**Chapter 19**

**Soft Law and the Promise of Transparency in the Member States**

Oana Stefan[[1]](#footnote-1)\*

# I Introduction

This chapter assesses the informative function of EU soft law, and its potential to increase transparency in a multi-level governance context. Tagged as interpretative/decisional instruments[[2]](#footnote-2) or post-legislative guidance,[[3]](#footnote-3) many communications, notices, or guidelines are used to interpret laconic hard law instruments, such as the Treaty, directives or regulations, or to indicate the way in which EU institutions think appropriate to exercise their discretion. In certain sectors, the Commission chose to regulate through soft law because of the advantages it represented: its speedy adoption process and its potential to increase the flexibility, transparency, and legal certainty of decision making.[[4]](#footnote-4)

Ensuring transparency appears to be one of the main functions of such instruments, often expressly stated in the text of EU soft law.[[5]](#footnote-5) This is confirmed by interviews conducted within the SoLaR project: in the words of one UK interviewee, soft law is ‘not only a question of regulating, but a question of transparency, consistency, and certainty.’[[6]](#footnote-6) In a post-Lisbon context, this function of soft law becomes even more important, with Article 1 TEU stating that decisions should be taken as openly as possible to the citizen and Article 15 TFEU calling for EU institutions to conduct their work as openly as possible.

Transparency is often seen as a relation between an actor and a forum towards which it is transparent. Through its informative function, soft law is expected to enhance the links between institutions and individuals. This should be conducive to the creation of a climate of legal certainty, yet, in the multi-governance framework of the EU this is not always the case.[[7]](#footnote-7) Transparency is supposed to enhance also the connections between European and national authorities, thus creating the premises for a uniform and consistent application of European law.[[8]](#footnote-8) Finally, transparency – in its wider sense of ‘openness’ – includes participation in decision making, a point on which many authors agree that soft law ranks fairly low.[[9]](#footnote-9)

Even though widely proclaimed, the potential of soft law to increase transparency is relatively unexplored from an empirical point of view, with certain reports pointing to serious flaws.[[10]](#footnote-10) Soft law comes under a myriad of different names, shapes, and forms, and is issued according to variable procedures. Such instruments are often very long and technical, and understanding them requires considerable expertise. Furthermore, according to recent case law, soft law does not even have to be translated in all EU languages in order to be relied on against individuals.[[11]](#footnote-11) Finally, the effects that such instruments can produce in the absence of legally binding force are arguably unclear, rendering soft law presumably unenforceable and unpredictable.[[12]](#footnote-12) All these elements point to a mismatch: soft law, issued in order to enhance transparency in the activity of EU institutions, can also sometimes lack transparency or even confuse matters further.[[13]](#footnote-13) In this context, this chapter analyses whether the statement that soft law increases transparency is a rhetoric strategy or is confirmed by practice.

The chapter relies on the data collected through the SoLaR project, and on established case law of the ECJ. It first offers a conceptualisation of the principle of transparency in an EU soft law context. It then looks into issues relating to the access to soft law before analysing the relational aspect of transparency, namely the capacity to enhance, through EU soft law, the links between individuals, national, and EU authorities.

# II Transparency in a Soft Law Context

In its legal sense, transparency is a virtue,[[14]](#footnote-14) or a normative concept including standards by which the behaviour of public actors can be evaluated. It is a principle that was progressively integrated into EU law: first, through the work of the Court and, after the 1990s, through Treaty amendments and legislation. Alongside procedural rights and human rights, transparency is considered to be a ‘trust-enhancing principle,’[[15]](#footnote-15) that strengthens ‘the democratic character of the institutions and the trust of the public in the administration’.[[16]](#footnote-16) Such accounts promote an understanding of transparency as a value of good governance, yet, the notion has an inherent relational aspect which is also crucial. This aspect is materialised in links between transparency and other principles such as effectiveness, accountability, fairness and legitimacy, with academia warning against elevating transparency to the statute of an intrinsic value of policy formulation. In this vein, Heald emphasises the instrumental value of transparency, as a means to achieve other principles.[[17]](#footnote-17) There are important limitations attached to transparency, and its inappropriate use might sometimes undermine other objectives, such as effectiveness or privacy.[[18]](#footnote-18) Seeing transparency as a value in and of itself fails to capture the complex set of institutional relationships between the actor and the forum towards which it is transparent, between the observer, the observed act, and the method of observation.[[19]](#footnote-19) Meijer defines transparency as ‘the availability of information about an actor that allows other actors to monitor the workings or performance of the first actor,’[[20]](#footnote-20) emphasising the relational aspect of transparency. In a soft law context, this aspect is crucial for three reasons.

