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SOFT LAW IN EUROPEAN UNION GOVERNANCE: BETWEEN ADMINISTRATIVE EFFICIENCY AND LEGAL CERTAINTY

Abstract: Using the European Commission's Code of Good Governance (CCG) as a case study, the article shows that the chief advantage of soft law lies in its flexibility and its ability to react quickly to political, social and economic change. Although not directly binding, such instruments serve as a useful reference when it comes to influencing Member States' actions, formulating public policies and paving the way for further legislation. The report assesses what soft law is, why it is so widely used and the policy areas in which it has emerged – from economic coordination and social policy to digital transformation, environmental measures and public health. This conversation also highlights the tensions of a growing reliance on soft law. On the one hand, they enable coordination and innovation; on the other, they risk avoiding parliamentary scrutiny and diluting accountability. The article examines the link between soft law and hard law, as well as its significance for the rule of law and standards of good governance.

The result is that soft law serves as an important complement to hard law, providing a flexible area in which cooperation and experimentation are possible. However, for this value to be realized, it must be supported by transparency, public involvement, and comprehensive performance measurement. Then, 'soft law' can make a decisive contribution to the legitimacy and effectiveness of governance in Europe.

Keywords: soft law, European Union, governance, legal certainty, European Semester.

DREPTUL SOFT ÎN GUVERNANȚA UNIUNII EUROPENE: ÎNTRE EFICIENȚA ADMINISTRATIVĂ ȘI SECURITATEA JURIDICĂ

Abstract: Folosind Codul de bună guvernanță al Comisiei Europene (CCG) ca studiu de caz, articolul arată că principalul avantaj al soft law-ului, pentru orice sistem de guvernanță, constă în flexibilitatea și rapiditatea cu care acesta poate reacționa la schimbările politice, sociale și economice. Deși nu au caracter obligatoriu, astfel de instrumente reprezintă un reper util atunci când vine vorba de influențarea acțiunilor statelor membre, formularea politicilor publice și pregătirea terenului pentru legislația ulterioară. Lucrarea analizează ce este soft law, motivele pentru care este utilizat

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pe scară largă și domeniile de politici în care acesta a devenit vizibil – de la coordonarea economică și politica socială la transformarea digitală, măsurile de mediu și sănătatea publică. Analiza evidențiază, de asemenea, tensiunile generate de recurgerea tot mai frecventă la soft law. Pe de o parte, aceste instrumente permit coordonarea și inovarea; pe de altă parte, riscă să evite controlul parlamentar și să dilueze responsabilitatea. Articolul examinează legătura dintre soft law și hard law, precum și semnificația acestora pentru statul de drept și pentru principiile bune guvernante.

Concluzia este că soft law reprezintă un important complement al legislației obligatorii, oferind un cadru flexibil pentru cooperare și experimentare. Totuși, valoarea sa depinde de transparență, implicarea publică și evaluarea constantă a performanței. Numai în aceste condiții soft law poate aduce o contribuție decisivă la legitimitatea și eficiența guvernantei europene.

Cuvinte-cheie: soft law, Uniunea Europeană, guvernanță, securitate juridică, Semestrul European.

INTRODUCTION

The EU relies on a mix of legal tools. Even when they are not formally binding, many of these instruments still have a strong impact on decision-making at both political and administrative levels. These are known as soft law and include recommendations, opinions, codes of conduct, guidelines, strategic orientations, or communications of the European institutions. Although they do not produce direct legal effects, they are used extensively to guide the behaviour of Member States and institutional actors.

The use of soft law has seen an accelerated expansion, especially in areas such as economic policy (e.g. the European Semester)¹, environmental protection (Green Deal, sustainable taxonomy)², fundamental rights (recommendations of the EU Agency for Fundamental Rights)³ and digitalisation (Commission guidelines on artificial intelligence). For example, within the framework of the European Semester, the European Commission issues specific recommendations for each Member State annually, which, although not binding, condition access to European funds or influence national policies⁴.

This proliferation of soft law instruments casts doubts on their legal status, the transparency of the drafting process, and the extent to which they ensure legal certainty. For example, academics and some national courts have criticized the lack of clear mechanisms for challenging or judicial review of Commission recommendations⁵.

