THE FUTURE OF EU SOFT LAW: A RESEARCH AND POLICY AGENDA FOR THE AFTERMATH OF COVID-19

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Abstract: Following an analysis of selected COVID-19 emergency instruments, this article shows that the current crisis increases the salience of both the advantages and the drawbacks of soft law instruments. It argues that now is a decisive moment for the future of the European Union soft law, from the point of view of research, as well as of policymaking. It is necessary to use the opportunity offered by this crisis to clarify, without impairing flexibility, the processes through which soft law should be issued, as well as the potential effects that such instruments can have absent legally binding force.

Keywords: *soft law; COVID-19; legal effects; legitimacy; European Union*

I. Introduction

Initially slow in organizing a battle against the Coronavirus, the European Union (EU) has made serious efforts to deal with the crisis brought by the COVID-19 pandemic, culminating with an unprecedented mobilisation of funds. This was announced in May 2020 through a Commission Communication titled, auspiciously for the purposes of this special issue, "Europe's moment: repair and prepare for the next generation"[1] which advocates that the current crisis should be turned into an opportunity for reforming the EU. Similarly to a vast body of instruments issued and even amended at competing speed in the four months following the arrival of COVID-19 in Europe, this Communication can be categorised as soft law. Soft law — or rules of conduct having no legally binding force but producing legal and practical effects,[2] are enshrined in art.288(5) of the Treaty on the Functioning of European Union (TFEU). Situated at the interface between law and politics, EU

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1 "Europe's Moment: Repair and Prepare for the Next Generation" (Communication) COM (2020) 456 Final.

2 Francis Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" (1993) 56 *Modern Law Review* 19.

soft law is fast, flexible, easy to issue, and thus adapted to rapid evolutions and changes in policies, qualities that make it ideal for pandemic regulation. Soft law also may have a constitutional relevance, as it is issued in the name of fundamental principles, such as equality, legal certainty, or transparency. Yet, soft law is thought to also undermine the very principles it is meant to foster,[3] as it suffers from important legitimacy deficits, it is hardly justiciable, and its legal effects are blurred.

Seen from the perspective of such drawbacks, one may rightfully wonder whether, on balance, there should be any future at all for EU soft law, and whether European integration would not be better off without these instruments.[4] However, with the amount of soft law instruments issued across the fields currently on the rise, it becomes practically impossible to imagine the future of EU law without appropriately acknowledging its softer side. This article relies on selected case studies of the EU soft law issued in relation with the COVID-19 crisis to illustrate that both the advantages and the disadvantages of soft law are brought to the fore by the current pandemic. The argument is that balancing the advantages and the disadvantages of soft law is a futile enterprise in the current regulatory context and that the focus should be on finding ways to palliate the disadvantages of EU soft law. Exploring, in the line with this special issue, "internal" matters related to European integration,[5] this article argues that reforming the EU should include also a reform of its softer policy instruments.

For a long while, soft law has belonged mostly to the realm of political science or interdisciplinary research. Twenty years ago, *International Organisations* published a seminal special issue on "legalisation", meant to create a bridge between legal thinking and political science thinking, by rejecting the understanding of law as "requiring enforcement by a coercive sovereign".[6] The concept was extremely accommodating towards soft law, not only because it implied even soft law is some type of *law*, but also because it outlined a set of defining criteria. Such flexible views are somewhat a trademark of political science research in EU studies. Doctrinal legal research has been rather critical to the phenomenon of soft law, pontificating that law is either hard, or not law at all, and leaving most of the work to the "lawyers in context". Since the beginning of this Millennium, however, legal scholars have become more and more involved in studying EU soft law and engaging with political science research.[7] However, work has been

3 Oana Stefan, "EU Soft Law: New Developments Concerning the Divide between Legally Binding Force and Legal Effects" (2012) 75 *Modern Law Review* 879.

4 Jan Klabbers, "The Undesirability of Soft Law" (1998) 67 *Nordic Journal of International Law* 381.

5 See the contribution by Elaine Fahey in this Special Issue, "Future-Mapping the Directions of European Union (EU) Law: How Do We Predict the Future of EU Law?"

6 Kenneth Abbott et al, "The Concept of Legalization" (2000) 54 *International Organization* 401, 402.

7 See among others Mariolina Eliantonio, Emilia Korkea-Aho and Oana Stefan (eds), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (Hart Publishing, forthcoming); Emilia Korkea-Aho, *Adjudicating New Governance: Deliberative Democracy in the EU* (Routledge, 2015); Oana Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the EU* (Kluwer, 2013); Joost Pauwelyn et al (eds), *Informal International Lawmaking* (Oxford University Press, 2012);

focusing mostly on the EU phenomenon itself and only marginally explored the potential for reform.

From a methodological perspective, this contribution relies on two case studies of selected EU soft law instruments issued during the pandemic: competition policy (including State aid and antitrust) and the use of data to control the spread of the virus post lockdown. Studying COVID-19 measures for the purposes of writing a paper on the future of EU soft law is essential given the extraordinary amount of soft law issued and the hope that, following a major crisis, there is an appetite for reform and innovative research to support such reform. The case studies cover both measures that were issued in order to deal with the emergency itself (competition and antitrust) and measures issued in order to help Europe resume life after the lifting of containment.[8] The timescale is four months (March–June 2020). The case studies spread across various areas of competence, and include a variety of soft law makers. With antitrust and State aid, the present analysis covers an area of exclusive EU competence. The use of data to control the spread of the virus post lockdown is an area straddling between both established EU policies (such as data protection) and the unexplored territory of art.168(5) of the TFEU (combatting major cross-border health scourges). The soft law discussed was issued by a variety of actors, not only by the European Commission but also by bodies of the Union or networks.

The case study reveals two substantive "red flags" in relation to EU soft law. The first red flag is legitimacy. The vast body of instruments issued within a short time span of four months brings to the fore a lack of involvement from stakeholders and democratic bodies. The second red flag concerns the effects of soft law, and, in this regard, the article also draws from empirical research undertaken by The European Network on Soft Law Research (SoLaR) studying the reception of EU soft law in the national legal orders.[9] The key finding is that soft law is generally relevant at the national level, yet there are major variations regarding its effects, as well as the involvement of national authorities in the processes of adoption of such instruments. This article advocates for a better streamlining of the adoption and the national implementation of EU soft law, which would increase transparency while fostering participation and ultimately enlisting support of authorities and the judiciary at the national level. Section II "Pandemic Soft Law", gives a brief account of the soft law issued during the pandemic, while outlining its most important drawbacks. Section III "The Issues: Shady Legitimacy and Blurry Legal Effects", zooms in on the legitimacy and the effects of the specific measures issued in the area of competition policy and the use of data to control the spread

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Kenneth Armstrong, "The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance" (2011) 64 *Current Legal Problems* 179.

