Soft Law in EU Competition and State aid: an Imperfect Solution to Grand Regulatory Challenges

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I. Introduction

EU soft law consists of rules of conduct that have no legally binding force but may have legal and practical effects.[2] These are the recommendations and opinions mentioned in Article 288(5) TFEU, but also the notices, communications, letters, frameworks, codes of conduct, guidelines, and so on issued by the EU institutions. Such instruments are flexible, in that they do not follow regular decision-making patterns, procedures, and especially timelines. This makes soft law ideal to deal with societal challenges, from tackling the consequences of crises such as the financial crisis, the pandemic, the climate crisis, or the war in Ukraine, to navigating disruptions such as the rapid expansion of the digital economy.

It is unsurprising therefore that much of the soft law issued in competition and State aid attempts to answer to such challenges. After all, these sectors have been regulated by a mix of soft and hard law since their inception. Initially, soft law was issued to simply cover regulatory gaps in these areas of exclusive competence, where the hard law of Articles 101, 102, and 107 TFEU has been the only hard law that the Commission could rely on for years in its enforcement activities. The aim of soft law switched soon enough from purely explaining the hard law to experimenting with and orienting various policy choices. This illustrates that EU soft and hard law have fuzzy boundaries,[3] and they hardly ever exist in isolation from each other. Given such hybrid regulatory landscape, it is established now that academic inquiry should focus on the relationship between soft(er) and hard(er) sources of law. [4]

This chapter illustrates how, together with hard law, soft law has had an important role in expanding the goals of competition and State aid to tackle the big societal challenges of the

[1] Many thanks to the editors for comments on a previous version – and generally many fruitful discussions in the past years. All errors should be pretty well obfuscated now. Websites accessed 22/01/2023 or thereabout.
[2] F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *Modern Law Review* 19, 32.
[3] F Terpan, 'Soft Law in the EU - The Changing Nature of EU Law' (2015) 21 European Law Journal 6.
[4] DM Trubek et al, ''Soft Law', 'Hard Law', and the EU Integration' in G de Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006), 6–10.

day. In its second section, by engaging with previous historical accounts of competition[5] and State aid,[6] the chapter will show that soft law has always been sensitive to the changes in policy choices which in turn have been oriented by societal issues. This happens at both the quantitative level (ie higher or lower proportions of soft law in the policy mix) and the qualitative levels (ie the content of soft law). At the quantitative level, non-binding emergency instruments have been promptly and copiously issued to deal with the effects of various crises, such as the financial crisis, the pandemic or the war in Ukraine. At the qualitative level, we see updates of instruments with an emphasis on environmental protection or social rights.

Following from these empirical observations, Section three goes on to assess clashes between soft law and principles of the EU constitutional legal order. The flexibility of soft law, an advantage in regulating societal challenges, means also that soft law suffers from a legitimacy deficit. This is highly problematic if we consider that some of these instruments are dealing with salient issues for the society at large, such as worker's rights in the sharing economy, or protecting the environment during a climate crisis. The prevalence of soft law in crisis situations (such as the pandemic, or the war in Ukraine) meant that even less legitimacy could have been preserved, as not even usual consultation procedures could not be followed. Being non-binding, soft law is potentially risk-free, allowing for regulatory experiments on issues such as the application of competition rules to novel situations arising from the digital economy. However, the non-binding character of soft law instruments defeats the purpose of bringing clarity for those regulated, meaning that transparency and openness of administrative action are suffering. Finally, crisis instruments might have had a wider impact than tackling the crisis itself, thus challenging important goals of competition and State aid policy. In emerges that wider reflections need to be made as to the links and potential clashes between emergency soft law and other policy instruments, and of course, as to whether emergency soft law is really necessary to deal with certain crises.

[5] I Maher, 'Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement?', (2008) 31 *Fordham International Law Journal* 1713.
[6] M Blauberger, 'Of 'Good' and 'Bad' Subsidies: European State Aid Control through Soft and Hard Law' (2009) 32 *West European Politics* 32 719.

II. The Evolution of EU Competition and State Aid Law: A Story of Hybridity

1. Hybrid Regulation as an Answer to Regulatory Challenges in Competition and State Aid

In a classical evolutionary account of competition policy, Gerber identified three phases up to 1994: fifteen years of learning for the Commission, when the system was established with the support of the Court; the consolidation of the system under strict court control, dating from the oil crisis to the Single European Act; and a shift of power from the courts to the Commission, coupled with a focus on regulating governmental intervention in the market.[7] In 2011, Maher notes a fourth phase: the modernization of antitrust, a phase of de centralized enforcement, characterized by an increasingly economic approach to competition law analysis and by a reliance on self-regulation by firms, as opposed to detailed scrutiny by the European Commission.[8] Ten years later, she finds that a potential fifth stage of transformation is emerging, with the implementation of the latest Directives on ECN+ and damages.[9]

These phases have all seen important changes in the regulatory mix in competition, fuelled by shifts in the regulatory objectives. Treaty articles were further implemented by hard law provisions since the beginning, when regulations were issued.[10] The number of soft law increased over the years in competition, with peak times in the 1990s (after the Single Market programme) and in the 2000s, following decentralization.[11] In the 1990s the substantive focus was on unified, fair, and open markets, which raised the challenge that competition law was straying away from its real economic purpose. The soft law issued in the years 2000 responded to this challenge, with an economic-based approach to enforcement introduced through Commission guidance.[12] The Commission was also accumulating an important backlog, and attempted to solve the matter by issuing individual soft law, comfort letters, instead of formal decisions, and by issuing general soft law[13] delegating enforcement downstream at the national

