**Chapter 8**

**No Longer that Small to Fall Through the Cracks: A French Story of Adaptation to the *Petites* Sources of EU Law**

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# **I Introduction**

This chapter explores the capacity of the French legal system to adapt and accommodate EU soft law.[[1]](#footnote-1) Such question is topical for three reasons. First, because France, a founding Member State, has been straddling between its role of promoter of European integration and, at least up until 2016, its status as not the most compliant EU Member State.[[2]](#footnote-2) A French case study on the reception of EU soft law can thus potentially reveal everything from full compliance, a cherry-picking attitude with regards to EU soft law, or rejection of such instruments. Second, the French legal system belongs to the continental legal tradition. Rooted in Romano-Germanic law, the French legal system is identified as a legal system which is written, centralised, and based on formal law, codification and parliamentary democracy.[[3]](#footnote-3) In principle, such characteristics would make it unlikely for the domestic legal system to naturally accommodate soft law. Similarly to Italy or Hungary,[[4]](#footnote-4) France has not yet developed, nationally, a soft law culture, with the exception of administrative circulars.[[5]](#footnote-5) Third, this research takes place at a crucial moment in French doctrinal and case law development. Perhaps paradoxically, France is now at the forefront of soft law practice, with the *Conseil d’État* (the French Administrative Supreme Court) showing a positive attitude towards such instruments.

In the landmark decisions *Numericable* and *Fairvesta*, the Conseil allowed annulment actions against, respectively, a position statement of the French Competition Authority and a press release of the French Financial Market Authority.[[6]](#footnote-6) Such instruments would not be considered justiciable according to the traditional view that only instruments producing legal effects can be reviewed. Following these decisions, the previously EU-reticent *Conseil d’État* has been singled out in recent case law from Luxembourg for its flexible approach with regards to soft law. This is because it ‘mapped the ground in a comprehensive report which offered, *inter alia*, a definition of soft law, […] it also built on that study by devising a new judicial test focusing on economic effects and the existence of significant influence on the behaviour of the addressees of the instrument’.[[7]](#footnote-7)

As shown by our research, civil servants and judges do not seem overtly reluctant to rely on soft law, contrary to the expectation that such attitude would be atypical in a rule-bound parliamentary democracy.[[8]](#footnote-8) The SoLaR methodology was employed for this chapter, with two caveats. First, French legal practitioners are not very familiar with socio-legal research, and conducting interviews was not straightforward. Only thirteen judges and public servants responded, despite numerous invitations to interview across the fields of research. Second, although the wind of change is currently blowing also on French ground,[[9]](#footnote-9) court language has been, traditionally and notoriously, brief.[[10]](#footnote-10) Indeed, one can hardly retrieve any express references to soft law in French judgments, although various combinations of keywords were used to interrogate the public databases.[[11]](#footnote-11) The chapter looks at the ways in which EU soft law is integrated in the French legal order before exploring the judicial attitude towards such instruments. It outlines various French specificities which might prove inspiring for authorities and courts at different levels of EU governance when issuing or applying soft law.

# **II The Reception of EU Soft Law in France: a Story of Fragmentation and Openness**

The reliance on EU soft law by French administration in general, and the implementation of soft law in particular, is not systematic, and occurs through a vast variety of ways, depending on the policy field, the actors involved, and the specificities of each instrument. Our study reveals two main take-aways. First, a multitude of actors are involved in the reception of EU soft law, and rely on different types of instruments to translate EU soft law in the French legal order. Courts, ministries and independent administrative authorities all contribute to the implementation of EU soft law in France, or indeed, to the application of EU soft law in individual cases. While the contribution of courts is addressed in the second part of this chapter, the current section looks at the ministries and independent administrative authorities. Second, administrative practice and legal academia show a more and more open attitude towards the evolution of legal sources and the variety thereof.

### *A The Implementation of EU Soft Law by French Administration: A Scattered Picture*

The implementation of EU soft law in the French legal order can be classified in four broad categories. First, soft law can be integrated into hard law. In competition, the *De minimis* notice,[[12]](#footnote-12) as well as the leniency notice,[[13]](#footnote-13) were integrated in the *Code de commerce*, which is the basic law regulating trade.[[14]](#footnote-14) In social law, the Recommendation on equal pay[[15]](#footnote-15) was integrated in the *Code du Travail*.[[16]](#footnote-16)

Second, EU soft law is implemented through national soft law or hybrid combinations. Indeed, EU soft law can be translated through specific national soft law instruments such as ‘*circulaires*’ but also through national hard law, for instance the French Codes. Traces of the antitrust Guidelines on fines[[17]](#footnote-17) can be found in the *Code de commerce*,[[18]](#footnote-18) however the Competition Authority has also set up its own guidelines for setting fines.[[19]](#footnote-19) A Prime Minister Act from 2019[[20]](#footnote-20) (an administrative *circulaire*)*,* guides the action of the administration in relation to State aid, and, together with Art. 1511-1-1 of the *Code general des collectivités territoriales*, is meant to gather all the relevant EU legislation.[[21]](#footnote-21) The *Ministère de l’économie et des finances* also published a Vade-mecum[[22]](#footnote-22) including various sectoral EU soft law and the notice on the notion of aid[[23]](#footnote-23). In the field of environmental law, the French government has adopted its own guidance in relation to the EU instruments studied by the SoLaR project. This was in the form of *circulaires* and/or *lignes directrices nationales*, which have the same function and deal with similar issues as the relevant EU guidance documents.[[24]](#footnote-24)