First, transparency is required by the law,[[21]](#footnote-21) and even more so in a post-Lisbon context. Article 15 TFEU makes it clear that, in the name of good governance, EU institutions need to conduct their work as open as possible. By laying down rules simplifying how discretion will be exercised, the Commission increases the transparency of its actions. The Commission often states that it is driven by transparency goals when issuing soft law instruments. For instance, the guidelines on fines, which set out the criteria used when applying fines to undertakings that are in breach of competition rules, serve the declared purpose of enhancing transparency and impartiality/objectivity in the activity of the Commission.[[22]](#footnote-22)

Second, soft law plays an important role in creating links between the institutions and individuals, natural or legal persons, thus enhancing legal certainty and transparency of administrative activity. Through these instruments, the Commission explains the existing law in a specific sector, presents its own views on the law and clarifies those provisions of an open and indeterminate character.[[23]](#footnote-23) In this context, Snyder talked about ‘regulation by publication’[[24]](#footnote-24) and Hoffman about ‘regulation by information’.[[25]](#footnote-25) The mechanism is as follows: the Commission publishes guidance and regulates without recourse to binding rules. Individuals would adjust their behaviour in accordance to the guidelines issued by the Commission in order to pre-empt potential challenges to their practices. The interpretative communications of the Commission were found to provide a ‘magna carta’[[26]](#footnote-26) for individuals, clarifying matters related to their rights and duties. Soft law is meant to help the individuals to understand what the law is, what the boundaries of their actions should be and what they should expect in case of infractions, increasing legal certainty.

Third, through its transparency function and ‘regulation by information’, EU soft law can strengthen the links between the EU institutions and the national authorities. In that regard, EU soft law constitutes a source of doctrine, guiding public administrations in their activities and, therefore, have the potential to increase the consistency of EU action. This can be observed in financial regulation, with Article 16(1) of the European Supervisory Authorities’ regulations stating that guidelines and recommendations shall be issued with a view to establishing consistent, efficient and effective supervisory practices, and to ensuring the common, uniform and consistent application of Union law.[[27]](#footnote-27)

Seeing transparency as a relation brings to the fore the distinction between openness and transparency, not always very clear in the literature.[[28]](#footnote-28) For some, openness relates mostly to the processes allowing us to see how organisations work, with Birkinshaw and Larsson arguing that transparency relates to the ability of the observer to understand and access the information delivered by the observed organisation.[[29]](#footnote-29) Heald explains that openness should be understood as a characteristic of an organisation, while ‘transparency also requires external receptors capable of processing the information made available.’[[30]](#footnote-30) Transparency and openness are thus similar concepts that both entail more than simply access to information. Curtin et al enlarged even more the notion of openness. While transparency includes access and availability of information in a general sense (revealing ‘the thinking behind a decision or the way in which a decision is made’),[[31]](#footnote-31) openness is broader and entails the possibility for citizens to ‘monitor and influence legislative and executive processes through access to information and access to decision-making arenas.’[[32]](#footnote-32) The notions of ‘vision’ and ‘voice’ are relevant in this context, and they relate to two facets of openness: transparency qua access to comprehensible information and participation of citizens in the decision making process.[[33]](#footnote-33)

Far from settling the theoretical debate, this chapter employs the notions of openness and transparency interchangeably, and deals only cursorily with the participation aspect. Some authors find that preparatory and informative soft law instruments fulfil an important function in the pre-legislative stage because it is through these means that the Parliament is informed and consulted on future legislation.[[34]](#footnote-34) Yet, the European Parliament is hardly involved in the soft law making process. [[35]](#footnote-35) Many soft law instruments are the result of consultation procedures. However, it has been argued that ‘consultative procedures are less rigorously adopted and structured in relation to rules whose binding nature is uncertain’,[[36]](#footnote-36) with research showing that soft law is sometimes issued according to procedures that completely lack transparency.[[37]](#footnote-37) Participation – and the lack of – is a key problem, challenging the argument that soft law enhances openness in the meaning of Article 15 TFEU if it is the result of opaque decision making procedures. More empirical research is needed to determine whether the level of involvement of stakeholders and of the European Parliament is satisfactory or not.[[38]](#footnote-38) This would involve a wider debate on legitimacy of soft law instruments, as addressed elsewhere in this volume.[[39]](#footnote-39)

Concerned primarily with the relational aspect of transparency/openness, this chapter only briefly deals with some issues related to public consultations. The focus is on the assessing the first facet of transparency/openness: that of access to comprehensible information that can improve the relationship between EU institutions and the individuals on the one hand, and EU institutions and national authorities on the other. The chapter considers first issues of physical access and comprehensibility of EU soft law before looking in the specificities of the relational aspect of transparency.