[7] DJ Gerber, 'The Transformation of European Community Competition Law?' (1994) 35 *Harvard International Law Journal* 97.
[8] I Maher, 'Competition Law Modernization: an Evolutionary Tale?' in P Craig & G de Burca (eds) *The Evolution of EU Law* (2nd edn Oxford, OUP, 2011), 727-730.
[9] I Maher, 'Competition Law: Convergence Through Law and Networks', in P Craig & G de Burca (eds) *The Evolution of EU Law* (2nd edn Oxford, OUP, 2021), 824-846.
[10] Council Regulation 19/65/EEC on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices [1995] OJ 36/533, amended by Council Regulation (EC) 1215/1999 [1999] OJ L148/1.
[11] P Ibáñez and A Kalintiri, 'The Evolution of EU Antitrust Policy: 1966–2017' (2020) 83 *Modern Law Review* 321, 362.
[12] Maher supra n 9, 830.
[13] Notice on Cooperation between National Courts and the Commission in Applying Arts 85 and 86 EEC [1993] OJ C39/6; Notice on Coordination with National Authorities [1997] OJ C313/3.

level. When such initiatives failed,[14] hard law was added to the regulatory mix and decentralization of competition law was done through Regulation 1/2003.[15] A monumental constitutional challenge, this effectively transformed enforcement of competition law in a shared competence,[16] further generating the need for more soft law.[17] Soft law became thus the core of the enforcement business,[18] a swift tool to manage diversity of national approaches and clarify the law for economic operators.[19] Diversity in the application of competition law was also managed through network governance, with the European Competition Network ensuring coordination between the authorities. The light touch in regulating the ECN meant divergences with regards to procedures and sanctions, which again posed a threat to the coherence and soundness of the law.[20] This called hard law back in, through the introduction of the Damages Directive and the ECN+ Directive.

In State aid, State aid law has been both resilient and adaptable to societal challenges, growing in sophistication in times of liberalization, enlargement, or economic crisis. [21] Soft law was for a long time the only regulatory instrument apart from the Treaty provisions. The embryonic enforcement practice of the Commission in the 60s and 70s evolved into the first sectoral guidance in the 70s and 80s, and towards a systematisation of common objectives from the mid-80s following the White Paper on the completion of the Internal market. Much of the soft law issued in state aid dealt with the application of Article 107(3): aid which may be declared, at the Commission's discretion, compatible with the internal market. The initial approach towards regulation was industry-specific and soft law instruments were issued in coal and steel,[22] motor vehicles[23] and fisheries.[24] The end of the 1990s were marked by a turn to hard

[14] Maher supra n 9, 832.
[15] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.
[16] C Townley and A Türk, 'The Constitutional Limits of EU Competition Law – United in Diversity' (2019) 64 (2) *The Antitrust Bulletin* 235.
[17] See on this N Petit & M.P. Rato, 'From Hard to Soft Enforcement of EC Competition Law - A Bestiary of 'Sunshine' Enforcement Instruments' in C Gheur et al *Alternative Enforcement Techniques in EC Competition Law: Settlements, Commitments and Other Novel Instruments* (Bruylant and LGDJ, Brussels and Paris, 2009), 203; and also D Lehmkuhl, 'On Government, Governance and Judicial Review: The Case of European Competition Policy' (2008) 28 *Journal of Public Policy* 139, 147.
[18] Maher, supra n 5, 1740.
[19] Lehmkuhl, supra n 17, 147.
[20] Maher, supra n 9, 733.
[21] Andrea Biondi & Elisabetta Righini, An Evolutionary Theory of State Aid Control, in D Chalmers and A Arnull (eds) *The Oxford Handbook of EU Law* (OUP, Oxford 2015).
[22] Letter to MS of 20 April 1977 SG (77) A/5039.
[23] Notice concerning the Community framework on State aid to the motor vehicle industry [1989] OJ C123/3.
[24] Commission Communication concerning State involvement in the promotion of agricultural and fisheries products [1986] OJ C272/3.

law, with the Commission delegated the power to issue block exemption regulations. The literature interpreted these developments as a shift in the soft-hard legal continuum towards harder rules,[25] showing, once again, that soft law is far from static, and it can transform in time.

In order to achieve greater reductions in the level of aid, a shift towards horizontal objectives of Community interest (education, research, employment and regional development) is noted in State aid policy at the beginning of the Millennium, through the 2005 State Aid Action Plan (SAAP).[26] This led to a reform of soft law as well, and a significant fall in the overall level of state aid from 2007.[27] The modernization of State aid (SAM) started in 2012[28] following the financial crisis, to foster sustainable, smart and inclusive growth in a competitive internal market, focusing on *ex ante* scrutiny of cases with the biggest impact on the internal market, whilst strengthening the Member State's (MS) cooperation in state aid enforcement and streamlining the rules and providing for faster decisions.[29] Both soft and hard law have been revamped, with most of the revisions occurring after 2014. State aid guidelines and frameworks were made consistent with common principles for the assessment of compatibility and eliminate the disparities in treatment that existed under different soft law instruments. The importance and the sophistication in the assessment of these principles was endorsed by the Court in *Hinkley Point*, a case confirming that a measure to aid the nuclear energy sector was proportionate given its positive effect on the security of supply.[30] Since 2020, many of this soft law is being changed, on the backdrop of seismic events, such as the COVID-19 pandemic and the war in Ukraine. New revisions of guidelines such as Rescue and Restructuring, as well as Environmental guidelines occur at the same time as State aid deals with the pandemic showing how both the crisis and other societal challenges such as the rise of the digital and the environmental crisis are currently spurring massive transformations of the field.

