the use of PPPs as a means to avoid budget stability rules.⁴³ This is contrary to the position sustained by Benito *et al.*, who consider that the risks should be allocated to the party that is the 'least cost avoider', that is, the party in the best position to control or bear the risks, and not just to the private party in order to improve public accounts in the short term at the expense of the global profitability of the project.⁴⁴

Moreover, the fact that the demand risk may not be transferred to the private party has been criticised by Posner *et al.*, who are of the view that demand risk is more difficult to anticipate and to value than construction and availability risks, which leaves governments with uncompensated costs which are not considered in the PPP contract and may not be reflected as possible liabilities in the balance sheet.⁴⁵ In this sense, in the case of those projects which are too big or important for governments to let them fail, if the government bears the demand risk, they should be directly seen as public because market discipline, the condition which causes the private party to be more efficient, will be missing.⁴⁶

Consequently, the intention to achieve mere accounting objectives may result in using PPP structures in cases in which they are not the best alternative from an economic perspective. As Boardman and Vining point out, governments may rely on PPPs in order to meet borrowing limitations and, furthermore, for mere electoral purposes. The reason is that with this system politicians can provide their voters with the benefits of public services and infrastructures (which increases their chances of re-election) while deferring the payments for decades, typically for 30 years, to future governments and a different set of voters.⁴⁷ When PPPs are used for this purpose they are normally more expensive than other alternatives, so they should be restricted to those cases in which the management expertise of the private party allows to achieve more efficiently the output determined and controlled by the public party.⁴⁸ In this sense, it has been pointed out in the literature that the

⁴² See *ibid* 108. This can also be observed in other areas, such as state aids, which have been regulated by the Commission mainly through soft law such as non-binding guidelines (Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (OUP 2011) 428-431). In this sense, Schwarze notes that after the Treaty of Lisbon soft law has not lost its relevance (Jürgen Schwarze, 'Soft Law im Recht der Europäischen Union' (2011) 46 *Europarecht* 3, 14-15).

⁴³ IMF, *Public-Private Partnerships* (IMF 2004) 22.

⁴⁴ See Bernardino Benito, Francisco Bastida and María-Dolores Guillamón, 'Public-Private Partnerships in the Context of the European System of Accounts (ESA95)' (2012) 1 *Open J of Accounting* 9.

⁴⁵ See Paul Posner, Shin Kue Ryu and Ann Tkachenko, 'Public-Private Partnerships: The Relevance of Budgeting' (2009) 1 *OECD J on Budgeting* 13.

⁴⁶ See *ibid* 13.

⁴⁷ See Anthony E Boardman and Aidan R Vining, 'The Political Economy of Public-Private Partnerships and Analysis of their Social Value' (2012) 83(2) *Annals of Public and Cooperative Economics* 125.

⁴⁸ See Benito, Bastida and Guillamón (n 44) 2.

advantages of PPPs may be outweighed in most cases by the higher financing cost of private parties and the transaction costs associated with partnerships.⁴⁹

In addition, the criteria proposed by Eurostat have other disadvantages. For instance, the analysis of all PPP projects creates an important administrative burden to national statistical institutes and to Eurostat, flooded with complex contracts.⁵⁰ Moreover, PPP contracts, which may last for decades, frequently suffer changes during the development of the project to adapt to the circumstances, which may require their constant assessment and reclassification.⁵¹

Summing up, the statistical criteria proposed by Eurostat have been a factor that has promoted the use of PPP contracts, sometimes beyond what was economically advisable. In fact, this favourable treatment that PPPs received in the decision of Eurostat may respond to the interest of European institutions to promote PPPs as a way of fostering economic recovery, which can be observed in several initiatives, such as the use of European funds to co-finance PPP projects, the technical assistance provided by the European Investment Bank⁵² or other soft governance initiatives.⁵³ In this sense, Frej Ohlsson notes that the European Council has encouraged on several occasions the use of PPPs as a way of improving public infrastructures.⁵⁴

An alternative to the criteria of Eurostat is to report PPP assets on a ‘control’ criterion. This approach has been recommended by the International Public Sector Accounting Standards Board (IPSASB), an institution which in general favours a move from cash to accrual accounting. In particular, IPSASB published a consultation paper in March 2008 on the treatment in public accounting of certain types of PPPs, according to which the grantor (in most cases the public sector entity) would have to report the assets and the related liabilities if the following criteria are fulfilled:

1. The grantor controls or regulates what services the operator must provide with the underlying property, to whom it must provide them, and the price ranges or rates that can be charged for services; and
2. The grantor controls –through ownership, beneficial entitlement or otherwise–, the residual interest in the property at the end of the arrangement.⁵⁵

The previous criteria were also criticised by the International Monetary Fund, who considered them to be too vague and susceptible to subjective and inconsistent

⁴⁹ See Posner, Ryu and Tkachenko (n 45) 11.

⁵⁰ See Philippe de Rougemont, ‘Accounting for PPP – The Eurostat Approach’ (Presentation in the International Seminar on Strengthening Public Investment and Managing Fiscal Risks from Public-Private Partnerships, Budapest, 7-8 March 2007).

