



INSIGHT

COVID-19 SOFT LAW: VOLUMINOUS, EFFECTIVE, LEGITIMATE? A RESEARCH AGENDA

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ABSTRACT: After the various recent crisis – financial, migration, Brexit, to name but a few – the mantra “the end of the EU is nigh” has somewhat become a common place. It is hardly surprising to see this repeated over and over again, while Europe got caught in the COVID-19 whirlwind – or the “eye of the storm” if you prefer more established quotes. Albeit initially a tad bit slow in mobilizing, the EU is producing measures at a competing speed. This short contribution aims at reflecting on the instruments used to achieve all these goals. And, in this regard, the conclusion is foretold, while Europe does indeed what it does best: governing through soft law. A look at selected COVID-19 emergency instruments shows that the salience of both the advantages and the drawbacks of soft law are brought to the fore by this pandemic. The current crisis should be turned into an opportunity for reform.

KEYWORDS: COVID-19 and the EU – soft law – Commission guidance – legal effects – legitimacy – rule of law.

I. ADVANTAGES OF SOFT LAW FOR CRISIS REGULATION

Soft law – or rules of conduct having no legally binding force but producing legal and practical effects,¹ have been flourishing in European integration. Enshrined in Art. 288, para. 5, TFEU, EU soft law is fast, flexible, easy to issue, and thus adapted to rapid evolutions and changes in policies. This makes these instruments particularly adapted to deal with emergencies such as the current pandemic. Yet, soft law suffers from important legitimacy drawbacks, it is hardly justiciable, and its legal effects are blurred.

One does not need to go to extensive lengths to show that the primary advantage of soft law in times of crisis is its flexibility. Its simplified adoption procedures are highly valued characteristics in regulating sensitive sectors, in addressing situations where

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¹ F. SNYDER, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, in *Modern Law Review*, 1993, p. 64 *et seq.*



swift action is imperative, or to accommodate uncertainty and national diversity.² All this is reflected in the current regulatory response to the pandemic. Faced with an initial lack of cooperation from the Member States, the EU ultimately attempted to achieve convergence through the intermediary of an ever increasing amount of soft law. Some authors argue that centralisation of all measures at the expense of subsidiarity, while desirable, might not be an ideal solution in all circumstances.³ In that vein, the virtues of soft law in catalysing cooperation have been praised since the times of A/H1N1 pandemic, as it leaves enough margin for states to construct their responses in accordance with national specificities.⁴

With regards to the current crisis, the instruments setting the scene were, amongst others, a Communication on a coordinated economic response to the COVID-19 outbreak,⁵ dealing with the immediate response to the crisis, as well as a joint statement from the European Council⁶ followed up by two roadmaps by the Council and the Commission⁷ on strategies and measures to end the lockdowns. As such, these measures do not figure among the legal instruments written down in Art. 288, para. 5, TFEU, but it is known that soft law comes in a vast variety of shapes and forms.⁸ Indeed, these instruments of mostly a steering nature were soon followed by a substantive body of soft law, all issued under unprecedented time pressure. For instance, the State aid measures outlined in the initial Communication on a coordinated economic response were further substantiated, only a week later, in a Temporary Framework to support the economy;⁹ this was already amended twice in less than two months,¹⁰ with

² For a comprehensive literature review see O. STEFAN, M. AVBELJ, M. ELIANTONIO, M. HARTLAPP, E. KORKEAHO, N. RUBIO, *EU Soft Law in the EU Legal Order: A Literature Review*, in *SoLaR Working Paper*, no. 1/2018, www.solar-network.eu.

³ M. DOBBS, *National Governance of Public Health Responses in a Pandemic?*, in *European Journal of Risk Regulation*, 2020, p. 1 *et seq.*

⁴ B. BENNETT, T. CARNEY, *Law, ethics and pandemic preparedness: the importance of cross-jurisdictional and cross-cultural perspectives*, in *Austrian and New Zealand Journal of Public Health*, 2010, p. 106 *et seq.*

⁵ Communication COM(2020) 112 final of 13 March 2020 from the Commission on a coordinated economic response to the COVID-19 outbreak.

