



SOFT LAW – THE INTERMEDIATE STAGE BETWEEN FREEDOM AND CONTROL

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Abstract

The soft law is placed on a scale between freedom and control, autonomy, and hard law. At first sight, it falls short of building elements known in the legal principles of law, like transparency, certainty, and predictability, but on the other hand, it is needed to address areas where complexity reigns, where flexibility is needed, where hard law is too hard, invasive, and inappropriate to achieve more distant goals. As soft law can have not only practical but also legal effects, this paper analyses the basic elements of soft law, its practice in the US, France, and the EU and gives pro et contra arguments to be able to recognise it as such and to apply it on a more objective manner. This can be done with the help of the manifest error standard of the judiciary, its structure, and the help of participatory collective wisdom. A first step could be the use of the evidentiary standard of manifest error as a possible solution for the most effective soft law (*a la* “Turing style”), after which the structure and collective wisdom follow. When the principle of loyal cooperation among institutions is established, the soft law hardens more and more into clay and/or hard law. It thus matters who, when, how, and why to enact the soft law.

Keywords

Administrative Law, Systemic Structure, Soft and Hard Law, Context, Public Participation, Transparency

I. Introduction

Life is more complex than legal acts reflect. Public administrations (PAs) that mostly implement legal acts are faced additionally with various practices, nowadays known as governance, and/or ‘the involvement of society in the process of governing’ (Pierre and Peters, 2000, p. 7), where governance processes are also more ‘hybrid and multi-jurisdictional, linking plural stakeholders in complex networks’ (Bevir, 2010, p. 3). The gist of PAs is in the policy choices they make and implement; it is about the respect of citizens and the state for the laws and traditions that govern their interactions (Kaufmann and Kraay, 2015). This kind of attitude is thus placed in specific contexts, where flexible

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accommodations to internal and external challenges are made, where incentives can be used instead of obligations, and where a plurality of stakeholders rather than unilateral, hierarchical-style orders of decisions are used. Such *coordinative* practices are hard for the hard law (HL), being mostly incapable to include in its frame new ideas and practices until they are not developed enough. Therefore, complex environments are fertile grounds for informational asymmetries between a regulator and a regulated, which can in the framework of HL lead to too burdensome and time-consuming hard rules (Simon, 2017). This can also lead to regulatory capture, administrative barriers, and legitimacy gaps. As can be shown similarly in customs, family and friendship relations, the HL's approach is not always the best answer (Gunningham, Grabosky, and Sinclair, 1998): 'law is desperately short of techniques, doctrines and institutions that adequately respond to the social features of organizational entities, their impact on stakeholders, their internal capacity for self-management, or their capacity for diffusion and avoidance of accountability' (Parker, 2002, p. 245). The rainbow of real life cannot be captured with the dichotomy between free market and command: 'control regulation fails to capture the full range of options that lie between the polar extremes of absolute discretion and total control' (Coglianese and Mendelson, 2012, p. 146). For systems theory – associated with von Bertalanffy – behaviour is latent in the *interaction* of parts (1968), influenced by the structure (Senge, 2010). Actions and results are hence not caused primarily by the external environment *per se* but by *interrelationships* (Ackoff, 1978). The latter cause new and emergent things where 'the appearance of a level of complexity [is] more advanced than the existing components of a system' (Feltz, Crommelinck, and Goujon, 2006, p. 341). Complexity and flexibility can be the main cause of the inability of HL to adapt and, at the same time, the main reason for attracting more attention in future legal doings; HL usually (outside time-consuming amendments) uses general principles, interpretation canons, undefined legal notions and discretion to be more adaptable, but the first many times "break the legal framework" and can also be found in a field known under the umbrella name of soft law (SL) that includes, guides, and directs behaviours towards the desired goals without imposing formal legal obligations. As already said, the effects of SL spontaneously appear in *interactions* between different parts (legal institutions, people, competencies, and processes) that voluntarily comply without the legal obligation to do so. SL has many forms, and their denominator – which is its most important element – is a possibility to *affect* decision-making to direct/change behaviour without compulsory means. This characteristic makes SL citizen friendly, as it does not require the time-consuming and burdensome efforts needed to enact or change HL; on the other hand, its ability to influence the freedom of choice, present in the choice (nudge) architecture (Sunstein, 2016) makes SL as a coordination/regulatory element that should be clearly described.

The aim of this work is to broaden our knowledge on ways through which SL expresses itself in different legal regimes and how it could be more objectively assessed. The topic of this paper is how informal regulation is expressed as SL, because it matters how control is practised on human rights and controlled by public authorities. It is undeniable that SL also presents situations and circumstances in which authorities and people should do what is asked or expected of them. For the American psychologist Zimbardo (2008) the banality

of evil and of heroism is caused by special situations where *circumstances* play the most important role for an individual. There is ‘greater power to make evil from good within the System [rather than in the behaviour of individuals] as a complex of powerful forces creating the Situation. Ample evidence from social psychology supports the concept that situational power prevails over individual power in the given circumstances’ (Zimbardo, 2008, p. x). It thus matters how deliberative practices occur in the PA, how SL (and also of HL) is formed, that is, in which context SL can be recognised as such and be applied. It thus matters to analyse SL’s structure, *i.e.*, its intertwining elements that co-shape the conditions and circumstances in which PA should (not) use it. Another reason to be cautious is that experts may simply be wrong (Landemore and Elster, 2012; Rosling, Rönnlund, and Rosling, 2018; Taleb, 2010).² The mentioned difficulties of HL and the dangers of SL are the inevitable fact and are thus interesting to study the relations between SL and HL. One among them is that SL is usually understood as not binding; this holds for administered, but usually not for those who administer, who define SL’s *structure*: what this structure entails, how its parts are connected, who perceives them, where, when, how, with what and why, surround the essence of SL. Having this in mind, this paper gives some perspectives on SL *vis-à-vis* regulation, domination, delegation, and discretion. As for the systems, for the mentioned notions it is also important how they are structured, *i.e.* how they recognise and respond to the context of their use (*qui bene distinguit bene judicat*). The research question is hence focused on the context of SL’s use to be able to have better content:

RQ1:

How can our future actions be based on the most objective manner in the context of SL?

Liberty, equality, justice, subsidiarity, proportionality, and similar legal principles demand a minimum use of force or authority to achieve desired goals. As SL is not based on authoritative demands, it should be used before or instead of HL in all cases where goals can be achieved successfully. Along with the mentioned perspectives, this work aims to extend our knowledge of SL to HL and to identify criteria on which SL can be used. An extension of knowledge will be done on the analysis of SL as it is present in the theory and practice of France, the US, and the EU, while the criteria will be extracted with the help of case law. Based on this, also RQs will be answered. The central argument of the theory of justice is not what animates us to think about justice and injustice, but especially the identification of *redressable* injustice (Sen, 2009). Therefore, it matters how SL can be understood and rectified because of apparent legal effects. Having this in mind, this paper has the following structure: the next section addresses the definition of SL, Section III describes SL as the wider notion of regulation between control and freedom, Sections IV and V describe how SL is viewed in France, the US, and in the EU, Section VI enumerates pro et contra reasons for SL, Section VII gives possible solutions for the effective administration of SL, while in Section VIII the GDPR code of conduct as the code with legal effects is tested based on findings from previous section, and in Section IX conclusion follows.