⁵¹ See EPEC – European PPP Expertise Centre, *Eurostat Treatment of Public-Private Partnerships: Purposes, Methodology and Recent Trends* (EIB, 2010) 22.

⁵² For more details, see Commission, ‘Mobilising Private and Public Investment for Recovery and Long Term Structural Change: Developing Public Private Partnerships’ (Communication) COM (2009) 615 final.

⁵³ The use of this type of initiatives, such as white papers and advice services, has been highlighted by Ole Helby Petersen, ‘Emerging Meta-Governance as Regulation Framework for Public-Private Partnerships: An Examination of the European Union’s Approach’ (2010) 11(3) *Intl Public Management Rev* 1, 7-15.

⁵⁴ See Frej Ohlsson (n 20) 41-42.

⁵⁵ See International Federation of Accountants – International Public Sector Accounting Standards Board, ‘Accounting and Financial Reporting for Service Concession Arrangements’ (2008) IFAC Consultation Paper 36 <<http://www.ifac.org/sites/default/files/publications/exposure-drafts/00288.pdf>> accessed 15 December 2013.

interpretation.⁵⁶ However, after further work, the IPSASB published a new standard on this issue: *IPSAS 32 – service concession arrangements: grantor*. This standard also follows the control criteria, expressed in almost the same terms, but it is complemented by detailed application guidance, and pays more attention to the recognition and measurement of liabilities.⁵⁷

In the opinion of the IPSASB, EU Member States should adopt IPSAS, including IPSAS 32, in order to improve transparency and accountability.⁵⁸ However, the ‘control’ criterion would probably have as a consequence that most PPP assets would be recorded on the government balance sheet, which may prevent many PPP projects from being carried out because of their reporting impact on public debt and deficit, including projects which are economically justified, affordable and yield value for money.⁵⁹ Consequently, if Eurostat moved to a ‘control’ criterion it would be necessary to change the application of budget stability rules to long term investments, but reaching an agreement on the modification of the hard law framework may be very difficult.⁶⁰

Thus, it can be observed that the approach of Eurostat, focusing on risks and rewards, is not the only possibility and may be revised in the future,⁶¹ but the alternatives, such as the control criterion, also have certain disadvantages. In fact, as Heald and Georgiou point out, the criteria of the distribution of risks and control are not completely independent, since in some cases the allocation of risks can be an indicator of where control lies and, alternatively, control competencies may be an indicator of the allocation of risks.⁶² However, it seems that the general approach of European institutions towards the advantages of PPPs is more optimistic than most of the literature on this topic. As a consequence, the statistical criteria of Eurostat may be favouring projects which do not deliver value for money and which use this type of contract to shift costs to future budgets, that is, to future generations of taxpayers, limiting the ability of governments to adapt to new priorities.⁶³

3.2. The Manual on Government Deficit and Debt

In order to implement ESA95, Eurostat has published the *Manual on Government Deficit and Debt*.⁶⁴ However, the Manual is not prepared by Eurostat alone, but by a group of experts, under the coordination of Eurostat, which includes representatives from the EU Member States, the Commission (the Directorate General for Economic and Financial Affairs) and the European Central Bank. Moreover, the Committee on Monetary, Financial and Balance

⁵⁶ See the letter of 29 July 2008 responding to the consultation paper.

⁵⁷ In particular, see paras 9 and 14 of IPSAS 32, together with the Application Guidance of Appendix 1 (International Public Sector Accounting Standards Board, *Handbook of International Public Sector Accounting Pronouncements*, vol 2 (2012) 1403-1462). IPSAS 32 mirrors IFRIC 12 - *Service Concession Arrangements*, which contains the interpretation of the International Financial Reporting Interpretations Committee which is applicable to the private party (David Heald and George Georgiou, ‘The Substance of Accounting for Public-Private Partnerships’ (2011) 27(2) *Financial Accountability & Management* 238).

⁵⁸ IPSASB’s response to the public consultation paper on the suitability of international public sector accounting standards for EU Member States is contained in the letter to Mr. François Lequiller (Eurostat) of 10 May 2012 <http://www.ifac.org/sites/default/files/publications/files/IFAC_E_Letter_IPSASB.pdf> accessed 15 December 2013.

⁵⁹ See EPEC – European PPP Expertise Centre (n 51) 25.

⁶⁰ *ibid* 27.

⁶¹ Frej Ohlsson admits the possibility that the criteria proposed by Eurostat may have to be reviewed in the future (Frej Ohlsson (n 20) 43).

⁶² See Heald and Georgiou (n 57) 222.

⁶³ See Posner, Ryu and Tkachenko (n 45) 15.