On the other hand, supporters of soft law value one thing above all: speed with enough room to adjust. It is not trapped in the heavy procedures that come with hard law. In the spring of 2020, for example, the Commission steered national action through recommendations and communications rather than formal legislation. For lawyers, the daily question is the trade-off: keep flexibility, yet preserve legal certainty. The wide use

¹ European Commission, *Country-Specific Recommendations 2023*, available at: https://commission.europa.eu/publications/2023-european-semester-country-specific-recommendations-commission-recommendations_en (accessed 10.05.2025).

² European Commission, *Communication on the European Green Deal*, COM(2019) 640 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52019DC0640> (accessed 10.05.2025).

³ European Commission, *Ethics guidelines for trustworthy AI*, 2019, available at: <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai> (accessed 10.05.2025).

⁴ Amy Verdun, Jonathan Zeitlin, "Introduction: the European Semester as a new architecture of EU socio-economic governance in theory and practice", chapter in *EU Socio-Economic Governance since the Crisis*, Routledge, 2018, pp. 1-12.

⁵ F. Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" in *Modern Law Review*, 56(1), 1993, pp.19-54, doi: 10.1111/j.1468-2230.1993.tb02852.x

of these non-binding tools invites a closer look at their legitimacy and their real effects. The pages that follow examine that balance in EU governance, using concrete examples and the current legal framework.

APPLIED METHODS AND MATERIALS

This article explores the evolving role of soft law in European Union governance by addressing three core research questions:

To what extent does soft law enhance administrative efficiency in the EU's multilevel system?

What legal and democratic risks stem from its increasing use in sensitive policy areas?

How do soft law instruments influence national policymaking, particularly through mechanisms such as the European Semester?

To answer these questions, we applied a mixed methodological approach, combining doctrinal analysis with the study of institutional practice and relevant case law.

The study was carried out in four complementary directions: documentary analysis, doctrinal study, case analysis, and jurisprudential review. We examined the fundamental EU treaties - the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) - as well as official documents issued by the European Commission, the Council of the EU, and the European Parliament. Reports published by the European Court of Auditors and the European Ombudsman were also reviewed, particularly for their evaluation of transparency⁶, accountability, and the effects of non-binding instruments on administrative procedures⁷.

A substantial part of our methodology consisted in reviewing the specialized literature in EU law and public administration, with key contributions from authors such as Senden (2004)⁸, Snyder (1993)⁹, Tridimas (2018)¹⁰, and Dawson (2009)¹¹, who critically examine the legitimacy and legal effects of soft law instruments in the EU context.

To ground the theoretical framework in practice, we selected several illustrative case studies that represent different stages and sectors of soft law application:

- the European Semester, for its impact on economic and budgetary coordination¹² ¹³;
- the European Green Deal, as a strategic soft law framework in environmental gov-

⁶ European Ombudsman, *Annual Report 2024*, available at: <https://www.ombudsman.europa.eu/en/publication/en/202253>, (accessed 10.05.2025).

⁷ Bastian Blanke, Patrick A. M. Möllers (eds.), "EU Executive Governance: Institutions" in *Politics and Law*. Oxford: Hart Publishing, 2020, available at: <https://library.oapen.org/handle/20.500.12657/99196> (accessed 10.05.2025).

⁸ L. Senden, *Soft Law in European Community Law*, Oxford and Portland, Oregon: Hart Publishing, 2004 <https://pdfs.semanticscholar.org/a3f0/29a85d4a8b5b0f741996106b37cd4ac4b3b7.pdf>

⁹ F. Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" in *The Modern Law Review*, vol. 56(1), 1993, pp. 19-54, doi: 10.1111/j.1468-2230.1993.tb02852.x

¹⁰ T. Tridimas, *General Principles of EU Law*, 3rd edition, Oxford University Press, 2018

¹¹ M. Dawson, "Soft Law and the Rule of Law in the European Union: Revision or Redundancy?" in *Hertie School of Governance*, EUI Working Papers (RSCAS) 2009/24, 2009, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415003

¹² European Commission, *Country-Specific Recommendations 2023*, available at: https://commission.europa.eu/publications/2023-european-semester-country-specific-recommendations-commission-recommendations_en (accessed 10.05.2025).