² Some studies have even shown that experts score less than chimpanzees (P. E. Tetlock, 2006; P. Tetlock and Gardner, 2015), so SL cannot be good *ipso facto* by being made by experts.

II. Definitions of Soft Law and Its Functions

SL is a general name for instruments that can be divided into unilateral non-obligatory acts (recommendations, directives, circulars, manuals, advice, awards, recognitions, notices, alerts, notifications, expressions/declarations of intent, protocols, bulletins, advisory opinions, interpretations, communications, guidelines, legal opinions, good practices, conclusions in public reports, employee handbooks, and training materials) and on concerted non-obligatory acts (Daillier, Quoc, Müller, Pellet, and Forteau, 2009) (the gentlemen's agreements, non-binding agreements, joint statements, memoranda, correspondence, charters, codes of conduct and responses). Their common denominator is an explicit or implicit change of human behaviour outside of *ius imperii*. SL thus has a nonbinding character with the expectation that its content will be respected (it is similar to a person's kind request to another person who is expected to fulfil it). It is no wonder that its initiation belongs to international law (Thürer, 1985), where it is still largely applied (Senn, 2014) due to difficulties in enacting HR among sovereign states.

One of the classic definitions of SL addresses it as 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects' (Snyder, 1994, p. 198). Black Law Dictionary defines SL as 'rules that are neither strictly binding nor completely lacking in legal significance or guidelines, policy declarations, or codes of conduct that set standards of conduct but are not legally binding' (Garner, 2004, p. 1426). SL are rules, policy decisions, declarations, positions, and codes that are not legally binding but are persuasive and influential on administrative behaviour proportionately to the passing of time. With its possibility to mould and harden, SL resembles to clay.³

The functions of SL are to guide official interpretation of policy, speed up the procedure, set up voluntary standards of conduct, impose standards, and influence behaviour without obligations. SL is 'intended to influence or control behaviour, and that intention is backed up by some form of enforcement' (Creyke and McMillan, 2008, p. 383). SL has its *raison d'être* in cases where the successful implementation of legal goals demands flexible adaptation to the external environment without encroaching the line of legality. In a broad sense, SL can mean any form of influence or teaching (see Article 38 paragraph 1(d) of the Statute of the International Court of Justice);⁴ an official's note about a decided case, or any kind of effective action, as 'it is what an instrument does, not what it is called, that is important' (Creyke and McMillan, 2008, p. 380). SL defines behaviour outside the law but within the legal frames; it non-bindingly coordinates actions where HL is not needed or where HL can be even enhanced, i.e., more effectively and efficiently implemented. It

³ Soft law and clay seem to share certain properties. It naturally lends itself to being shaped and moulded by those working with it. Over time it may eventually vitrify into hard law. Yet, as most scholars attempting to grapple with it have come to realize, the concept of soft law often remains amorphous, difficult to pin down (Lagoutte, Gammeltoft-Hansen, & Cerone, 2016, p. v).

⁴ '1. The Court, whose function is to decide under international law such disputes as are submitted to it, shall apply: . . . d. subject to the provisions of Article 59 [the decision of the Court has no binding force except between the parties and in respect of that particular case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

could be that the ability of SL to coordinate HL in ways that more freedom and less control can be established is the most important feature of SL.

III. Soft Law – The Wider Notion of Informal Regulation, Present Between Freedom and Control

Regulation traditionally entails public power (*ius imperii*); here the government intervenes on the basis of coercion: '[t]he implementing rule is a binding legal norm created by state organ that intends to shape the conduct of individuals and firms' (Orbach, 2012). A classic definition of regulation refers 'to sustained and focused control exercised by a public agency over activities that are valued by a community' (Selznick, 1985, p. 363). This definition could almost hold also for SL (except a milder or more sophisticated form of control): it presupposes wider elements than coercion (the sustained and focused control focused on public values). Regulation of a situation is one definition of control and the other is domination (Merriam-Webster, 2016). Regulation and domination are therefore the elements of control, which means the latter can be realised also outside regulation, through different ways that can (directly or indirectly) influence behaviour. The gist is thus how control is practised on all sorts of behaviour; the binary connection between freedom and control is more relevant than between regulation and non-regulation. It is not about regulatory tools that can be used, but how the freedom, control and degree can be established in the effective pursuit of goals. Regulation could be 'a specific set of commands, a deliberate state influence, as all forms of social or economic influence, or as enabling or facilitative' (Baldwin, Cave, and Lodge, 2013, p. 3) – but except for commands, other notions also fall into SL.

Although SL instruments lack a legally binding force, they are capable of having "incidental" effects based on the substance or the basis of an underlying agreement (Senden, 2004) and/or interpretation.⁵ The substantive approach by the courts has been induced mainly 'in the interest of the legal protection of the individual, providing it with the possibility of contesting acts affecting its legal position' (Senden, 2004, p. 465). Between legislation/regulation and adjudication hence exist non-binding possibilities to affect human behaviour; they can be grouped under the wide notion of SL (on the meso level⁶). The possibility to change human behaviour without using HL puts the flexibility of SL in contrast with the principle of legality: on the one hand, it differs from the latter's *ex ante* known content, while on the other hand, SL can even enhance it: i) by not using legal force when it is not necessarily needed (by this, the principle of proportionality is respected), and ii) by a flexible interpretation of HL in new contexts, where old interpretations fail (and thus fulfilling the principle of legal expectations⁷).

⁵ The value of SL related to discretion recognised Davis in 1970s: '[w]henver an officer has a discretionary power to decide what to do in a particular case, he necessarily has the power to announce how he will exercise that power. Such an announcement may be an interpretative rule, but it may have great value even though, for want of a statutory grant of power, it may lack the force of law' (1979, p. 220).

⁶ SL on the macro level can be understood as customs, morality, traditions, while on micro level SL can be seen in daily practices among friends, relatives or co-workers.

⁷ The adoption and publication of notices, guidelines and other instruments of SL produce (legitimate) expectations that a relevant institution will apply/respect them in its actions.

SL can be an instrument of soft hierarchical control (through a superior's domination that can result in a delegation to lower levels) by which behaviour can be changed/administered; this puts SL into a wider frame of informal regulation. SL can be seen also as a form of delegation by which a superior (tacitly or explicitly) permits the subordinate to do something. SL in its nature of delegation⁸ fits into administrative law, which 'purpose is... the science of common action' (Wyman, 1903, p. 14). SL – with its possibility of gentle coordination – fits quite well into this frame of common actions and relations, where effects are distributed among different stakeholders, contexts, times, ways of doing things, experiences, etc. SL can be helpful when the institutional dynamics in which it is applied and the individual doings on which it is targeted are known. Whenever one is interested in constraints, one must hence consider institutional and individual contexts. They are further presented in the next section on the case of France as being the cradle of administrative law, and the US as having the oldest regulated administrative procedure in which SL is also addressed.

