

IS EU SOFT LAW RULE OF LAW COMPLIANT?

Prof Oana Stefan
Chair in European Law
King's College London



Brussels, 2.12.2020
COM(2020) 786 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

Staying safe from COVID-19 during winter





**EUROPEAN
RULE OF LAW
MECHANISM**





Bit of structure...

- What is soft law
 - How do I use RoL in this context
 - Thick RoL- legitimacy of SL?
 - Does SL matter?
 - Thin RoL – control of soft law?
-

Soft... what?

What is Soft Law?

- A notion borrowed from the international relations literature.
- Generally reference is made to the English term; however, some national variants as well:
 - DE - weiches Völkerrecht
 - FI – pehmeä sääntely
 - FR - Droit mou, droit assourdi, droit vert, droit vague, droit doux, droit souple...
 - IT – *la* soft law; il diritto non vincolante
 - SI - mehko parvo
 - NL - beleidsregels and richtsnoeren

The EU definition

- Starting from Art 288 (5) TFEU- Recommendations and opinions shall have no binding force.
- Most quoted – Snyder(1994): ‘rules of conduct which have no legally binding force but which nevertheless may have practical effects and legal effects.’
- ‘The Bamboo’ of the law? (Snyder 2022 forthcoming)



Examples of soft law

Precursors to harmonisation:

- Communication on Cassis/White Paper on the Internal Market;
- public procurement;
- consumer soft law as precursors to Treaty consecration

Soft law as second best harmonisation solution:

- Recommendations mainly (Online Gambling; AI)

Soft law explaining harmonizing hard law:

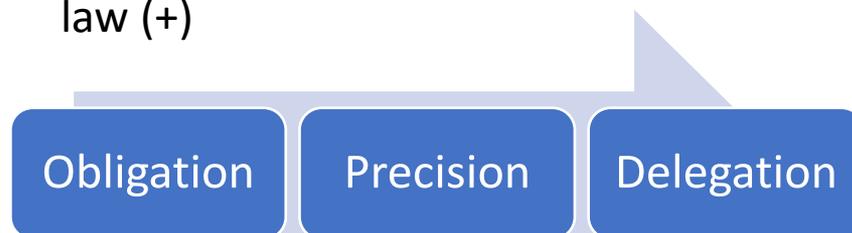
- the 2017 package of public procurement reform;
- AI Act soft law
- competition law - Leniency notice; Guidelines on the methods to set fines;
- (?) Agencies hard-law mandated soft law (Supervisory authorities guidance for the consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law (ie – EBA on outsourcing, on internal governance...))

Theories – the positivist & the rationalist view

- No distinction in the Vienna Convention
- Literature contrasts soft and hard law
- For some, a norm either is law or it is not law at all.

- Abbott et Al, 2000: legalization; law as a continuum

- No law Soft law(-)
law (+) Hard



- Terpan, 2015: a variant – obligation and enforcement

- No law Soft law(-)
law (+) Hard



Theories –
pluralist (?)
views

Abbott et al definition
under constructivist
criticism: what about
legitimacy?

Hybridity theory – the
focus should be on the
relationship between hard
and soft law - Trubek et al

Theories: soft law and new gov

- New governance:
 - **Restricted sense:** ‘types of political steering in which non-hierarchical modes of guidance, such as persuasion and negotiation, are employed, and/or public and private actors are engaged in policy formulation’. (Heritier)
 - **Generally:** a new way to govern that ‘departs from the traditional model where collectively binding decisions are taken by elected representatives within parliaments and implemented by bureaucrats within public administrations.’ (Treib et al)

Role of Soft law

- Soft law is cheap, fast, and flexible!
 - Catalyst for creating the premises of successful international cooperation
 - Best suited to deal with the complexity of European affairs, their diversity
 - Regulating sensitive sectors
 - Addressing situations where swift action is imperative
- Soft law lacks legitimacy safeguards!
 - Enhance the discretion of the Community institutions to the detriment of MS competences
 - Parliament not involved
 - Sketchy consultation processes
 - Inappropriate for court use

Taxonomy

Wellens and Borchard (1989): the way in which the authors avail themselves of certain acts, the enacting forum, the form and the content of the documents

Senden (2004): functional and purposive criteria

- preparatory and informative;
- interpretative and decisional;
- formal and informal steering instruments.