¹³ Amy Verdun, Jonathan Zeitlin, "Introduction: the European Semester as a new architecture of EU socio-economic governance in theory and practice", chapter in *EU Socio-Economic Governance since the Crisis*, Routledge, 2018, pp. 1-12.

ernance¹⁴;

- the Ethics Guidelines for Trustworthy Artificial Intelligence, developed by the High-Level Expert Group on AI¹⁵.

The examples were picked to show how soft law works in different settings. Some of them come from areas where these instruments are already well established, while others show how they are starting to appear in new policy fields. In both cases, they guide decisions, influence how money is allocated, and shape the behaviour of institutions across the Union.

The analysis also turns to the case law of the Court of Justice. A key reference here is case C-322/88 Grimaldi. This judgment is still used to explain what recommendations mean in EU law and what their limits are. Read together with later cases, it shows that even non-binding acts can be taken into account by courts, can guide interpretation, and sometimes have indirect legal effects¹⁶.

The method combines three angles: what scholars have written, how EU institutions act in practice, and how the Court interprets their actions. Looking at these together gives a clearer basis for judging whether soft law is effective and legitimate, and what it means for governance. The aim is to stay close to real examples, without losing sight of the theory, and to show how these tools move in the space between quick action and legal certainty.

DISCUSSIONS AND RESULTS OBTAINED

1. The concept of soft law and the justification for its use

1.1. Definition and characteristics of soft law

The term soft law refers to those norms, principles, or instruments which, although not legally binding, have a notable impact on Member State behaviour and the European institutions. According to the literature¹⁷, soft law includes acts such as recommendations, opinions, codes of conduct, implementation guidelines, or Commission communications¹⁸. The defining characteristic is the lack of binding legal force; however, these instruments produce practical effects, as they guide behaviour, influence policies, and create legitimate expectations.

A lack of legal relevance does not define soft law. Rather, its key feature is the absence of enforceability through judicial means. They guide institutional behaviour, signal policy intentions, frame political debate, and even anticipate or prepare the ground for future binding legislation. Often, they create a form of normative pressure that encourages alignment without coercion, fostering the emergence of common standards and mutual expectations among stakeholders.

Moreover, soft law plays a subtle yet essential role in shaping the internal market, in ensuring the coherence of national reforms with EU objectives, and in consolidating a

¹⁴ European Commission, *Communication on the European Green Deal*, COM(2019) 640 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52019DC0640> (accessed 10.05.2025).

¹⁵ European Commission, *Ethics guidelines for trustworthy AI*, 2019, available at: <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai> (accessed 10.05.2025).

¹⁶ CJEU, C-322/88, Grimaldi v Fonds des maladies professionnelles [1989] ECR 4407, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61988CJ0322>, (accessed 10.05.2025).

¹⁷ LL. Senden, *Soft Law in European Community Law*, Oxford and Portland, Oregon: Hart Publishing, 2004 <https://pdfs.semanticscholar.org/a3f0/29a85d4a8b5b0f741996106b37cd4ac4b3b7.pdf>

¹⁸ F. Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" in *The Modern Law Review*, vol. 56(1), 1993, pp. 19–54, doi: 10.1111/j.1468-2230.1993.tb02852.x

shared administrative culture. Through its interpretative, guiding and adaptive functions, soft law has become an indispensable instrument within the European Union's multi-level system of governance.

In addition to its practical aspects, another important aspect is that we need to understand the symbolic and communicative power of soft law itself. Soft law documents are often written in simple, policy-specific language, which allows them to reach a wider audience than technical legislation. This gives the impression that they are not only "implying" people or states to do one thing or another – an illusion that has persisted for some time – but also serve as signals of where political will lies, opening up new avenues for more formal types of action.

In the meantime, they can raise expectations not only among Member States, but also among private actors, civil society organisations and citizens who are motivated by these instruments to shape their strategies or needs. In this sense, therefore, it can be seen that the normative value of soft law lies not only in its capacity to act indirectly on patterns of behaviour, but also [and more importantly,] in its capacity to set courses and set priorities, which sets the tone for the European debate. Soft law, even if it does not have a binding force of its own, acquires a legitimacy based on participation, persuasion and a gradual internalisation of common norms.