⁶⁴ Eurostat, *Manual on Government Deficit and Debt – Implementation of ESA95* (Publications Office of the European Union 2013).

of Payments Statistics (CMFB), comprising officials from National Statistical Offices and Central Banks, also advises Eurostat on how to interpret ESA95.⁶⁵ Finally, the Manual is discussed and approved by the Working Parties on national and financial accounts, which are made up of statisticians from Eurostat, the Member States and other interested parties.⁶⁶

With respect to the legal nature of the Manual, it is not legally binding and its aim is simply to assist in the interpretation or application of ESA95. However, in practice it is considered to be ‘an indispensable complement to ESA95’.⁶⁷ Following the terminology of Senden, it could be considered an example of soft post-legislative rulemaking, since it indicates the view of the Commission on the interpretation and application of EU law but lacks legally binding force.⁶⁸

In relation to the treatment of PPPs in the Manual, following the decision of Eurostat of February 2004, a new chapter on this issue was added that same year.⁶⁹ The third edition of 2010 dealt with PPPs in part VI.5 with more detailed guidance, and the fifth and last edition of the Manual, dating from January 2013, has not included any fundamental change in this area.

In the opinion of the present author, there is nothing wrong with the publication of an interpretative manual on this issue and it should be seen as part of the normal activity of Eurostat, which has published other methodological manuals on complex issues such as the *Manual on sources and methods for the compilation of COFOG (Classification of the Functions of Government) statistics*, the *Manual on quarterly non-financial accounts for general government*, and the *Manual on sources and methods for ESA 95 financial accounts*. However, even though the clarifying purpose of Eurostat should be welcomed, it also entails certain risks. In particular, there is the danger that the Manual would go beyond a mere interpretative role and that it will be used as a source of law, as will be later commented on in the section dealing with the decisions of Eurostat on particular cases.⁷⁰

3.3. Recommendations in Dialogue Visits

In order to ensure the quality of the data reported by the Member States to Eurostat in the framework of the excessive deficit procedure, Council Regulation (EC) 479/2009 requires Eurostat to carry out dialogue or methodological visits (Articles 11 – 11b). Dialogue visits have a regular character and focus on the actual data which has been reported by the Member States to Eurostat, but also deal with methodological issues, statistical processes, sources of information and accounting rules. In turn, methodological visits have an exceptional nature and review the processes and accounts which justify the reported data, especially if there are frequent revisions of the deficit or debt of a Member State or if there

⁶⁵ This Committee is currently regulated by the decision of the Council of the European Union of 13 November 2006 and its functions are merely advisory, without legislative powers. Its origins date back to 1991 and in recent years its role has become particularly relevant with respect to consultations relating to the Excessive Deficit Procedure.

⁶⁶ See Eurostat (n 64) 1-2.

⁶⁷ *ibid* 1.

⁶⁸ See Linda Senden ‘Soft Post-Legislative Rulemaking: A Time for More Stringent Control’ (2013) 19 ELJ 57, 60-62.

⁶⁹ Frej Ohlsson (n 20) 41.

⁷⁰ In the opinion of Scott, given that guidance materials may include substantive errors and their adoption process may be characterized by procedural flaws, it would be advisable to strengthen their judicial review (see Joanne Scott, ‘In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law’ (2011) 48 CML Rev 329, 344-353).

are changes to the sources and methods for the estimation of public deficit and debt without a clear justification. Therefore, given that dialogue visits are the most common, the following paragraphs will comment on their main characteristics, focusing on the case of PPPs.

With respect to the legal nature of these dialogue visits, they should be seen as an example of cooperation among statistical authorities to ensure the quality of the data. In other words, they could be considered a particular example of the application of the principle of sincere cooperation between the Member States and the EU institutions which is foreseen in Article 4(3) of the Treaty on European Union. Therefore, in principle, the recommendations of Eurostat should not be considered to be legally binding, even though a lack of cooperation could give rise, under certain circumstances, to the imposition of fines. Similarly, the reports published by Eurostat summing up the content of these visits are merely informative, but despite their non-binding character they could be seen as an instrument to exert pressure on the Member States and guide their accounting practices.

In relation to the attention paid to PPPs during these visits, this type of projects is analysed in most of them, especially in those countries such as the United Kingdom and Spain where PPPs are very common. In the case of the dialogue visits to the United Kingdom in 2009 and 2011, Eurostat highlighted the need to verify whether the recording of PPPs according to British accounting criteria was consistent with the position of Eurostat, for instance, in relation to the treatment of the construction risk. Therefore, Eurostat required the British statistical authorities to review certain projects (which affected very different areas, from hospitals to prisons) and to send Eurostat more information on aspects such as the contracts of the projects.⁷¹

With respect to the dialogue visits to Spain, Eurostat has noted that PPP projects in this country are characterised by the fact that the construction and availability risks are always borne by the private investor, while the demand risk is normally on the side of the government; and that most projects deal with the provision of health services, such as hospitals, and transport infrastructures, such as highways.⁷² During these visits, Eurostat has also required in several occasions clarifications in order to determine the statistical treatment of PPP projects, such as additional information concerning the design of PPP contracts, especially on the clauses of the contracts which allow for changes in the fees or the services provided, since this could affect the distribution of the risks.⁷³