8 Taxonomy by Alberto Alemanno, "Taming COVID-19 by Regulation: An Opportunity for Self-Reflection" (2020) 11(Special Issue 2) *European Journal of Risk Regulation* 187.

9 Results forthcoming in Eliantonio, Korkea-Aho and Stefan, *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (n.7).

of the virus, while Section IV "Looking into the Future: Policy Change Backed by Renewed Research", zooms out putting forward several directions for research and policy change.

II. Pandemic Soft Law

In terms of advantages of soft law, authors have praised that it acted as a catalyst for successful international cooperation[10] and the regulation of complex issues under diverse systems such as EU law.[11] Adding to these the extraordinary flexibility of soft law which can be easily issued and adapted, it appears that these instruments are ideal to tackle crises and disasters such as the current pandemic. As a matter of fact, the virtues of soft law in catalysing international cooperation have been observed since the times of A/H1N1, as it leaves enough margin for states to construct their responses in accordance with national specificities.[12] While cooperation is essential, centralisation of all measures at the expense of subsidiarity, while desirable, might not be an ideal solution.[13] In the EU, it has been established since the financial crisis that simplistic hard and soft dichotomies do not work, and that, in order to deal with massive economic disequilibria it is important to combine both hard and soft law.[14]

A complete list of COVID-19 soft law is difficult to compile, given that they are spread over various websites of EU bodies and institutions. However, what we do know is that, up to June 2020, 384 documents related to COVID-19 were published on Eurlex, and, out of these, 62 per cent were soft law (see Figures 1 and 2).[15] Tracing the instruments relevant for the two case studies presented in this article is revealing as to the incredible speed through which such instruments were adopted and amended and to the amount of institutions involved in producing sometimes competing soft law.

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10 H Wolfgang Reinicke and Jan Martin Witte, "Challenges to the International Legal System Interdependence, Globalization, and Sovereignty: The Role of Non-Binding Legal Accords" in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2000) p.76.

11 Armin Schäfer, "A New Form of Governance? Comparing the Open Method of Co-Ordination to Multilateral Surveillance by the IMF and the OECD" (2006) 13 *Journal of European Public Policy* 70, 84; Dermot Hodson and Imelda Maher, "Soft law and Sanctions: Economic Policy Co-ordination and Reform of the Stability and Growth Pact" (2004) 11 *Journal of European Public Policy* 798, 810–811.

12 Belinda Bennett and Terry Carney, "Law, Ethics and Pandemic Preparedness: The Importance of Cross-Jurisdictional and Cross-Cultural Perspectives" (2010) 34 *Austrian and New Zealand Journal of Public Health* 106.

13 Mary Dobbs, "National Governance of Public Health Responses in a Pandemic?" (2020) 11(Special Issue 2) *European Journal of Risk Regulation* 240.

14 Rolf Weber, "Overcoming the Hard Law/Soft Law Dichotomy in Times of (Financial) Crises" (2012) 1 *Journal of Governance and Regulation* 8.

15 Statistics and figures compiled from <https://eur-lex.europa.eu/content/news/Covid19.html> (visited 31 July 2020).

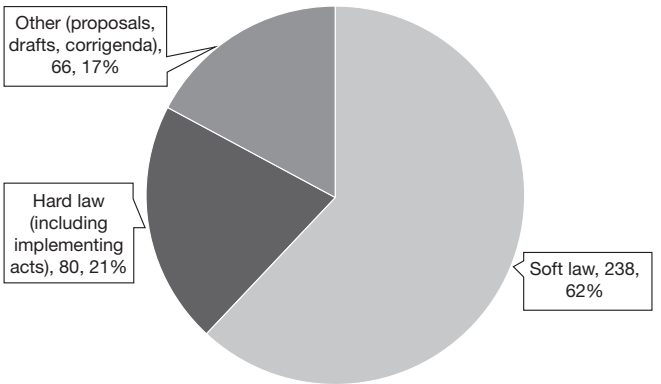

Figure 1: Documents Related to COVID-19 Published on Eurlex

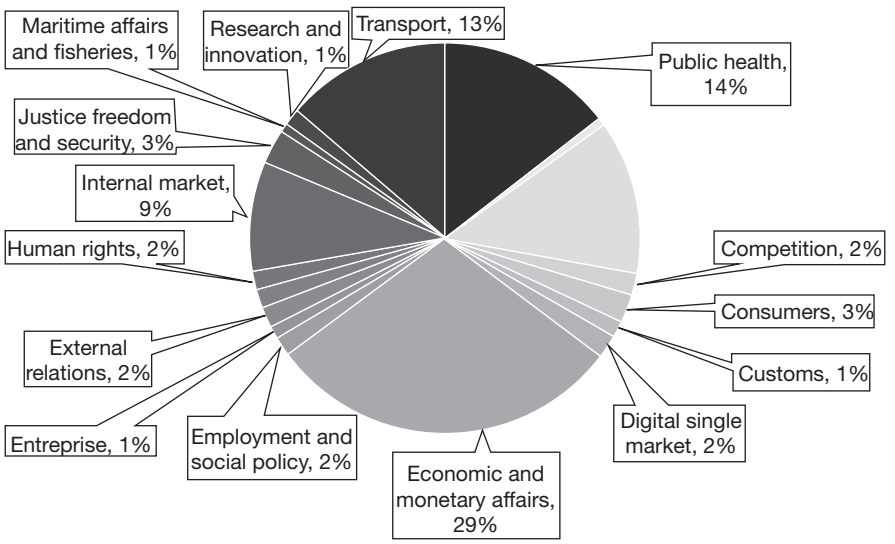

Figure 2: COVID-19 Soft Law Per Policy Field

A. Instruments dealing with the crisis

Mid-March, when the COVID-19 pandemic was rapidly engulfing Europe, Member States were putting in place a number of rules to limit social interaction. The economic consequences were severe, and the Commission set the basis for the general State aid policy in the context of the pandemic in a Communication on a coordinated economic response to the COVID-19 outbreak,[16] followed shortly

16 Commission, Communication on a Coordinated Economic Response to the COVID-19 Outbreak COM (2020) 112 Final, pt.5 and annex.3.

after by a specific Temporary Framework on State aid.[17] The Framework promised a quicker approval process for measures falling under art.107(3)(b) of the TFEU — aid to remedy a serious disturbance to the economy of a Member State — an article that was also relied on to deal with the consequences of the financial crisis.[18] The Framework enabled quick approval decisions for Member States measures valued already at 1.9 trillion euros.[19] As of July 2020, the Framework had been amended three times: first to enable support for products needed for fighting the virus and to ease liquidity constraints for companies,[20] second in order to allow recapitalisation,[21] and third in order to provide support to micro and small companies including start-ups.[22]

In antitrust, the European Competition Network (ECN) was the first to publish a Statement regarding COVID-19.[23] Tagged as a "classic instrument of governance"[24] the network issues various soft law as for example the ECN Model Leniency Programme.[25] The ECN statement advised companies to seek informal guidance from the authorities. Shortly after, the Commission published general guidance, in the form of a Temporary Antitrust Framework,[26] reviving, for the occasion, comfort letters. This is a form of individual guidance which allowed, before decentralisation, speedy Commission decisions on the validity or the individual exemption of agreements under art.101 of the TFEU. A first comfort letter was addressed, at

17 Commission, Communication from the Commission Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak 2020/C 91 I/01, C/2020/1863 [2020] OJ C 91I/1.