1.2. Fundamentals of the use of soft law in the European Union

The motivation for the use of soft law within the EU is linked to the institutional complexity, the diversity of national legal systems and the need for rapid reactions in dynamic political contexts. Soft law offers flexibility, is easier to develop and amend, does not require lengthy legislative procedures, and enables the Commission and the Council to send clear political signals without directly intervening in national legislation¹⁹. Another argument is the role of a "normative laboratory": soft law allows the testing of principles or guidelines that can later be enshrined in positive law²⁰.

In a system with multiple levels of governance and significant differences between the legal traditions of the Member States, soft law instruments offer a flexible and efficient solution. They allow for the rapid formulation of political or administrative responses, without triggering lengthy legislative processes. At the same time, soft law serves as a mechanism for normative experimentation, providing a preliminary framework for testing policies or legal solutions before they are enshrined in formal law.

In addition, soft law responds to a practical need to balance uniformity and diversity. The Union needs to find ways to coordinate policies across very different legal and political systems without undermining national sovereignty. Soft law instruments are particularly well suited to this task: they signal common priorities while leaving room for domestic adaptation. This flexibility explains why soft law has been widely used in areas such as economic governance, social policy and environmental protection, where rapid action is needed but consensus on binding measures is often difficult to achieve.

At the same time, the experimental nature of soft law allows the institutions to an-

¹⁹ F. Terpan, "Soft Law in the European Union—The Changing Nature of EU Law" in *European Law Journal*, vol. 21(1), 2015, pp. 68–96, doi: 10.1111/eulj.12090

²⁰ D. Chalmers, G. Davies, G. Monti, *European Union Law: Text and Materials*, Cambridge University Press, 2019, available at: https://assets.cambridge.org/97811076/64340/frontmatter/9781107664340_frontmatter.pdf

anticipate future challenges. By setting provisional standards or policy guidelines, the EU can test reactions, collect feedback and refine its approach before adopting binding rules. This 'learning by doing' function reduces the risk of rigid or ineffective legislation and increases the legitimacy of subsequent legal acts. In this way, soft law not only fills regulatory gaps but also strengthens the Union's capacity for adaptive governance.

1.3. Areas of application

The European Union has developed a wide range of soft law instruments in areas where legislative harmonisation is difficult or where a gradual and flexible approach is preferred. An emblematic example is the *European Semester*, through which the European Commission issues annual recommendations to the Member States on economic and budgetary policies. Although these acts are not legally binding²¹, they are closely linked to access to European funds and to public evaluations that can generate political pressure²².

In the area of *fundamental rights*, the European Union Agency for Fundamental Rights (FRA) contributes to shaping common standards by publishing guidelines and recommendations to the Member States. These cover topics such as non-discrimination, social inclusion or equal access to justice²³.

Another emerging area in which soft law plays a central role is that of *digitalisation* and *artificial intelligence*²⁴. Expert groups set up by the Commission²⁵ are developing ethical codes, guiding principles and technical guidelines aimed at ensuring the responsible development and use of emerging technologies, in the absence of a unified legislative framework.

Also, in *environmental policy*, the Union is promoting ambitious visions through strategies such as the *European Green Deal*. Although this document sets out clear political objectives regarding the ecological transition, its concrete implementation is largely achieved through communications, guidelines and recommendations of the Commission²⁶.

These examples demonstrate the ability of soft law to shape behaviours, guide public policies, and anticipate future regulations, becoming a key tool in the architecture of contemporary European governance.

In addition to these existing areas, soft law has expanded into those sensitive areas where the political landscape is changing particularly rapidly. For 'strategic planning' exercises (such as in migration and asylum policy), the Commission and the Council have used action plans, communications and guidelines to guide Member States' responses

²¹ European Commission, *Country-Specific Recommendations 2023*, available at: https://commission.europa.eu/publications/2023-european-semester-country-specific-recommendations-commission-recommendations_en (accessed 10.05.2025).

²² Amy Verdun, Jonathan Zeitlin, "Introduction: the European Semester as a new architecture of EU socio-economic governance in theory and practice", chapter in *EU Socio-Economic Governance since the Crisis*, Routledge, 2018, pp. 1-12.