⁶ European Council, Joint statement of the Members of the European Council of 26 March 2020, www.consilium.europa.eu.

⁷ European Commission, European Council, *The Joint European Roadmap towards lifting COVID-19 containment measures*, ec.europa.eu; Council, *Roadmap for Recovery*, www.consilium.europa.eu.

⁸ R. BAXTER, *International Law in Her Infinite Variety*, in *International and Comparative Law Quarterly*, 1980, p. 549 *et seq.*

⁹ Communication C(2020) 1863 final of 20 March 2020 from the Commission, *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*.

¹⁰ Communication C(2020) 2215 final of 4 April 2020 from the Commission, *Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*; Communication from the Commission of 13 May 2020, *Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*.

a flexibility that matched the dimensions of the crisis.¹¹ The recommendations on the use of data and apps to fight coronavirus post lockdown can be found in at least four substantial documents adopted by various EU bodies¹² within less than two weeks. The volume of these instruments is indeed impressive, and it only matches an unprecedented crisis of a massive scale, characterized by a rapid evolution corresponding to an ever changing scientific dataset. However, the questions are whether, in the speed of production, rule of law checks and balances are respected, and what effectiveness these measures will have.

II. RULE OF LAW CREDENTIALS

As anyone writing about soft law can confirm, a certain research fatigue is soon reached from encountering, over and over again, arguments related to the rule of law credentials of soft law. The literature (present author included) goes somewhat in circles, endlessly discussing the legitimacy, transparency, clarity, and accountability of soft law.

In order to offset the legitimacy deficit, in many sectors soft law is issued following public consultations. However, a quick look at the COVID-19 measures and EU websites show little clarity as to how exactly these instruments were issued. In State aid – where soft law is generally issued following robust consultations – press releases stress that the Commission engaged consultations with the Member States in order to issue the Temporary Framework and its various amendments. However it is difficult to discern how these consultations took place and whether the arguments put forward by the Member States were finally taken into consideration. In relation to the recommendations regarding mobile apps, issued by the Commission and the European Data Protection Board, it is unclear from the websites the extent to which national authorities have been consulted. It should be mentioned that Art. 70, para. 4, of the General Data Protection Regulation (GDPR)¹³ requires the Board to organise consultations when issuing guidance “where appropriate”, while also requiring the results of the consultation pro-

¹¹ A. BIONDI, *State Aid in the Time of COVID-19*, in *EU Law Live Op-Ed*, 25 March 2020, eulawlive.com; see also A. ROSANÒ, *Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law*, in *European Papers – European Forum, Insight* of 7 May 2020, www.europeanpapers.eu.

¹² Commission Recommendation (EU) 2020/518 of 8 April 2020 on a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis, in particular concerning mobile applications and the use of anonymised mobility data; Communication of 16 April 2020 from the Commission, *Guidance on Apps supporting the fight against COVID 19 pandemic in relation to data protection*; EHEALTH NETWORK, 15 April 2020, *Mobile applications to support contact tracing in the EU's fight against COVID-19 Common EU Toolbox for Member States*, ec.europa.eu; European Data Protection Board, *Guidelines 04/2020 of 21 April 2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak*.

¹³ Regulation (EU) 2016/679 of 27 April 2016 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

cedure to be publicly available. While the article is not drafted in a particularly prescriptive form, one may wonder whether the urgency of the pandemic is sufficient to render consultations – and publication thereof – “inappropriate”.