IV. Soft Law in France and the US

The French Council of State has opened a possibility to review circulars in the decision of 29.1.1954, *Institution Notre Dame du Kreisker*: a circular can be revived on its legality if it administers rights or guarantees, or imposes additional obligations. The circular is regulatory if it is *innovative* (when new rules are enacted with mandatory and/or imperative character without having a competence – CE of 26.12.2018, *Massis import export Europe*, or where there exists a *significant influence on the behaviour* of the addressees, CE of 21.3.2016, *Numericable*, and *Société Fairvesta International GmbH*), while 'interpretative circulars are those which contain only indications, counsels, recommendations, and the one which does not modify the state of the law' (Chapus, 1996, p. 476). Contrary to regulations and circulars, are directives; here, an authority has discretionary power to elaborate situations that fall under general criteria, and self-subordinates under them in future cases, with a possibility to depart from this auto-limitation if circumstances demand so (Waline, 2010). The decision *Crédit Foncier de France* (CE, 11 December 1970) provided the opportunity for the State Council to create the category of directives, also called guidelines. This made it possible to overcome the practical inconveniences resulting from the refusal to grant general regulatory power to ministers (EC, 23 May 1969, *Distillerie Brabant*). The theory of guidelines recognises that the administrative authority, acting within the framework of discretionary powers, has the power to define award criteria, which cannot bind the authority's discretionary power responsible for taking individual decisions. An administrative authority may, while it does not have the power to regulate, regulate the actions of the administration; to ensure consistency, it can determine guideline criteria (without enacting a new condition) for implementing a text that should be applied and subjected to reasons of general interest, which can lead to text derogations and

⁸ The ordinary rule in execution is delegation. This is the internal law of administration. A superior may give power to an inferior or he may withhold power from an inferior. That is the system in administration... seen to be no more than the usual order in the exercise of discretion (Wyman, 1903, pp. 17–18).

a particular appreciation of each situation. In the case of an appeal against an individual decision that applies such guidelines, their guidance and application may be challenged. If the administration decides to derogate from the directive, it must establish that it does so on the grounds of general interest (Laubadère, Venezia, and Gaudamet, 1994). Directives do not regulate or decide – as documents of orientation, they only orient (CEE, of 29.6.1973, *Société Géa*). A judge nevertheless can give some legal effect to directives: a specific decision can be legal concerning a directive despite the fact that the latter is illegal and vice versa: a denial to apply a particular directive without giving reasons to do so is also illegal (Waline, 2010). Since the case of *Ms Duvignères* of December 18, 2002, the Council of State abandoned the distinction between interpretative and regulatory circulars. As a new admissibility criterion for appeals against circulars, the Council of State has set *a mandatory character*. Thus, any circular with mandatory provisions is open to challenge. The French Council of State in 2013 proposed a definition of SL (*droit souple*) as the set of instruments that meet three cumulative conditions: 'i) its purpose is to modify or guide the behaviour of its recipients by encouraging, as far as possible, their adhesion (this criterion distinguishes SL from notices and other preparatory documents for the development of the rule of law); ii) it does not create rights or obligations for their recipients (this marks the limit between SL and HL); iii) it presents, by its content and a method of elaboration, a degree of formalisation and structuring that is similar to legal rules (this criterion separates SL from non-law)' (Conseil d'Etat, 2013). The Council of State has further formulated 25 proposals for a reasoned use of SL.

Considering the desirability of using SL, the Council of State proposes one has to answer three major questions: its usefulness, its effectiveness, and its legitimacy known also as the utility test, the effectiveness test and the legitimacy test⁹ – if one of them is negative, the recourse to SL should be rejected or resorted to after a thorough investigation. The usefulness of SL is understood through four rather different functions, without being mutually exclusive: a) SL can be a substitute for HL, b) it can be used to apprehend emerging phenomena that are multiplying in the contemporary world, c) it can accompany the implementation of HL by administration or by companies, and d) it can be presented as a long-term alternative to HL. It must be ensured that the authors of SL do not go outside of their area of competence. The legitimacy of SL depends on the conditions of elaboration, which must respect the requirements of transparency and stakeholder involvement. Lastly, special vigilance must be exercised with regard to legal uncertainty and costs incurred by the recipients of SL (Conseil d'Etat, 2013, pp. 10–11).

⁹ In order to conduct the utility test, consider whether the proposed soft law fulfils the function of substitution, preparation, support or permanent alternative with regard to hard law. To conduct the effectiveness test, consider the following criteria: the probability of a dynamic adhesion or, on the contrary, the existence of strong opposition among recipients; evaluation of the results of previous use; the difficulties of ensuring the control of an instrument of hard law. To conduct the legitimacy test, check if: the flexible law is not likely to infringe a fundamental right or freedom and, in general, rules of international law setting out indelible minima; as regards the flexible right issued by public persons, the author is competent in the field concerned; as regards the flexible law issued by private persons, it does not exert excessive influence on the situation of third parties (Conseil d'Etat, 2013, p. 193).

The obligation to publish the instructions and circulars of ministers in France was established by Decree No. 2008–1281 of 8 December 2008. It covers also guidelines within the meaning of *Crédit Foncier de France* (CE, 11 December 1970) and other SL instruments produced by public authorities. Only special reasons can hinder publication. The publication on the authority's website is the most appropriate way in most cases, while all SL can be nowadays reached also in one place.¹⁰ In France, there is no contradiction between the recognition of SL, its expansion, and a better quality of the law: 'by giving greater power of initiative to the actors, and beyond more responsibilities, soft law helps to oxygenate our legal order. Through reasoned usage, it can fully contribute to the policy of simplification of standards and the quality of regulation' (Conseil d'Etat, 2013, p. 6). The US Federal Administrative Procedure Act in 553 (rulemaking) excludes interpretative rules, general statements of policy, rules of agency organisation, procedure, or practice from the requirements of notice and hearing. The US Court of Appeals for the District of Columbia Circuit in 1952 in *Gibson Wine Co., Inc. v. Snyder et al.*, 194 F.2d 329 (D.C. Cir. 1952) explained that 'regulations, substantive rules or legislative rules are those that create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means'. In the case *American Hospital Association v. Bowen* 834 F.2d 1037 (D.C. Cir. 1987), the court stated that 'substantive rules are the ones which grant rights, impose obligations, or produce other significant effects on private interests, or which affect a change in existing law or policy'. Interpretive rules, in contrast, are those that merely clarify or explain existing laws or regulations, are essentially hortatory and instructional, and do not have the full force and effect of a substantive rule, but in the form of an explanation of particular terms. In *American Mining Congress v. Mine Safety & Health Administration* US 995 F.2d 1106 (D.C. Cir. 1993) the court stated that 'interpretation is a chameleon that takes its colour from its context; therefore, an interpretation will use imperative language – or at least have an imperative meaning – if the interpreted term is part of a command; it will use permissive language – or at least have a permissive meaning – if the interpreted term is in a permissive provision' (para 29) and 'whether the purported interpretive rule has "legal effect" ... is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule' (para 32). 'The burdens associated with notice-and-comment rules have led agencies to make policy through interpretive rules ... thereby arguably diminishing public input and accountability, transparency, and fair notice' (Breyer, Stewart, Sunstein, and Vermeule, 2006, pp. 568–569). A rule is not interpretive if it fills a statutory gap by a new/additional/changed standard of conduct if it creates an exemption from an existing standard or otherwise completes an incomplete legal rule.