18 Commission, Communication from the Commission — Temporary Community Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis [2009] OJ C16/1.

19 European Commission Press Release "State Aid: Commission Expands Temporary Framework to Recapitalisation and Subordinated Debt Measures to Further Support the Economy in the Context of the Coronavirus Outbreak", 8 May 2020, <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_838> (visited 31 July 2020).

20 Commission, Communication from the Commission Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak 2020/C 112 I/01 [2020] OJ C112I/1.

21 Commission, Communication from the Commission Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak 2020/C 164/03 [2020] OJ C164/3.

22 Commission, Communication from the Commission Third Amendment to the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak 2020/C 218/03 [2020] OJ C218/3.

23 European Competition Network, "Joint Statement by the European Competition Network (ECN) on Application of Competition Law during the Corona Crisis" <https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf> (visited 31 July 2020).

24 Imelda Maher, "Competition Law Modernization: An Evolutionary Tale?" in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2011) p.735.

25 Available at <https://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf> (visited 31 July 2020).

26 Communication de la Commission Cadre temporaire pour l'appréciation des pratiques anticoncurrentielles dans les coopérations mises en place entre des entreprises pour réagir aux situations d'urgence découlant de la pandémie actuelle de COVID-19 2020/C 116 I/02, C/2020/3200 (*OJ C 116I, 8 April 2020, pp.7–10).*

the same time with the Framework, to Medicines for Europe, an association of pharmaceutical companies active in the generic industry.[27]

B. Instruments to support lifting the containment measures

In a Joint Statement, the European Council asked, on 26 March for a coordinated exit strategy, a comprehensive recovery plan and unprecedented investment. This led to the publication of two "Roadmaps" jointly by the Council and the Commission. The Joint European Roadmap towards lifting COVID-19[28] containment measures set out guidelines for the timing, the criteria, principles, measures and recommendations concerning the phasing out of lockdowns in the Member States. The Roadmap for Recovery[29] laid out the principles and the key areas for action towards a comprehensive recovery plan and unprecedented investment.

Even before the Roadmap, the Commission adopted a recommendation on a common EU toolbox for the use of technology and data to address the COVID-19 crisis (the Commission Toolbox).[30] This is complemented by several other instruments, issued by the Commission itself,[31] the eHealth network,[32] and the European Data Protection Board (EDPB).[33] The instruments provide for various levels of technical details to develop such apps and for various guiding principles in order to ensure compliance with the General Data Protection Regulation (GDPR).[34] Besides the European Commission, we see that a multitude of actors are involved in COVID-19 soft law.

This brief account, as well as the data compiled in the figures above, show an incredible reactivity of the EU institutions towards the COVID-19 crisis. While this

27 European Commission DG Competition, "Comfort Letter: Coordination in the Pharmaceutical Industry to Increase Production and to Improve Supply of Urgently Needed Critical Hospital Medicines to Treat COVID-19 Patients, COMP/OG — D(2020/044003)" (Brussels, 8 April 2020).

28 Information from the EU Institutions, Bodies, Offices and Agencies, European Commission Joint European Roadmap towards Lifting COVID-19 Containment Measures (2020/C 126/01, 17 April 2020).

29 "A Roadmap for Recovery: Towards a More Resilient, Sustainable and Fair Europe" (21 April 2020) <https://www.consilium.europa.eu/media/43384/roadmap-for-recovery-final-21-04-2020.pdf> (visited 31 July 2020).

30 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 C/2020/3300 [2020] OJ L114/7.

31 Communication from the Commission Guidance on Apps Supporting the Fight against COVID 19 Pandemic in Relation to Data Protection 2020/C 124 I/01 C/2020/2523 [2020] OJ C 124I/1.

32 Document Adopted by eHealth Network, "Mobile Applications to Support Contact Tracing in the EU's Fight against COVID-19. Common EU Toolbox for Member States" (Brussels, 15 April 2020).

33 European Data Protection Board, "Guidelines 04/2020 on the Use of Location Data and Contact Tracing Tools in the Context of the COVID-19 Outbreak", 21 April 2020.

34 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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), OJ L119/1.

is commendable, the questions left to address are whether legitimacy safeguards could have been respected in such a short time span, and whether these measures are effective.

III. The Issues: Shady Legitimacy and Blurry Legal Effects

This article adopts the input/throughput/output legitimacy structure proposed by Scharpf[35] and revised by Schmidt[36] in order to assess COVID-19 soft law. If we understand input legitimacy as participation through "majoritarian institutions of electoral representation",[37] the absence of the European Parliament in the process of COVID-19 soft law making is striking. What is more, in a Resolution, the Parliament itself called for the intervention of various EU bodies to set up a coordinated action to combat the pandemic.[38] It also frequently discusses the various COVID-19 measures taken by the other bodies, such as the measures related to COVID-19 apps,[39] but does not appear to be involved by the Commission or the EDPB.

The need for urgent action cannot justify such an absence. The Finnish Parliament, for instance, is far from excluded from the management of the crisis.[40] Yet, the absence of the European Parliament from the process of issuing of soft law is, sadly, business as usual. As early as 1968, the European Parliament warned about the dangers associated with the proliferation, by the Council, of acts not mentioned in the Treaty, notably the circumvention of decision-making formalities,[41] with national authorities echoing similar concerns.[42] Albeit Parliament's involvement in the decision-making process increases through the

35 Fritz Scharpf, *Governing in Europe: Effective and Democratic* (Oxford University Press, 1999).

36 Vivien Schmidt, "Democracy and Legitimacy in the EU Revisited: Input, Output and 'Throughput'" (2013) 61 *Political Studies* 2.

37 As summarised by Schmidt, *ibid.*, 5.

38 European Parliament Resolution of 17 April 2020 on EU Coordinated Action to Combat the COVID-19 Pandemic and Its Consequences, 2020/2616(RSP) (Brussels, 17 April 2020).

39 Press Release, "COVID-19 Tracing Apps: MEPs Stress the Need to Preserve Citizens' Privacy" <https://www.europarl.europa.eu/news/en/press-room/20200512IPR78915/covid-19-tracing-apps-meps-stress-the-need-to-preserve-citizens-privacy> (visited 31 July 2020).