The third way to integrate soft law in the French legal order is through web references. The French Competition Authority and the *Ministère de l’Economie et des Finances* all refer on their website to various competition and State aid soft law instruments.[[25]](#footnote-25) In the field of environmental law, a limited number of EU guidance documents related to the Habitats Directive can be found on the governmental website of Natura 2000 sites, under the tabs ‘*Guides Europe*’ and ‘*Autres guides de référence*’.[[26]](#footnote-26) Most of these documents are available only in English, such as the Guidance document on Climate Change and Natura 2000,[[27]](#footnote-27) and some have been translated into French, such as the Guidance on the requirements for hydropower in relation to Natura 2000.[[28]](#footnote-28) In social law, the Cleiss website[[29]](#footnote-29) managed by the government, describes social security regimes throughout the world and especially within the EU. The fact that some soft law is not translated into French, together with the incorporation of soft law instruments without directly referring to the source, raises well-known issues related to access to soft law instruments, as described elsewhere in this volume.[[30]](#footnote-30)

Finally, a fourth way to integrate soft law is specific to financial supervision,[[31]](#footnote-31) given the comply-or-explain obligation in relation to EU guidance, as provided by Article 16 of the ESMA regulation.[[32]](#footnote-32) The Authority of Financial Markets (*Autorité des marchés financiers*, hereinafter referred to as the AMF) has several options in this regard. First, it could choose a mere declaration of conformity, with or without issuing a press release. Second, they could follow a case-by-case approach, which would potentially offer more leeway, while triggering the need to explain its actions in every case by reference to national provisions or the need for consultation. Finally, the AMF could choose the more ambitious approach of transposing the guidelines into national legislation and regulations.[[33]](#footnote-33)

The approach usually chosen by AMF consists in using the guidelines only when the AMF Board decides to apply them.[[34]](#footnote-34) In a press release the AMF informed the stakeholders that they henceforth apply the ESMA guidelines.[[35]](#footnote-35) These are mainly used to clarify certain practices, by using the definitions provided by ESMA.[[36]](#footnote-36) Most of the time, they are used to interpret the provisions of the AMF Regulation which is a legally binding instrument.[[37]](#footnote-37) This is yet another example of hybridity *par excellence*, as such technique ensures that the AMF regulation, which is national hard law, is constantly adapted to the soft guidance produced by ESMA.

Practices to implement EU soft law are thus diverse, with an important amount of instruments translated into the French legal order, including through direct appropriation in a manner that might result in obliterating their EU origin.

## *B Embracing the Petites Sources: An Increasingly Open Attitude to Soft Law*

Contrary to such varied ways to implement EU soft law, the general attitude towards soft law is positive, which might challenge traditional views on the categories of legal sources in France. This happens both at the level of administrative authorities, and in legal scholarship, with the *Conseil d’État* recently rubberstamping soft law and confirming a new, ‘soft law friendly’ approach both for French practice and for academia.

Some ministries rely on EU soft law in their day to day activity more than others, depending on the field, with similar experiences recorded in the Netherlands.[[38]](#footnote-38) Interviews show that the Ministry for the Economy and Finance (*Ministère de l’Economie et des Finances*) is very involved in the application of State aid law. Such attitude can be explained by the fact that failure to follow the policies set out by the Commission in State aid might lead to a recovery order against France, which would have important implications for the recipient, as well as for the economy. A civil servant from the Ministry told the SoLaR team that they are dealing daily with EU soft law instruments, as it is their responsibility to verify whether a measure can constitute State aid or not. When in doubt, the civil servant is expected to warn the national authorities involved and to get in touch with the Commission for a first informal dialogue.[[39]](#footnote-39) Conversely, ministries dealing with social matters or the environment engage less with soft law. The civil servants interviewed for social policy admitted that, while they do deal with EU law frequently, they simply consider soft law to be too weak or superfluous to engage with.[[40]](#footnote-40) In environment, the approaches vary depending on the background, culture, position, and tasks of the civil servants, with some resorting to soft law on a daily basis.[[41]](#footnote-41)

Similar field distribution can be noted at the level of independent administrative authorities, with authorities dealing with competition and financial regulation soft law being by far the most involved in implementation. These are the French Competition Authority (*Autorité de la concurrence*), the AMF, and the Prudential Supervision and Resolution Authority (*Autorité de contrôle prudentiel et des résolutions*, hereinafter the ACPR). The output from these authorities is fairly transparent and publicly available online, hence facilitating research. Our interviewees from the administrative authorities agreed that EU soft law is necessary and useful in their work. For instance, in the field of competition and State aid law, the civil servants we interviewed use very frequently European soft law instruments which constitute important sources in their everyday practice. However, the civil servants stressed that European soft law instruments are scrutinised on a case by case basis, whenever the issue falls within the scope of European law.[[42]](#footnote-42)

In the field of environmental law, the frequency of the use of EU soft law instruments depends on the background, culture, position, and responsibilities of the interviewees. Nevertheless, the interviewed civil servants agreed that soft law is a valid source of law that is relevant for decision-making. Administrators feel compelled to follow soft law documents issued by the Commission, acting in the shadow of hierarchy. Our interviews revealed the perception that the Commission expects EU guidance to be followed, and that failure to comply might result in lawsuit against national administration.[[43]](#footnote-43) In any case, EU environmental soft law is more generally considered to be a precious source for the interpretation of EU hard law than the other policy areas considered in the SoLaR project.[[44]](#footnote-44) EU soft law should carefully be considered by lawyers when engaging in litigation, and not to do so is considered a strategical mistake.[[45]](#footnote-45) The factors that motivate the use of EU environmental soft law in France include the need for clarification of hard law, essential in a field so specialised, complex, and technical; the facilitation of the implementation processes; and the desire to avoid litigation, to make sure that the administration are ‘doing the right thing’ *vis à vis* the Commission and the Government.[[46]](#footnote-46)