In the dialogue visits to other countries, the classification of PPP projects is also a topic which appears very frequently. For instance, among other issues, the visit to Poland in 2011 dealt with the classification of a PPP for the construction and exploitation of a motorway, and finally it was agreed that the Polish statistical authorities would formally require Eurostat for *ex-ante* advice on the recording of the PPP project.⁷⁴ In the case of the visit to Greece, Eurostat required the Greek authorities to send a statistical analysis of the PPP

⁷¹ See Eurostat, 'EDP Dialogue Visit to the United Kingdom, 12-13 January 2009, Final Findings, 24 April 2009' 19-20; and Eurostat, 'EDP Dialogue Visit to the United Kingdom, 26-28 January 2011, Final Findings, 10 May 2011' 19. The reports with the final findings of the visits of Eurostat are available online: <http://epp.eurostat.ec.europa.eu/portal/page/portal/government_finance_statistics/excessive_deficit/eurostat_edp_visits_member_states> accessed 15 December 2013.

⁷² See Eurostat, 'EDP Dialogue Visit to Spain, 05-06 February 2007, Final Findings, 14 June 2007' 9.

⁷³ See eg *ibid* 10; Eurostat, 'EDP Dialogue Visit to Spain, 15-16 June 2009, Final Findings, 28 September 2009' 22; and Eurostat, 'EDP Dialogue Visit to Spain, 17-18 November 2011, Final Findings, 22 November 2011' 24.

⁷⁴ See Eurostat, 'EDP Dialogue Visit to Poland, 5-6 September 2011, Final Findings, 19 January 2012' 20-21.

contract concerning the construction, maintenance and operation of several fire department buildings.⁷⁵ Similarly, during the dialogue visit to Italy in 2011, Eurostat also asked for the PPP contract of a hospital in order to check whether the risks were borne by the private party and if, consequently, the corresponding assets and liabilities could be classified outside the government accounts.⁷⁶

Finally, with respect to the participants to the dialogue visits, it is important to mention that they will depend on the internal distribution of competences among the different levels of government. For instance, in Germany, the processing of data on the public accounts of local governments is carried out by the regional statistical offices and, therefore, the last dialogue visit to Germany in 2011 included a visit to the Regional Statistical Office of Hessen.⁷⁷ Moreover, in some cases, such as in the visit to Estonia in 2011, representatives of the private parties of the PPP projects also participated as observers.⁷⁸

Thus, it can be observed that the dialogue visits are used by Eurostat as an opportunity to make recommendations and request further information. Even though these recommendations are not legally binding and the visits should be seen as an example of voluntary cooperation among statistical authorities, they are particularly influential on the Member States, especially taking into account that the reports on the visits are made public.

3.4. Eurostat's Decisions on Particular Cases

In principle, Eurostat could use both binding and non-binding decisions in order to solve controversial issues dealing with the statistical classification of particular operations. As Craig and de Búrca have noted, administrative decisions aimed at a particular individual in the sense of Article 288 TFEU may not fit within the categories of legislative, delegated or implementing acts, but this does not imply that such decisions cannot legally be made.⁷⁹ In fact, the possibility of using binding decisions in the sense of Article 288 TFEU is already followed in other areas in which the Commission also has important competences, such as competition and state aids.⁸⁰

In relation to the legal nature of the opinions of Eurostat on particular cases it is important to note that, even though the term 'decision' is frequently used, the Court of Justice has considered that they do not constitute the object of binding decisions, namely, they are not a formal source of law. On the contrary, they would fit more within the type of decisions which, according to Hofmann *et al.*, are not 'intended to produce legal effects' in the sense of Article 263(1) TFEU and consequently could be considered an example of 'factual conduct' or 'factual acts'.⁸¹ As a result, the legality of these decisions cannot be directly reviewed by the Court of Justice or, at most, these factual acts could only be reviewed when they are part of an administrative procedure and the final decision is challenged, even though by then it may be too late to protect the interests of the affected parties.⁸²

The advice of Eurostat can be required in advance to the implementation of a project, but it can also deal with on-going projects and can imply their accounting reclassification if there

⁷⁵ See Eurostat, 'EDP Dialogue Visit to Greece, 22-23 March 2012, Final Findings, 8 June 2012' 8-9.

⁷⁶ See Eurostat, 'EDP Dialogue Visit to Italy, 27-28 June 2011, Final Findings, 30 August 2012' 23-24.

⁷⁷ See Eurostat, 'EDP Dialogue Visit to Germany, 5-6 May 2011, Final Findings, 27 July 2011' 27-35.

⁷⁸ See Eurostat, 'EDP Dialogue Visit to Estonia, 4-5 July 2011, Final Findings, 22 March 2012' 13-15.

⁷⁹ See Craig and de Búrca (n 15) 118.

⁸⁰ See *ibid* 107.

⁸¹ For more details, see Hofmann, Rowe and Türk (n 33) 668.

⁸² *ibid* 667-668.

are changes in the way they are applied. In the following paragraphs the characteristics of these decisions of Eurostat will be analysed focusing on the case of PPPs and paying particular attention to their legal nature and practical consequences.