¹⁰ Available at https://www.legifrance.gouv.fr/liste/circ?sortValue=SIGNATURE_DATE_DESC&pageSize=10&page=1&tab_selection=all#circ.

It can be ‘a maxim of administrative law’ (Cass, Diver, Beermann, and Freeman, 2011, p. 494) that ‘if a second rule repudiates or is irreconcilable with the prior one, the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative’ (Asimow, 1985, p. 396). In such cases, the agency must comply with the notice and comment requirements of 553 of the APA.

The publication of SL instruments issued by public authorities, public participation, impact assessment, and the possibility of private actors to issue SL, seems important for the legitimacy of SL. The likelihood of the abuse of power increases proportionately with the absence of any public process; as in France, this is recognised also in the US. 5 U.S.C. § 552(a)(1)(D). It requires publication in the Federal Register of all interpretations of general applicability, and in the 552(a)(2)(B) which requires agencies to make available for public inspection and copy ‘the statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register’. In both countries, the context of SL is relevant in deciding whether SL has legal effects. It is recognised that SL should not limit or widen HL, but this is a subject (or better a chameleon) of various interpretation. The recent development of SL can also be analyzed in the framework of the EU where it is used on a large scale due to the lack of formal competences of the EU with respect to member states.

V. Soft Law and the European Union

The EU institutions are authorised by Article 288 TFEU to adopt regulations, directives, decisions, recommendations, and opinions. The latter two types are specifically stated by the Treaty to be non-binding. Although Article 263(1) excludes recommendations and opinions from the legality review, legality review, it also states that under this review all “acts... intended to produce legal effects against third parties” fall into the category fall into the category (whatever their nature or form). Recommendations have an indirect legal effect in the sense they have to be used as a mandatory interpretation aid by the national courts.¹¹ Also, according to Article 263 TFEU recommendations and opinions (as well as declarations, resolutions, communiqués and other positions taken by the institutions of the Community) adopted by the EU institutions, lack binding force. For a measure to be reviewable by way of judicial review, it must have been intended to produce legal effects. The first case that specifically addressed this issue was C-22/70, ERTA [1971], which concerned minutes of the Council on the matters of negotiation and conclusion of an international agreement: ‘an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are *intended* to have legal effects’ (para 42, emphasis added). The ERTA test was first applied to a recommendation by the General Court in case T 721/14, *Belgium v. Commission* [2015]; To determine whether the recommendation is capable of having legal effect, the court examined its language and context, its substance and the intention of its author, and held

¹¹ National courts are bound to consider recommendations to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted to implement them or where they are designed to supplement binding Community provisions. Case 322/88 *Grimaldi (Salvatore) v Fonds des Maladies Professionnelles* [1989]; Case C-188/91 *Deutsche Shell* [1993].

that it did not have a binding legal effect on its addressees by giving a lot of weight to the language than to the other factors (see Paras 21, 22, 26). Belgium has appealed against this decision.

The opinion of AG Bobek in this case (C-16/16 P, *Belgium v Commission*) is one of the most advanced reasonings on SL: to him, the ERTA test should not be applied in this way due to the issues a) internal to the test (the necessarily binding nature of an EU act to be able to review its legality [Paragraph 42 of the ERTA judgment did not refer to measures intended to have *binding* legal effects – as a narrower category on which the General Court in case T-721/14 relied that is usually connected with coercion – but only to *intended* legal effects], and a drafter's intent as to its legal effects – due to wording in Article 263 TFEU the past (historical) subjective intent of the drafter is relevant is the ascertaining of the meaning) and the b) external issues (the rise of SL in the EU and the Member States' jurisdictions,¹² and Recommendations with no binding force but with legal effects). AG Bobek has proposed i) a return to the ERTA case's legal effects (and not binding legal effects), where ii) the wording of an act should not outweigh its content, context and purpose (the first should even, through its essence, be rather secondary compared to substantial elements of context, system and logic), and something that resembles Turing test¹³, iii) 'the assessment of the ability to generate legal effects... should focus on... [whether] could I, as a reasonable addressee, infer from the content, aim, general scheme and the overall context of a recommendation or, more generally, of a soft law instrument that I am expected to do something? Would I be likely to modify my behaviour accordingly, or is that act likely to impact on my legal position' (para 113)? Factors that appear to be relevant to produce legal effects can be found within I) an assessment of context and purpose (the degree of formalisation, the content and overall purpose of the contested act and enforcement); II) the structural compliance mechanisms (several indirect mechanisms, e.g. reporting, notification, monitoring, and supervision, peer pressure such as the publishing of performance tables, reports involving public naming and shaming), III) the institutional element (which institution adopted the instrument in question, and whether it can impose sanctions on the same addressees) (AG Bobek, para 115–122).

As the element of legal self-boundedness, the EU General Court declared that 'the commission may lay down for itself guidelines for the exercise of discretionary powers by way of documents... provided that they contain directions on the approach to be followed by that institution and do not depart from the Treaty rules' (T-115/09 and T-116/09, *Electrolux*

¹² It appears that despite their diversity, both at the national as well as EU law levels, the various soft law instruments share the same key feature: they are not binding in the traditional sense. They are a type of imperfect norm: on the one hand, they clearly have the normative ambition of inducing compliance on the part of their addressees. On the other hand, no instruments of direct coercion are attached to them (AG Bobek, para 86).

¹³ Test designed Alan Turing (1950) as an imitation game in which an evaluator must decide whether he is speaking with a machine or with a human, while both are hidden behind a curtain. 'If a reader were to be given that document [a recommendation] with its title removed and were invited to read the text without knowing its title, it is safe to assume that he might think that he is reading a directive or, at some stages, even a regulation, but certainly a legislative document that seeks to impose clear and precise obligations and induce compliance' (AG Bobek, para 135).

and *Whirlpool v Commission* [2012], para 38). The EU Commission's communications are usually regarded as being interpretative and not as legislative provisions,¹⁴ but in some cases, the Commission cannot depart from the rules (of practice) it has imposed on itself. The well-known *Dansk*¹⁵ case is an example of Roman legal maxim *patere legem quam ipse fecisti* (obey the law that you made yourself) (German "*Selbstbindung*") as a specific application of the principle of self-boundedness. In the mentioned case, ECJ held that although internal measures adopted by the administration, are not the rules of law which the administration is always bound to observe, they 'nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment' (C-171/00 P, *Libéros v Commission* [2002], para 35). That case law applies a fortiori to rules of conduct designed to produce external, legal effects; the institution involved cannot derogate from its own rules when such derogation would be contrary to the general principles of law.¹⁶ 'Whilst rules of conduct designed to produce external effects, as is the case of the Guidelines... may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment' (C-397/03, *Arc* [2006] para 91).

The principle of legal certainty that forms part of the general principles of Community law prohibits that SL could add new obligations to those provided in legal provisions. The Commission communication to the Member States framed in these conditions must be annulled: 'any act intended to have legal effects must derive its binding force from a provision of Community law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis, failing which the act in question will be null and void'. C-325/91, *France v. Commission* [1993] para 2. The case concerned a communication that required the Member States annually to report to the Commission, on a systematic basis, data relating to the financial relations of a particular category of undertaking achieving a specified turnover. The ECJ stated that this constituted an act intended to have legal effects of its own distinct from those of Article 5(2) of the directive and. As a result, the Communication was annulled. See also, joined cases C-189, 202, 205, 208 and 213/02, *Dansk Rørindustri and others v. Commission* [2005] para 223.