Chalmers (2010)

- commitments about the conduct of institution;
- commitments to respect certain values;
- programming legislation;
- regulatory instruments

Rule of Law & EU soft law – attempt at theorizing

No clear definition

Tamanaha, 2008

- Thin version: government officials and citizens are bound by and act consistent with the law
- Thick version: reference to fundamental rights, democracy, and/or criteria of justice or right

Møller/Skaaning 2012 – careful to say which version is used.

Dawson 2008 – the Fullerian, thin rule of law definition does not apply to the Open Method of Coordination, new frameworks need to be devised.

Rule of Law – EU official position

- EU- Article 2 TEU: value *alongside* human dignity, freedom, **democracy**, equality, human rights.
- Conditionality Reg:
 - Art 2 Includes the principles of legality implying a transparent, accountable, **democratic** and **pluralistic law-making process**; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.
- Thick *and* thin!

ELUSIVE NATURE: IS
THIS EVEN LAW?!?!

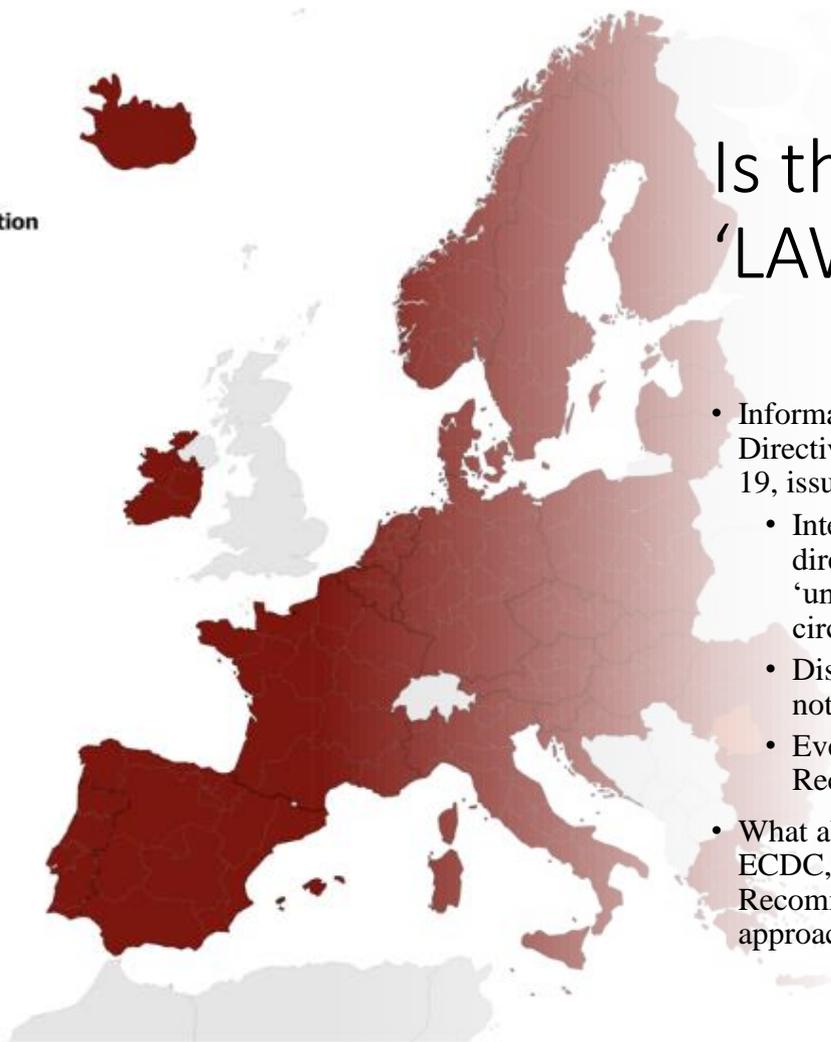
**14-day notification rate per 100 000 population
weighted by vaccine uptake, EU/EEA
Week 03, 2022**