What emerges from this picture is that all phases of policy development in competition and State aid were characterised by hybrid regulation. The changing approach in policy was

[25] M Aldestam, 'Soft Law in the State Aid Policy Area' in *Soft Law in Governance and Regulation: an Interdisciplinary Analysis*, U Mörth (ed) *Soft Law in Governance and regulation: an Interdisciplinary Analysis* (Edward Elgar, Cheltenham, 2004), 33.
[26] European Commission, State Aid Action Plan: Less and Better Targeted State Aid A Roadmap for State Aid Reform 2005-2009 COM (2005)107, < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0107:FIN:EN:PDF>, 1 June 2010.
[27] C Quigley, *European State Aid Law and Policy* (Oxford: Hart Publishing, 2009), 179-181.
[28] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU State Aid Modernisation (SAM) COM(2012) 209 final <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012DC0209:FR:NOT>, 26/06/2012.
[29] Communication on EU State Aid Modernisation, COM/2012/0209 final, para. 8.
[30] Judgment in Case C-594/18 P *Austria v Commission*, ECLI:EU:C:2020:742, para 77.

accompanied either by a switch in the soft-hard law configurations, or by a change in the regulatory goals pursued by the soft law instruments. The following subsections will show an emerging trend in contemporary soft law to deal with major societal challenges, both in competition and in State aid.

2. Hybrid regulation as an answer to the major challenges in competition law

It is safe to say that, at least since the Millennium, soft law was issued either to reinforce the economic approach towards competition law or to deal with procedural challenges stemming from decentralisation. In the area of Articles 101 and 102 of the TFEU, Commission guidance showed for a long-time reluctance in promoting more than economic efficiency. This corresponds perhaps with the general narrative that competition law should be about consumer welfare and maximising economic efficiency. To cite from the Guidance on Article 101(3), the types of efficiencies listed in that article 'are broad categories which are intended to cover all objective economic efficiencies.'[31] Indeed, the Commission guidance on the application of Article 101 (3) is 'littered'[32] with references to economic benefits, albeit a 'timid' reference that 'goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Art 101 (3).'[33]

Yet, most recent soft law shows a qualitative shift towards more non-economic goals, responding to current challenges such as the environmental crisis and the societal problems connected to the rise of digital platforms. This matches perhaps the finding that nowadays enforcement has focused on certain industries, going hand-in-hand with EU-policy initiatives, including the digital single market.[34]

With regards to the current environmental challenges, this back-and-forth from economics to wider societal and policy goals can be illustrated by the history of the Horizontal Cooperation Guidelines, whose revisions have been including and deleting references to the environment and sustainability as assessment criteria. The 2001 version of the Guidelines included a full

[31] Communication from the Commission — Notice — Guidelines on the application of Article 101(3) [2004] OJ C101/97, para. 59
[32] J Buhart, D Henry, 'Think Green Before You Apply: EU Competition Law and Climate-Change Abatement', (2021) 44 (2) *World Competition* 147, 156 et s.
[33] Para 41 Guidelines on 101 (3) supra n 31.
[34] Ibanez/Kalintiri supra n 11, 368

section on 'environmental agreements' concluded in order 'to achieve pollution abatement.'[35] The focus was still on economic benefits, but the Commission was ready to take 'a positive stance on the use of environmental agreements as a policy instrument to achieve the goals enshrined […] in the Treaty.'[36] Interestingly, the 2011 Revision of the Notice scraps completely this section, even the Commission insisted that the assessment of environmental agreements was not downgraded as a result, but on the contrary, was better streamlined under the other relevant headings of the Notice.[37] The most recent revision of the Notice contains a chapter on sustainability agreements. Sustainability is here understood not only in relation to environmental protection (as in the 2001 Notice), but also in relation to economic and social development, by reference to the 2030 UN Agenda for Sustainable Development. [38]

The Revision of the Notice happens in a context where NCAs have already adopted a sustainability perspective in their own guidance documents or practice. This is the case of the Dutch Competition Authority which updated its Guidelines on sustainability agreements, an initiative dating back to 2014.[39] Similarly, in the post-Brexit UK, the Competition and Markets Authority has advocated for more clarity to help businesses understand how sustainability considerations are taken into account in competition law.[40] This goes on to show that EU soft law is hardly ever static, and the various updates in European guidance happen in the context of wider overhauls of soft laws within the Members or the neighbouring States.

With regards to the digital market, one challenge which is currently tackled (also) through soft law is the difficult situation of individuals employed by platforms facilitating various services. The Commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons,[41] holds that Art 101 TFEU does not apply to collective agreements regarding the working conditions of solo self-employed people who are in a situation comparable to workers. This would help counteract the practice of some firms to give a self-employed status to people working for them, which

[35] Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C 3/02, Section 7.
[36] Para 192 *ibid*.
[37] MEMO/10/676 of 14 Dec. 2010, Competition: Commission adopts revised competition rules on horizontal co-operation agreements – Frequently asked questions
[38] Draft Communication - Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the EU to horizontal co-operation agreements, para 543.
[39] https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf.
[40] https://www.gov.uk/government/news/cma-publishes-environmental-sustainability-advice-to-government.
[41] [2022] OJ C374/2.

would mean, under the Treaty competition provisions, that such individuals could not enter into agreements with their peers, hence losing bargaining power regarding their conditions of work. The Guidelines are part of broader soft[42] and hard law initiatives[43] to deal with the uneasy interaction between labour law and current realities of the digital economy, again underlining hybridity of regulation.