Most notable is the absence of the European Parliament in issuing all these rules. The Parliament itself called for the intervention of various EU bodies to set up a coordinated action to combat the pandemic.¹⁴ The urgency of action during the pandemic does not really explain this lack of involvement, with experiences from the Member States showing that Parliaments can indeed be very much active during a state of emergency.¹⁵ However, there is no requirement to consult Parliament when issuing soft measures in normal circumstances either, with some articles of the Treaty providing for the Parliament only to be informed when certain soft law is issued.¹⁶ In light of the increasing number of soft law instruments, issued in emergency or otherwise, research is needed to find ways of involvement of the European Parliament in drafting this material.¹⁷ In this vein, the focus of soft law research might need to shift from the Courts and their role in preserving the rule of law to other mechanisms that are essential in ensuring accountability and legitimacy.¹⁸

With regards to accountability, it will be recalled that this cannot be ensured through ex-post judicial review. This is because in the absence of legally binding force, the threshold for justiciability of soft law instruments is rarely met. Although the Court of Justice seemed favourable to acknowledge a wider definition of ‘legal effects’ for the purposes of justiciability of international agreements,¹⁹ in a recent case²⁰ the Court refused to review a recommendation of the European Commission as it was not intended to have *binding* legal effects, and hence could not constitute a challengeable act for the purposes of Art. 263 TFEU. Of course there is still the possibility for such measures to be challenged indirectly through preliminary rulings or pleas in illegality.²¹

The issue of justiciability will become probably extremely salient, as one can already identify a variety of litigious aspects related to COVID-19 soft law. For example, issues of

¹⁴ European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences.

¹⁵ M. SCHEININ, *The COVID-19 Emergency in Finland: Best Practice and Problems*, in *Verfassungsblog*, 16 April 2020, verfassungsblog.de.

¹⁶ See for instance Art. 121, para. 2, TFEU regarding economic policy.

¹⁷ T. VAN DEN BRINK, L. SENDEN, *Checks and Balances of Soft EU Rule-Making*, 2012 Report for Policy Department C: Citizens' Rights and Constitutional Affairs, available at ssrn.com.

¹⁸ See more generally the articles in E. FAHEY (ed.), *Future-Mapping the Directions of European Union Law*, forthcoming special issue of the *Journal of International and Comparative Law*.

¹⁹ See for instance Court of Justice, judgment of 7 October 2014, case C-399/12 *Germany v. Council*, and opinion of AG Sharpston delivered on 26 November 2015, case C-660/13, *Council v. Commission*.

²⁰ Court of Justice, judgment of 20 February 2018, case C-16/16, *Belgium v. Commission*.

²¹ A. TURK, *Liability and accountability for policies announced to the public and for press releases*, in ECB Legal Conference 2017, *Shaping a new legal order for Europe: a tale of crises and opportunities*, available at www.ecb.europa.eu.

competences might arise and arguments might be put forward as to the competence of the Commission to regulate through soft law in areas excluded from harmonization, such as public health. Furthermore, in relation to issues such as the use of contact tracing apps, the stakes are particularly high, as they might involve a potential trade-off between privacy on the one hand and public health on the other. Since neither of these ideals can be compromised, careful work needs to be done to ensure that contact tracing is construed in a proportional fashion, both from a technical and regulatory perspective.²²

With an important number of instruments dealing with the same topic, duplication occurs. This is problematic not only in light of efficiency, vital in times of pandemic, but also in terms of coherence. In relation to the contact tracing apps, the Communication of the Commission states that ‘national health authorities (or entities carrying out task in the public interest in the field of health) are the controllers’ of data.²³ Conversely, the Guidelines of the Board mention that “the national health authorities could be the controllers for such application; other controllers may also be envisaged”, emphasising on the fact that the roles and the responsibilities of such actors must be clearly set out.²⁴ Given the plurality of actors involved in the setting up of such app²⁵ the Guidelines appear to be more adapted to the technical reality, in that they do not require that a particular body be entrusted a task in the interest of public health.

This brief account shows that emergency soft law suffers from the same problems as any soft law. Whilst its legitimacy credentials need to be strengthened, further work is needed to clarify its legal effects while ultimately ensuring effectiveness and accountability.