**Regions not visible
in the main map extent**



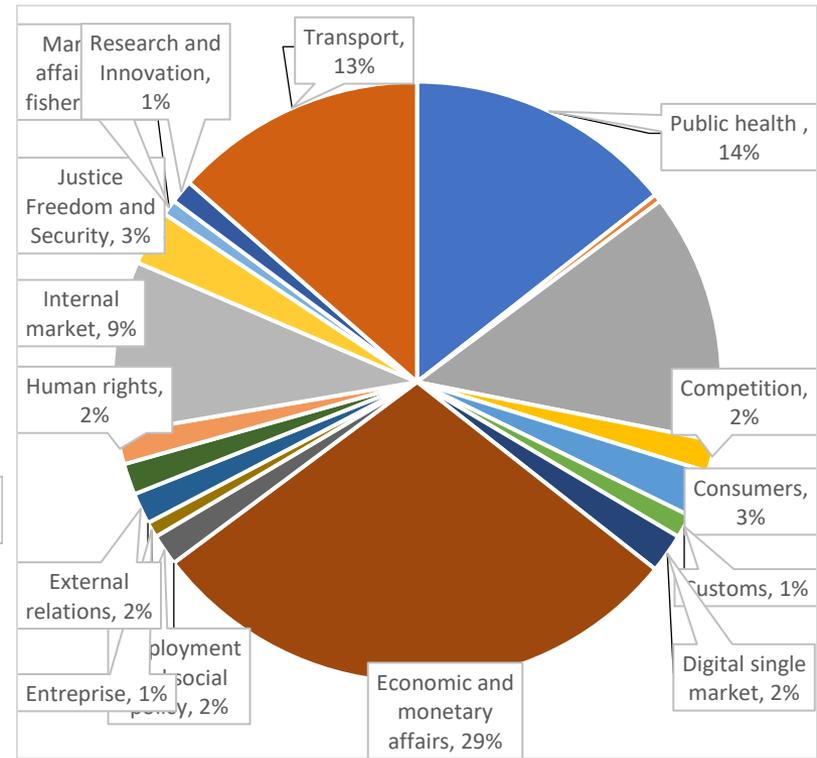
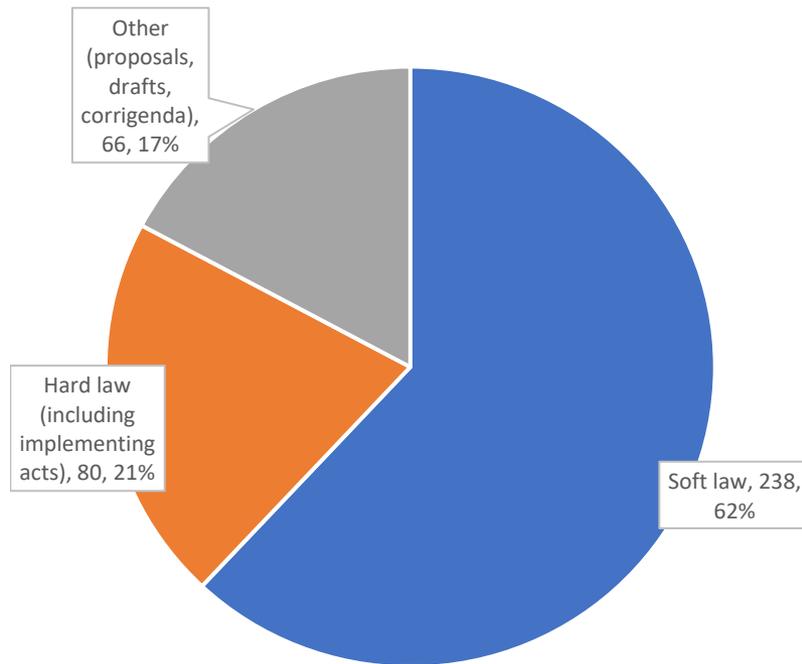
**Countries not visible
in the main map extent**



Is this even 'LAW'??

- Information on the Package Travel Directive in connection with the COVID-19, issued by DG Justice and Consumers
 - Interprets Art 12 Package Travel directive – COVID-19 can qualify as 'unavoidable and extraordinary circumstances'
 - Disclaimer: Not formally adopted, not endorsed by the Commission
 - Eventually the Commission issued a Recommendation
- What about the maps drawn by the ECDC, in support of the Council Recommendation on a coordinated approach to travel measures in the EU??