# III Access to Soft Law

This section conceives the standard of openness/transparency in the EU to include public access to information, as well as the pro-active institutional duty to ensure that information is provided in an accessible and understandable way.[[40]](#footnote-40) There are several barriers to access considered here, related to physical access, publication, as well as the sheer volume of soft law instruments. It is argued that translation issues, as well as issues related to clarity, legality, and quality of regulation might be more acute in a soft law context.

## *A Barriers to physical access to soft law*

Soft law of general application abound, are extremely varied, and not always consistently published, thereby challenging transparency. It has been argued that international soft law comes in an ‘infinite variety’[[41]](#footnote-41); EU soft law is no exception. The list of European soft law instruments starts with the fifth paragraph of Article 288 TFEU: ‘Recommendations and opinions shall have no binding force’.[[42]](#footnote-42) However, a vast array of other instruments also come under the heading of European soft legislation. The most frequent designations are recommendations, opinions and resolutions,[[43]](#footnote-43) but various other designations are employed too: declarations; green and white papers; conclusions; action papers; reports; programmes; communications; memoranda; statements of the representatives of the Member States meeting in the Council; inter-institutional agreements; codes of conduct; notices; guidelines; practices. This variety is reflected in the sample selected by SoLaR, as a quick glance at Annex I would show. The different headings, as well as the sheer volume of instruments might be confusing, as it might not be immediately obvious that various keywords do not indicate different degrees of legal effects.[[44]](#footnote-44) Civil servants interviewed by SoLaR believe that EU guidance can *decrease* transparency as too many instruments might obscure the interpretation of the law.[[45]](#footnote-45)

Furthermore, Article 297 TFEU does not require soft law instruments to be published in the Official Journal. Nonetheless, as noted in a report on soft law commissioned by the European Parliament, [[46]](#footnote-46) the Commission does publish soft law in the C series of the Official Journal, where the recommendations of the Commission and the Council are also published. However, some other instruments, published as COM documents, are available only online.[[47]](#footnote-47) An important number of the soft law instruments analysed by SoLaR are published in the C series of the Official Journal, yet some are published by the Publication Office under an ISBN and a DOI,[[48]](#footnote-48) while others are published on the website of the issuing agency (ESMA), and some others are published as COM documents.[[49]](#footnote-49) While the Commission now publishes annual reports in various areas, such reports might create confusion with regards to the rules applicable. Given the vast array of issues reported per annual volume, it might be a cumbersome task for individuals and national authorities to closely monitor these instruments in order to be up to date with latest rules that the Commission might decide to publish therein. It would be recommended that all these publication processes are better streamlined in order to facilitate access.

## *B Lost in Translation and Transposition: Issues Stemming from the Multi-Linguistic and Multi-Level Nature of the EU*

Translation issues are a classic problem in the multi-cultural and multi-linguistic EU.[[50]](#footnote-50) To counteract such problems, the ESAs translate EU financial guidance in all official languages.[[51]](#footnote-51) However, our research shows that the differences in translations might impair consistent application throughout Europe.[[52]](#footnote-52)

Given the lack of binding force of soft law, there is no requirement to publish such instruments in all the official languages. Some of the instruments dealt with by SoLaR were available in most of the languages,[[53]](#footnote-53) while others only in English.[[54]](#footnote-54) Thus, individuals may encounter difficulties in understanding or accessing the text relevant to their case. This happened in *PTC*, where untranslated soft law was applied by national authorities to a Polish telecommunications company.[[55]](#footnote-55) As mentioned by environmental officials interviewed by the Slovenian team, the language can be an issue also for the national authorities, not only the individuals.[[56]](#footnote-56) Specific ‘Brussels jargon’ might be a problem too, with an interviewee in the UK noting that the State aid Manual published by the Department for Business, Energy, and Industrial Strategy (BEIS)[[57]](#footnote-57) is a translation into common law terms of formal EU guidance written originally in English such as the Commission Notice on the Notion of Aid.[[58]](#footnote-58)