3.4.1. *Decisions on Ex-Ante Consultations*

Consultations on future projects were first regulated by the ‘Code of best practice on the compilation and reporting of data in the context of the excessive deficit procedure’, endorsed by the Ecofin Council on 18 February 2003. That Code was not legally binding, but most of its content has been later incorporated into Regulations. In this sense, Article 10(1) of Council Regulation (EC) 479/2009 of 25 May 2009 foresees the possibility to request clarifications from Eurostat on the application of ESA95, but the procedural details to request *ex-ante* advice are regulated by the guidelines published by Eurostat on this issue.⁸³

They deal with aspects such as the requirements to initiate the process or the effects of the advice. In particular, it is important to note that Eurostat will basically respond to the requests of national statistical authorities responsible for the government sector of the national accounts, and will not provide specific advice to private parties. Moreover, Eurostat’s *ex-ante* views are always preliminary and conditional on the information provided, that is, once the PPP project is effectively implemented Eurostat can check whether the initial opinion is still applicable. With respect to the transparency of the advice of Eurostat, in principle all preliminary views are made public, but their publication could be delayed or they could even remain confidential if the Member State requiring the opinion of Eurostat does not want to give information on possible future projects.

Another significant characteristic of the *ex-ante* consultation procedure is the fact that exchanges of views on different options are not generally welcome, in other words, Member States should only ask for advice on one design of an operation rather than present different options for borderline cases and negotiate a solution with Eurostat. Thus, once Eurostat has received all the relevant information of the case, it will provide its opinion in the form of a bilateral letter (or as a general decision in cases of particular relevance or complexity in which it is necessary to consult the CMFB), without entering into any further negotiation with the authority requesting for advice. In this sense, it is important to note that the procedure designed by Eurostat does not foresee any further step that could be followed in case of disagreement with the view of Eurostat on the statistical treatment of the proposed operation and in principle it is not possible to bring an action against this decision before the Court of Justice.

The reason is that these decisions are considered to be non-binding on the Member States and, therefore, if they are not satisfied with the content of the answer they could still go ahead with the project and classify its related assets and liabilities according to their view. In that case they should be aware of the fact that if they depart from the recommendation of Eurostat it is almost sure that the data on deficit and debt will be corrected. This amendment of the data by Eurostat is the act which in principle could be reviewed by the Court of Justice.

⁸³ The guidelines are available online: Eurostat, ‘Eurostat’s Ex-Ante Advice on Methodological Issues’ <http://epp.eurostat.ec.europa.eu/portal/page/portal/government_finance_statistics/documents/EUROSTAT_ADVISE_19_JULY_2006.pdf> accessed 18 October 2013.

With respect to the effects of these decisions on Eurostat, if there are no changes in the circumstances of the case, Eurostat should be consistent with its initial opinion, but strictly speaking it is not legally bound and in practice, given the complexity of PPP projects, it may be easy to justify a change of position alleging that the initial information was not complete or that there have been changes in the implementation of the project. However, the activity of Eurostat should respect the principle of legitimate expectations, which is a general principle of EU law which applies both to its legislative and administrative acts and which may derive not only from legal acts conferring individual rights or benefits, but also from the conduct of EU authorities in the cases in which they give precise, unconditional and consistent assurances.⁸⁴

In relation to the consultations for *ex-ante* opinions on the statistical treatment of PPP projects which Eurostat has received in recent years, from the letters of Eurostat which have been made public on its website it can be observed that the country with more consultations on this topic was Spain. The projects in this country dealt with the construction of roads and motorways in the Autonomous Communities of Aragón,⁸⁵ Galicia⁸⁶ and Navarra,⁸⁷ as well as with the construction of a canal to increase the irrigable area of Navarra.⁸⁸ In addition, Eurostat has also replied to a consultation from Poland⁸⁹ and Belgium⁹⁰ on PPP projects dealing, respectively, with the construction of a motorway and the reorganization of regional public transportation in Brussels.

From the analysis of the advice of Eurostat, the following aspects can be highlighted. To begin with, almost all of these projects were promoted by the regional governments (Autonomous Communities in Spain and Region of Brussels-Capital in Belgium), but these authorities could only relate to Eurostat through the National Statistical Institutes.

Second, in relation to the legal sources on which Eurostat bases its decisions, it is important to note that ESA95 is only referred to in one case among the ‘applicable accounting rules’, together with the *Manual on Government Deficit and Debt* interpreting (or developing) ESA95. In the rest of cases, the Manual (in particular its chapter on PPPs) is the only ‘rule’ which is mentioned and, in practice, the criteria of the Manual are in all cases the only aspects which are considered by Eurostat to solve the controversies, which shows that the Manual, despite not being legally binding, is treated in practice as a source of law.

⁸⁴ For more details, see Hofmann, Rowe and Türk (n 33) 178.

⁸⁵ Letter of Eurostat of 21 June 2011 with the Subject ‘Public-Private Partnership by Autonomous Community of Aragon’ (reference ESTAT/C-3/FL/LA/DB/mb (2011) 721215).