COVID-19 EU Soft Law Quants (Stefan 2021, JICL)



COVID-19

CUSTOMS GUIDANCE FOR TRADE



Soft law is adaptable and very good for regulating pandemic circumstances

- The COVID-19 Customs Guidance for Trade – an ‘evolving document’
- It explains and adapts the Customs Code to emergency situations
- Examples on how the Code could be interpreted to accommodate various hardship – alternatives to paying custom debts, waiving guarantee requirements...
- Gap filling function – no room for force majeure in EU customs regulation

THICK RULE OF
LAW... Legitimacy,
anyone??

Legal basis??

- General – Art 17(1) TEU; specific - art 107 (3) TFEU; Agencies – specified in the Agency Regs, for instance 8(2)(c) and 16 of ESMA Reg
- Conflicts of legal basis and Covid contact tracing apps
- Brings to the fore the issue of competence
 - What about the Online Gambling Recommendation?
 - What about the Notice on the Notion of State Aid?

Soft law making

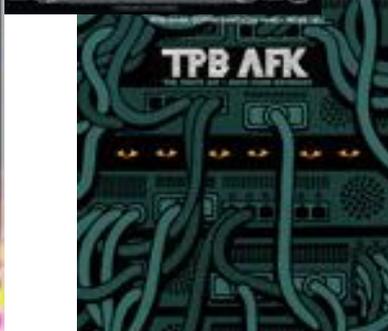
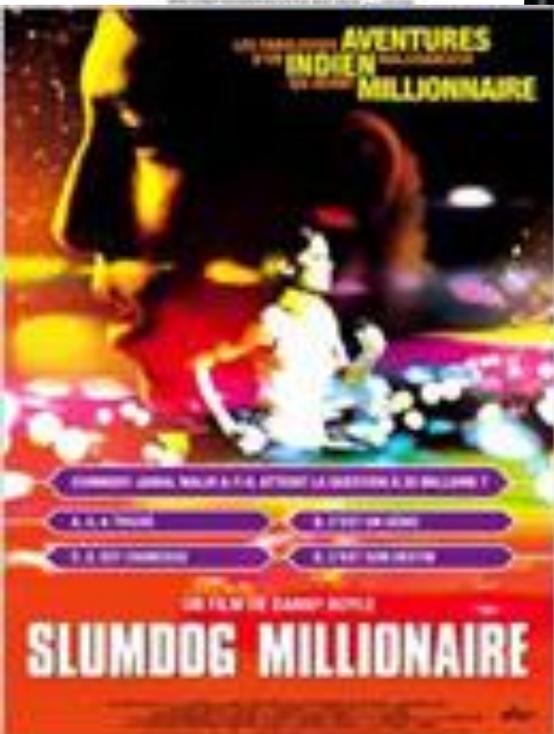
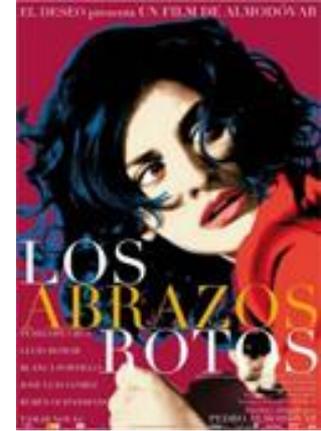
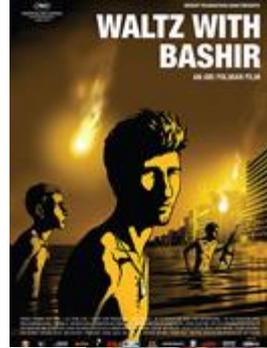
- No formal involvement of the European Parliament
- Criticized by the Parliament itself:
 - 1960 – the Parliament warned about the dangers associated with the proliferation, by the Council, of acts not mentioned in the Treaty
 - 2007 Resolution - the use of soft law is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law under Article 6 of the EU Treaty, and also those of subsidiarity and proportionality
- Criticized by national authorities:
- French Conseil d'État (1992) condemned the profusion of Council decisions and resolutions, as well as of Commission communications