40 Martin Scheinin, *The COVID-19* "Emergency in Finland: Best Practice and Problem" (2020) <https://verfassungsblog.de/the-covid-19-emergency-in-finland-best-practice-and-problems/> (visited 31 July 2020).

41 Résolution sur les actes de la collectivité des États membres de la Communauté ainsi que les actes du Conseil non prévus par les traités (OJ C/63, 28 May 1969, p.18); European Parliament Resolution of 4 September 2007 on Institutional and Legal Implications of the Use of "Soft Law" Instruments (2007/2028(INI)) [2008] OJ C187E/75.

42 Conseil d'État, Rapport Public 1992, collection "Études et documents", *Documentation française* 44 (Paris, 1993) pp.22–23, quoted in S Leclerc, "Les communications de la Commission et le marché intérieur: A propos de l'arrêt rendu par la Cour de justice des Communautés européennes le 20 mars 1997 dans l'affaire C-57/95, Rec. 1997, p. I-1640 à I-1652" (1998) 34 *Cahiers de droit européen* 161, 163.

intermediary of soft law measures such as inter-institutional agreements,[43] its bargaining power remains the same: the outcome of the final negotiations on legislation can depart from the content of the inter-institutional agreement.[44] The European Parliament is not involved in issuing most of the soft law in certain sectors of activity — for example, competition law.[45] In this context, research needs to look more into potential ways to engage the European Parliament — or potentially national Parliaments — in the process of issuing of soft law instruments. The answers are not easy, given the specialised character of soft law and the need for flexibility, which might appear antonymic in relation to the politicised dimension of input legitimacy. In that regard, perhaps an easier proxy to assess the legitimacy of COVID-19 soft law is throughput legitimacy. This article shares the views of Schmidt and Wood that throughput legitimacy is a useful concept for studying a multi-level governance setting,[46] and the potential of soft law to connect the different levels of governance.[47] This will be discussed more in detail in Section III (A) "Throughput legitimacy of COVID-19 soft law".

The criterion for output legitimacy is policy effectiveness and outcomes.[48] These elements are of course to be measured only later in the process, with non-emergency soft law being found sometimes effective in the process of Europeanisation[49] and sometimes effectiveness being found dependent on multiple variables.[50] Assessing effectiveness for the purposes of output legitimacy requires methodologies exceeding the ambit of traditional legal analysis. The article will offer some insights into the potential legal and practical effects of soft law in Section III (B) "Effects of COVID-19 soft law", while inviting future multi-disciplinary ventures on the topic.

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43 Francis Snyder, "Interinstitutional Agreements: Forms and Constitutional Limitations" in Gerd Winter (ed), *Sources and Categories of European Union Law* (Nomos Verlag, 1996) p.453.

44 See the discussion in Isabella Eiselt and Peter Slominski, "Sub-Constitutional Engineering: Negotiation, Content, and Legal Value of Interinstitutional Agreements in the EU" (2006) 12 *European Law Journal* 209.

45 Herwig Hofmann, "Negotiated and Non-negotiated Administrative Rule-Making" (2006) 43 *Common Market Law Review* 153, 172; Ton van den Brink and Linda Senden, "Checks and Balances of Soft EU Rule-Making" (2012) Policy Department C: Citizens' Rights and Constitutional Affairs <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042480> (visited 14 July 2020).

46 Vivien Schmidt and Martin Wood, "Conceptualizing Throughput Legitimacy: Procedural Mechanisms of Accountability, Transparency, Inclusiveness and Openness in EU Governance" (2019) 97 *Public Admin* 727.

47 Oana Stefan, "Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance" (2014) 21 *Maastricht Journal of European and Comparative Law* 359.

48 Schmidt and Wood, "Conceptualizing Throughput Legitimacy: Procedural Mechanisms of Accountability, Transparency, Inclusiveness and Openness in EU Governance" (n.46) 728.

49 Chloé Bérut, "The EU as an Opportunity: Structures and Uses of European Soft Law in French, Austrian and Irish eHealth Policies" [2020] *West European Politics* ahead-of-print, 1-21.

50 Egidijus Barcevičius et al (eds), *Assessing the Open Method of Coordination: Institutional Design and National Influence of EU Social Policy Coordination* (Palgrave Macmillan, 2014).

A. Throughput legitimacy of COVID-19 soft law

Schmidt conceptualised the standard for throughput legitimacy to be a function of "the accountability of the policy-makers and the transparency, inclusiveness and openness of governance processes".[51]

Evaluating accountability of COVID-19 soft law will have to take into consideration various mechanisms applicable for the activities of the institutions involved. The reporting obligation of the EDPB towards the Parliament, Council and the Commission[52] will be crucial especially in light of the very low judicial accountability of soft law.[53] Other than classical Parliamentary or judicial control, another potential accountability mechanism is inherent within networks based on strong epistemic communities, such as the ECN. Exchange of information, peer pressure, reputation and the *primus inter pares* role of the Commission all contribute to achieving accountability.[54]

In this context, it is worrying that the Temporary Antitrust Framework does not provide for systematic consultations of national authorities when issuing individual comfort letters. Beyond accountability, this can also damage coherence of the decentralised enforcement of competition law. News are not always bad, with the Temporary Framework on State aid providing the obligation of monitoring, reporting and publication of aid.[55] Such provisions enable individuals themselves[56] to keep in check the way in which the provisions of the Framework are observed in practice and report abuses.

The lack of accountability might allow breaches of principles such as competence allocation or proportionality. Soft law might appear the best adapted to encourage and support cooperation between Member States in health-related matters (art.168 of the TFEU) and in the protection against disasters (art.196 of the TFEU). Yet, it is also known to transcend its mandate and prescribe actions in areas where it can only provide guidance. Researchers argue that the EU has more competences than one can discern at first sight in order to tackle the pandemic;[57] yet, the question of the

51 Schmidt and Wood, "Conceptualizing Throughput Legitimacy: Procedural Mechanisms of Accountability, Transparency, Inclusiveness and Openness in EU Governance" (n.46) 728.

52 Article 71 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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) [2016] OJ L 119/1/

53 Judgment in Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2018:79.

54 Imelda Maher, "Functional and Normative Delegation to Non-majoritarian Institutions: The Case of the European Competition Network" (2009) 7 *Comparative European Politics* 414.

55 Section 4 of Communication from the Commission Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak 2020/C 91 I/01, C/2020/1863 [2020] OJ C 91I/1–9.

56 Beate Kohler-Koch, "Civil Society and EU Democracy: 'Astroturf' Representation?" (2010) 17 *Journal of European Public Policy* 100.