⁸⁶ Letter of Eurostat of 3 June 2008 with the Subject ‘Formal Consultation on the Classification of the Assets in the Public-Private Partnership (Autovía del Salnés, Tramo enlace con la PO-531-SANXENXO)’ (reference ESTAT/C-3/LN/LA/FS/ji D (2008) 30147).

⁸⁷ Letter of Eurostat of 7 July 2011 with the Subject ‘Consultation on the Classification of the Assets in the Public-Private Partnership (Autovía A-21 del Pirineo Motorway in the Autonomous Region of Navarra’ (reference ESTAT/C-3/FL/LA/SF/mb (2011) 745745).

⁸⁸ Letter of Eurostat of 11 August 2011 with the Subject ‘Formal Consultation on the Classification of the Assets in the Public-Private Partnership (Irrigable Area of the Navarra Canal, Phase 1)’ (reference ESTAT/C-3/FL/LA/SF/mb (2011) 7957626).

⁸⁹ Letter of Eurostat of November 2011 with the Subject ‘Ex-Ante Consultation on the Statistical Recording of the Project of Construction and Operation of A1 Motorway Tuszyn - Pyrzowice Stretch’ (reference ESTAT/C-4/FL/JV/GSR/eb D(2011) 1371309).

⁹⁰ Letter of Eurostat of 28 March 2008 with the Subject ‘Sector Classification of CITEO in the Context of a PPP Operation’ (reference ESTAT/C-3/LN/MW/mg D(2008) 30052).

3.4.2. *Decisions on On-Going Projects*

Eurostat may express its opinion on the statistical treatment of the assets of PPP projects which are already under implementation, which can have immediate practical consequences. In particular, if Eurostat decides to reclassify the assets involved in a PPP project on the government balance sheet, the impact on the levels of deficit and debt can be very relevant. Moreover, this type of decisions is also problematic because of the impossibility to bring an action against them before the Court of Justice, as can be observed in the following two cases.

To begin with, in order to expand the underground railway network of Madrid, the regional government of the Autonomous Community of Madrid established the company *Madrid, Infraestructuras del Transporte* (Mintra), which was a public-law entity attached to the regional ministry of transports and infrastructures. This entity had legal personality, its own assets and full capacity to act and to incur autonomous debts with regard to the Autonomous Community of Madrid. Initially, by letter of 14 February 2003, Eurostat had classified Mintra outside the government sector and therefore its debt was considered to be private, but it changed its opinion by letter of 3 February 2005, with an important impact on the public debt and deficit of the region of Madrid.

In the opinion of Eurostat, the change was due to the fact that Mintra did not fulfil the initial conditions to be considered as a non-financial corporation, since it did not carry out a significant part of its activities in the free market and depended only on the projects commissioned by the regional government of Madrid. However, the conservative government of Madrid declared that the change was only motivated by political and not by economic reasons, and raised doubts on the impartiality of Eurostat.⁹¹

Given that the regional authorities of Madrid considered that their interests were not properly defended by the Spanish National Statistical Institute, the President of the Autonomous Community of Madrid travelled directly to Brussels to interview with the Commissioner for Economic and Monetary Affairs to analyse the case of Mintra.⁹² Despite this, given that the position of Eurostat did not change, the Regional Government of Madrid and Mintra brought an action before the Court of First Instance on 11 April 2005 against the letter from Eurostat, alleging, among other reasons, that Eurostat's decision was contrary to the principle of legitimate expectations and that it lacked any reference to its legal basis.⁹³

However, the action was dismissed as inadmissible by order of the Court of First Instance of 5 September 2006.⁹⁴ The reason is that the letter of Eurostat was not considered to have binding legal effects, that is, it had to be seen as a mere opinion of Eurostat in the framework of its cooperation with the national statistical institutes and therefore it had to

⁹¹ In particular, the change was directly qualified as a manoeuvre of the new social-democrat Spanish government together with the European Commissioner for Economic and Monetary Affairs, the Spanish social-democrat Joaquín Almunia, under whose final responsibility Eurostat operates, with the aim of undermining the credibility of the regional government of Madrid and limit its capacity to initiate new public works. See eg M Calleja and E Serbeto, 'El Gobierno regional acusa a Zapatero de querer "asfixiar" a Madrid' *ABC* (Madrid, 4 February 2005) 40; Vicente G Olaya, 'El cambio en la deuda de Mintra obedece a motivos políticos' *El País* (Madrid, 7 February 2005); and 'La Comunidad exige al Gobierno que defienda los intereses de Madrid en la UE' *ABC* (Madrid, 9 February 2005) 37.

⁹² See M Calleja, 'Aguirre viaja a Bruselas para pedir a Almunia que cambie el informe sobre Mintra' *ABC* (Madrid, 15 February 2005) 44.

⁹³ Case T-148/05 *Comunidad de Madrid and Mintra v Commission* [2005] OJ C143/41.