Usual soft law making – the nuanced view

- Intra-institutional relationships:
 - The Communication on *Cassis de Dijon* – first a letter to the MS & exchanges within the Commission legal service
 - Information on the Package Travel Directive in connection with the COVID-19- first issued by DG Justice and Consumers, then followed up with a Recommendation by the Commission
- Inter-institutional relationships:
 - Partnership Court-Commission – Cassis Communication and the 2006 Interpretative Communication on contracts falling outside of the public procurement directives.
 - Involvement of the EP – Recommendation on Online Gambling
 - Challenge to clarity? – the contact tracing apps

Public consultations

- These occur unsystematically – very good in State aid, poor in other sectors:
 - environmental law – trading schemes and the guidelines on large hydroelectric power production projects
 - Guidance by agencies – normally provision is made for such public consultations to occur in the hard law framework
- Expert groups – important in co-generation of soft law:
 - Ethics Guidelines on Trustworthy AI: expert group, following consultation of 500 stakeholders, Commission SUPPORTED the GL (not ‘adopted’)
- Transparency is vital here:
 - Guidelines on Regional Aid 2007-2013
 - GL on contact tracing apps by EDPB: Art 70 (4) GDPR – consultations ‘where appropriate’



Guidelines on State aid for
Climate, Environmental
protection and Energy 2022



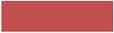
- Builds on environmental GL from 2014, 2011 and 2008, extending to energy
- 2014 GL:
 - Impact on the design of the national support schemes in favour of renewable energy sources
 - National energy mix (Art 194(2) TFEU- preference for technology-neutral schemes.
- Revision (since Nov 2020):
 - Backdrop of the European Green Deal
 - Need to ensure effectiveness of reduction of energy charges for Energy Intensive Users

Consultation of citizens and stakeholders

This initiative will benefit from two consultations ([Targeted consultation on the EEAG, Public consultation of the Fitness Check](#)) already carried out in the framework of the Fitness Check of the State aid modernisation package.

Additional planned consultation activities for this initiative are:

- Parallel four week consultation to provide feedback on this inception impact assessment and 8 week public consultation to any interested stakeholders on a questionnaire. Stakeholders are invited to submit their responses directly to the questionnaire on the official public consultations page of the European Commission: <https://ec.europa.eu/info/law/better-regulation/have-your-say>.
- 8 week public consultation to any interested stakeholder on the draft revised EEAG. Stakeholders will be informed of the consultation on the official public consultations page of the European Commission: <https://ec.europa.eu/info/law/better-regulation/have-your-say> and DG Competition website: <http://ec.europa.eu/competition/consultations/open.html>
- Meeting with Member States, and in particular with national and regional competent authorities involved in the granting of aid, to gather feedback on the draft revised EEAG. An invitation to the meeting will be officially sent in due time to all Member States through the Permanent Representations.
- Meetings with other stakeholders, amongst others business associations, consumer organizations, companies, NGOs and environmental organisations.



Temporary Framework(s):

20.03.20

Updates:

- 4.04.20

- 13.05.20

- 02.07.20

- 13.10.20

- 01.02.21

- 18.11.21 (prolonged till
30 June)



Elia Antonio & Stefan
EJRR 2021:
The elusive
legitimacy of EU soft
law: an analysis
into consultation and
participation in the
process
of adopting COVID-
19 soft law in the EU

- Dataset established in August 2020, search through 383 documents, identifying 197 'soft law'.
- Finding traces of consultations between the Commission and EP, National authorities, Relevant EU or national scientific bodies or agencies, Other stakeholders – NGOs etc.
- 27 instruments left...
- Big absent! The European Parliament
- Small proportion of instruments where references to consultations was made (less than 15%):
 - Only in six of these instances consultations occurred.
 - 22 measures contain 'pledges' for further consultations
- OMC-like mechanisms in place for the use of technology and data to address the COVID crisis
- Some consultations transpire from press releases, but are not actually published.



Transparency...?

- The reason behind soft law is enhancing transparency: ‘regulation by publication’; ‘regulation by information’
- Frequently prolonged, amended, changed (Case C-431/14 *Greece v Commission* para 71: guidelines must be kept under constant review).
- Controversy... Reg 2020/2092
 - EUCO conclusions: ‘The application of the conditionality mechanism under the Regulation will be objective, fair, impartial and fact-based, ensuring due process, non discrimination and equal treatment of Member States.’ – Commission to adopt guidance....
- C-657/21 *Parliament v Commission* (in progress)
 - Commission is failing to apply Regulation 2020/2092 in full
 - Commission did not publish GL yet as is waiting results of Court judgments
 - Commission didn’t apply the reg pursuant to instruction from European Council, which is against Commission independence.