The multi-level governance structure of the EU and the need to implement nationally EU material might raise problems of transparency as well. While there is no obligation to transpose soft law, unsurprisingly, experiences are diverse, country and field-dependent.[[59]](#footnote-59) The Member States analysed by SoLaR chose between various options,[[60]](#footnote-60) which, to paraphrase Abbott et al.[[61]](#footnote-61) and Terpan,[[62]](#footnote-62) seem to reflect the continuum of ‘legalization.’ The variations go from full engagement with soft law in the text of national hard law to brief website references and no engagement at all.[[63]](#footnote-63) Following respective constitutional and administrative organisation rules, the transposition of EU soft law is done centrally, but also at the regional level, at the discretion of various authorities, such as in Italy where certain EU guidance stemming from the Habitas Directive[[64]](#footnote-64) was transposed into binding form only at the local level.[[65]](#footnote-65)

First, in certain areas, the transposition might follow traditional routes, and can be done through national soft law or even hard law. Examples of the former include the *Bundesanstalt fur Finanzdienstleistungsaufsicht* (BaFin) circulars (*Rundschreiben*) and information sheets (*Merkblatt*).[[66]](#footnote-66) Similarly, a French *circulaire*[[67]](#footnote-67) 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. Soft law is sometimes transposed into hard law, such as the the Banking Communication,[[68]](#footnote-68) transposed into the Slovenian legal order through an amendment to the Banking Act.[[69]](#footnote-69) Second, the text of soft law can be reproduced without citing the source in the text of national acts, leading to hybrid combinations. For instance, the French commercial code[[70]](#footnote-70) incorporates the thresholds of the *De minimis* notice.[[71]](#footnote-71) Third, EU soft law is included in national acts by reference to the original source, such as the Aviation Act of Slovenia referring to the Aviation Guidelines of the Commission.[[72]](#footnote-72) Fourth, EU soft law may simply be referred to on websites, or in national guides. Examples in this regard include the Dutch practice to issue national guidance ‘limited to a single phrase stating the Commission’s guidelines on a certain issue also apply to the corresponding national provision,’[[73]](#footnote-73) with websites mentioning quick references to the EU text. Similarly, a reference to EU’s Buying Social guide[[74]](#footnote-74) is included in the list of further reading appended to the Finnish Handbook of Government Procurements.[[75]](#footnote-75) Finally, the EU-inspired practice of questions and answers (Q&A) has been a valuable source of translating EU financial regulation soft law into the national legal orders, such as for instance the Q&A included in the Perimeter Guidance Manual[[76]](#footnote-76) by the UK’s Financial Conduct Authority (FCA).[[77]](#footnote-77) Fifth, soft law might not be included at all in the national legal order, but there would exist a certain faith in national authorities that they would know what rules to apply. Such category was confirmed by the case law, such as in the environmental sector in the UK, [[78]](#footnote-78) as well as by interviews, such as with Slovenian officials feeling bound by EU State aid guidance Slovenia committed to.[[79]](#footnote-79)

The question is, which of the above options would offer the maximum from the point of view of transparency and consistency. A traditional approach would be that the official reception, through incorporation in soft or (even better) hard law would be preferred. Yet, this might just not correspond to the idea that flexibility is one of the most sought-after features of soft law: what happens if guidance is amended at the EU level? Would the national level always respond with a swift change in the corresponding instrument? Seen in this light, potentially the best solution would be the inclusion of soft law by dynamic reference, in either national hard or soft law, to the original source – including an expectation that this means a reference to the up to date version of the instrument at any given time. This is confirmed by public consultations in the area of financial regulation in the UK, where, to keep the volume of the rules at a manageable level, the FCA (non-binding) handbook included only references to corresponding ESAs guidance. This appears to have been done in agreement with most stakeholders’ wishes, as summarised in a policy statement from the FCA, although a minority of respondents suggested additional signposts, and a few suggested integrating in the handbook the entirety of EU applicable provisions.[[80]](#footnote-80) Such approach would resonate with wider conclusions that too much information might impair transparency.[[81]](#footnote-81) What is more, integrating soft law by way of reference might even increase the weight of EU soft law, by showing that the rules are applicable internationally.