²³ European Union Agency for Fundamental Rights, *Annual Reports and Thematic Reports*, available at: <https://fra.europa.eu/en/publication/2024/fundamental-rights-report-2024> (accessed 21.05.2025).

²⁴ European Commission, *Ethics guidelines for trustworthy AI*, 2019, available at: <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai> (accessed 10.05.2025).

²⁵ European Commission, *High-Level Expert Group on AI, Ethics Guidelines for Trustworthy Artificial Intelligence*, 2019, available at: <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai> (accessed 21.05.2025).

²⁶ European Commission, *Communication on the European Green Deal*, COM(2019) 640 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52019DC0640> (accessed 10.05.2025).

to a crisis when there is no binding consensus. Also, in the area of public health, soft law advice has been essential during the COVID-19 pandemic, including guidance on border control measures, vaccination strategy and the movement of essential workers²⁷.

These sectoral examples show that 'soft law' is not limited to peripheral issues, but covers areas central to European integration. Its value lies in the possibility of establishing a common frame of reference, allowing for uniform regulation where rules are otherwise difficult to agree politically. Encouraging voluntary convergence and dialogue tools gives the Union the means to make progress even where binding legal acts are not possible. This pragmatic adaptability goes some way to explaining why soft law has been a persistent feature of EU governance, functioning in many cases as both an interim measure and a testing ground for later efforts at hard law.

2. Soft law in the architecture of European Union governance

2.1. The role of soft law in the decision-making process of European institutions

Soft law is frequently used by the European institutions as a tool for guiding public policies and coordinating Member States in the absence of a sufficient legal basis for the adoption of binding acts. The European Commission constantly resorts to communications, guides, or recommendations to promote the convergence of national policies or to prepare the ground for future hard law regulations. For example, the Commission Communication on "A Strong Social Europe for Just Transitions"²⁸ contains a series of guidelines on the implementation of the European Pillar of Social Rights, without being legally binding character. The Council of the EU also issues recommendations on structural reforms within the European Semester²⁹, and the European Central Bank (ECB) frequently uses non-binding opinions and advice on the economic policies of Member States. These instruments help maintain strategic alignment and ensure coherence within the Community area³⁰.

2.2. The relationship between soft law and hard law

The relationship between soft law and hard law is complementary, but not without tensions. On the one hand, soft law can pave the way for the subsequent adoption of binding acts, contributing to the testing of ideas or the formulation of preliminary standards. For example, the recommendations on the sustainability of investments issued by the European Commission in 2018–2019 were followed by the adoption of Regulation (EU) 2020/852 on the taxonomy of sustainable activities³¹.

On the other hand, there is a risk that soft law instruments will be used to circum-

²⁷ R. Baratta, "EU Soft Law Instruments as a Tool to Tackle the COVID-19 Crisis: Looking at the Guidance" on Public Procurement Through the Prism of Solidarity", *European Papers*, 5(1), 2020. <https://search.datacite.org/works/10.15166/2499-8249/384>.

²⁸ European Commission, A strong social Europe for just transitions, COM(2020) 14 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0014> (accessed 11.06.2025).

²⁹ Amy Verdun, Jonathan Zeitlin, "Introduction: the European Semester as a new architecture of EU socio-economic governance in theory and practice", chapter in *EU Socio-Economic Governance since the Crisis*, Routledge, 2018, pp. 1-12.

³⁰ ECB, *Guide to consultation of the European Central Bank by national authorities*, 2025, p. 5-6., available at: <https://www.ecb.europa.eu/pub/pdf/other/ecb.consultationguide202505.en.pdf> (accessed 11.06.2025).

³¹ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, available at: <https://eur-lex.europa.eu/eli/reg/2020/852/oj/eng>

vent democratic control or to impose standards without a clear legal basis³², which may affect the democratic legitimacy of European decisions³³. Thus, doctrinaires emphasize the need for the use of soft law to be accompanied by transparency guarantees and evaluation mechanisms.