Why do we even
care???

The EFFECTS of Soft
Law

Soft Law: effects

- Practical:
 - transformations that soft law may generate in the behaviour and practices of the Member States ranging from policy changes to subtler changes at the level of discourse, understanding and policy principles.
- Legal effects:
 - the capacity of EU legal instruments to change the rights and obligations of actors.
- The real problem: different effects at different levels of governance



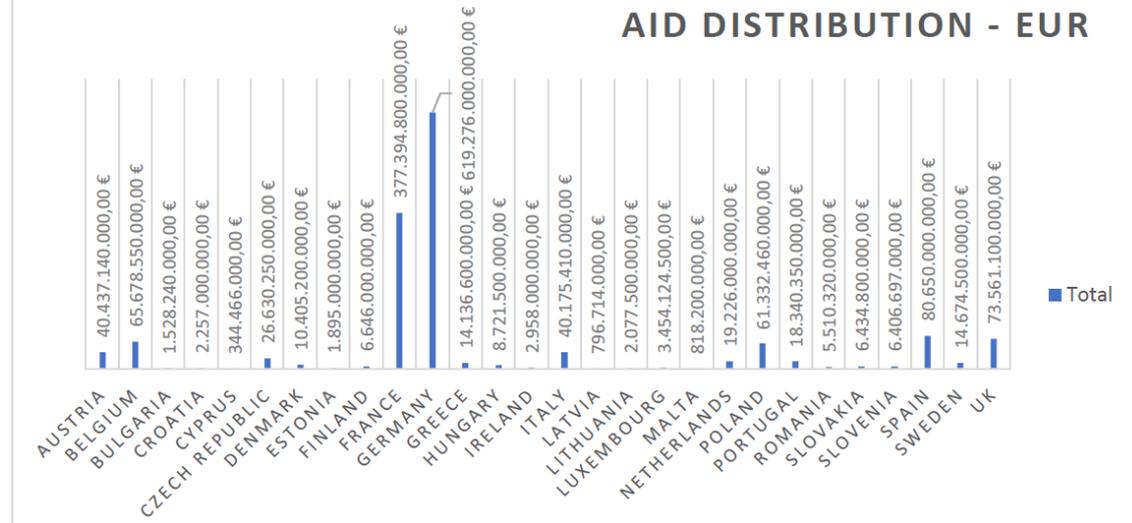
Package travel directive recommendation and national interpretations: anti-law through opportunistic use

- The Recomm on package travel directive saved tourism industry BUT given its non-binding nature the airlines and organisers of package travel issued vouchers as they saw fit – differences in treatment throughout EU
- Some MS allowed operators to *impose* vouchers – soft law implemented disregarding hard law.
 - Infringement proceedings from the Commission
 - Preliminary references: States cannot invoke force majeure to relieve operators from the obligation to provide reimbursements – the Recomm does not say provide *only* vouchers!! C-407/21 *Que choisir*; C-540/21 *Com v Slovak Rep*

Anti-Law...???

Temporary
Framework for
State aid
Over 3 trillion EUR

Distribution of aid
(Agnolucci, JECLAP
2021)



PERMANENT emergency!

- Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia (OJ C 426, 9.11.2022, p. 1–34) – 3 amendments
- Temporary Crisis and Transition Framework
https://competition-policy.ec.europa.eu/state-aid/temporary-crisis-and-transition-framework_en



Rule of law soft law might have effects with the passage of time (Romanian story).





Supremacy at play – conflict!