¹⁴ C-226/11 *Expedia Inc. v Autorite de la concurrence and Others* [2012]; T-189/03 *ASM Brescia v European Commission* [2009].

¹⁵ Although the notices or the guidelines enacted by the Commission are not rules of law that the administration is bound to apply, they are seen as the rules of practice from which – in some cases, regarding the context – cannot be departed. Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri and others v Commission* [2005], para 209; C-167/04 *JCB Service v Commission* [2006], para 207. About *patere legem* see also case C-51/92 *Hercules Chemicals v Commission* [1999].

¹⁶ In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot, therefore, be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects. Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri and others v Commission* [2005] para 211.

The general idea of (il)legality of SL is in acts intended to produce legal effects. Two conclusions can be made from this: i) potential, and not already demonstrable legal effects are enough for the legal review of SL instruments, and ii) intention is more important than plain text. The ability of an act to have a legal effect can be established for different reasons:

- * it is necessary to examine its wording and context (C-57/95, *France v Commission* [1997], para 18; C-301/03, *Italy v Commission* [2005], paras 21–23),
- * its substance (C-147/96, *Netherlands v Commission* [2000], para 27), an intention of its author (C-362/08 P, *Internationaler Hilfsfonds v Commission* [2010], para 52; C-521/06 P, *Athinaiki Techniki v Commission* [2008], para 42),
- * a provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it is part (C-510/10, *DR and TV2 Denmark* [2012], para 45),
- * whether an act is designed to have new legal effects by comparison with those entailed by the application of the fundamental principles of the Treaty, by considering its content (C-303/90, *France v Commission* [1991], para 10; C-57/95, *France v Commission* [1997], para 9; and T-258/06, *Germany v Commission* [2010], para 27),
- * by assessing whether that act is confined to giving expression to those principles (or if it lays down specific, new obligations concerning them) (see C-325/91, *France v Commission* [1993], para 14; C-57/95, *France v Commission* [1997], para 13; and T-258/06, *Germany v Commission* [2010], para 28), or
- * under objective criteria, such as the contents of that measure, considering, as appropriate, the context in which it was adopted and the powers of the institution which adopted the measure (C-31/13, *Hungary v Commission* [2014], para 55).

The ratio decidendi of case-law vis-à-vis SL ‘is not constituted by the guidelines and notices of the Commission, but of hard, general principles of law, and in particular legal certainty, protection of legitimate expectations and equality’ (Ștefan, 2008, p. 770). The case law does not convert the Commission’s guidelines and notices to HL, but reasonably identifies the legal effects of nonbinding documents while recognising at the same time their specific and important status in the European normative context. Both courts consider SL instruments and recognise their practical effects when they serve for the enforcement of the general principles of law (this was not specifically stated in the case of *France* and the *US*).

In case C 16/16 P, *Belgium v Commission*, the ECJ declined to follow the opinion of AG Bobek; it applied the conventional (formal) reading of the Treaty because ‘the first paragraph of Article 263 TFEU excludes recommendations from the scope of annulment actions since those measures do not produce binding legal effects’ (para 43); it did not elaborate more deeply why the recommendations cannot produce legal effects and stayed on “binding legal effects”. The *Grimaldi* case (see note 12) thus was left intact, and the outcome is still somehow inconsistent: recommendations cannot be annulled because they have no binding legal effect, but national courts must nevertheless consider

recommendations. Indeed, this ECJ's decision 'disturbs the institutional balance by offering the Commission a way of circumventing the decision-making processes laid down by the Treaty' (Arnull, 2018, p. 620). The ECJ has frequently departed from the text of the Treaty – as this holds for all Supreme/Constitutional courts – to creatively adapt the legal notions to relevant contexts (especially in the internal market, state aid, and services of general economic interest cases) but ironic is that it did not even respect Article 263 of the explicit TFEU language on which it relies: recommendations and opinions are not binding except where they are *intended* to produce legal effects, and hence not to already have *de facto* binding legal effects. As reality evolves further, below is given a new example of SL that will emerge from the bottom-up, and not the contrary as it is usual for the regulation of private by public entities.

VI. Discussion for and Against Soft Law

Various SL instruments increasingly change the (supra)national normative landscape. There are many reasons for the rise of SL: new technology, complex social and natural problems, a lack of formal legislative competences to enact HL, difficulties in a legal procedure, or a desire to guarantee flexibility and diversity in the shortest time possible come to mind. The public institutions, citizens and business environment tacitly replace the certainty and legal effects for less formal but more flexible and adaptable SL. The proliferation of SL can be aligned with the appropriate and needed responses to new developments. A combination between SL and HL shows more than a binary division among binding and nonbinding rules: along with HL – HL and SL – SL there are also SL – HL and HL – SL. The latter two divisions address prelaw (precursor of HL) and postlaw (an interpretation of HL); both are placed on a spectrum towards the direction of HL. The pro and contra reasons for SL are not used to amplify or deny SL, but to be aware of the different effects SL can produce. Based on the case law of France, the US, and the EU, below are the enumerated shortcomings and advantages of SL. The first is:

- 1) the enactment of SL instruments lacks procedural legitimacy;
- 2) the complicated terms in which SL is drafted increase legal uncertainty;
- 3) there are rare possibilities for individuals to challenge SL;
- 4) by bypassing legal decision-making procedures, SL could increase the probability of (exponential) abuse of power;
- 5) SL can be used to block or delay the subsequent development of HL instruments, and hence reduce the legal quality of protection that could be otherwise provided to individuals in the human rights law;
- 6) SL has *ex ante* "immunity" from the classical procedural legal measures, and the ones developed under the better/smart regulation umbrella that demand the minimisation of regulatory burdens and that the demands of regulation are proportionate to the objectives sought;
- 7) 'they [SL instruments] are inconsistent. They sometimes have legal effects, although not always. This means that individuals can never be sure whether to base their future conduct on them' (Sueur, Herbert, and English, 1999, p. 180);

- 8) SL ‘has the effect of distorting the constitutional balance... it may influence judges to interpret statutes under the executive’s intentions, not the Parliament’s. If ministers are aware that the details of any proposed policy are likely to be controversial, they may avoid parliamentary debate by leaving these details to be implemented by non-statutory codes and rules. It is often the case that types of soft law, particularly guidance notes and codes, may emerge as a result of disproportionate lobby group pressure, without the balancing effect of parliamentary scrutiny’ (Sueur et al., 1999, p. 180);
- 9) ‘[w]hat is perhaps the greatest strength of recommendations may also then be the greatest danger. They could be used as more than just tools for advancing policies that are politically (lack of consensus) or legally (no specific powers to that effect) gridlocked. They could also potentially be used as a tool to circumvent the same legislative processes’ (AG Bobek, para 93);
- 10) ‘soft law instruments are invariably drafted by “loving hands” within the institution that has made them and not externally by experts such as the parliamentary counsel or a legislative writing office. There is a heightened risk that the instruments will be poorly drafted and give rise to ambiguity, inconsistency, or overlap between instruments and, in turn, to problems of interpretation’ (Creyke and McMillan, 2008, p. 389).