Another potential solution is the publication of Q&As, referring to EU guidance. Such practice, developed especially in EU financial regulation, has inspired national authorities to produce their own Q&As, potentially increasing transparency, especially for individuals who can find relevant information faster. In Germany, for instance, all interviewees confirmed that this practice is on the rise,[[82]](#footnote-82) while, in the UK, the FCA has also integrated Q&As.[[83]](#footnote-83) As mentioned by German interviewees, this might raise concerns of legitimacy, as well as of legal effects, as they are ‘softer’ than soft law. Similarly, the way in which ESAs Q&As are drafted is sometimes not transparent in itself, although they do involve national representatives.[[84]](#footnote-84) Perspectives from Italy show a totally different picture: the Italian regulatory authority rarely considers them, as they are perceived to be directed mostly at the financial institutions within their day-to-day operation.[[85]](#footnote-85)

## *C Issues related to the content of soft law*

The literature discussed this point at length and it was argued that the duty to communicate the law in a clear and transparent fashion is part of the good administration requirement provided for in Article 41, Charter of Fundamental Rights,[[86]](#footnote-86) and with legal certainty requiring that legal rules in force at a certain moment are clear and precise.[[87]](#footnote-87) Yet, the content of soft law instruments is often ambiguous, as criticised in front of the ECJ itself by applicants[[88]](#footnote-88) and Court members.[[89]](#footnote-89)

Similarly, according to the interviews of SoLaR, some soft law instruments lack in precision and clarity, which increases the potential for varying national interpretation.[[90]](#footnote-90) German civil servants criticised the lack of clarity of EU social soft law.[[91]](#footnote-91) Finnish respondents mentioned that environmental soft law is open to interpretation, hence difficult to apply in practice, [[92]](#footnote-92) and that the transparency of ECB guidance is even lower than that of the ESAs guidance.[[93]](#footnote-93) Conversely, another Finnish respondent linked the lack of transparency with the high specialisation of the financial sector.[[94]](#footnote-94) In the Netherlands, the perspective seems to be that in financial regulation soft law may increase transparency because market participants appreciate the clarity ‘public documents’ provide.[[95]](#footnote-95) Similar positive perspectives on the transparency of financial regulation soft law were expressed by Slovenian officials.[[96]](#footnote-96) French respondents were unanimous in maintaining that EU environmental guidance can clarify hard law.[[97]](#footnote-97)

The views are mixed and it is difficult to draw patterns regarding which instruments or practices are likely to lead to maximum transparency. In competition, an area where soft law is somewhat of an acquired taste, most interviewees agreed that soft law increases transparency and predictability.[[98]](#footnote-98) However, as mentioned by the Italian report, there is a difference between these statements and what actually happens in practice, given that legal effects are not recognised to EU guidance at the national level.[[99]](#footnote-99)

Transparency is also at a loss when soft law provisions conflict with hard law, partly because of the blurred line that divides the two categories of regulation. This is solved, in theory, by simply considering the hierarchy of norms: soft law would always be trumped by hard law. However, the overlap between hard and soft law is not always easy to grasp. Sometimes soft law interpreting hard law provisions creates new obligations and in such situations, soft law is generally considered *ultra vires* and is annulled by the Courts.[[100]](#footnote-100) As noted by Scott, in the case of vague, general hard law norms, it may ‘frequently be impossible to make a clear determination of where the boundaries of the existing obligation begin and end’.[[101]](#footnote-101) Even though a soft law instrument might not seem to introduce new legal obligations, it might promote a radical interpretation of an obligation provided in a regulation or a directive thus having in practice significant effects on the legal situation of individuals or Member States. Indeed, one can envisage that in the absence of the soft law instrument, the national or European authorities might interpret the specific obligation provided in the hard law provision in a more lenient or indeed more stringent way. Interviewees on the SoLaR project confirmed the existence of a very thin line between interpretation of the law and clarification of the law.[[102]](#footnote-102) Concerns regarding the legality of soft law have also been expressed, with Finnish interviewees raising matters regarding the competence of the ECB to adopt guidance.[[103]](#footnote-103) The issue of competence was mentioned also by a Dutch official talking about competition law[[104]](#footnote-104) and by a Slovenian official talking about environmental guidance,[[105]](#footnote-105) who wondered why an authority should adopt non-binding tools instead of adopting hard law.