- Cooperation and verification mechanism (CVM) recommending Romania to reverse the so called reforms
- Various cases referring to CVM with Constitutional Court rejecting its primacy (CCR 33/2018) and refusing to make preliminary references (CCR 137/2019)
- C-83/19 Forumul Judecatorilor

New principle of progression introduced by the operation of CVM (Moraru and Bercea 2022)

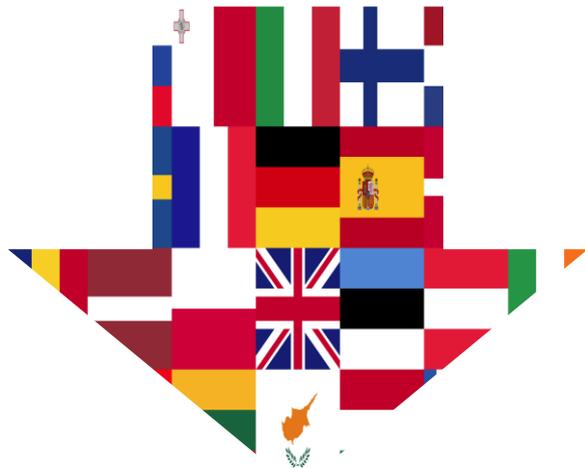
First time sincere cooperation comes up as a principle giving effects to soft law.

- CCR 390/2021: I'm all for this sincere cooperation but 'CVM reports do not reguate and therefore cannot conflict with national law'
- C- 357/19 Euro Box comes back to it but rejected by CCR in a press release
- HOWEVER, after time, Romania got to change many of the so called reforms, including dismantling the section for investigation of magistrates: a sign CVM actually worked??



Legal effects: dichotomy EU/national level
transpiring from the case law of the ECJ

**EU soft law is
binding on
institutions**

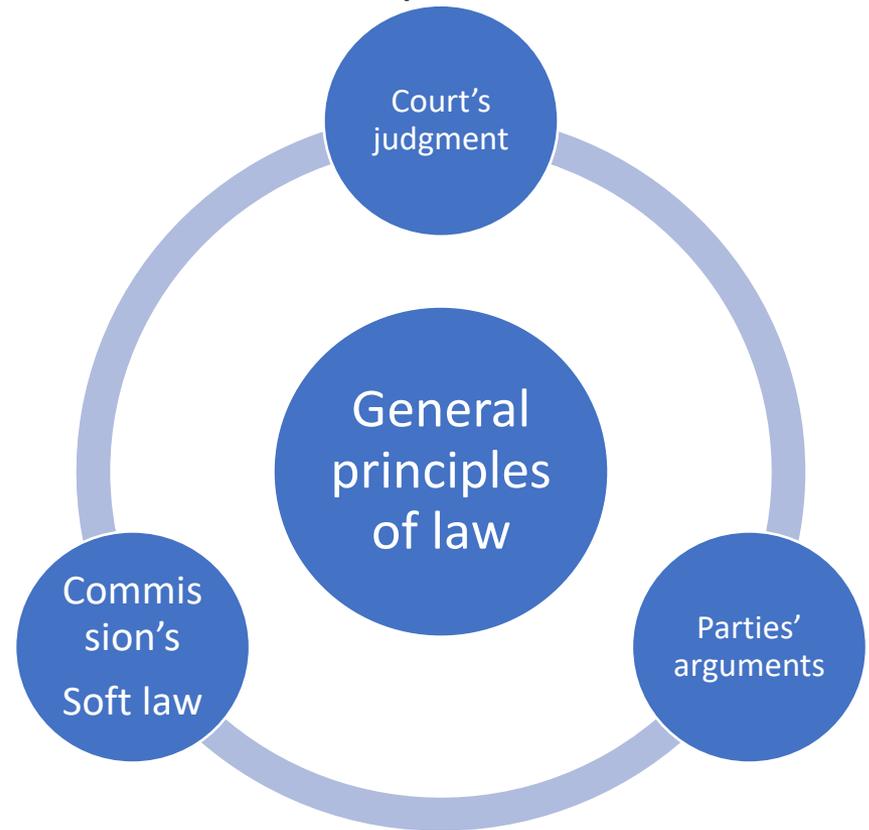


**EU soft law
generally not
binding but...**

Soft law – binding on the enacting institution

A Mechanism Based On General Principles of law

- Principles: a twofold purpose in the case law
 - they are the mechanisms through which soft law provisions are enforced
 - they are the benchmark against which soft law and its application are evaluated.
- Soft law not transformed into hard law, as legal effects are recognized through the intermediary of general principles.
- What principles?
 - Legitimate expectations, non-retroactivity, legal certainty, equal treatment, rights of defense, human rights, transparency...