The French legal literature has reflected on EU soft law, although it has not yet recognised it as a source of law *stricto sensu*. Embracing wholeheartedly (EU or non-EU) soft law would be unusual, given that the French system is grounded in the basic principle of legality, in the sense that administrative acts must comply with higher norms. Legality (*principe de légalité*) is nowadays understood broadly, and as relating not only to laws, but also to constitutional norms, international and European norms, and the general principles of law defined by case law and regulations.[[47]](#footnote-47) French law belongs to a Romano-Germanic tradition characterised by a certain formalism regarding the sources of law, which might be resistant to newish legal sources, such as soft law. French legal theorists called for a clear delineation from hard law, with Weil noting that the legal character of a norm cannot be a matter of scale; either a norm is law or it is not law at all.[[48]](#footnote-48) Similarly, according to Thibierge, an exploration of ‘flexible law’ reveals three categories, dependent on content (‘vague law’, characterised by the lack of detail), binding legal force (‘soft law’, that is to say law without legal obligation), and enforcement (‘slack law’, meaning unenforceable law).[[49]](#footnote-49) What is more, research on soft law has been conducted by international and EU legal scholars working in French universities,[[50]](#footnote-50) and not so much by academics interested in fields of national law. Until five years ago, soft law was not even mentioned in general handbooks of French public law, and it played a very minor role for doctrine and legal education alike, similarly to Germany.[[51]](#footnote-51) Recently however, some experts in administrative law conceded to soft law the role of a “small” source of law,[[52]](#footnote-52) and civil law scholars are affording a more important position to soft law in their studies.[[53]](#footnote-53)

This discussion shows that the administration is open to soft law, and this is matched to a certain extent by academia. In that regard, the recent position of the *Conseil d’État* on the matter is highly relevant. With its composite function, the *Conseil* navigates between the worlds of administration and the judiciary, while at the same time informing academic discourse. In an Annual Study from 2013,[[54]](#footnote-54) it found that soft law is ‘a phenomenon theorized and valued by the legal literature’.[[55]](#footnote-55) The findings of the study were carried forward in the case law, with the Conseil issuing a judicial definition for soft law. Accordingly, soft law comprises ‘the set of instruments fulfilling the three following criteria: 1) they must have as an object to modify or guide the behaviour of their addressees by leading to their adherence; 2) they do not create in themselves rights or obligations for their addresses; 3) they represent, by their content and the way that they are structured, a degree of formalisation and structure which brings them closer to looking like rules of law’.[[56]](#footnote-56) This definition is now largely taken up by French academics.[[57]](#footnote-57)

Finally, the *Conseil d’État* finds that the distinction between hard and soft law relates to a difference of scale rather than a difference of nature.[[58]](#footnote-58) On the basis of the legal literature and the diversity of instruments, actors and fields, the *Conseil d’État* notes that soft norms belong to a ‘graduated normative scale’ between soft and hard law,[[59]](#footnote-59) rubber stamping the idea that various forms of legalisation are situated alongside a continuum.[[60]](#footnote-60) Readers of this book would probably agree that such openness to soft law is unprecedented. The question is to what extent is this approach matched in the case law of other French courts dealing with EU soft law, an issue our chapter now turns to.

# **III The Application of EU Soft Law by French Courts**

The French dual system of jurisdiction consists of two separate orders: the administrative order, overseen by the *Conseil d’État* (Administrative Supreme Court) and the civil order, overseen by the *Cour de Cassation* (French Supreme Court). The existence of these two different orders is rooted in French history, and answered to a need to prevent the ordinary judge from interfering with administrative matters. The justification of this duality is also based on the necessity of having two different legal systems, and thus an autonomous administrative law dealing with the general interest. Only an administrative judge can quash or amend the decisions made by authorities exercising executive powers. Despite the massive differences between the disputes that each order of jurisdiction deals with, our research shows common trends in the attitude towards soft law by the civil and the administrative judge.

## *A Soft Law is Everywhere: The Different Types of Litigation Concerning Soft Law*

The distribution between the different orders and levels of jurisdiction depends on the nature of the contested national act, the object of the dispute and the parties to the dispute. Thus, civil and administrative courts have, in principle, jurisdiction over appeals against the decisions of independent administrative authorities, such as the Competition Authority and the Financial Market Authority. Administrative courts have jurisdiction over illegality proceedings, often as first instance and last resort, while both civil and administrative courts have jurisdiction over liability proceedings. Finally, civil courts in principle have jurisdiction over disputes between legal persons governed by private law.

Similarly to other Member States, French courts cannot review European soft law; in other words, no allegation against EU guidance documents can be brought directly or indirectly before national judges. Indeed, national judges are not competent to review EU norms, and has nothing to do with the softness of the acts. National soft law is justiciable before French courts. The *Conseil d’État* acknowledged jurisdiction to review national soft law and is ever expanding the notion of reviewable acts.[[61]](#footnote-61) Similarly, the civil courts are willing to take into account national competition soft law, while acknowledging their status and flexibility.[[62]](#footnote-62) Thus, even though national French courts are unlikely to review EU soft law, French judges could eventually engage in a dialogue with their counterparts in Luxembourg questioning the validity of EU soft law through the preliminary reference procedure. In the most recent case *Fédération bancaire française*, pending at the time of writing, the Conseil d’Etat sent such a preliminary reference question with regards to the validity of European Banking Authority guidance.[[63]](#footnote-63)

Very few lower court judgments expressly refer to EU soft law. SoLaR only retrieved a few relevant cases of the Supreme Courts: there is no such decision in the environmental, social and financial fields;[[64]](#footnote-64) two judgments deal with competition soft law and three with State aid. We also found forty relevant decisions of the appellate courts in the field of competition law, all bar twelve mentioning EU soft law only in passing.[[65]](#footnote-65)