57 Kai Purnhagen et al, "More Competences than You Knew? The Web of Health Competence for EU Action in Response to the COVID-19 Outbreak" (2020) 11(Special Issue 2) *European Journal of Risk Regulation* 297.

chosen instrument is very important too. For instance, art.168(5) provides for acts adopted under the ordinary legislative procedure in order to improve human health and to combat the major cross-border health scourges. Furthermore, the COVID-19 outbreak requires not only measures directly related to the fight against the virus but also measures meant to offset the dramatic consequence of lockdowns, which could fall in policy areas such as the internal market or competition law. There is nothing wrong, of course, with soft law interpreting hard law in these areas, or with soft law suggesting various ways of action. However, the line between interpreting and adding to hard law provisions is famously thin,[58] and the potential of such instruments to slip in the realm of *ultra vires* is high. Similarly, dealing with highly sensitive topics such as contact tracing through soft law might be problematic, especially since this involves 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 in order to ensure that contact tracing is construed in a proportional fashion, both from a technical and regulatory perspective.[59] National implementation and flexible interpretation of central EU guidance is likely to be key in this respect in the future,[60] while the burden of accountability is shared between the different levels of EU governance.

Accountability is closely connected to transparency,[61] which includes public access to information, as well as the pro-active institutional duty to ensure that information is provided in an accessible and understandable way.[62] In that regard, EU soft law has an important transparency function, which enhances the connections between individuals, EU and national institutions.[63] However, this function is often impaired in practice given the sheer volume of such instruments — and this is particularly so in the context of COVID-19. The instruments on contact tracing apps are a good example: issued by various bodies within a tight time span, it is difficult to establish whether some are a follow up to other instruments, and what are the interlinkages between them, although they appear to be cited together in ulterior soft law.[64] These instruments have a high potential for duplication, which is problematic not only in light of efficiency, vital in times of pandemic, but also in terms of coherence.

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58 Joanne Scott, "In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law" (2011) 48 *Common Market Law Review* 329.

59 Ciro Cattuto and Alessandro Spina, "The Institutionalization of Digital Public Health: Lessons Learned from the COVID-19 App" (2020) 11(Special Issue 2) *European Journal of Risk Regulation* 228.

60 Alan Greene, *Emergency Powers in a Time of Pandemic* (Bristol University Press, 2020).

61 Christopher Hood, "Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?" (2010) 33 *West European Politics* 989.

62 Alberto Alemanno and Oana Stefan, "Openness at the Court of Justice of the EU: Toppling a Taboo" (2014) 51 *Common Market Law Review* 109.

63 Oana Stefan, "EU Soft Law and the Promise of Transparency" in Eliantonio, Korkea-Aho and Stefan, *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (n.7).

64 Commission, Communication from the Commission Guidelines on the Progressive Restoration of Transport Services and Connectivity — COVID-19 2020/C 169/02, C/2020/3139 [2020] OJ C169/ 17.

The processes through which certain instruments were drafted are quite opaque, such as for instance, the Communication on a coordinated economic response to the COVID-19 outbreak. This brings to the fore the criterion of inclusiveness and openness of the governance processes, with the introduction to the Communication stressing the importance of solidarity and "close cooperation among all relevant actors" in tackling the pandemic. The Commission is set to "fully use all the tools at its disposal to weather this storm", in particular, "ensuring a framework allowing Member States to act decisively in a coordinated way". Finally, the Commission commits to work closely together with the EU institutions and Member States to *implement* its measures swiftly. The Communication on a coordinated economic response is littered with various statements operationalising such commitment in sectors such as transport, tourism, employment. Lacking clear information as to the key stakeholders involved in drafting the Communication, it appears therefore that the appeal to solidarity is the closest link to inclusiveness that can be retrieved in this instrument.

Turning to the inclusiveness and openness criterion, open public consultations appear to be an important tool of throughput legitimacy.[65] Yet, consultations for COVID-19 soft law seem to be far from being open or public. State aid is an area where soft law has been issued, traditionally, through public consultations, fully available online, but this was not the case with the Temporary Framework on State aid. Member States appear to have been consulted in the drafting and the successive amendments of the Framework,[66] with answers understandably expected at very short notice. The full text of these consultations is not available online; however, it emerges from the press releases that sometimes the final instrument was altered following discussions with the Member States.[67] In competition, given the succession of the ECN Joint Statement and the Antitrust Temporary Framework, one can infer that the texts thereof were discussed by the relevant authorities but there is no information as to how these consultations took place. Such consultations between the authorities play an important role, as they ensure a necessary dialogue within a network where exchange of information is crucial.[68]

The Joint European Roadmap towards lifting COVID-19[69] and the Roadmap for Recovery[70] stated clearly that they follow a certain consultation process.

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65 Schmidt, "Democracy and Legitimacy in the EU Revisited: Input, Output and 'Throughput'" (n.36) 7.

66 See the Commission Statements on Consulting Member States <https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html> (visited 14 July 2020).

67 The initial threshold provided by the Commission for direct grants or tax advantages of 500 000 Euro was raised to 800 000 in the final text of the first version of the Framework. (Communication from the Commission Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak 2020/C 91 I/01, C/2020/1863 [2020] OJ C91I/1).

68 Scott Burris et al, "Changes in Governance: A Cross-Disciplinary Review of Current Scholarship" (2008) 4 *Akron Law Review* 1.

69 Information from the EU Institutions, Bodies, Offices and Agencies, European Commission Joint European Roadmap towards Lifting COVID-19 Containment Measures (2020/C 126/01, 17 April 2020).

70 "A Roadmap for Recovery: Towards a More Resilient, Sustainable and Fair Europe" (n.29).

The Roadmap on lifting the containment mentions that it "builds on the expertise and the advice provided by the European Centre for Disease Prevention and Control (ECDC) and the Commission's Advisory Panel on COVID-19 and takes into account the experience and outlook from a number of Member States as well as guidance from the World Health Organization (WHO)". Note that only the experience from a "number" of Member States feeds into these recommendations. The Roadmap for Recovery appears to have covered a more extensive base of stakeholders, being "drawn up after consulting other institutions, social partners as well as Member States". All this is indeed commendable, albeit rather vague as to who exactly was consulted and how.

While the participation of the general public in the drafting of these documents appears to be very limited, even institutional partners do not appear to have been sufficiently and transparently involved. It emerges from a letter[71] from the Chair of the EDPB that the Commission sought advice for its Guidance on apps supporting the fight against COVID-19.[72] The Chair felt the need to underline at the end of the letter that the EDPB and its Members should be fully involved in the process of elaboration and implementation of such measures, and that the EDPB was preparing some Guidelines of its own in this regard. It is unclear from the websites the extent to which national authorities have been consulted in the issuing of the Commission Guidance on apps and whether such consultations were undertaken by the Board for its Guidelines on the use of location data and contact tracing tools.[73] What is more, organising consultations is required for EDPB guidance "where appropriate", and the results of the consultation procedure need to be publicly available.[74] In the interest of proportionality, it might be useful for such consultations to take place even in the context of a pandemic, but at a very short notice, allowing for the interested parties to make their voice heard. This is particularly important if an egalitarian and inclusive approach need to be envisaged for the future of data protection law.[75]

The picture emerging from this analysis of throughput legitimacy of EU COVID-19 soft law is that of rather opaque consultation processes excluding, in most cases, the involvement of individuals. For the immediate future, it would be advisable that the text of the consultations is published by the institutions involved. It becomes however urgent to streamline consultations procedures for the adoption

71 Letter to Olivier Micol, Head of Unit C.3 — Data Protection by Andrea Jelinek, Chair of the European Data Protection Board (Brussels, 14 April 2020) https://edpb.europa.eu/sites/edpb/files/files/file1/edpbletterecadvisecodiv-appguidance_final.pdf.