The recent revival of informal individual guidance is another soft law route through which antitrust enforcement could be used to tackle big new societal challenges. Prior to decentralization, individual guidance in form of 'comfort letters' was copiously used to ease the Commission backlog in authorising agreements. Regulation 1/2003 allowed informal guidance in the context of decentralization,[44] yet, a 2004 Notice limited excessively the circumstances under which the Commission could provide such guidance, which meant that the practice was discontinued. [45] In 2020, an Antitrust COVID Temporary Framework expressly provided for the possibility for the Commission to assess business cooperation projects linked to the situation of urgency,[46] which led to a revival of comfort letters/individual guidance after the pandemic. The 2004 Notice was thus renewed in 2022,[47] setting out two circumstances under which informal guidance can be provided. First there should be a novel or unresolved question, which means that the assessment of an agreement or practice poses a question where there is no sufficient clarity in the existing Union framework. Second, there should be a Union interest in providing the guidance.

These two conditions create the optimal premises for comfort letters to be used to deal with matters raised by current challenges posed by the evolution of our societies, such as digitalization or greening the economy, as declared by the Director-General.[48] One of the indicators for an 'interest' in providing the guidance is the relevance of the agreement or

[42] Communication from the Commission Better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work COM(2021) 761 final.
[43] Proposal of a Directive on improving working conditions in platform work COM(2021) 762 final.
[44] Recital 38.
[45] https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5887.
[46] Two letters were issued in this regard: 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) and Comfort letter: cooperation at a Matchmaking Event – Towards COVID19 vaccines upscale production COMP/E-1/GV/BV/nb (2021/034137).
[47] Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (2004/C 101/06) revised as Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the EU that arise in individual cases (guidance letters) (2022/C 381/07).
[48] A Boyce, 'Climate cooperation should get 'comfort' from EU antitrust officials, Guersent says', MLex.com, 14 September 2020.

practice for the achievement of the Commission's priorities. A practical confirmation is that the Commission has issued informal guidance to GAIA-X, an organisation having as a declared purpose to provide the next generation of data infrastructure.[49] Another indicator of the 'interest' criterion is the extent to which the agreement or practice could correspond to a more widely spread usage in the Union. This implies that there is a will to signal the approach that the Commission would take for similar future behaviours, with the Notice alluding that these comfort letters could be used as interpretative instruments beyond the respective case. Thus, whether a problem is 'novel' needs to be assessed in relation not only to the case law of the ECJ, and general soft law, but also prior individual guidance. Provision is made in the Notice that such informal guidance will be published on the website of the Commission, with an obvious transparency goal. Ultimately, this practice enables the Commission to regulate by simply publishing information online.

3. Hybrid regulation as an answer to the major challenges in State aid

The financial crisis, and now the pandemic and the war, determined the entrenchment of emergency soft law in State aid, triggering not only challenges as to transparency and legal effects, but also questioning fundamental principles of the internal market. During the financial crisis, MS rushed to the rescue of their banks, risking subsidy races across Europe and severe distortions of competition. By September 2009, some three trillion Euro of state guarantees were provided to European banks under schemes approved by the European Commission, in addition to over 300 billion Euro in capital injections from MS governments.[50] The measures taken comprise of a communication from 2008 laying down the rules applicable to state aid measures in the context of the financial crisis,[51] a communication on measures for the recapitalisation of financial institutions,[52] several communications relating to support measures in favour of banks in the context of the financial crisis,[53] etc. Most importantly, in striving to support the real economy, the Commission loosened, for a limited amount of time, the rules

[49] Feedback on the membership criteria and internal working rules of GAIA-X COMP/C.6/SS/RI/vvd.
[50] Source <http://ec.europa.eu/competition/recovery/financial_sector.html>, 22 May 2012.
[51] Communication from the Commission -- The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis [2008] OJ C270/8.
[52] Commission Communication recapitalization of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition [2009] OJ C10/2.
[53] Communication from the Commission on the Treatment of Impaired Assets in the Community Banking sector [2009] OJ C72/1; Communication from the Commission on the application, after 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis [2010] OJ C329/7; Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis [2011] OJ C356/7.

applicable to horizontal aid, facilitating speedy access to credit by businesses through the adoption of temporary frameworks (TF).[54]

More recently, a vast array of national aid measures[55] have been approved by the Commission to counteract the negative effects of various pandemic lockdowns on the economy of the MS. This was done under the exceptional rules issued by the European Commission, first through a Communication on a coordinated economic response to the COVID-19 Outbreak,[56] and then by a targeted Coronavirus TF.[57] The European Commission also adopted a Temporary Crisis Framework for State aid[58] in the context of Russia's invasion of Ukraine, meant to mitigate the economic impact of the war and EU sanctions by supporting severely affected businesses. The Ukraine TF contains provisions aimed at compensating companies for additional costs incurred due to the high energy prices, but goes beyond this goal and provides support measures to businesses otherwise affected by the crisis, such as agriculture and food industry, cut from important sources of supply. As with the previous TFs, the Ukraine TF was issued under the Commission's discretionary power to approve State aid 'to remedy a serious disturbance to the economy of a MS.'[59]