One way to address the above-mentioned difficulties is to amend legal acts, to establish clear case law, to enact an interinstitutional agreement between the branches of power, or to amend it where it exists.¹⁷ This kind of agreement could address the mechanisms, conditions and procedures of SL by which the latter could be better and more transparently administrate and thus be legitimised even under further delegations to other public or private institutions. On the other hand, complexity in the environment is always greater than can be put in any kind of legal frame. SL is the permanent companion of HL and can be traced back to Roman law, in the Praetorian edicts and *responsa prudentio* (Maine, 1936). Among the advantages of SL are:

- I) SL ensures transparency and objectivity in official activities, helps individuals to understand what the law is, what and where are the boundaries of their actions, and what should they expect in case of violations, and thus increases legal certainty;
- II) it ensures that similar cases are not treated in an unlike manner and that the same criteria are followed by the institution when it applies HL instruments;
- III) its non-binding nature contributes to flexibility, diversity, and autonomy (it can be a preferred mean for both states and non-state actors to respond more quickly, with less paucity and more flexibility);
- IV) it performs a prelegal experiment that can show real results;
- V) it can be a precursor to (prelaw) or not to (paralaw) legislate;
- VI) as the post-law it has a privileged position in resolving interpretative uncertainties (it can elaborate the legal terms in legislation, the same as the explanation of articles in draft law);

¹⁷ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making OJ L 123, 12.5.2016, pp. 1–14.

- VII) it can be an alternative to legislation (para-law; sometimes it is needed only as a temporary solution before legislation); when well-used, SL can help fight normative inflation;
- VIII) it disseminates information to all relevant stakeholders and collates (experimental) data based on which the optimal regulatory instrument can be chosen;
- IX) through the principle of *patere legem*, it can be applied before judicial interpretation or with quasijudicial supervision;
- X) it can define higher professional standards that could lead future behaviour in new directions or, in a similar manner, it can, in a more responsive, effective, efficient, and ethical manner uphold the principle of good administration;
- XI) 'its flexibility is indispensable for modern administration. Statements of policy, performance targets, and nonbinding codes may be set aside in the interests of justice for individual cases; but the need to draw up these forms of soft law enhances accountability and transparency by informing the public of the way that official discretion is likely to be exercised so that they can plan their conduct accordingly. Bureaucrats, in other words, are encouraged by these rules to be consistent, without being rigidly inflexible' (Sueur et al., 1999, p. 180);
- XII) 'soft law may be said to bridge law and policy. It has the potential to enhance the coherence and fairness of bureaucratic decision-making' (Sossin and Smith, 2003, p. 892).

The range of disadvantages *vis-à-vis* advantages of everything is a matter of weighing, according to the text, purpose, consequences and their connections: as the fire, axe, weapon, etc. can be used for good or bad purposes the same stands for SL; the latter could be weighted, along with the mentioned three criteria also to constitutional balances, mainly between the legislative and the Executive branch of power in a given context; only the latter can more specifically enlighten disadvantages and advantages. SL is one of the predominant parts of the Constitutional and Legislative Practices of the EU and Member States, as it is similar to the case in member states and other countries: SL outnumbers HL. SL is tightly connected with interpretation and discretion, as can be seen in the case law and literature. SL is not only here to stay, but the question is how it will further evolve and how its nature can be determined. Until now, various meanings of SL were based on interpreting persons, who gave SL an "official stamp" of (il)legality, based on different tests, standards, or case law, mostly due to their official competence or hierarchical possibility to do so. So, the question remains how the most objectively base our future actions based on SL? This is also RQ1 of this paper, which will be answered in the next section.

VII. Structure, Collective Wisdom and Manifest Error as Possible Solutions for More Objective Soft Law

The importance of determining the nature of SL is relevant also for HL. The non-bindingness of SL is indeed its common element, while also some legal rules are inconsistent in this regard i.e., without legal effects. They are formally present in a legal act, but without effect, like the solemn declarations, preamble or incidental records or other forms of legal interpretation (as in the case of SL, also here individuals cannot be sure whether to base their future conduct on them). SL has always had some impact in practice – otherwise it would not be necessary at all. The point is thus to assess the degree of the mentioned impact. As a rule of thumb, how the most objectively base our future actions based on SL and not on HR, there are three options (from the less to more complex): one is focused on the standard of interpretation, the second on the structure, and the third on the public.

Standard of Interpretation

The easiest option is, for now, the most practical. The correctness and precision of SL can be tested through the standard of *manifest error* as it is used in the EU at regulation (it is similar to the US's *reasonableness* standard). SL addresses and/or interprets issues when a public institution has some form of wide or narrow discretion. Here, courts generally apply a marginal review that requires intervention only in exceptional circumstances. In Case T-60/05, *Ufex and Others v. Commission* [2007], for the General Court error of assessment is not manifest 'if in the particular circumstances of the case, it could not have had a decisive effect on the outcome' (para 77). ECJ in the case C-427/12, *Commission v. Parliament and Council* [2014] held that 'judicial review is limited to manifest errors of assessment as to whether the EU legislature could reasonably have taken the view, first, that, to be implemented, the legal framework which is laid down... needs only the addition of further details, without its non-essential elements having to be amended or supplemented and, secondly, that the provisions... require uniform conditions for implementation' (para 40). Manifest error in the frame of SL could be treated differently than in the frame of discretion (despite the fact that the first interprets the second); here the first presupposes the validity of all legal acts (also the discretionary ones), so grave errors like improper purpose, ignoring relevant considerations or taking irrelevant ones into account, unreasonableness as the failure to respect general principles of law, infringement of human rights, discrimination, abuse of power or process and hidden motives are illegal, and thus do not fall into consideration whether such "SL" is valid. The manifest error could be hence in the relation HL – SL divided in manifest error 1 and manifest error 2 (or manifest and less manifest error). The validity of SL in the second frame addresses the ambiguous and disputable errors of facts or disputable errors of judgement, an apparent disregard of facts of the case (an apparent failure to correctly assess legal and material facts, failure to consider factors that could lead to different results or considering irrelevant ones, but they are nevertheless not so grave as in the abuse of power or manifest error 1 frame). Manifest error 2 occurs when error is indisputable, and/or obvious a goal cannot be reached in an allowed or effective manner. The easiest way to test it is by the a la SL –

Turing test: “If the SL instrument is given to me only in its substance, could I think that the text obliges or only recommends me to do something?” Less manifest error brings the proposed solution very close: when neither an institution nor the public could change/reach an outcome in a different substantial way that it was, then SL is without error. Assessment errors are “manifest” when an authority makes a different conclusion that could be possible if the public or other stakeholders participated in the procedure.