III. LEGAL EFFECTS OF COVID-19 SOFT LAW

Soft law instruments can only bind the discretion of the author²⁶ but can constitute a point of reference for national authorities and courts.²⁷ The necessity to ascertain such effects with some clarity becomes apparent when one looks at the scale of some measures, such as those that allowed an estimated 1.9 trillion Euros to be granted in State aid as a consequence of the pandemic. As decided, EU State aid guidance accepted by Member States through an exchange of letters creates a framework of cooperation in accordance with Art. 108, para. 1, TFEU from which neither the Commission nor the MS

²² C. CATTUTO, A. SPINA, *The Institutionalization of Digital Public Health: Lessons Learned From the Covid-19 App*, in *European Journal of Risk Regulation*, 2020, p. 1 *et seq.*

²³ Guidance on Apps supporting the fight against COVID 19, *cit.*, para. 3.1.

²⁴ European Data Protection Board Guidelines 04/2020, *cit.*, para. 25.

²⁵ At the time of writing, the StopCovid project team in France consists of the health authority the cybersecurity agency, a research institute, and several companies: www.inria.fr.

²⁶ Court of Justice, judgment of 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri*.

²⁷ Court of Justice, judgment of 13 December 1989, case C-322/88, *Grimaldi*.

could be released.²⁸ It remains to be seen whether the State aid Temporary Framework falls within the same category. In any case, the practical effects of State aid soft law are as such that Member States have little leeway to depart from the provisions thereof. The Court held that, while EU soft law is not legally binding for Member States, it is to be followed by the European Commission when investigating national measures.²⁹

Interesting legal issues might be raised by the temporary reintroduction of the comfort letters in antitrust. These are instruments of an individual application used before the entry into force of Regulation 1/2003 in order to speedily and informally decide on the validity of agreements that did not infringe Art. 101 TFEU or qualified for an individual exemption under Art. 101, para.3, TFEU. The Commission relied heavily on comfort letters, even though this practice raised important concerns with regard to legal certainty or transparency.³⁰ While it is clear that such letters could create a legitimate expectation that the Commission would not depart from their text,³¹ it is less clear what the value of these documents will have at the national level. Historically, comfort letters were deemed not to produce binding legal effects vis-à-vis national courts. In *Guerlain* and *Lancôme* the Court of Justice decided that such letters “do not have the effect of preventing national courts before which the agreements in question are alleged to be incompatible with article [101] from reaching a different finding as regards the agreements concerned on the basis of the information available to them.” Whilst not binding upon the national courts, the comfort letter “constitutes a factor which the national courts may take into account.”³² However, to date, there is not much clarity as to what exactly does it mean to ‘take into account’ EU guidance.

What emerges from the brief examples discussed above is a potential for different applications of the COVID-19 soft law instruments at the national level. While EU guidance can indeed create a potential for mutual learning,³³ this cannot happen outside some clear frameworks regarding the legal and practical effects that such guidance can have. Simplistic hard and soft dichotomies whereas the former have all binding effects

²⁸ Court of Justice, judgment of 15 October 1996, case C-311/94 *Ijssel-Vliet v. Minister van Economische Zaken*, paras 37-44.

²⁹ Court of Justice, judgment of 30 September 2016, case C-526/14 *Kotnik*.

³⁰ H. COSMA, R. WHISH, *Soft Law in the Field of EU Competition Policy*, in *European Business Law Review*, 2003, p. 43-44.

³¹ Court of Justice, judgment of 28 June 2005, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri* [GC], for general guidelines in competition; also General Court, judgment of 19 September 2018, case T-68/15, *HH Ferries*, para. 309, for letters in State aid.

³² Court of Justice: judgment of 10 July 1980, joined cases 253/78 and 1 to 3/79 *Procureur de la République and Others v. Bruno Giry and Guerlain SA and Others*, para. 13; judgment of 10 July 1980, case 99/79 *Lancôme v. Etos*, para. 11. The judgment resonates with the current position on commitment decisions Court of Justice, judgment of 23 November 2017, case C-547/16, *Gasorba*, paras 28-29.