Soft law is not the only answer to grand problems of our societies in State aid. The recent discussions around research, development and innovation confirm that hybridity is still relied on to deal with the challenges of the digital world. The R&D&I framework[60] has been very recently updated to respond to such challenges. At the same time, the Commission has proposed hard and put forward soft law, in the form of a 'European Chips Act', to reinforce Europe's technological competitiveness in international trade, by pooling together investments from the Union and the MS in the field of semiconductor technology.[61]

[54] Communication from the Commission - Temporary framework for State aid measures to support access to finance in the current financial and economic crisis (consolidated version) [2009] OJ C83/1, Communication of the Commission: Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis [2011] OJ C6/5 - now expired.
[55] A comprehensive list is available here https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_en.
[56] COM(2020) 112 final; point 5 and annex 3.
[57] Communication from the Commission of 20 March 2020, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C91I/1.
[58] Communication from the Commission Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [2022] OJ C131I/01.
[59] Article 107 (3) (b) TFEU.
[60] https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6233.
[61] https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_730.

This brief account shows that shifts towards harder or softer regulation in competition and State aid correspond, as expected, with major turns in policy approaches. In both sectors, major shifts in the regulatory mix are determined by concerns of increasing effectiveness in the application of the rules. At the substance level, we note that in competition law the turn to soft law has been dictated by changes in approach from a completion of the internal market goal towards more modern and economic orientations, and most recently tend to include wider societal goals. Conversely, reforms of the soft law in State aid are spurred mostly by grand societal changes, as well as crises. One important take away needs to be drawn from the above: soft law is not a static instrument, its flexibility being its most praised characteristic, and allowing it to change, improve, or even translate into hard law as an answer to external challenges or simply the evolution of the legal framework. The next section turns to challenges raised using soft law in tackling wider societal problems in State aid and competition.

III. Evaluation

The usefulness of soft law is obvious: its speedy adoption processes allow a swift response in a fast-changing landscape, dictated by the rapid evolutions of trade and economics. Competition and State aid are areas of exclusive EU competence, where the European Commission enjoys wide discretion. Explaining this discretion through guidance is vital for transparency, and ultimately increases legal certainty. Such principles are often put forward as rationale in the preambles of various soft law instruments. In turn, Courts rely on these principles to extract even binding legal effects of soft law for the enacting institution.[62] Yet, competition and State aid soft law is not immune to the general rule of law concerns: the lack of legitimacy safeguards of these instruments and their potential for overstepping competence boundaries, as well as the uncertainty surrounding their effects in the multi-level governance system of the EU. Finally, the entrenchment of emergency soft law in State aid raises significant issues regarding the potential of these instruments to undermine EU integration goals.

1. Legitimacy of EU soft law

Given its lack of legally binding force, soft law is not constrained by the list of competences provided for in the TFEU, and the general basis used for issuing such instruments is Article 17 TEU, providing in its first paragraph sweepingly that ‘The Commission shall promote the

[62] O Ștefan, *Soft Law in court. Competition law, state aid and the Court of Justice of the EU* (Kluwer, 2013).

general interest of the Union and take appropriate initiatives to that end.' Whilst this might be less of an issue for areas of exclusive competence, some problems can still arise in practice. For instance, State aid environmental guidance was used to regulate the security of electricity supply, falling within an area of energy, a shared competence. Indeed, capacity mechanisms – or financing measures meant to ensure the security of supply to avoid blackouts – have been regulated through State aid guidelines[63] before the adoption of a dedicated hard law instrument within the recent Clean Energy Package.[64] Further, the Notice on the Notion of Aid,[65] sits uncomfortably with the principle that the discretion of the Commission is limited under Article 107(1) TFEU. Traditionally, the Commission has issued an important number of soft law instruments with the objective of informing its stakeholders of the way in which it intended to exercise its discretion under Article 107(3) TFEU. However, it is surprising to see the Commission publishing such a detailed instrument dealing with Article 107(1) TFEU criteria – an area where it has only limited discretion to exert or explain. [66]

It is worrying that there are no clear procedures or rules for soft law making, especially since soft law is tackling now social issues, such as the precarious condition of workers in the sharing economy.[67] Flexibility is undoubtedly praised in times of emergency, such as the pandemic, or more generally when a swift action is necessary to adapt to changing market circumstances. Yet, flexibility also means that the legitimate decision-making channels are not used, with a big absence from the EU soft law landscape: the European Parliament. [68] Soft law in competition and State aid is generally issued by the European Commission and published online and in the C series of the Official Journal, although publication is not compulsory for soft law.[69]

One should not imagine that soft law is produced out of thin air. It emerges, most of the time, from complex and lengthy consultations with the stakeholders. There are usually

[63] Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020 [2014] OJ C200/01.
[64] Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity [2019] OJ L158/54.
[65] Commission Notice on the notion of state aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/1.
[66] A Biondi and O Ștefan, 'The Notice on the Notion of State Aid: every light has its shadow', in B Nascimbene (ed.), *The Modernisation of EU State Aid Control*: *Evolution and Perspectives of the EU Rules on State Aids and Services of General Economic Interest* (Springer 2018), 43.
[67] Thanks to Carlo Colombo for this point.
[68] Resolution of the European Parliament 'on the institutional and legal implications of the use of soft law instruments' 2007/2028(INI), at 1.
[69] Article 297 TFEU.