This phenomenon can undermine the democratic legitimacy of the EU decision-making process, especially if such acts produce significant political or administrative effects. It is therefore essential that the use of soft law is accompanied by guarantees of transparency, public consultation and clear mechanisms for assessing the impact on the rights and obligations of those concerned.

This dual nature of soft law – as an instrument of innovation and, at the same time, as a potential vector of legal ambiguity – requires a balanced governance that capitalizes on the advantages of this type of regulation, without compromising the foundations of the rule of law and participatory democracy.

Sitting at the crossroads between law and politics, soft law allows the EU institutions to respond quickly and pilot new practices. At the same time, it raises questions about accountability and weakening democratic checks. The real question is not whether to use soft law or not, but how it is applied. With open consultation, regular monitoring, and clear review mechanisms, the legitimacy of European governance can be enhanced. Without these safeguards, soft law risks being seen as a shortcut that overrides formal legislation. The future task is to strike a proper balance: to keep soft law as a flexible adjunct to hard law, while at the same time ensuring that transparency, participation, and legal certainty are firmly protected.

3. Soft law and the principles of good governance: transparency, participation, accountability

According to Article 41 of the Charter of Fundamental Rights of the European Union, every citizen has the right to good administration. This fundamental principle implies, among other things, access to clear information, the possibility of effective participation in the decision-making process and the obligation of authorities to provide adequate reasons for administrative acts concerning them. Soft law instruments, although lacking binding legal force, can significantly contribute to achieving these objectives by providing detailed guidelines and interpretative clarifications that guide institutional behaviour and complement existing rules³⁴.

A relevant example is the Code of Conduct on the Dialogue between Citizens and the European Institutions, drawn up by the European Commission. This document sets standards for accessible and inclusive communication, i.e., rules that promote clear, respectful and adapted expression of the linguistic and cultural diversity of Union citizens. In the same vein, the guidelines on public consultations (known as the Better Regulation Toolbox) provide a procedural framework designed to stimulate the participation of civil society in the formulation of European policies. These guidelines encourage transparen-

³² F. Terpan, F., "Soft Law in the European Union—The Changing Nature of EU Law" in *European Law Journal*, vol. 21(1), 2015, pp. 68–96, doi: 10.1111/eulj.12090

³³ M. Dawson, "Soft Law and the Rule of Law in the European Union: Revision or Redundancy?" in *Hertie School of Governance*, EUI Working Papers (RSCAS) 2009/24, 2009, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415003

³⁴ Charter of Fundamental Rights of the European Union, art. 41.

cy, dialogue and accountability of public decision-makers³⁵.

Soft law can therefore function as an effective vehicle for good administration and more transparent governance – governance understood as the set of processes, institutions and practices through which public decisions are made and policies are implemented. However, the effectiveness of these instruments depends on how they are used: they should not replace binding legal norms, but responsibly complement them, accompanied by mechanisms of institutional accountability – that is, clear procedures through which authorities can be held accountable for the way they apply or interpret these guidelines.

4. Administrative advantages of soft law

4.1. Flexibility and adaptability

One of the most appreciated advantages of soft law instruments is that they can be easily adapted to rapidly evolving political, social, or economic realities. Because they do not require the application of rigorous legislative procedures, such as those required for regulations or directives, these instruments allow the European institutions to react promptly when unforeseen or urgent situations arise.

In 2020, with the outbreak of the health crisis caused by COVID-19, the European Commission provided several non-binding guidelines on border management, the movement of medicines and the mobility of essential workers. These documents did not have binding legal value. Yet, in practice, Member States used them as benchmarks for action. At a time of uncertainty and pressure, such recommendations helped to maintain a certain coherence in national responses.

Soft law proves its value when speed is required. Without bureaucratic obstacles, it can be implemented rapidly. In addition, the fact that implementation is usually done through voluntary assumption provides a margin of flexibility to national authorities, avoiding conflicts with the domestic legal order and preserving the principle of subsidiarity³⁶.

This flexibility also allows soft law to develop in parallel with the issues it attempts to cover. Guidelines can be changed, recommendations fine-tuned, and codes of conduct rewritten without the baggage of a long, drawn-out legislative overhaul. This isn't just a convenience for the policymakers; it's a living organism that can adapt to new threats, new technologies, or crises. For the Member States, it leaves room to adapt solutions to their own systems, while still working within a common European framework. And, in principle, flexibility is not only a "technical plus" but also a political one, because to act together it does not have to impose uniform answers where divergence should be valued.