These findings have to be read in the methodological context of this research. On the positive side, access to information was straightforward. French court rulings are published and are easily available in databases, which is not necessarily the case in other countries covered by the SoLaR project.[[66]](#footnote-66) Searches based on keywords and/or the title/identifier of a text were therefore sufficient to retrieve the relevant judgments. However, the caveat relates to French judgment writing techniques. Indeed, it is rather difficult to determine whether a soft law instrument was taken into account, given the traditionally concise form of French judgments. This was even if soft law was directly or indirectly invoked by the parties. However, as mentioned by one of the judges we interviewed, even when EU soft law is not expressly mentioned in the ruling, it may very well have been considered at the preparatory stage.[[67]](#footnote-67) We fully endorse the current reform requiring fuller argumentation and substantiation of the decisions of the *Cour de Cassation* and of the *Conseil d’État*. This will entail not only higher levels of legal certainty for the litigants, but would also enable researchers to explore French judicial reasoning more into depth.[[68]](#footnote-68)

## *B Convergent Judicial Approach to Soft Law*

Our study shows that, in France, the civil and the administrative courts converge with regards to their attitude towards soft law. Thus, both the *Conseil État* and the *Cour de Cassation* have devoted a study to the soft law phenomenon. As mentioned above, its 2013 Annual Study, the *Conseil d’État* describes the role of soft law, gives instructions for using national soft law instruments and proposes a new typology. In its 2018 Annual Study, the *Cour de Cassation* pays more attention to the application of the Commission’s guidelines in the field of competition law. It thus emphasises the specificity of soft law, which ‘lays out the principles’ determined by the European judge and gives ‘methodologies’.[[69]](#footnote-69)

Our research revealed two important trends.[[70]](#footnote-70) First, soft law is sometimes part of legal reasoning. Second, soft law is an additional element used as a supplement to other legal sources, such as the case law of the ECJ. The examples drawn from different fields of research below will reflect these trends.

In *Expedia*,[[71]](#footnote-71) the *Cour de Cassation* decided that the Competition Authority could engage proceedings against an agreement containing hardcore restrictions to competition, even though the market shares fell below the impunity thresholds mentioned in a *de minimis* notice of the Commission.[[72]](#footnote-72) The case, which reached also the ECJ in preliminary reference,[[73]](#footnote-73) led the Commission to revise its notice, showing that the evolution of EU soft law is inspired also by national practice. In *Total*,[[74]](#footnote-74) the *Cour de Cassation* recalled that, while Commission guidance was not binding on the Competition Authority or national courts, it could be part of the reasoning in a case. Consequently, the Appellate Court was right to take such guidance into consideration and is entitled to refer to it in judgments.

In the field of State aid law, we retrieved no discussion as to the soft nature of the instruments, with courts working directly with the substance of EU guidance. The judgments analysed reveal that EU soft law is used by the French judge in the same manner as hard law, and is generally applied in cases.[[75]](#footnote-75) Soft law is often used as a legal ground to explain specific EU terms and can sometimes be very helpful for the parties.[[76]](#footnote-76) Interestingly, the *Conseil d’État* refrains from assessing the legality of national acts against Commission guidance in State aid, on the grounds of respecting the exclusive competence of the EU Commission in this area.[[77]](#footnote-77) This latter finding gives even more substance to the worry that many EU soft law instruments are largely unchecked, given that neither the national courts, nor the ECJ itself engage in judicial review.[[78]](#footnote-78)

In the field of environmental law, there is no relevant case from the Supreme Courts but two lower court judgments can to some extent be considered relevant for the purposes of our analysis. Both judgments are related to the protection of a site of Community importance under the Habitats Directive. In the first, the Lyon Administrative Appellate Court mentioned in its reasoning a provision of the Directive ‘as construed by the European Commission’,[[79]](#footnote-79) without specifying which interpretation issued by the Commission they precisely referred to and which document or guidance provided this interpretation.[[80]](#footnote-80) Similarly, in the second judgment, while analysing whether a site of Community importance had correctly been designated by French authorities, the Marseille Administrative Appellate Court referred to the form of the document used for the designation of the site and to the way it had been compiled in line with the Commission’s expectations.[[81]](#footnote-81) Yet, it did not specify which expectations of the Commission they were referring to precisely or a source document, which could be either a guidance document or else an actual act issued by the Commission.[[82]](#footnote-82)

This brief account of the judicial attitude to soft law in France shows that, while express references and discussions of EU guidance in the case law are scarce, courts do engage with such instruments at different levels and orders of jurisdiction. Our limited interview material, as well as the abovementioned environmental cases, might point to the suspicion that many of the soft law discussions happen behind the scenes, with potentially more guidance documents used in practice by the courts than it might be apparent from word searches on publicly available databases.

# **IV Evaluation: Any Role for General Principles of Law?**

The SoLaR research shows that France matches the SoLaR findings regarding the application of EU soft law in other Member States, as it transpires from the current book. There is therefore no French exceptionalism compared with the other Members States across the fields. Somewhat paradoxically, EU soft law is not considered as a legal source, it is considered as not legally binding but it might have legal effects, and it is taken into account by both the administration and judges. This confirms a certain lack of clarity with regards the effects of such instruments, which, together with legitimacy issues, constitute primary drawbacks surrounding EU soft law. The question is whether, in the application of EU soft law in France, general principles of law are thwarted or, conversely, enhanced.