The extremely popular Notice on the Notion of Aid illustrates the importance of these concerns. Issued in 2016, the notice is already amply relied on at the national level as shown by SoLaR research,[[106]](#footnote-106) and features regularly in the case law of the ECJ.[[107]](#footnote-107) It codifies the rather convoluted case law of the ECJ defining the notion of State aid. According to Article 107 (1) TFEU, support schemes granting a specific advantage to national industries and distort EU competition and trade are prohibited unless they are approved by the Commission, which enjoys discretion under Article 107 (2) and especially (3). The notice is controversial for two reasons. First, unlike other State aid soft law, this is an instrument issued within the ambit of Article 107 (1), which lays down the objective concept of State aid, an area where there is very little discretion for the Commission to exert or to explain. Second, the Commission is limited in its interpretation of Article 107 (1) by the case law of the Court, as is also acknowledged by the Preamble to the Notice. Yet, many paragraphs of the Notice refer solely to Commission practice. Thus, while the Notice must be commended for pooling a vast array of subtleties inherent within the notion of aid, its goal to promote transparency is undermined by the uneasy mix of codified case law, views of the Commission on issues not yet decided by the ECJ, and views of the Commission on aspects pertaining to its limited discretion.[[108]](#footnote-108)

While it can be argued that issues related to the clarity, the legality, and ultimately the quality of regulation are not soft-law specific, it is important to highlight that in a soft law context such issues are difficult to correct. This is because of the very high justiciability thresholds[[109]](#footnote-109) which make often impossible judicial review of such instruments, [[110]](#footnote-110) as well as because of the lack of wider participation in the process of adoption of soft law.

# IV The Relational Aspect of Transparency

The analysis now turns to limitations of transparency inherent in the relationship between the forum and its observers, as well as the relationship between transparency and other principles of law. As mentioned in Section II, soft law has the potential to enhance the links between individuals and institutions on the one hand and between EU and national institutions on the other. The first aspect of this relationship is participation in EU soft law making, which can concern private parties and national authorities alike. While legitimacy is not the primary focus of the analysis here,[[111]](#footnote-111) public consultations will be briefly discussed as a specific soft law making mechanism. The second aspect concerns the potential of ‘regulation by publication’ to increase legal certainty, equality, and consistent application of EU law, yet this is rather limited by the limited effects that soft law can produce in a multi-level governance setting.

## *A Consultations*

The literature shows that, even if it is true that the Commission undertakes lengthy public consultation before publishing soft law, such consultations are not always systematic, and there is little information as to how they occur.[[112]](#footnote-112) A study on the OMC showed the prevalence of technocratic and bureaucratic forms of representation, as opposed to substantive political or functional ones. This was connected to fairly limited levels of transparency at both the EU and the national level, with OMC processes taking place behind closed doors.[[113]](#footnote-113) As revealed also by Armstrong, in practice, the participation of various stakeholders’ rights in OMC processes were limited,[[114]](#footnote-114) resulting in uneven representation.

The lack of participation seems to be however, forum and sector dependent. Consultations on new soft law are frequently organised in competition and State aid law, as well as in other areas – such as energy, with consultation procedures required sometimes by hard law instruments.

In competition and State aid the process is relatively streamlined.[[115]](#footnote-115) This has been also observed by SoLaR interviewees, for instance, by Finnish official who tagged competition soft law as ‘democratic’ as drafted following discussions with Member State representatives.[[116]](#footnote-116) Only Italian respondents were marginally dissatisfied with the participatory aspect of EU soft law transparency (the view expressed was that the real problems in competition and State aid do not relate to soft law).[[117]](#footnote-117) It was considered that the text of the proposal submitted to public consultation is already a compromise, with consultations becoming a simple formality, not capable of influencing the content of the measure at issue. In relation to State aid, it was mentioned that it is impossible to check whether public consultations were taken into consideration by the Commission. While all documentation is available on the webpage of DG Comp, one would have to carry out extensive analysis to see how many of the arguments expressed by the participants made it in the final text.[[118]](#footnote-118)

With regards to environmental EU guidance, French[[119]](#footnote-119) and Slovenian[[120]](#footnote-120) officials interviewed by the SoLaR team agreed that the Commission does not involve Member States enough in the process of drafting, which in turn may impair transparency and consistency. Paradoxically, this lack of consultation does not deter compliance at the national level.[[121]](#footnote-121)

Consultations are not required only for soft law issued by the Commission, but also for soft law issued by EU agencies. For instance, consultations have to be organised, wherever appropriate, in order to issue guidance according to Article 16 of the ESAs Regulations. However, SoLaR interviews confirm participation concerns in relation to ESAs soft law. According to civil servants working in the area of financial regulation in Finland, it is unclear whether consultations have any actual effect, and, what is more, negotiations points are sometimes reopened in order to push for certain positions.[[122]](#footnote-122)

More research is needed in order to assess the robustness of these consultations and their relevance for the legitimacy of soft law. With regards to the relational aspect of transparency, of interest for this chapter, the views from national civil servants are very important, with a shared feeling emerging that national perspectives are not always taken into account when drafting EU soft law. This leads to the conclusion that EU soft law creates one-way relationships, with the Commission simply informing of its intentions but not always listening to national voices.