Structure

When the error is not *prima facie manifest*, the structure of an action can be further analysed with the help of system theory. The latter emphasises parts, their relations, feedbacks and purposes; its essence is in the focus on the underlying structure that produces system behaviour (Meadows, 2008) *i.e.*, its patterns. This insight could be relevant for the SL’s structure: each SL instrument could be built and/or evaluated with elements that should establish SL’s parts *vis-à-vis* its inputs that is, who, on what assessment grounds, how and why defines a goal, a standard by which this goal can be achieved, criteria on which monitoring will be focused, near and distant goals, that is, outputs and outcomes, a feedback mechanism and adaptable/amendable (pre-established) options in case of deviations from the intended goal. Feedback is the internal SL’s mechanism that records goals and errors of a particular SL instrument, it thus determines changes in basic stocks *vis-à-vis* flows based on external changes in the environment. Decisions (of SL or HL) change the basic relationship between stocks and flows. When a structure is changed, results can be altered. A known structure is hence relevant for establishing a pattern that changes its form whenever some element in the structure is changed. Actions based on SL (flows) can be more objectively evaluated when their elements are known, when the analysis is made on the causes or factual/legal state of affairs (stocks), goals (intentions), consequences (results), relations between the latter two (feedback) and how relations between stock and flows (decisions or SL’s content) can be changed. Thus, more control or freedom can be established in the whole process.

Public

As the third option, when public participation can add something to an instrument in a way that is not possible or exclusive for public administration, then public involvement is welcomed (it could give due to more various perspectives more relevant answers to questions from the previous paragraph). Public servants usually know a lot, but often less than cognitively very diverse citizens, so it could be valuable that public agencies post an online draft of SL to ensure public comment (this would be all the more helpful for countries with no legal demand to publish SL). Public interest is the interest of the *public*. This statement is nothing new, but it also has a buried truth. It is in the interest of the public, which usually does not collaborate with authorities through public participation. That public can know more than an individual knew already Aristotle (1998); nowadays, this is called collective intelligence (CI) as the capacity of a human community to evolve toward problem-solving on a higher level that integrates collaboration and innovation (Por,

1996). CI is the general ability of the group to perform a wide variety of tasks (Woolley et al., 2010) that can give the most unbiased and legitimate results that blow information asymmetry in its core.

Collecting data from answers (from a large group of various, independent people) allows statistical conclusions about the group that no individual member cannot know: ‘building new conclusions from independent contributors is really what collective intelligence is all about’ (Segaran, 2007, p. 2). Collective goals can be accomplished by a community of people; to have efficient SL, it is thus important to understand determinants of group performance *vis-à-vis* an uncertain future. An example of SL adaptability could be present in CI as a greater general ability to work together across a wide range of task types (Woolley et al., 2010), in an architecture of *serendipity*, where people are exposed to materials they would not choose and where people have *various* experiences, distant from echo chambers and mechanistic conception of reality towards the holistic one (Sunstein, 2017). This approach – although the better one than the one below¹⁸ – will probably not be operative for at least two reasons soon: it would be hard to establish it at all levels on which public institutions operate, and it would demand a great share of public finance to build, run, and sustain it (it can nevertheless be tested in all decision-making environments where procedures/models for collective intelligence/wisdom are placed on IT platforms). This is not an argument to abolish this idea, but to emphasise it because public participation would be placed on a higher level of democratic transparency, accountability, and legitimacy.

VIII. Soft Law in GDPR’s Code of Conduct and Public Services

Based on the approaches proposed in the previous section, how the most objectively bases future actions based on SL and not on HR Article 40(1–2) of the General Data Protection Regulation (EU) 2016/679 (“GDPR”) was analysed. The mentioned Article states that ‘the Member States, the supervisory authorities, the Board and the Commission shall encourage the drawing up of codes of conduct *intended to contribute to the proper application of this Regulation*, taking account of the specific features of the various processing sectors and the specific needs of micro, small and medium-sized enterprises. Associations and other bodies representing categories of controllers or processors may prepare codes of conduct, or amend or extend such codes to specify the application of this Regulation’ (emphasis added). From the structure point of view (see previous section) the voluntary preparation and further specification of the code show the latter as the SL instrument, but the further reading of GDPR, that is, its context, shows that this code is legally binding (meta) not

¹⁸Soft law is a particularly significant window into the relationship between judicial and bureaucratic decision-making. Non-legislative instruments embody the policy choices of decision-making bodies, including the interpretation and application of new judicial standards. Such discretionary standards and guidelines, in turn, are considered as part of the decision maker’s “expertise”, which attracts deference from the Court when discretionary decisions are challenged’ (Sossin, 2004, p. 91). On the other hand, there are examples where officials are not better than the ordinary public. This holds especially in the social, complex and flexible matters (Eagleman, 2014; Taleb, 2010; P. E. Tetlock, 2006; P. Tetlock and Gardner, 2015). This kind of “expertness window” is present only when citizens and other stakeholders know about the adoption of SL instrument when the latter is published or made transparent by an issuing public institution. In this way, the identification, collection, and monitoring of SL’s content is easier.

only due to its intended, but also binding legal effects. This approach sees/analyses the mentioned Article in its embeddedness into the whole GDPR's structure. Article 40 should be read in conjunction with other relevant Articles:

- * adherence to approved codes of conduct as referred to in Article 40... may be used as an element by which to demonstrate compliance with the obligations of the controller [Article 24(3)], processor [Article 28(5)] or security of processing [Article 32(3)];
- * compliance with approved codes of conduct referred to in Article 40 by the relevant controllers or processors shall be taken into due account in assessing the impact of the processing operations performed by such controllers or processors, in particular for a data protection impact assessment [Article 35(8)];
- * without prejudice to the tasks and powers of the competent supervisory authority... the monitoring of compliance with a code of conduct under Article 40 may be carried out by a body that has an appropriate level of expertise concerning the subject matter of the code and is accredited for that purpose by the competent supervisory authority [Article 41(1)];
- * the appropriate safeguards for the transfer of personal data to a third country or an international organisation can also be an approved code of conduct under Article 40 together with binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights [Article 46(2)(e)];
- * a national supervisory authority encourages the drawing up of codes of conduct according to Article 40(1) and provide an opinion and approve such codes of conduct that provide sufficient safeguards under Article 40(5) [Article 57(1)(m)];
- * a national supervisory authority issues an opinion and approves the draft codes of conduct [Article 58(3)(d)];
- * a code of conduct shall contain mechanisms that enable a national supervisory authority to carry out the mandatory monitoring of compliance with its provisions by the controllers or processors which undertake to apply Article 40(4); and
- * when deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each case, consideration shall also be given to adherence to approved codes of conduct under Article 40 [Article 83(2)(j)].

These articles connected with Article 40 clearly impose legal effects also on the latter. The second approach would demand the participation of the public that could assess all relevant articles from the point of the presence or absence of legal effects, while the third the least intensive approach (as the manifest error 2 standard of interpretation) demands only a common denominator for the courts when they assess SL instruments from the point of their possible legal effects. The standard of interpretation of manifest error 2 demands from courts that assess SL from the position of a neutral person with the available knowledge of a situation in which an agency was at the time of the creation of an act. Such an error of ambiguousness can be seen at first sight; although it can be easily demonstrable without extensive investigation, it cannot mean that an error must be

immediately demonstrated (also extrinsic evidence could be considered in the context of intrinsic ones). The reasonable man who could apply this standard is a fictional man who possesses and exercises the qualities of attention, knowledge, intelligence, and judgment that a particular action requires for the protection of its own interests and the interests of others. From statements like those of the Member States, the supervisory authorities shall only “*encourage* the drawing up of codes of conduct intended to contribute to the proper application of this Regulation”, where “associations *may* prepare codes of conduct, or amend or extend such codes”, it can be concluded that the code of conduct is SL, while on the other hand, the articles mentioned above (with the stated “*fin*es, mandatory monitoring, general validity and compliance”) clearly point more towards HL. Ambiguity is established and thus Article 40 falls out of SL.