The answer is nuanced. Although our interviewees have mentioned some drawbacks of soft law, they acknowledged that the use of EU soft law has many advantages.[[83]](#footnote-83) It was mentioned that soft law is flexible, quick, well-suited to deal with the complexity and diversity of issues in each Member State. EU soft law fills the gaps, allows an easier harmonisation of technical provisions and has the potential to facilitate the implementation process for civil servants, and more broadly for all stakeholders, as it can help overcome national and local hurdles to the implementation of EU instruments. Globally, EU soft law instruments are used to supplement and/or clarify relevant hard law norms, codifying case law and Commission decisions in complex areas.

In State aid, the civil servants we interviewed concurred that soft law ensures legal certainty and increases transparency and predictability, helping a common method of implementation of EU hard law. With regards to the role of soft law to ensure consistency in the application of the law across the Member States, while mentioned by some Courts in their annual studies, such principle cannot be traced in the rulings analysed.[[84]](#footnote-84) In the field of competition law, one of the interviewees found it regrettable that some European soft law instruments are sometimes unclear or contain contradictory information. They considered that these drawbacks render soft law unhelpful and inefficient.

In environment, the interviewees emphasised that soft law lacks legitimacy and transparency, because soft law is not generated in cooperation with Member States.[[85]](#footnote-85) Environmental soft law would be more acceptable if it were the result of a more inclusive process.[[86]](#footnote-86) Otherwise, soft law only increases the discretion of some actors (ie the European Commission) to the detriment of others (ie national authorities). Conversely, in competition, some interviewees were fond of the output legitimacy of soft law and its high specialisation; however, some more nuanced views were also expressed, purporting that legitimacy could become a problem if soft law is treated as hard law.[[87]](#footnote-87)

In social law,[[88]](#footnote-88) the opinion of the interviewees was that EU soft law is still largely symbolic but useful to understand a policy goal or, if necessary, to clarify the substance of a hard law rule. The implementation of such instruments remains plausible, but the main usefulness of soft law is still seen in its informative or guidance purpose. They call unanimously for a better diffusion of soft law and, at the same time, ask for an educational effort from European institutions in this respect: EU must issue understandable laws. Rules would spread more easily if they were accessible and intelligible.

The balance between the positive and the negative effects of soft law is therefore unsurprisingly difficult to strike. Depending on the field, some general principles of law are promoted at the expense of others, which is perhaps inevitable in the multi-governance setting of the European Union, confirming previous hypotheses.[[89]](#footnote-89)

# **V Conclusion**

Our research shows that there is both judicial and administrative awareness towards EU soft law in France, and a plurality of legal sources is being used by civil servants and judges nowadays. The core concern remains the quality of soft law,[[90]](#footnote-90) which calls for clarification and accessibility, as reflected in recent case law developments, scholarly studies and on-going national revisions. Facing such challenges, the hope rests – as is perhaps inevitable for a legal chapter – with the courts. The question is whether the openness to judicial review of national soft law by French courts will revolutionise justiciability of EU soft law, in France and elsewhere in Europe. With a first step taken in the *Fédération bancaire française*, the ball is now in the Luxembourg court.[[91]](#footnote-91)