EU Soft Law Not Binding @ the National Level

- Multi-level governance means multi-level principles (C-226/11 Expedia)
- C-410/09 Polska Telefonya Cyfrowa (PTC): if not binding, doesn't have to be translated

The logo for Voyages-sncf.com is displayed in a colorful, stylized font. The word 'Voyages' is in a multi-colored font (yellow, green, blue, purple), and 'sncf.com' is in a solid pink font. The logo is centered within a light gray, brush-stroke-like background shape.

- Binding on the States that negotiated and accepted them (*Ijssel-Vliet*)
- Areas of exclusive competence SL can be perceived as binding- state aid/competition
- Commission can pressure the MS into accepting SL Commission imposing SL through individual decisions with the blessing of the Court (*Motor Vehicles, Deufil*)

Binding effects



EU Soft Law in the
Member States

THEORETICAL FINDINGS AND
EMPIRICAL EVIDENCE

MARIOLINA ELIANTONIO, EMILIA KORKEA-AHO
AND OONA STEFAN

European Network of Soft Law Research

- Whether and how national authorities and Courts deal with EU soft law instruments?
- Book with Bloomsbury-Hart 2021
- Soft law is applied by judges and administrators at national levels, but its application varies in function of the strength of EU competences in the particular fields, also national preferences.



If these soft laws matter
then what about
control/accountability?

Online gambling

- The Commission issued a Recommendation , as a result of a failure to regulate the sector through usual decision-making ways.



Case C-
16/16
*Belgium v
Commission*

- Belgium:
 - Recommendation is a hidden directive, meant to harmonise the application of Arts 49 and 56 TFEU in the area of gambling
 - Principles of conferral and duty of sincere cooperation breached
- General Court: not judicially reviewable through direct actions: have a look at Art 263(1)!
- AG Bobek: legal effects do not necessarily mean 'binding effects'
- ECJ: agreed with General Court, act not reviewable as no binding effects.
- YOUR VIEW???



Direct actions against true soft law

- Internal review or judicial review impossible (T-671/15; T-63/16 *E-Control*)

But really,
who
cares??

Indirect actions via 277
still possible

De facto disapplication
usual

Preliminary review to
check validity is accepted

Indirect actions possible!

- Article 277
- Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.
- AG Tizzano in C-189/92 et al. *Dansk Rorindustri* :
 - Act of general application
 - Connected to the Decision at stake

**De facto
disapplication T-
268/06 Olimpiaki**

- 9/11 aid
- The Commission considered that aid could be granted to compensate for the extra cost of insurance, and to cover the losses incurred as a result of American air space being closed for four days.



Joined cases
T-268/06
Olimpiaki

- Commission Communication: any compensation paid under Article 87(2)(b) EC must concern only costs incurred from 11 to 14 September 2001.
- Greek authorities compensated Olimpiaki Aeroporia Ypiresies AE for losses incurred also after 14 September.
- Can these losses still be compensated?
- ECJ – yes, they have to be compensated, regardless what the Communication says

Preliminary reference

- Article 267

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Preliminary reference reviews

Case C-911/19
Fédération
bancaire française

C-501/18 -
Balgarska
Narodna Banka

- *Grimaldi* and duty to take into consideration
- *Rosalba Alassini* – imprecise Recommendations cannot limit the discretion of MS
- *Friesland Coberco* – soft law can generate comply-or-explain obligations in the name of effective cooperation
- *Koninklijke* – soft law creates a presumption of proportionality for complying decisions from national authorities
- *Chemische Fabrik Kreussler (CFK)* – guidance *may* be taken into account but case law has to be respected
Kotnik – warning national courts about the potential ripple effects of not respecting soft law

Soft law and national courts

Is it right to
have no
direct
judicial
review for
soft law?

Effectiveness of EU soft law?

Partnership court-commission?

Judicial protection?

Taking soft law seriously?

Too many cases for the Court?

Conclusions

Strengthen	Strengthen the focus on duty of sincere cooperation
Enlist	Enlist the support of national courts and authorities
Create	Create new channels of accountability: MOVE AWAY FROM COURTS!!!
Link	A legitimacy loop will be created from output to input as national authorities will start discuss and elaborate soft law together with EU authorities