72 Communication from the Commission Guidance on Apps Supporting the Fight against COVID 19 Pandemic in Relation to Data Protection 2020/C 124 I/01 C/2020/2523 (OJ C 124I, 17 April 2020, pp.1–9).

73 European Data Protection Board (edpb), "Guidelines 04/2020 on the Use of Location Data and Contact Tracing Tools in the Context of the COVID-19 Outbreak" 21 April 2020.

74 Article 70(4) of the General Data Protection Regulation.

75 See Contribution of Maria Tzanou, in this Special Issue, "The Future of EU Data Privacy Law: Towards a More Egalitarian Data Privacy".

of soft law more generally, and/or to be creative with regards to input legitimacy and involvement of the European and national Parliaments.

B. Effects of COVID-19 soft law

The legal effects of COVID-19 soft law vary at different levels of EU governance and per policy field. At the EU level, such instruments will produce self-binding effects for the authorities issuing them. At the national level, however, with some exceptions, soft law cannot be legally binding, with the EU Courts requiring it to be taken into consideration.[76]

The Antitrust and State aid Temporary Frameworks are likely to be binding on the discretion of the Commission, which cannot depart from the text of such soft law without giving reasons that are compatible with legal certainty, equality or legitimate expectations.[77] In competition, Commission guidance has been internalised at the level of EU Courts.[78] In relation to State aid, specific obligations may also stem for Member States. In *IJssel-Vliet*,[79] it was decided that EU state aid guidance accepted by Member States through an exchange of letters creates a framework of cooperation in accordance with art.108(1) of the TFEU from which neither the Commission nor the Member States could be released. This resonates with the duty of sincere cooperation as general principle of EU law. Binding effects of EU soft law appear to be mediated by general principles of law,[80] yet, this appear to apply only at the EU level of governance or in specific circumstances in State aid.

In the seminal case of *Grimaldi*,[81] the European Court of Justice (ECJ) decided that national courts are bound to take soft law into consideration. In more recent cases, the Court noted that EU guidance is not binding at the national level. According to *Expedia*, EU soft law is meant to make transparent the manner in which *the Commission* exercises its discretion.[82] National authorities' disregard of Commission guidance cannot interfere with principles such as legitimate expectations and legal certainty.[83] As confirmed by empirical research, general principles of law are rarely mentioned in connection with EU soft law in national judgments or administrative decisions.[84] In an EU soft law context, it seems that

76 Judgment in Case C-322/88 *Grimaldi* ECLI:EU:C:1989:646.

77 Judgment in Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri v Commission* ECLI:EU:C:2005:408.

78 Contribution of Francisco Costa-Cabral, in this Special Issue.

79 Judgment in Case C-311/94 *IJssel-Vliet v Minister van Economische Zaken* ECLI:EU:C:2002:363, [37]–[44].

80 Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the EU* (n.7).

81 *Grimaldi* ECLI:EU:C:1989:646, [18].

82 Judgment in Case C-226/11 *Expedia*, ECLI:EU:C:2012:795, [28]–[29].

83 *Ibid.*, [32].

84 Eliantonio, Korkea-Aho and Stefan, *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (n.7).

general principles of law have different intensities at different levels of European governance.

This finding throws into doubt the effects of the Antitrust Temporary Framework at the national level, but also of individual guidance, issued by the Commission through COVID-19 comfort letters. Such comfort letters have been in the past heavily criticised as not binding with practice reporting that there have been instances when the Commission reopened cases in which such letters were issued.[85] However, as decided recently in relation to State aid,[86] letters originating from the European Commission qualify as precise, unconditional and consistent assurance from authorised and reliable sources[87] for the purpose of establishing legitimate expectations against a potential investigation by the Commission. Yet, it is unlikely that such letters would bind national authorities or courts.

Historically, comfort letters were deemed not to produce binding legal effects vis-à-vis national courts. In *Guerlain* and *Lancome* the ECJ decided that such letters did however "constitute a factor which the national courts may take into account".[88] Recent case law on commitment decisions under art.9 of Regulation 1/2003 (allowing the Commission to conclude antitrust investigations on the basis of commitments offered by the defendants) provides that commitment decisions cannot create legitimate expectations, but cannot be overlooked by national courts, who need to regard the preliminary assessment carried out by the Commission as evidence. This is in the name of principles such as sincere cooperation, uniformity and effectiveness of EU law.[89] With the Antitrust Temporary Framework expressly mentioning that comfort letters are issued in order to increase legal certainty, a legal argument might be construed to the effect that national authorities and courts need to take into consideration the comfort letters in their assessment of cases in order to comply with general principles of law.[90] In practice, this might translate simply in a duty to comply-or-explain: in case the courts or the authorities wish to depart from the comfort letter, they should give appropriate reasons to do so.[91]

According to its definition, soft law can also produce important "practical" effects. While creating expectations for individuals,[92] soft law can contribute to the europenisation of policies.[93] Furthermore, even though they do not immediately

85 Frank Montag, "The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View" (1998) 22 *Fordham International Law Journal* 829.

86 Judgment in Case T-68/15 *HH Ferries* ECLI:EU:T:2018:563, [309].

87 Judgment in Case T-347/03 *Branco*, ECLI:EU:T:2005:265, [102].

88 Judgment in Joined Cases C-253/78 and 1 to 3/79 *Procureur de la République v Bruno Giry and Guerlain SA* ECLI:EU:C:1980:188, [13]; Judgment in C-Case 99/79 *Lancôme v Etos* ECLI:EU:C:1980:193, [11].

89 Judgment in Case C-547/16 *Gasorba*, ECLI:EU:C:2017:891, [29].

90 *Ibid.*, [18].

91 Stavros Makris and Alexandre Ruiz Feases, "Commitments and Network Governance in EU Antitrust: Gasorba" (2018) 55 *Common Market Law Review*, 1959.

92 Stefan, "EU Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects" (n.3).

93 Bérut, "The EU as an Opportunity: Structures and Uses of European Soft Law in French, Austrian and Irish eHealth Policies" (n.49).

recognise legal effects for soft law for the purposes of justiciability of such instruments, many courts of the Member States are informed in their work by EU guidance. According to the findings of the SoLaR project, administrations of EU Member States are more often than not influenced by EU soft law.[94] However, the practical effects of soft law are difficult to research, define and conceptualise, yet an interdisciplinary analysis of the effectiveness of COVID-19 soft law would be incomplete without them.