## *B Transparency and other principles of law*

Transparent ‘regulation by publication’ can, in principle, enhance legal certainty. This link is not always clear, with Birkinshaw finding that the notion of open government has been used in a pejorative sense, as provision of ‘access to information under non-legally binding codes that do not create rights’.[[123]](#footnote-123) Yet, this is not always the case, and the intensity of the link between transparency and legal certainty varies in function of the sectors and levels of EU governance.

In some sectors this link is particularly weak, given the judicial reluctance to recognise legal effects of soft law. This was found in relation to the Lisbon Agenda and the OMC, [[124]](#footnote-124) as well as for standalone soft law instruments issued in the social sphere, which do not necessarily accompany hard law.[[125]](#footnote-125) However, in other sectors, soft law can be enforced through the traditional judicial route, hence creating rights and obligations.[[126]](#footnote-126) In competition, soft law might be considered binding for the enacting institution. As laid down in cases such *Dansk Rørindustri*, by publishing soft law, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules under risk of being found to be in breach of the general principles of law such as equal treatment or the protection of legitimate expectations.[[127]](#footnote-127) Thus, binding effects for soft law are not automatically acknowledged by the Court, but are mediated through the operation of general principles of law. In this respect transparency is crucial. The case law discussing the legal effects of soft law cites together: transparency and legal certainty; transparency and objectivity; and transparency and the right to good administration as principles enhanced by the publication or amendment of soft law instruments.[[128]](#footnote-128)

Yet, even in competition, the link between transparency and legal certainty in relation to EU soft law is weaker at the national level of governance. In *Expedia,* the Court held that the national authorities and courts were not bound by the provisions of EU guidance, namely the *de minimis* notice in competition law.[[129]](#footnote-129) The French competition authority had complete discretion to take the thresholds mentioned therein into consideration and to judge that, despite a minimal coverage of the market, an agreement could still breach competition rules.[[130]](#footnote-130) As noted by the Court, the notice was meant to make transparent the manner in which *the Commission* applies Article 101 TFEU, [[131]](#footnote-131) while national authorities’ disregard of the notice could not interfere with principles such legitimate expectations and legal certainty.[[132]](#footnote-132) SoLaR research shows that, as a consequence*,* national authorities might have relaxed their approach towards EU guidance. If the UK competition authority has, for a long time, complied with EU guidance, it noted in *Mobility Scooters* that ‘notwithstanding the potential application of the Commission’s De minimis Notice, the [authority] will also consider a number of factors in determining whether the infringements are appreciable by reference to the actual circumstances of the agreement.’[[133]](#footnote-133)

SoLaR has not undertaken any empirical research into the perceptions of individuals and whether they believe the information provided through EU soft law can help enhance legal certainty. SoLaR research does reveal a related aspect, namely the impact of ‘regulation by publication’ on the relationship between national institutions and EU institutions, shedding light on whether transparency through soft law is conducive to equal and consistent application of EU law at the national level.

With regards to certain sectors, such as competition law, the officials interviewed were more optimistic with regards to the transparency function of soft law, and its potential to ensure uniform application of the law. Finnish interviewees noted, for instance, the value of soft law in increasing transparency and predictability.[[134]](#footnote-134) Similar perspectives transpire from some of the judgments analysed. In *Wye Valley,* in relation to the Commission’s guidance on environmental impact assessments, the UK Court of Appeal has stated ‘The objective of the guidance is twofold: first, ‘the document aims to improve understanding of what can be reasonably considered to be covered by certain project categories that have proved particularly difficult to interpret in practice’; secondly, it is intended to provide an overview of existing useful sources of information at EU level. [[135]](#footnote-135) While some of the judges interviewed were rather sceptical about the benefits of using soft law in court, they did acknowledge that soft law can render administrative action more transparent.[[136]](#footnote-136) Even though some courts, such as the French Conseil d’État, have never noted that guidelines can ensure the uniform application of EU law, French interviewees agreed that soft law can help with motivating both judicial and administrative decisions.[[137]](#footnote-137) Such views are not always shared, with a Finnish interviewee finding rather unclear how soft law should be used by national courts, and whether it is preferable to rely on EU case law instead.[[138]](#footnote-138)