4.2. Rapidity in institutional reactions

Soft law allows for prompt administrative responses and provides an intermediate framework for action between regulatory inactivity and over-regulation. Thus, the European institutions can intervene quickly to guide the behaviour of public or private actors. For example, the Commission used soft law guidelines in the field of competition to clarify the applicability of Articles 101 and 102 of the Treaty on the Functioning of the European

³⁵ European Commission, *Better Regulation Toolbox*, 2021 edition, available at: https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation_en (accessed 11.06.2025).

³⁶ European Commission, *COVID-19: Guidelines on border management measures*, COM(2020) 1753 final, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0316\(03\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0316(03)) (accessed 11.06.2025).

Union (TFEU) during the energy crisis, avoiding administrative gridlock.

While not binding, such interventions have offered economic operators and national authorities a guiding interpretation signal in an unpredictable market where the rates are never constant. Rather than enact broad-based legislative changes, the Commission again opted to develop guidelines and proposals that enable cooperation between companies to guarantee energy supply, without violating the rules of competition. This has prevented both institutional inertia and the danger of taking measures that are too radical in such uncertain conditions.

This pragmatic use of soft law shows its mediating role: it does not apply strict dispositions or create a legal vacuum. Instead, it is more of a skeleton from which projects can be built, intended to ensure swift adjustment to economic realities, while safeguarding regulatory consistency and the core objectives of the European Union³⁷.

The speed with which soft law can be issued also strengthens the EU's ability to respond to crises in real time. In moments when political negotiations for binding legislation would take months or years, a recommendation or set of guidelines can be circulated within days. This does not replace the need for formal law, but it buys institutions and Member States valuable time to coordinate, prevent fragmentation, and prepare more durable solutions. In this sense, rapid soft law interventions act as a bridge: they stabilise the immediate situation and create space for longer-term legislative debate without leaving urgent problems unanswered.

4.3. Voluntary standardization and dissemination of good practices

Soft law promotes administrative convergence and the dissemination of good practices without imposing legal constraints. This approach is particularly useful in politically sensitive areas such as education, culture, or health, where Member States have broad competences and direct Union intervention is often limited by the principle of subsidiarity. In this context, non-binding instruments allow for gradual harmonisation, through dialogue and voluntary cooperation, without affecting national sovereignty.

For example, through the Erasmus+ programme and the Council Recommendation on key competences for lifelong learning (2018), the European Union promotes common standards in education in a non-coercive manner, stimulating the exchange of experience between different education systems and strengthening a culture of lifelong learning³⁸. The result is not uniformity, but rather the gradual approximation of educational visions and practices, in line with European values.

Similarly, codes of conduct developed in the digital field, such as the one on combating online disinformation adopted in 2022, provide a self-regulatory framework that actively involves digital platforms, civil society and national authorities³⁹. These mechanisms allow for the formulation of common commitments, monitoring of progress and gradual adjustment of the behaviour of the actors involved, in an environment marked by accelerated technological innovation and emerging risks.

³⁷ European Commission, *Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia*, 2022, available at: <https://competition-policy.ec.europa.eu> (accessed 11.06.2025).

³⁸ Council Recommendation of 22 May 2018 on key competencies for lifelong learning, OJ C 189, 4.6.2018, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2018_189_R_0001

³⁹ European Commission, *Strengthened Code of Practice on Disinformation*, 2022, available at: <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation> (accessed 11.06.2025).

Such instruments create the conditions for gradual action, favour institutional learning – that is, the progressive adaptation of administrations to new challenges – and facilitate administrative accommodation without imposing sudden or radical reforms. Through this approach, soft law becomes an instrument of discreet but effective normative construction in areas of shared or limited competence.

5. Legal challenges and risks to legal certainty

5.1. Lack of binding character and legal uncertainty

Although flexibility is one of the undeniable strengths of soft law, this very feature can generate significant difficulties in practice. The non-binding nature of these instruments raises questions about their concrete applicability, the way of interpretation and, above all, the legal force they may have in a given context.