In State aid, regardless of MS acceptance, soft law can anyways become binding in practice. In *Kotnik*,[95] EU guidance on recapitalisation of banks following the financial crisis[96] was considered "no more than a criterion governing the Commission's authorization of state aid granted to banks",[97] which was not binding on national authorities or courts. Paradoxically though, when scrutinising national measures, the Commission would be entitled to apply this criterion to conclude that they constituted illegal aid, and eventually order recovery. In other words, even if legal effects might be uncertain under the *Ijssel-Vliet* route mentioned above, the Temporary Framework on State aid is likely to be binding in practice.

The State aid case is specific and similar mechanisms are hard to imagine for other instruments, such as the instruments dealing with the use of mobile data to combat COVID-19. Yet, other mechanisms might lead to practical effects, such as the reporting cycle introduced by the Commission Toolbox. This is roughly similar to the European Semester or Open Method of Coordination cycles, whereby countries need to report on the actions taken, with the Commission likely to issue further recommendations upon assessment. This will offer good grounds for a future case study regarding the effectiveness of this type of measures and new governance. Such mechanism is not likely to produce binding legal effects in the legal sense of the term, or grounds for engaging State liability against defaulting members. Yet, it is likely to lead to policy changes or subtler changes at the level of discourse, understanding and policy principles.[98]

The effects of the specific guidance from the EDPB and the eHealth network need to be assessed in the particular context of these two bodies. Born from the recent GDPR, the EDPB was tagged as either an emerging EU agency or an "intergovernmental club" due to the relatively weak powers that it holds.[99] Following pressure from various stakeholders, the Board acts mainly through soft

94 Conclusions of SoLaR, forthcoming in Eliantonio, Korkea-Aho and Stefan, *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (n.7).

95 Case C-526/14 *Kotnik* ECLI:EU:C:2016:570.

96 Commission, Communication from the Commission on the Application, from 1 August 2013, of State Aid Rules to Support Measures in Favour of Banks in the Context of the Financial Crisis [2013] OJ C216/1.

97 *Kotnik* ECLI:EU:C:2016:570, [71].

98 Kerstin Jacobsson, "Between Deliberation and Discipline: Soft Governance in the EU Employment Policy" in Ulrika Mörth, *Soft Law and Governance and Regulation: An Interdisciplinary Analysis* (Cheltenham: Edward Elgar, 2004) p.89.

99 Laima Jančiūtė, "European Data Protection Board: A Nascent EU Agency or an 'Intergovernmental Club'?" (2019) 10 *International Data Privacy Law 57.*

law. Its Guidelines on the use of location data and contact tracing tools were issued pursuant to art.70 of the GDPR, in accordance to the task of the board to ensure the consistent application of the Regulation. While the Board can play a centralising role in achieving Europeanisation of data protection law,[100] it remains to be seen what effectiveness — and what legal effects — these Guidelines will have at the national level. The eHealth network is a voluntary network created in 2011,[101] and gathers representatives from the Member States. While initial soft law in relation to electronic health have been very weak, including Commission recommendations and action plans, recent research shows that, with the emergence of the eHealth network, soft law in the area started to harden.[102] Provided they follow the same pattern, the instruments issued by the network in the area of COVID-19 might have the potential to be adopted by the Member States especially if they legitimise national policies in the field or simply because they are technically or scientifically relevant.

Research studying the legal effects of soft law abounds and demonstrates that the legal effects of such instruments are rather limited.[103] With courts failing to acknowledge such effects, justiciability of soft law is at a loss, which might impact accountability[104] (and thus, throughput legitimacy). In the context of COVID-19 soft law, one author wondered whether this "flurry" of instruments issued in "unchartered territory" could entail state liability in case of non-compliance.[105] While the answer to this question is probably no, this does not mean that COVID-19 is ineffective. Research needs now to focus less on court-centric approaches[106] and engage with multi-disciplinary assessment of the practical effects of such instruments at the national level.

IV. Looking into the Future: Policy Change Backed by Renewed Research

What is striking in the EU response to the COVID-19 pandemic is not the lack of reactivity, but the massive amount of measures undertaken. The Commission is actively engaged with the crisis, and so are various other bodies of the Union and

100 Orla Lynskey, "The 'Europeanisation' of Data Protection Law" (2017) 19 *Cambridge Yearbook of European Legal Studies* 252.

101 Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the Application of Patients' Rights in Cross-Border Healthcare [2011] OJ L 88/45.

102 Bérut, "The EU as an Opportunity: Structures and Uses of European Soft Law in French, Austrian and Irish eHealth Policies" (n.49).

103 Korkea-Aho, *Adjudicating New Governance: Deliberative Democracy in the EU* (n.7); Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the EU* (n.7).

104 Joanne Scott, "In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law" (2011) 48 *Common Market Law Review* 329.

105 Alberto Alemanno, "The European Response to COVID-19: From Regulatory Emulation to Regulatory Coordination?" (2020) 11(Special Issue 2) *European Journal of Risk Regulation* 307.

106 Fahey in this Special Issue, "Future-Mapping the Directions of European Union (EU) Law: How Do We Predict the Future of EU Law?" (n.5).

networks, mainly through soft law instruments. One may wonder whether, in times of crisis, the reactivity from the EU institutions and bodies should not supersede rigid requirements for legitimacy or transparency. After all, it may very well be that all these instruments will be legitimised through their effectiveness (which is yet to be determined). Furthermore, all documents refer to *some* consultations with Member States, and to the fact that they respond to a particular need identified in practice. Such is for instance the case of the Antitrust Temporary Framework reintroducing individual guidance through comfort letters as a response to particular needs formulated by business. Details of consultations are also understandably difficult to publish in current circumstances when work efforts need to be concentrated in tackling the pandemic.

However, Europe cannot allow another rule of law backsliding right at its core, even if times are exceptional. What is more, enlisting the trust of the citizens and Member States is essential to increase the effectiveness of COVID-19 soft law. Such trust is needed in order to garner acceptance of controversial measures, like the use of data in combating COVID-19.[107] As acknowledged by the Roadmap for Recovery, it is necessary to "to ensure buy-in from governments and parliaments, from social partners and from citizens".

Trust, solidarity, as well as their materialisation in a duty of sincere cooperation are essential not only for COVID-19 soft law but indeed for all EU soft law. At the same time, if properly issued and employed, soft law has the potential to catalyse these ideals. Indeed, soft law was found to provide a *magna carta*[108] for individuals, clarifying matters related to their rights and duties. For the national authorities, soft law can constitute a source of doctrine, guiding public administrations in their activities and, therefore, have the potential to increase the consistency of EU action. Soft law can thus connect not only EU institutions and individuals, but also EU and national institutions, cutting across multiple levels of governance.