1. This chapter draws on research work undertaken by the Aix-Marseille team of the SoLaR Network (Nathalie Rubio, Olivier André, Eric Oliva, Marie Lamoureux, Sandrine Maljean-Dubois and Eve Truilhé) and by Vanessa Richard. It relies on the following field working papers: G Lisi, M Eliantonio, S Maljean-Dubois and E Thuilhé-Marengo, ‘National Report on France: The Use of EU Soft Law by National Courts and Administration in the Field of EU Environmental Law’, in M Eliantonio, G Lisi (eds), ‘EU Environmental Soft Law in the Member States’, (2020) SoLaR Working Paper, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656418>; M Lamoureux and N Rubio, ‘National report for France: the use of EU soft law by National Courts and Administration in the Field of EU Competition law and State aid’, in O Stefan (ed), ‘EU Competition and State Aid Soft Law in the Member States’, (2020) SoLaR Working Paper, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356227>; E Oliva, ‘National report on France: The use of ESMA’s guidelines by the French authorities and courts for the regulation of financial markets’ in M Avbelj (ed), ‘EU Financial Regulation Soft Law in the Member States’, (2020) SoLaR Working Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3668793; O André, ‘National report on France: The use of EU soft law by National Courts and Administration in the field of EU Social policy’ in M Hartlapp (ed), ‘Studying EU soft law effects in social policy’, (2020) SoLaR Working Paper, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668981>. [↑](#footnote-ref-1)
2. The three Member States against which the Commission received the highest number of complaints are Italy, Spain and France: European Commission, ‘*Commission staff working document* accompanying the document *Monitoring the application of European Union law 2018 Annual Report,* Part I: General statistical overview’ (July 4 2019) 12, https://ec.europa.eu/info/sites/info/files/report-2018-commission-staff-working-document-monitoring-application-eu-law-general-statistical-overview-part1\_0.pdf. [↑](#footnote-ref-2)
3. R Legeais, *Grands systèmes de droit contemporains, Approche comparative* (3th edn, Paris, Lexis Nexis, 2016) 30–37. [↑](#footnote-ref-3)
4. Alberti and Eliantonio, this volume and Lancos, this volume. [↑](#footnote-ref-4)
5. Conseil d’État, *Le droit souple*, Annual Study 2013 (Paris, La documentation Française, 2013) 59 and 70; Conseil d’État, 18 décembre 2002, *Duvignières*, no 233618; M Lombard et al (eds), *Droit administrative* (Paris, Dalloz, 2019) 58-65; F Melleray, ‘Brèves observations sur les “petites” sources du droit administratif’ (2009) *Actualité juridique de droit administratif*  917; C Testard, ‘Le droit souple, une “petite” source canalisée’ (2019) *Actualité juridique de droit administratif*  934. [↑](#footnote-ref-5)
6. Rulings of 21 March 2016, *Numericable*, no. 390023 and *Société Fairvesta International GmBH*, no. 368082. [↑](#footnote-ref-6)
7. Case C-16/16 *Kingdom of Belgium v European Commission* [2018] EU:C:2018:79, Opinion of AG Bobek, para 85. [↑](#footnote-ref-7)
8. Korkea-aho et al, this volume. [↑](#footnote-ref-8)
9. P Deumier, ‘Motivation enrichie: bilan et perspectives’*D.*2017, 1783; P Deumier and P Puig ‘Quand le droit souple rencontre le juge dur’(2016) *RTDC* 571. [↑](#footnote-ref-9)
10. B Markesinis and J Fedtke, *Engaging with Public Law* (Hart, 2009); JL Halpérien, ‘Les styles judiciaires, des traditions nationales?’ (2015) *Droit et société* 491. [↑](#footnote-ref-10)
11. Legifrance: www.legifrance.gouv.fr. Legifrance is the French government official platform for online legal texts. It provides access, in French, to laws and decrees published in the *Journal officiel*, important court rulings (especially from both civil and administrative Supreme Courts), collective labour agreements, standards issued by European institutions, and international treaties and agreements to which France is a party; ‘Ariane Web’: www.conseil-etat.fr. This case law database gives access to more than 230.000 documents: decisions and contentious opinion of the *Conseil d’État* and the administrative appellate courts, commentaries of these decisions and opinions having been retained for their contribution to the case law, as well as a selection of conclusions of public *rapporteurs*; ‘Lexis 360’ and ‘Lamyline reflex’ contain a wide range (albeit non-exhaustive) of lower courts’ decisions. For the lists of keywords per each sector and specific websites see the field working papers for France. [↑](#footnote-ref-11)
12. European Commission, ‘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 European Union (De Minimis Notice)’ [2014] OJ C 291/1. [↑](#footnote-ref-12)
13. European Commission, ‘Commission Notice on Immunity from fines and reduction of fines in cartel cases’ [2006] OJ C 144/23. [↑](#footnote-ref-13)
14. Art. L. 464-6-1 & 2 of the French trade code (*Code de commerce*)–which incorporate market share thresholds into French law–; and the leniency notice–which is outside of the scope of the SoLaR research–, Art. L. 464-2 & Art. R.464-5 of the French trade code. [↑](#footnote-ref-14)
15. European Commission, ‘Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency’ [2014] OJ L 69/112. [↑](#footnote-ref-15)
16. Article L.3221-2 of the *Code du Travail* (Labour Code) stipulates that work of equal value must lead to equal pay. [↑](#footnote-ref-16)
17. ‘Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003’ [2006] OJ C 210/ 2. [↑](#footnote-ref-17)
18. Art. L. 420-1 to L. 420-7 and Art. L 464-2 of the *Code de commerce*. [↑](#footnote-ref-18)
19. Autorité de la concurrence, ‘Communiqué du 16 mai 2011 relatif à la méthode de détermination des sanctions pécuniaires’ www.autoritedelaconcurrence.fr. [↑](#footnote-ref-19)