several rounds of consultations, as well as targeted discussions with various stakeholders, or negotiations with MS, all published online on the website of DG competition.[70] All in all, competition and State aid soft law making appears to be much more transparent than in other sectors. [71] Yet, such processes are not a panacea in relation to ensuring legitimacy: in the absence of a clear recognition of participatory rights, expressly in the text of the Treaty or through ECJ case law, the Commission remains free to organise these consultations and take them into consideration as it sees fit. Furthermore, with the rise of Temporary Frameworks, consultations are stripped to a minimum and rendered opaque, presumably in the interest of urgency.[72] The Coronavirus TF is a perfect example, with amendments being brought at an incredibly fast pace (six times in less than two years), following consultations with MS only, vaguely mentioned in various press releases.[73] The Ukraine TF is following a similar path (although updated only twice since the start of the war). This is the third time that extraordinary State aid emergency soft law is adopted through procedures that depart from the established public consultation routes. Whilst it is perhaps to be expected that in case of emergency it is difficult to comply with burdensome procedural requirements, the worry is that such modus operandi will become entrenched, creating a category of emergency soft law, published with even lower legitimacy standards than regular soft law.

What is more, soft law cannot be subject to direct judicial review,[74] and the ECJ is likely to reject a case against these Temporary Frameworks before looking at the merits. Even if the Court accepted such judicial review, one may wonder how far its scrutiny could go. Indeed, the Commission enjoys vast discretion in the area of Article 107 (3) TFEU, and the Court's review is limited to checking if rules of procedure and the duty to state reasons were respected, and that there is no manifest error in assessing facts, or error of law and no misuse of powers.[75] The accountability of soft law thus cannot rest on courts, but on alternative channels such as permanent (and transparent) dialogue with the stakeholders.

[70] See for an example Press release 21 December 2021 State aid: Commission endorses the new Guidelines on State aid for Climate, Environmental protection and Energy https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6982.
[71] A contrario, J Scott, 'In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law' (2011) *Common Market Law Review* 329, 336.
[72] A Biondi, 'Governing the Interregnum: State Aid rules and the COVID -19 Crisis', 2020 *Market and Competition Law Review*.
[73] M Eliantonio, O Ștefan 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12(1) *European Journal of Risk Regulation*, 159-175.
[74] Judgment in Case C-16/16 P *Belgium v Commission* ECLI:EU:C:2018:79.
[75] Case C-333/07 *Régie Networks* ECLI:EU:C:2008:764.

2. Uncertain legal effects

In the absence of legally binding force, it is unclear what legal effects can soft law produce. The recently issued guidelines on the collective agreements concluded by the self-employed clearly state that they 'do not create any social rights or obligations' and neither do they affect the distribution of competences between the EU and the MS.[76] Non-binding effects might create further uncertainty which ultimately is detrimental to workers' rights.[77] Whilst the guidelines apply to *all* self-employed persons, the Commission has also proposed a Directive to deal with the specific situation of digital platforms.[78] Such hardening of the legal framework would be probably more conducive to legal certainty, as it would leave less scope for variation in the application at the national levels.

The revival of individual guidance in competition law raises also concerns. Comfort letters were already criticized pre-decentralization from the point of view of legal certainty or transparency:[79] in most cases, these were only published in short form.[80] Yet, practitioners welcome the reintroduction of such letters, given that the Commission has never followed up on the possibility to provide informal guidance under Regulation 1/2003.[81] Their effects are still far from clear. As per the 2022 Notice on individual guidance, applicants remain responsible to carry out their own self-assessment of the applicability of Articles 101 and 102 TFEU, regardless of the letter they received. Such letters do not prejudge the assessment by the Court of Justice, and the Commission is not entirely bound by such letters either. In case of general guidance, the Commission would be allowed to depart from its own soft law, if they provide arguments that are compliant with legal certainty and legitimate expectations.[82] There might be a difference between general and individual guidance: the Commission can subsequently examine the agreements or the practice that were subject to an individual letter, and they are only bound to *take the letter into account*, and even this subject to a long list of

[76] Supra n 41, Preamble, Para 10.
[77] N Countouris et al, 'The EU, Competition Law and Workers' Rights' (March 25, 2021). Available at SSRN: https://ssrn.com/abstract=3812153 or http://dx.doi.org/10.2139/ssrn.3812153.
[78] Proposal for a Directive on improving the working conditions in platform work https://ec.europa.eu/social/main.jsp?langId=en&catId=89&furtherNews=yes&newsId=10120#navItem-relatedDocuments.
[79] H Cosma and R Whish, 'Soft Law in the Field of EU Competition Policy', (2003) 14 *European Business Law Review* 25, 43-44.
[80] F 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*, 827.
[81] J Buhart, D Henry, 'COVID-20: The Comfort Letter Is Dead. Long Live the Comfort Letter?', (2020) 43 (3) *World Competition*, 305.
[82] Joint Cases C-189/02 et al Dansk Rørindustri and others v Commission, ECLI:EU:C:2005:408, para 211.

caveats.[83] However, applicants who relied on the letter in good faith cannot, in principle, be imposed fines.[84]