The GDPR’s codes of conduct are the explicit way to demonstrate an institution’s *compliance* with the GDPR rules. A difference vis-à-vis other codes of conduct (that are usually the SL instrument, e.g., the European Code of Good Administrative Behaviour, Codes of Conduct for Public Servants or Civil Service Codes of Standards and Behaviour) is in its legal effects that emerge from the voluntary compliance of institution, after which code became obligatory. The legal effects here emerge from the bottom-up and not from the top-down relation. This kind of approach is promoted to be an effective legal strategy to incorporate social responsibility principles into corporate self-regulation (Rahim, 2013) or to internalise social values and to accordingly moderate behaviour (Coglianese and Mendelson, 2012). The inclusion of values or principles based on which rules are self-made is a form of meta regulation that requires the ‘unambiguous and direct communication between all relevant parties – via consultation, reporting, informal discussion, lobbying and market relationships – as well as via information intermediaries such as activists and the news media’ (Simon, 2017, p. 6). Adhering to the GDPR code of conduct is about an institution’s value and promise towards the public and business partners. The violation of the code will primarily affect the institution’s brand or trust in its operations, but it will likely also violate ipso facto the GDPR rules. The absence of this code will affect a decision on whether to impose an administrative fine and a decision on the amount of the administrative fine (stated in GDPR).

With this code of conduct, the EU wanted to push corporate self-regulation to a higher level of meta-regulation, where public institutions promote and oversee self-regulation to which controllers or processors shall make binding and enforceable commitments. The GDPR code illustrates that law and government constantly change and evolve; meta-regulation resembles to SL, but it fits into “the HL camp”. Practical effects thus depend on numerous communicative actions that can lead to various types of behaviour. Following an analysis under the legal standard of intended legal effects and based on the wording, the content and purpose of the enumerated articles, as well as of their context, is proper to conclude that codes of conduct enacted under Article 40 of GDPR have not only intended (which would already be enough to establish SL as illegal) but also binding legal effects, with the result they can be as acts legally challenged for the purposes of Article 263 TFEU. In the absence of legal rules, and SL’s further evolution in the GDPR’s private auto-limitation with the

help of public institutions, the GDPR code is the illustration of adaptable development according to the flexible, complex changes in the environment.

Another example of SL is related to the implementation of Article 106(2) TFEU. The latter allows for a derogation of the prohibition of state aid when the performance of a task in question would be obstructed without state aid. The assessment has to ensure the competition neutrality regarding SGEI funding (the absence of overcompensation or cross-subsidisation of commercial activity). To assist with an assessment, the Commission enacted the so-called “Almunia package”.¹⁹ In areas without sector-specific rules, it hence applies the mentioned HL legal package. On the other hand, the Commission has also published the “SL package”²⁰ that could have legal effects. By using the manifest error standard this holds especially for the Commission communication C(2004) 43,²¹ where a failure to comply with the communication triggers the initiation of the formal investigation procedure. On the other hand, the communication on broadband networks resembles to HL, but SL outweighs the former (as the absence of unconditional agreement only assumes that Member State in question does not agree with the proposed measures), while the communication on public service broadcasting is undoubtedly SL (there is no obligation for Member States). Such is also all case law outside the legal precedent systems. The analysis of case law on SL (Sulev, 2021) points at the possibility – as in the French case – to derogate from SL, if there are reasons on the grounds of general interest or other justified reasons. The court looks favourably at SL also under the duty to cooperate under Article 4 of the TEU.

¹⁹ 2011 SGEI Decision: Commission Decision of 20 December 2011 on the application of Article 106 (2) of the TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI, OJ 2012 L 7/3; 2011 SGEI Framework: Communication from the Commission, EU framework for State aid in the form of public service compensation, OJ 2012 C 8/15; and 2011 SGEI Communication: Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of SGEI, OJ 2012 C 8/4; as well as a De minimis Regulation: Commission Regulation on the application of Articles 107 and 108 TFEU to de minimis aid granted to undertakings providing SGEI, OJ 2012 L 114/8.

²⁰ Communication from the Commission – Updating the Annex to Commission Communication [Commission communication C(2004) 43 – Community guidelines on State aid to maritime transport UL C 13/3, 17.1.2004] – Community guidelines on State aid to maritime transport UL C 120, 13.4.2017; Communication from the Commission – EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks UL C 25, 26.1.2013; Communication from the Commission on the application of State aid rules to public service broadcasting UL C 257, 27.10.2009.

²¹ The Commission communication C(2004) 43 among in appropriate measures states that ‘member States are invited to confirm that they accept these proposals for appropriate measures in writing by 30 June 2004 at the latest. Should a Member State fail to confirm its acceptance in writing by that date, the Commission will apply Article 19(2) (legal consequences of a proposal for appropriate measures – the initiation of the formal investigation procedure) of Regulation (EC) No 659/1999 and, if necessary, initiate the proceedings referred to in that provision’. This Regulation was replaced with the Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union OJ L 248, 24.9.2015 that states the same legal consequences in Article 23. The problem here is that proposed measures from Regulation are focused in an existing aid scheme of a particular Member State, and not on all of them at the same (as the communication does).

IX. Conclusion

Interpretation is an indispensable part of decision-making; the meaning of language in general legal rules is abstract and thus ambiguous. Interpretation is at its core the determination of meaning, logos, and system; the rising level of complexity, technical development, different intertwined relations, a “snowball effect” etc., in numerous ways push authorities to interpret legal rules. The level of SL will probably rise further in the future. Therefore, it is important that the SL instruments are transparent and available for *public scrutiny*. There is no precise formula to determine when SL will crystallise into HL or *vice versa*. A result is a matter of degree. SL instruments can impose obligations when courts recognise in them certain HL characteristics, but this is already the second step. Before this, other related factors might include the intent of the authors, goals, consequences, the formulation and text of a rule, whether the rule is formulated in terms of rights or obligations, the nature and form of the instrument in which the rule appears, whether the new rule is understood by the addressees as an interpretation or obligation, and the character or status of the addressees. This is the usual approach that can be formed as the standard of interpretation, while an additional step toward even more objective SL can be made with the help of systems theory and/or perspectives, SL’s publication, public participation and/or collective intelligence. Research on SL has traditionally focused on the role of courts that give effect to SL, but to add diversity, to think systematically, also other stakeholders should be included, who will abide SL, but not due to its non-bindingness, but due to its persuasion/argumentation and their relationships in mutual efforts towards final goals. To know more about the context, structure, and relations in which SL will operate, an issuing authority could preliminarily test a draft of the SL instrument in a relevant environment, and with affected stakeholders. A procedure that establishes at least a rough frame for doing this is greatly appreciated. This would be better than decisions enacted solely based on formal power, especially when decision-making is enacted with a tight majority of collective decision-makers.

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