20. Circulaire du Premier Ministre, ‘Application des règles européennes de concurrence relatives aux aides publiques aux activités économiques’ no 6060/SG (5 February 2019) http://circulaires.legifrance.gouv.fr/pdf/2019/02/cir\_44368.pdf. [↑](#footnote-ref-20)
21. ibid 43 (list of EU soft and hard law). For instance, EU soft law: European Commission, ‘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 and also EU hard law: Art. 107 and 108 TFEU, and Council Regulation (EU) 2015/1589 ([2015] OJ L 248/9) and Regulation (EU) No 733/2013 ([2013] OJ L 204/11). [↑](#footnote-ref-21)
22. Ministère de l’économie, ‘Vade-mecum des aides d’État Edition 2019’ www.economie.gouv.fr/daj/vade-mecum-des-aides-detat-edition-2019. [↑](#footnote-ref-22)
23. See the list of all EU communications, guidelines and regulations in ‘Annex’ of the Vade-mecum. Particularly, in the scope of SoLaR research, the Vade-mecum cites European 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. [↑](#footnote-ref-23)
24. In addition to Art. L. 414-4 et R. 414-19 of *Code de l’environnement*, see Ministre d’Etat, ministre de l’écologie, de l’énergie, du développement durable et de la mer, en charge des technologies vertes et des négociations sur le climat, ‘Circulaire du 15 avril 2010 relative à l’évaluation des incidences Natura 2000’, http://circulaire.legifrance.gouv.fr/pdf/2010/05/cir\_31044.pdf. In addition to Art. L. 122-1 of *Code de l’environnement*, see Commissariat général au développement durable, ‘Évaluation environnementale Guide d’interprétation de la réforme du 3 août 2016’, www.ecologique-solidaire.gouv.fr/sites/default/files/Th%C3%A9ma%20%20Guide%20d%E2%80%99interpr%C3%A9tation%20de%20la%20r%C3%A9forme%20du%203%20ao%C3%BBt%202016.pdf. [↑](#footnote-ref-24)
25. www.autoritedelaconcurrence.fr/fr/textes-de-reference; www.economie.gouv.fr/daj. [↑](#footnote-ref-25)
26. www.ecologique-solidaire.gouv.fr/levaluation-environnementale; www.natura2000.fr/documentation/references-bibliographiques/guide-methodologique-pour-evaluation-incidences. [↑](#footnote-ref-26)
27. Guidance document on Climate Change and Natura 2000, www.natura2000.fr/documentation/references-bibliographiques/guidelines-climate-change-and-natura-2000. [↑](#footnote-ref-27)
28. Guidance on the requirements for hydropower in relation to Natura 2000, www.natura2000.fr/documentation/references-bibliographiques/orientations-pour-hydroelectricite-lien-avec-natura-2000. [↑](#footnote-ref-28)
29. CLEISS stands for *Centre des Liaisons Européennes et Internationales de Sécurité Sociale*. See ‘documentation’ www.cleiss.fr/. [↑](#footnote-ref-29)
30. Stefan this volume. [↑](#footnote-ref-30)
31. Oliva (n 1), 42. [↑](#footnote-ref-31)
32. Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L 331/84 (hereinafter referred to as ESMA Regulation). [↑](#footnote-ref-32)
33. AMF, ‘Atelier 2: Un an après la mise en place de l’ESMA: impact de la doctrine et articulation avec la réglementation AMF’ (19 March 2013), www.amf-france.org/fr/actualites-publications/evenements-de-lamf/colloques-et-conferences-de-lamf/13e-journee-de-formation-des-rcci-et-des-rcsi-atelier-ndeg-2-un-apres-la-mise-en-place-de-lesma. [↑](#footnote-ref-33)
34. ibid 29. For instance, AMF decides to apply ESMA Guidelines on risk factors under the prospectus regulation (ESMA31-62-1293 FR), AMF Press release 29 November 2019. [↑](#footnote-ref-34)
35. www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf. See also AMF recommendations called ‘doctrine’. [↑](#footnote-ref-35)
36. AMF, ‘Atelier 2: Un an après la mise en place de l’ESMA’ (n 33) 30. For instance, see the AMF press release about the ESMA guidelines on MiFID II product governance requirement (Directive 2014/65/EU on markets in financial instruments) 12 April 2018. [↑](#footnote-ref-36)
37. AMF General regulation, https://reglement-general.amf-france.org/eli/fr/aai/amf/rg/notes/fr.html. [↑](#footnote-ref-37)
38. See in this book the chapter on the Netherlands by Beijen. [↑](#footnote-ref-38)
39. Lamoureux and Rubio (n 1). [↑](#footnote-ref-39)
40. André (n 1) 50. [↑](#footnote-ref-40)
41. Lisi et al (n 1) 45. [↑](#footnote-ref-41)
42. Lamoureux and Rubio (n 1) 67. [↑](#footnote-ref-42)
43. Lisi et al (n 1) 45. [↑](#footnote-ref-43)
44. ibid. [↑](#footnote-ref-44)
45. ibid. [↑](#footnote-ref-45)
46. ibid. [↑](#footnote-ref-46)
47. M Lombard et al (eds), *Droit administratif* (n 5) 23; P Weil and D Pouyaud*, Droit administratif* (Paris, Presses universitaires de France, 2017) 82–86. [↑](#footnote-ref-47)
48. P Weil, ‘Vers une normativité relative en droit international?’ (1982) *Revue Générale de Droit International Public* 5. [↑](#footnote-ref-48)
49. C Thibierge, ‘Le droit souple, réflexion sur les textures du droit’ (2003) *RTDC* 599. [↑](#footnote-ref-49)
50. F Terpan, ‘Soft Law in the European Union - The Changing Nature of EU Law' (2015) 21 *European Law Journal* 68;F Berrod, ‘L’utilisation de la soft law comme méthode de conception du droit européen de la concurrence’ (2015) *Revue de l’Union Européenne* 283; F Snyder, ‘Soft Law’ in D O’Keeffe, N Neuwahl and J Monar (eds), *Butterworths Expert Guide to the European Union* (London, Butterworths, 1996) 277–278; F Snyder, ‘Soft Law and Institutional Practice in the European Community’ in SD Martin (ed), *The Construction of Europe: Essays in Honour of Emile NOEL* (Deventer, Kluwer, 1994) 197–225; F Snyder, ‘Soft Law and Institutional Practice in the European Community’ (June 1993) EUI Working Paper LAW no 93/5; L Idot, ‘A propos de l’internationalisation du droit. Réflexions sur la soft law en droit de la concurrence’ (2007) 2 *Concurrences* 1. [↑](#footnote-ref-50)
51. Hartlapp, Hofmann, Knauff this volume. [↑](#footnote-ref-51)