The 2022 Notice also provides that letters do not bind MS' authorities and Courts, who could take them into consideration 'as they see fit.'[85] This is reminiscent of older case law, such as *Guerlain* and *Lancome* where comfort letters were considered mere factors which the national courts may take into account.' [86] Theoretically, if a national authority decides to pursue investigations regarding an activity covered by individual guidance, they are free to do so. National authorities do not seem to be constrained, in the case of individual guidance, by any duty to state reasons or by the respect of principles such as sincere cooperation, uniformity, and effectiveness of EU law – as it happens for instance when they would investigate cases which were subject to commitment decisions. [87]

All in all, governing through soft law in multi-level settings such as the EU can at the same time provide clarity for national regulators, but also increase fragmentation of the law because of uncertain legal status. [88] EU competition soft law is used by the NCAs and Courts, even though sometimes certain decisions or judgments specifically mention that authorities and judges do not feel bound by such instruments.[89] The attitude of authorities towards a certain piece of EU soft law can vary in time, as shown by the initial reluctance[90] to rely on the Guidance Paper on Article 102 TFEU[91] which is now more frequently mentioned at the national level.[92] Soft law is incorporated in the legal orders of the MS through various means, from brief references on national authorities' websites to national soft law or even national hard law.[93] Yet, such fragmentation is not *always* a negative outcome. Take the revision of the *de minimis*

[83] 2022 Notice supra n 47, para 25.
[84] *Ibid.*
[85] Para 27.
[86] Judgment in Joined Cases 253/78 and 1 to 3/79 *Guerlain* ECLI:EU:C:1980:188, para. 13; Judgment in Case 99/79 *Lancôme* ECLI:EU:C:1980:193, para. 11.
[87] Case C-547/16, Gasorba ECLI:EU:C:2017:891, para 28-29.
[88] I Maher, 'Functional and Normative Delegation to Non-Majoritarian Institutions: The Case of the European Competition Network' (2009) 7 *Comparative European Politics* 414, 425.
[89] O Ștefan et al, 'EU Competition and State Aid Soft Law in the Member States' (August 5, 2020) Available at SSRN: http://dx.doi.org/10.2139/ssrn.3667387, p 24.
[90] Z Georgieva, 'The judicial reception of competition soft law in the Netherlands and the UK' (2016) 12 *European Competition Journal* 54.
[91] European Commission, 'Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.
[92] M Dobbs and O Ștefan, 'EU Soft Law in the UK on the Eve of Brexit: (not) Much Ado About Nothing?', in M Eliantonio et al, *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (Oxford, Hart, 2021).
[93] O Ștefan, 'Soft Law and the Promise of Transparency in the Member States', in Eliantonio et al, *ibid.*

notice[94] which was prompted by the refusal of the French Autorité de la Concurrence to apply it, and the follow-up preliminary reference at the ECJ. [95] It appears thus that the dialogue between the various levels of governance can change soft law instruments, rendering them potentially better. This can even ultimately strengthen the legitimacy of soft law, given that it adapts to stakeholders views.

3. Putting in abeyance established EU law principles

Pandemic regulation shows another danger of EU soft law, as entrenched emergency soft law can put in abeyance established EU law principles. In State aid, the EU has issued two frameworks to deal with the effects of two overlapping crises: the Covid-19 pandemic and the Ukraine war. These frameworks have effectively allowed MS to help their economies through subsidies, thus pausing the prohibition provided for in Article 107 TFEU. Whilst it is too soon to offer a full evaluation of the full effects that these frameworks had on the internal market, one thing is certain: they both have a huge potential to distort the level playing field between the MS. France and Germany are the absolute leaders of pandemic State aid spending between March and December 2020, as they have injected in their economies over 60% of the total amount of State aid spent by all MS.[96] Many of the schemes approved on the basis of the TF are currently challenged in Court, with serious allegations being brought regarding breaches of the non-discrimination principle, a cornerstone of EU law. Although the General Court declared compatible with the State aid rules schemes that favored companies on the basis of their links to the national economies,[97] the literature found such an approach problematic, as it fails to consider other more objective criteria for granting aid, such as the actual contribution of companies to the economy, or indeed, the degree of damage suffered by extraordinary circumstances such as the pandemic.[98] Thus, the Framework attacks the very rationale of State aid control in Europe, creating a danger for subsidy races and internal market distortions.

Often fraught with contradictions, crisis soft law can clash with regulatory goals in other fields. Some of the most important sustainability goals of modern State aid policy have been put on

[94] Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the EU [2014] OJ C291/1.
[95] Case C-226/11 *Expedia* ECLI:EU:C:2012:795.
[96] I Agnolucci, 'Will COVID-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions Authorising Pandemic State Aid Measures', (2021) *Journal of European Competition Law & Practice*.
[97] Case T-379/20 *Ryanair v European Commission* ECLI:EU:T:2021:195, para 87 and T-238/20 Ryanair v European Commission ECLI:EU:T:2021:91. Appeals before the ECJ in pending cases C-320/21 P and C- 209/21 P.
[98] P Nicolaides, 'The Limits of 'Proportionate' Discrimination', 2021 (20) *EStAL* 3, 384-396.

hold by the Commission in its efforts to deal with the pandemic.[99] The green and digital agendas were not appropriately pursued by the Commission pandemic State aid policy.[100] This is not offset by some MS pushing green agendas in sectors such as transport during the pandemic.[101] This illustrates that emergency soft law should be carefully tuned to pre-existing or planned hard and soft law. The second amendment of the Covid TF stated it 'complements rather than replaces existing possibilities under EU State aid rules for MS to provide support'[102] according to the Risk Finance Guidelines[103] or the (then upcoming) Climate, Energy and Environmental Aid Guidelines (CEEAG).[104]