⁹⁴ [2006] ECR II-61*.

be considered that the Spanish National Statistical Institute could have departed from the suggested criteria.⁹⁵ In that case, Eurostat could have amended the data presented by Spain and this is the action which, according to the Commission, would have been binding and could have been reviewed by the Court of Justice. One of the aspects that the Court takes into account in order to justify the non-binding character of the letter is the fact that at the time it was sent, no legal act expressly foresaw this type of decisions or advice, even though the Code of best practice on the compilation and reporting of data in the context of the excessive deficit procedure already referred to this possibility. Given that the current regulations also place these decisions of Eurostat in the framework of the cooperation among statistical authorities it seems that their non-binding character remains unchanged.

Another important PPP project which was affected by a decision of Eurostat was the rehabilitation, operation and maintenance of the M-30 ring road of Madrid, which involved the creation of a company (Madrid Calle 30) with public (80%) and private (20%) capital. This company receives periodic payments for the operation and maintenance of the road during 35 years and its profits are distributed in the form of dividends to its shareholders (the city of Madrid and the private investors). In principle, the assets of this PPP were planned to be recorded off the government accounts, since the private partner would bear the construction and availability risks.

After consulting with Eurostat, the Spanish National Statistical Institute classified Madrid Calle 30 in the public administrations sector within ESA95, which had a direct impact on the levels of government deficit and debt of Spain for 2005 which were published by Eurostat in news release 48/2006, of 24 April 2006. The Madrid City Council and Madrid Calle 30 considered that the news release included an implicit decision of Eurostat classifying Madrid Calle 30 in the public administrations sector and brought an action on 3 July 2006 to the Court of First Instance to seek its annulment.⁹⁶ In the opinion of the applicants, the private companies which were shareholders of Madrid Calle 30 had been selected after a call for tenders subject to strict criteria in respect of market prices and considered that Eurostat had not respected the rules of ESA95 and that it had not justified its decision adequately nor given a hearing to the affected parties. However, the Court of First Instance rejected the action as inadmissible by order of 12 July 2007 because it considered that the news release 48/2006 did not include an implied decision of the Commission (Eurostat) with binding legal effects and therefore it was not a legal act against which an action could be brought. In this sense, the advice provided by Eurostat at the request of the Spanish authorities had to be considered as a mere example of voluntary cooperation without binding nature. The authorities of Madrid brought that order to the Court of Justice but the appeal was also dismissed and the position of the Court of First Instance was confirmed.⁹⁷

From the analysis of the cases of Mintra and Madrid Calle 30 it is possible to observe two main limitations of the current procedure used by Eurostat to take decisions on on-going cases.

⁹⁵ In other cases, Eurostat has analysed if non-binding instruments, such as guidelines, affect the rights and obligations of individuals. This shows that the Court of Justice acknowledges that soft law may have legal effects, including legally binding effects (for more details, see Oana Stefan, 'European Union Soft Law: New Developments Concerning the Divide between Legally Binding Force and Legal Effects' (2012) 75 *Modern L Rev* 879, 885-888).

⁹⁶ Case T-177/06 *Ayuntamiento de Madrid and Madrid Calle 30 v Commission* [2006] OJ C212/33.

⁹⁷ Order of the Court (Sixth Chamber) of 20 June 2008 in Case C-448/07 P *Ayuntamiento de Madrid and Madrid Calle 30 v Commission* [2008] ECR I-99*.

To begin with, the decisions of Eurostat, expressed in letters to the national statistical institutes or in press releases, cannot be directly reviewed by the Court of Justice.⁹⁸ The reason is that these decisions are not considered to be legally binding, even though in practice Eurostat officials recognise that the Member States have to follow the criteria that they propose.⁹⁹ This restrictive approach of the Court when reviewing these ‘intermediate’ decisions contrasts with the important attention that non-binding instruments, such as codes of conduct or recommendations, have received by the Court when interpreting or supplementing binding rules.¹⁰⁰

In principle, if a Member State does not agree with the classification proposed by Eurostat it should not follow it and wait until Eurostat amends its data on deficit and debt to bring the case to the Court of Justice. This situation is not satisfactory and some form of interim protection should be guaranteed. For instance, the courts should accept the existence of reviewable tacit or implicit decisions in the cases in which a factual measure is taken, or the judicial review system may be reformed to introduce some kind of declaratory judgement.¹⁰¹

In this sense, it is important to note that if the national statistical authorities follow the advice of Eurostat, it will not be possible for the affected administrations (regional in most cases) to bring an action to the Court of Justice because Eurostat will not have to amend the data. In these cases, López Díaz has suggested that the affected public administrations or private parties carrying out the projects could still apply to their national courts for the legal review of the decision of their national statistical institute applying the criteria of Eurostat.¹⁰²

A second limitation of the procedure followed by Eurostat to express its opinion on the classification of certain on-going projects is the fact that, as it was explained before, Eurostat only engages in dialogue with the competent national authorities, which are basically National Statistical Offices together with Finance Ministries and Central Banks, but does not enter into direct contact with other public authorities such as regional or local governments, even though in some countries, such as Spain, the majority of all PPPs take place in the regional government sub-sector.¹⁰³ Thus, these sub-central entities will have to rely on other instances to present their position to Eurostat, something which could be problematic if they have opposing political interests and which could raise doubts on the impartiality of the statistical decisions, a problem which was particularly clear in the case dealing with the classification of Mintra.¹⁰⁴