In order for these goals to be achieved, the research questions that need to preoccupy us for the next years need to change from the "whether" to the "how". It has been amply established that soft law suffers from a legitimacy deficit that cannot be corrected by Court intervention, given the high thresholds for justiciability. While research can inform policy change in finding ways for involvement of the European Parliament in the process of adopting soft law, other avenues can be explored as well. In that regard, inquiries mapping the way in which transparent public consultations can help legitimising soft law are very important, and some research in this regard has been already undertaken in respect of the soft law issued by EU agencies.[109] It is crucial to determine the way in which national authorities

107 Marcello Ienca and Effy Vayena, "On the Responsible Use of Digital Data to Tackle the COVID-19 Pandemic" (2020) 26 *Nature Medicine* 463.

108 Nina Tornberg, "The Commission's Communications on the General Good — Magna Carta or Law-Making?" (1999) 24 *European Business Law Review* 27.

109 Peneloppe Rocca and Mariolina Eliantonio, *European Union Soft Law by Agencies: An Analysis of the Legitimacy of Their Procedural Frameworks* <https://www.researchgate.net/publication/332464552_

are involved in these processes. In that respect, the insights from the SoLaR project show different experiences according to the field or the Member States involved, for instance, the involvement of UK authorities in the drafting of European Supervisory Authorities soft law is much higher than the involvement of other countries, such as Finland.[110] National authorities agreed that the process of adoption of EU soft law in competition and state aid is inclusive, yet, in environment, many were concerned that their voices were not heard.[111] A systematic analysis of the ways in which consultations with the national authorities are currently occurring can provide insights into best practices and reveal creative ways of involvement even outside the public consultations framework.

Coming back to COVID-19 soft law, the Roadmap for Recovery 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.

With regards to the effects in the absence of legally binding force, as revealed by empirical research, soft law is not always taken into account by national Courts.[112] Traditional enforcement avenues are therefore quite limited for soft law, and, in the multi-layered EU governance system, this can generate variations in the intensity of protection of individual rights at the EU and at the national levels.[113] Lawyers have been extremely preoccupied lately with distilling the legal effects of EU guidance, but, in the context of COVID-19 soft law (and the existing hope for output legitimacy) a more important question relates to establishing effectiveness.

In that regard, research needs to shed light into the controversial issue of "practical" effects of soft law. A change of the questions asked by research might be necessary. While many studies so far focused on whether and how soft law is applied by EU and national courts, research is now needed to determine whether the role of courts — and of national administrations — is changing, currently, by an increased socialisation of judges and administrators to such policy instruments. As shown by a Japanese study, soft directives by the government appear shape behaviour even in the absence of an enforcement mechanism, but only if public messages are well targeted.[114] Research into EU soft law could in the future distil various ways in which the "regulation by information" through

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European_Union_Soft_Law_by_Agencies_an_Analysis_of_the_Legitimacy_of_their_Procedural_Frameworks> (visited 31 July 2020).

110 Eliantonio, Korkea-Aho and Stefan, *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (n.7).

111 Stefan, "Soft Law and the Promise of Transparency" (n.63).

112 Eliantonio, Korkea-Aho and Stefan, *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (n.7).

113 Stefan, "Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance" (n.47).

114 S Cato et al, *The Effect of Soft Government Directives about COVID-19 on Social Beliefs in Japan* (16 April 2020) <https://ssrn.com/abstract=3577448> (visited 31 July 2020).

soft law in the course of a pandemic/crisis could be achieved by adapting the communication to different categories of the public — be it national authorities, courts or individuals.

Researching effectiveness does not necessarily need to stray completely away from traditional legal analysis. In that regard, the potential of principles such as consistency and the duty of sincere cooperation need to be further explored. These principles provide a good basis for soft law to be recognised legal effects at the national level, from two points of view. First, an argument might be constructed,[115] on the basis of these principles, that soft law instruments carry "comply-or-explain" obligations. Thus, if national authorities or courts would wish to depart from the text of relevant EU soft law, they should give reasons, which in turn would allow accountability checks as well as legal certainty safeguards, promoting, at the same time, a certain degree of differentiation.[116] This would also prompt a dialogue between the national and EU authorities, thus strengthening the potential of soft law to act as a linking agent in a multi-level governance setting. Finally, this would improve effectiveness of soft law, as empirically observed in relation with financial soft law issued by European Supervisory Authorities, subject, according to hard law, to comply-or-explain mechanisms.[117]

Second, consistency and sincere cooperation might provide a basis for the more systematic implementation of EU soft law at the national level. While there is no obligation to transpose soft law, unsurprisingly, experiences are diverse, country and field-dependent.[118] Member States chose between various options, which seem to reflect the continuum of "legalisation" ranging from full engagement with soft law in the text of national hard law to brief website references and no engagement at all.[119] A reflection on what are the most appropriate ways to implement EU soft law while retaining its highly valued flexibility is long overdue. Such reflection should include EU and national perspectives, with some authors expressing the need for the EU to issue "guidance for guidance" in order to show how EU soft law needs to be treated at the national level.[120]

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115 Opinion of Advocate General Kokott in Case C-226/11 *Expedia* ECLI:EU:C:2012:544.

116 See the contribution of Maria Kendrick in this Special Issue, "The Future of EU Differentiated Integration: The Tax Microcosm".

117 Jakob Schemmel, "The ESA Guidelines: Soft Law and Subjectivity in the European Financial Market — Capturing the Administrative Influence" (2016) 23 *Indiana Journal of Global Legal Studies* 455, 464; Marloes van Rijsbergen, "EU Agencies' Soft Rule-Making: Lessons Learnt from the European Securities and Markets Authority" (DPhil thesis, Utrecht University Repository, 2018) p.195.

118 Noted in relation to Germany by Miriam Hartlapp and Andreas Hofmann "The Use of EU Soft Law by National Courts and Bureaucrats: How Relation to Hard Law and Policy Maturity Matter" (March 2020) *West European Politics*.

119 Stefan, "EU Soft Law and the Promise of Transparency" (n.63).

120 Clara van Dam, "Guidance Documents of the European Commission in the Dutch Legal Order" (DPhil thesis, Leiden University, 2020) <https://openaccess.leidenuniv.nl/handle/1887/86926> (visited 31 July 2020).

V. Conclusion

Studying the rapidly unfolding regulatory events related to COVID-19 brings to the fore important drawbacks of soft law, suggesting that this crisis might be used as a springboard for reform. There are indeed many things that can be changed, from the processes of issuing soft law, to the clarifications of its legal and practical effects with national administrations and courts, with the literature already suggesting some avenues in this regard. Yet, for the short term, only acting in the spirit of loyal cooperation and solidarity might legitimise and render more effective COVID-19 soft law. This should go both ways, from the EU duty to consult to the national to give at least *some* consideration to soft law instruments.