These interlinkages between various policy instruments have been exploited by the Commission in tackling the energy crisis even in the wake of the Ukraine crisis and the corresponding TF. The REPowerEU Communication[105] already mentioned that the new ETS State aid guidelines might also tackle the conundrum between security of supply, greening, and competition. Similarly, the Commission has announced it will prioritise its assessment of the notifications for the first Important Projects of Common European Interest on hydrogen.[106] Since energy market design is not an instant matter, the EU has been grappling with this issue for years, designing three energy packages, a Clean Energy for All Europeans 'package', as well as a Green Deal. Out of the measures suggested in the Commission Toolbox on Energy Prices.[107] State aid appears to be a quick fix, part of a bigger framework. The goal is to achieve short term measures to help the consumers, whilst at the same time creating a long-term vision for the electricity market. The only worry might be that the quick fix might undermine long term goals.

[99] Agnolucci, supra n 96.
[100] J van Hove, 'Impact of state aid on competition and competitiveness during the COVID-19 pandemic: an early assessment', Study for the Committee on Economic and Monetary Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020
[101] S Truxal, 'State Aid and Air Transport in the Shadow of COVID-19' (2020) Air & Space Law 61, 81.
[102] Communication from the Commission Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ C164/3, recital 14.
[103] Communication from the Commission — Guidelines on State aid to promote risk finance investments [2014] OJ C19/4.
[104] Communication from the Commission – Guidelines on State aid for climate, environmental protection and energy [2022] OJ C/1.
[105] Communication from the Commission REPowerEU: Joint European Action for more affordable, secure and sustainable energy COM/2022/108 final.
[106] *ibid* section 2.1.3.
[107] Communication from the Commission Tackling rising energy prices: a toolbox for action and support COM/2021/660 final.

Whilst it is a matter of fact that economic sanctions can backfire on the EU's internal market, the question is whether it was necessary to adopt *general* rules to deal with State aid granted by the MS to address such collateral damage. The Ukraine TF rightly states that aid cannot be granted to undertakings under sanctions adopted by the EU.[108] Apart from the obvious scenario where aid cannot be granted to entities specifically named on the sanction list, aid cannot be granted to undertakings *controlled* by such entities, raising the question of what the threshold of 'control' is. Furthermore, aid cannot be granted to 'undertakings active in *industries targeted by sanctions* adopted by the EU, insofar as the aid *would undermine the objectives of the relevant sanctions*.' Yet, this would imply in and of itself that a case-by-case analysis will be necessary in such scenarios defeating the purpose of soft law measures, aimed at providing transparent, reasonably general criteria for the assessment of aid. Such case-by-case analysis is likely to be complex, given the evolving, sophisticated character of economic sanctions: just two weeks after the TF, multiple other packages were adopted, including energy bans and the exclusion of Russian businesses from accessing European public procurement or EU money.

The above concerns show that temporary frameworks need to be used with caution. The question is what qualifies as an emergency, and what is the necessary urgency threshold that needs to be employed for consultations with the MS to be carried outside of the public domain. Different degrees of urgency can be noticed already between the Coronavirus TF and the Ukraine TF. In the case of the former, the unprecedented health crisis and lockdown measures called for intervention to keep jobs and salvage entire economic sectors. In the case of the latter, we notice that the Commission advised already in October 2021 to use the state aid tool in order to deal with the extraordinary increase in energy prices.[109] The seriousness of the crisis in Ukraine and the overspill on European markets cannot be contested, but one may wonder whether, in the future, a dro ught in the South of Europe will not also trigger the issuing of a Temporary Framework on the basis of Article 107 (3) (b) effectively putting in abeyance established rules and practices.

IV. Conclusion

The various combinations between hard and soft norms in the competition landscape match various challenges raised at the level of procedures, namely the decentralization and its aftermaths. At the qualitative level we see that competition soft law is becoming increasingly

[108] Para 33.
[109] Toolbox supra n 107.

a tool to promote environmental and social protection goals, or, in the case of individual guidance, any ‘novel’ issues. In State aid soft law has been issued since the very beginning to orient the discretion of the European Commission in approving measures fulfilling a whole host of non-economic goals. This has allowed for whole policy sectors, such as energy, to be regulated initially through State aid guidance. A tendency to include more objective economic assessments is clear in the various modernisation packages, yet we see that following the Coronavirus pandemic and the Ukraine war, State aid rules have been effectively put in abeyance, with consequences that are yet to be witnessed.

Whilst it is difficult to contest the usefulness of these tools, which have been an established part of the regulatory landscape in these sectors for over half a century, their drawbacks need also to be considered. The relatively more transparent and more streamlined consultation procedures for competition and State aid soft law cannot necessarily make out for regulating, through such instruments, areas of shared competence such as environment or energy. The uncertain legal effects that soft law can produce in the multi-level EU context make individual guidance an awkward solution for clarifying ‘novel’ issues in antitrust. Finally, emergency soft law, issued following cursory consultations and challenging fundamental integration principles needs to be used with parsimony and care. Soft law is however not static and needs to be always considered in relationship with its regulatory environment. As such, it has either the potential to translate into hard law, if necessary, or to be changed because of the interactions with the stakeholders or as a result of its application in concrete cases. To improve soft law and to counteract its negative consequences one should start by focusing on these processes.