This situation does not seem to be satisfactory from the perspective of the right to be heard before individual measures which could have a negative impact are taken, which is usually

⁹⁸ Apart from the cases of Mintra and Madrid Calle 30, the Belgian authorities also brought an action on 22 December 2006 to the Court of Justice (Case T 403/06 *Belgium v Commission*) in order to annul a decision of Eurostat contained in a letter of 18 October 2006 on the classification of a railway infrastructure fund in the public administration sector ([2007] OJ C42/36). Among other reasons, Belgium alleged that the decision of Eurostat was contrary to the principle of protection of legitimate expectations since Eurostat had initially agreed with the inclusion of the fund in the non-financial corporations sector. However, the Court did not rule on the case since Belgium withdrew its action.

⁹⁹ See Östergren Pofantis (n 20) 11.

¹⁰⁰ For more details, see Jan Klabbers, ‘Informal Instruments before the European Court of Justice’ (1994) 31(5) CML Rev 1011-1014.

¹⁰¹ For more details, see Hofmann, Rowe and Türk (n 33) 672-673.

¹⁰² See López Díaz (n 36) 29.

¹⁰³ Eurostat, ‘EDP Dialogue Visit to Spain, 17-18 November 2011’ (n 73) 24.

¹⁰⁴ See Juan Martínez Calvo, ‘Hacia la construcción de un “Derecho Administrativo financiable”: Crónica del Caso Mintra’ (2005) 167 Revista de Administración Pública 400.

considered a part of the general principle of good administration.¹⁰⁵ In this sense, the participatory procedure followed by the Commission in the area of state aids, where the parties concerned, understood in a broad way, can make their views known,¹⁰⁶ could serve as a reference to improve the procedure dealing with the quantification of public debt.

Moreover, it is important to remember that Article 4(2) of the Treaty on European Union establishes the obligation to respect the national constitutional identity of the Member States, which according to authors such as Besselink includes the extent to which regional self-government is allowed in some countries.¹⁰⁷ Therefore, even though 'national constitutional identity' is an ambivalent and controversial concept,¹⁰⁸ it seems that the working procedures of Eurostat should be more flexible in order to take into account that many cases affect regional governments.

4. CONCLUSIONS

The regulation of budget stability seems to be an area dominated by hard law, but in practice Eurostat has had to complement many aspects, such as the treatment of PPPs, with a wide set of instruments with a high degree of informality (decisions in press releases, manuals, recommendations during dialogue visits, opinions in letters to the national authorities, etc.). These instruments look in general like soft law, but their legal status is controversial and have certain limitations.

To begin with, even though general decisions of Eurostat are published as mere press releases, taking into account the changes introduced by the Treaty of Lisbon, they should be considered to be legally binding decisions because of their content. In any case, in order to increase legal certainty it would be advisable to make clear the type of legal act which is being used and whether it has a legislative, a delegated or an implementing character. This is important because, as it could be observed with respect to PPPs, the activity of Eurostat is not merely interpretative and in practice it has been filling the gaps of the accounting norms, favouring criteria which are not devoid of debate.

With respect to the legal status of the manuals published by Eurostat and the recommendations expressed during dialogue visits, they could be considered as soft law because even though they are not legally binding, in practice they have an important influence on the behaviour of the Member States. In fact, on many occasions the *Manual on Government Deficit and Debt* seems to be treated as a source of law.

Finally, Eurostat's decisions on particular cases, which would seem to entail legal obligations, have been considered as non-binding by the Court of Justice. As a result, if a disagreement arises, the views of Eurostat cannot be subject to immediate judicial review and the affected Member State would have to wait until the statistical data is amended by Eurostat, which would cause unnecessary delays and damages. Therefore, this is an aspect which should be improved and probably the best alternative would be the use of binding decisions, an option that is already applied in the area of competition law. Furthermore, in the cases in which the affected parties are mainly regional or local governments, in order to

¹⁰⁵ See, for example, Hofmann, Rowe and Türk (n 33) 198. For a detailed analysis of the case-law on this issue, see Mendes (n 42) 161-186.

¹⁰⁶ See *ibid* 380-402.

¹⁰⁷ See Leonard F M Besselink, 'National and Constitutional Identity Before and After Lisbon' (2010) 6(3) *Utrecht L Rev* 36, 44.

¹⁰⁸ For more details, see eg Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia 2013).

avoid misunderstandings it would be advisable to establish mechanisms, such as hearings, to allow them to express their views directly to Eurostat instead of having to communicate always through their national statistical institutes.

To sum up, it can be observed that Eurostat has frequently made use of instruments of controversial legal status in order to interpret or develop the regulation of public finance statistics. For Eurostat, this is probably a comfortable situation since it offers greater flexibility, but several cases, such as those of Mintra and Madrid Calle 30, have shown that more clarity on the nature of the instruments which are used by Eurostat would be advisable in order to protect basic values such as the rule of law and facilitate the access to judicial review.