³³ A. PACCES, M. WEIMER, *From Diversity to Coordination: A European Approach to COVID-1*, in *European Journal of Risk Regulation*, 2020, p. 1 et seq.

and are considered 'law' whereas the latter, non-binding, can only have 'practical' effects with no legal relevance in a court of law cannot work, neither in times of crisis³⁴ nor in usual times.³⁵ Once the pandemic is over, research is needed to show how this experience could be used as a springboard to issue a "guidance for guidance".³⁶ Such guidance should be drafted with care, however, in order to preserve the flexibility of soft law, while keeping these instruments not legally binding, as required by the Treaties. Some authors³⁷ – as well as some members of the Court³⁸ – expressed the view that soft law might entail a 'comply or explain' obligation, potentially requiring national authorities to comply with soft law or explain eventual departures. Similarly, it is important to engage stakeholders and authorities from the Member States more in discussions regarding the effects of EU soft law instruments.³⁹

IV. CONCLUSION: THE NEED TO CLARIFY SOFT LAW

What is striking in the EU reaction to the COVID-19 crisis is not the lack of reactivity, but rather the massive amount of measures undertaken. While an evaluation of COVID-19 soft law is too soon to complete, one important issue emerges from the above brief discussion. In times of crisis, the disadvantages of soft law, in particular its weak legitimacy credentials and unclear legal effects come to the fore. It is perhaps high time for the EU institutions to clarify uniform procedures for the adoption of soft law involving transparent consultations of stakeholders and of the European Parliament. With regards to the legal effects that COVID-19 soft law can produce, these are limited, similarly to any soft law measure issued outside the framework of the crisis. In this connection, one author wonders whether this 'flurry' of instruments issued in 'unchartered territory' could entail state liability in case of non-compliance.⁴⁰ While the answer is probably no, as they are not intended to produce binding legal effects, the more interesting question pertains to the effectiveness of COVID-19 soft law. This is obviously a matter which can

³⁴ R. WEBER, *Overcoming the Hard Law/Soft Law Dichotomy in Times of (Financial) Crises*, in *Journal of Governance and Regulation*, 2012, p. 8 *et seq.*

³⁵ O. STEFAN, *Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 359 *et seq.*

³⁶ C. VAN DAM, *Guidance Documents of the European Commission in the Dutch Legal Order*, 2020, PhD Thesis, 2020, openaccess.leidenuniv.nl.

³⁷ Z. GEORGIEVA, *Soft law in EU competition law and its reception in member states' courts: An empirical study on national judicial attitudes to atypical legal instruments*, PhD Thesis 2017, available at research.tilburguniversity.edu.

³⁸ Opinion of AG Kokott delivered on 6 September 2012, case C-226/11 *Expedia*, para. 39 and footnote 40.

³⁹ See Policy recommendations from the SoLaR Network to the European Commission, www.solar-network.eu.

⁴⁰ A. ALEMANN, *The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?*, in *European Journal of Risk Regulation*, 2020, p. 1 *et seq.*

only be observed in the months/years to come, with experiences from other jurisdictions showing that soft law can orient individual behaviours in order to fight the virus.⁴¹

One issue is however certain. Enlisting the trust of the citizens and Member States is essential to increase the effectiveness of COVID-19 soft law. As acknowledged by the Roadmap for Recovery, it is necessary 'to ensure buy-in from governments and parliaments, from social partners and from citizens.' Such buy-in from citizens, and indeed, solidarity in tackling the pandemic cannot be conceived in the absence of transparency of EU action.⁴² In that regard, the Roadmap promises that consultations as well as permanent dialogue with stakeholders will follow for further measures. One can only hope that these promises would be acted upon, and also, the expectation is that it will be possible to access sooner or later the relevant information concerning consultation processes on COVID-19 soft law.

⁴¹ S. CATO, T. IIDA, K. ISHIDA, A. ITO, K. McELWAIN, *The Effect of Soft Government Directives About COVID-19 on Social Beliefs in Japan*, 2020, available at ssrn.com.

⁴² C. BEAUCILLON, *International and European Emergency Assistance to EU Member States in the COVID-19 Crisis: Why European Solidarity Is Not Dead and What We Need to Make It both Happen and Last*, in *European Papers - European Forum*, Insight of 25 April 2020, www.europeanpapers.eu.