52. Lombard et al (eds), *Droit administratif* (n 5) 58–64; Melleray, ‘Brèves observations’ (n 5) 917; Testard, ‘Le droit souple’ (n 5)934. [↑](#footnote-ref-52)
53. P Deumier and JM Sorel (eds), *Regards croisés sur la soft law en droit interne, européen et international* (Paris, LGDJ, 2018). [↑](#footnote-ref-53)
54. Conseil d’État, *Le droit souple* (n 5). [↑](#footnote-ref-54)
55. ibid 52–55 (our translation). [↑](#footnote-ref-55)
56. Rulings of 21 March 2016, *Numericable*, no. 390023 and *Société Fairvesta International GmBH*, no. 368082. [↑](#footnote-ref-56)
57. P Deumier and P Puig, ‘Quand le droit souple rencontre le juge dur’ (2016) *RTDC* 573; Ph Jestaz, ‘La norme dans la doctrine privatiste du XXème siècle’ (2020) *RTDC* 42-43; F Melleray, ‘Le contrôle juridictionnel des actes de droit souple’ (2016) *Revue française de droit administratif* 681–682. [↑](#footnote-ref-57)
58. Conseil d’État, *Le droit souple* (n 5) 63. [↑](#footnote-ref-58)
59. ibid 69. [↑](#footnote-ref-59)
60. ibid 191. [↑](#footnote-ref-60)
61. In the *Fairvesta/Numericable* Case (21 March 2016, cases nos.368082, 368083, 368084), the Conseil d’État recognised the admissibility of a judicial proceeding against national soft law acts. This position was confirmed by other subsequent cases: Conseil d’État, 20 June 2016, *FFSA*, case no. 384297; Conseil d’État, 30 June 2016, *CASA*, case no. 383822; Conseil d’État, 13 July 2016, *Société GDF Suez*, case no. 388150; Conseil d’État, 10 November 2016, *Mme Z et al*., case no. 384691; Conseil d’État, 20 March 2017, *Région Aquitaine-Limousin-Poitou-Charente*, case no. 401751; Conseil d’État, 13 December 2017, *Société Bouygues Telecom et al.*, case no. 401799 ; most recently in *GISTI* (12 June 2020, case no 418142, A) expanding justiciability to most of the soft law acts of general application issued by public authorities. [↑](#footnote-ref-61)
62. Cour de Cassation, chambre commerciale, 18 October 2016, case no. 15-10.384; Cour de Cassation, chambre commerciale, 8 November 2017, case no. 16-17.226. [↑](#footnote-ref-62)
63. Conseil d’État, 4 December 2019, *Fédération bancaire française (FBF),* case no. 415550; ECJ, Request for a preliminary ruling from the Conseil d’État (France) lodged on 13 December 2019 — *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution* (ACPR) (Case C-911/19). [↑](#footnote-ref-63)
64. Lisi et al (n 1); Oliva (n 1); André (n 1). [↑](#footnote-ref-64)
65. Lamoureux and Rubio (n 1). [↑](#footnote-ref-65)
66. Avbelj and Vatovec, this volume; Lancos, this volume. [↑](#footnote-ref-66)
67. Lamoureux and Rubio (n 1), 67. [↑](#footnote-ref-67)
68. Cour de cassation, ‘Rapport de la commission de réflexion sur la réforme de la cour de cassation’ (April 2017) 129; Conseil d’État, ‘Vademecum sur la rédaction des décisions de la juridiction administrative’, 4–16. Both reports are available on these courts’ websites. [↑](#footnote-ref-68)
69. Cour de cassation, *Le rôle normatif de la Cour de cassation*, Annual Study 2018 (Paris, La documentation Française, 2019) 206, www.courdecassation.fr/IMG///2019-01-18\_Etude\_2018.pdf. [↑](#footnote-ref-69)
70. There is no ruling in the field covered by the SoLaR research regarding social and financial legal matters. [↑](#footnote-ref-70)
71. Case C-226/11 *Expedia inc. v Autorité de la concurrence and others* [2012] EU:C:2012:795, para. 27: ‘it also follows from the objectives pursued by the *de minimis* notice, as mentioned in para. 4 thereof, that it is not intended to be binding on the competition authorities and the courts of the Member States’. See also Cass. Com., 16 April 2013, case no.10-14.881, *Bull. Civ*. IV, n° 64. [↑](#footnote-ref-71)
72. Cour de cassation, *Le rôle normatif de la Cour de cassation* (n 69) 207. [↑](#footnote-ref-72)
73. C-911/19 *FBF* [pending]. [↑](#footnote-ref-73)
74. Cass. Com., 20 janvier 2015, cases no. 13-16745, 13-16764, 13-16765, 13-16955**,** *Bull. civ*. IV, no 8. [↑](#footnote-ref-74)
75. Conseil d’État, 9 mars 2016, *Association Vent de Colère!*, case no. 384092. [↑](#footnote-ref-75)
76. See the *Valeo* case, where the Conseil d’État adopted a different interpretation of a soft law act’s provisions than the lower court: Conseil d’État, 26 July 2018, case no. 403009. [↑](#footnote-ref-76)
77. Conseil d’État, 13 avril 2018, *Association Vent de Colère!*, case no. 401755; Conseil d’État, 27 October 2016, *Société Efnovia,* case no*.* 392494. [↑](#footnote-ref-77)
78. Cour administrative d’appel de Paris, 12 mai 2014, *SIDE*, case no. 12PA00767. [↑](#footnote-ref-78)
79. ‘telle qu’interprétée par la Commission européenne.’ [↑](#footnote-ref-79)
80. Cour Administrative d’Appel de Lyon, 21 March 2017, case no. 14LY03096. [↑](#footnote-ref-80)
81. ‘rédigé en la forme prévue par la Commission européenne.’ [↑](#footnote-ref-81)
82. Cour Administrative d'Appel de Marseille, 28 March 2011, case no. 09MA02029. [↑](#footnote-ref-82)
83. Lisi et al (n 1), 45 et seq; André (n 1) 49 et s; Lamoureux and Rubio (n 1), 67 et seq. [↑](#footnote-ref-83)
84. Compare with the *Mastercard* case: Dobbs and Stefan, ‘EU soft law in the UK on the Eve of Brexit: (not) much ado about nothing’, this volume. [↑](#footnote-ref-84)
85. Lisi et al (n 1) 46. [↑](#footnote-ref-85)
86. Eliantonio, Korkea-aho and Stefan, this volume. [↑](#footnote-ref-86)
87. Lamoureux and Rubio (n 1) 68. [↑](#footnote-ref-87)
88. André (n 1) 51. [↑](#footnote-ref-88)
89. O Stefan, ‘Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance’ (2014) 21 *Maastricht Journal of European and Comparative Law* 359. [↑](#footnote-ref-89)
90. Conseil d’État, *Simplification et qualité du droit*, Annual Study 2016 (Paris, La documentation Française, 2016), www.vie-publique.fr/sites/default/files/rapport/pdf/164000610.pdf. [↑](#footnote-ref-90)
91. Eliantonio, this volume. [↑](#footnote-ref-91)