Being transparent and engaging in ‘regulation by publication’ at the EU level cannot, in and of itself, guarantee that the relationships between EU institutions, national institutions and individuals are strengthened and that legitimate expectations, equality, and consistency in the application of the law are improved. For this to happen, EU soft law also needs to gain recognition at the national level. This can be achieved for instance if national authorities issued their own guidance documents, or expressly endorse Commission guidance (as pleaded also by Advocate General Kokott in Expedia).[[139]](#footnote-139) Some authorities already do this– for instance the French Competition Authority has established its own guidance on setting fines, which also aim at increasing transparency and explaining the different methodologies to the individuals,[[140]](#footnote-140) and the public procurement guidelines are ‘nationalised’ in Finland.[[141]](#footnote-141) Similarly, the Italian Competition Authority has also established its own guidance in competition and is committed to respect it, just as the Commission is self-bound by its soft law.[[142]](#footnote-142)

Another way to enhance EU ‘regulation by publication’ is as a result of hard law provisions, at the EU or the national levels. For example, ESA guidance is subject to the ‘comply or explain’ mechanism provided for in the regulations, with authors agreeing that ESMA is achieving convergence and consistency in the European financial supervision.[[143]](#footnote-143) Such success appears hard to attain for guidance issued by other agencies not following the ‘comply or explain’ framework, such as Agency for the Cooperation of Energy Regulators.[[144]](#footnote-144) National provisions can also act as intermediary. In the UK, Section 60(3) of the CA ’98, which advises authorities to ‘have regard to any relevant decision or statement of the [European] Commission’.[[145]](#footnote-145) Georgieva[[146]](#footnote-146) finds that the existence of such consistency obligation in the national legal order might make the application of soft law in court more likely, as confirmed in very recent case law from the UK. In *Mastercard,* the Court of Appeal noted, in relation to EU competition guidance that, although not legally binding and allowing for flexibility, it facilitates a consistency of approach across the Member States.[[147]](#footnote-147)

Finally, by simply acting in the spirit of sincere cooperation national authorities and courts might help EU soft law achieve its full potential for transparency. Interviews with judges confirmed that soft law is taken into account even if not mentioned by the parties because it is important ‘to do the right thing’ with regards to principles such as sincere cooperation and consistent interpretation.[[148]](#footnote-148) Asking to act in the spirit of sincere cooperation with the EU is not a tall order, as such cooperation already happens to a certain extent at the national level. In one UK financial regulation case, the High Court held that also national soft law should be taken into account in order to ‘ensure consistency between the [financial authority] and the court in the application of the market abuse regime’.[[149]](#footnote-149)

Sincere cooperation can also be empowered by the EU institutional setup, as for instance in financial regulation. As pointed out by Moloney, achieving consistency across the EU is the result of a compromise between, on the one hand, the soft character of ESMA guidance and ESMA’s intergovernmental setup.[[150]](#footnote-150) National authorities have thus the freedom to decide on national supervision, but also have the possibility to impose common rules by cooperating within ESMA. This insight brings us back to the discussion on consultations dealt with above, and highlights again the importance of a two-way relationship and dialogue between, on the one hand, the forum issuing soft law and, on the other, its addressees. Korkea-aho and Hartlapp argue in this volume that diversity is key in understanding the national reactions to soft law.[[151]](#footnote-151) This chapter submits the modest proposal that, by relying on the duty of sincere cooperation, soft law could help achieve a certain degree of unity in this diversity, provided its transparency function is taken seriously.[[152]](#footnote-152)

# V Conclusions

This chapter explored the transparency enhancing function of soft law, by looking at established case law of the ECJ and insights from the SoLaR project. While perspectives vary across the board, the picture emerging is that of a work in progress. The views from the case law and interviews show a certain trust in the potential of EU soft law to connect, through information, individuals, national, and EU institutions. This is strikingly illustrated, among others, by the warm welcome given to initiatives to codify and explain the case law of the Court through instruments such as the Notice on the Notion of State aid. Yet, there is a certain reluctance to acknowledge that in practice such potential for transparency is achieved. This is for several reasons, related to the quantity and quality of instruments, the way in which they are published, but also for reasons pertaining to core drawbacks of soft law, such as their lack of legitimacy or uncertain legal effects in a multi-level governance context. For some of these problems, there are quick-fixes, such as an improved accessibility to soft law, or better translation and dissemination practices. For others, a deeper reform is needed involving strengthening the links between the EU soft law issuing authorities and the national authorities and Courts. A great first step in this direction would be for the EU to engage in a dialogue with its Member States regarding soft law.[[153]](#footnote-153)

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