From the perspective of the principle of legal certainty, which is fundamental to any democratic system, citizens must be able to anticipate, within reasonable limits, the legal consequences of their behaviour in relation to public authorities. In other words, the rules – regardless of their form – must be clear, predictable and accessible. Or, when the European institutions issue recommendations, guides, or codes of conduct without clearly specifying the legal status of these documents, the risk of normative ambiguity arises⁴⁰.

This lack of clarity can lead to confusion not only among national authorities, who have to decide to what extent they comply with these guidelines, but also among the direct addressees (such as businesses or public administrations) and indirect addressees (citizens) of European policies. In the absence of a firm demarcation between what is recommended and what is required, there is a risk of divergent interpretations, uneven application between Member States and an impact on trust in the European institutions.

Therefore, to maintain the balance between administrative efficiency and the legal protection of citizens, the use of soft law instruments must be accompanied by explicit clarifications on their nature and effects, so that they do not become sources of uncertainty in the Union's legal order.

5.2. Absence of procedural guarantees: challenge, justiciability

Soft law instruments are not usually susceptible to challenge before the European courts, precisely because, by their nature, they do not produce direct legal effects. They do not create rights or obligations in the strict sense and, therefore, cannot be subject to classical judicial review. In the case law of the Court of Justice of the European Union, this line is drawn: in Case C-322/88, *Grimaldi*, the Court established that recommendations can only be used as instruments of interpretation or guidance, but cannot be challenged as such before the court⁴¹.

This fact, however, highlights a sensitive point: the absence of a systematic arrangement for the legal scrutiny of matters that, in substance, may have important implications for the behaviour of institutions or businesses, or even for administrative decisions taken by Member States. Even where they do not constitute formal obligations, such instruments can have real pressure effects, particularly when tied to public reporting, funding

⁴⁰ European Commission, *Strengthened Code of Practice on Disinformation*, 2022, available at: <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation> (accessed 11.06.2025).

⁴¹ CJEU, C-322/88, *Grimaldi v Fonds des maladies professionnelles* [1989] ECR 4407, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61988CJ0322>, (accessed 10.05.2025).

access, or other forms of conditionalities for implementation⁴².

It can also reduce the quality of debate in decision-making. Many of these acts are adopted without an open consultation and without the real involvement of citizens or civil society. In a democratic system, the right to participate in the elaboration of norms, including those beyond what is established by Article 11 of the Treaty on European Union, plays an important role in ensuring not only formal legitimacy for decisions but also support and confidence.

The absence of explicit rules or guidelines concerning the adoption of soft law instruments may make these appear as technocratic measures unrelated to democratic control, with no institutional responsibilities for adopting them.

5.3. Possible tensions with the rule of law

Another major risk derives from the possibility of the abusive use of soft law to shape policies or standards without a clear legal basis, thus bypassing the democratic control exercised by the European Parliament or national parliaments. This practice can undermine the principle of separation of powers and the legality of administrative acts⁴³. For example, some codes of conduct in the digital field have been adopted through limited consultations, involving private platforms in a process with low democratic legitimacy. The doctrine⁴⁴ thus underlines the need for closer monitoring of the effects of soft law and its integration into the mechanisms of accountability and evaluation of good European governance⁴⁵.

These risks also point to a deeper concern: the increasing usurpation of decision-making power by elected bodies by the executive or technocratic forces. While soft law can be useful, excessive reliance on it could undermine the role of parliament in setting rules and could also reduce the possibility of genuine public debate. If people feel that key policies are formulated in documents that are not openly debated and cannot be legally challenged, trust in the Union institutions may decline. To avoid this, soft law will need to respect the principles of transparency and legality, not replacing a democratic form of law-making, but serving as a complementary means.

6. Case study: European Semester recommendations

6.1. Legal nature of the recommendations

The European Semester is a mechanism for coordinating the economic and budgetary policies of the Member States of the European Union, introduced in 2011 in response to the global financial crisis. It aims to strengthen fiscal discipline and promote economic convergence between Member States, within a preventive framework that anticipates possible macroeconomic imbalances. The central element of this process is the coun-

⁴² S. Prechal, *Directives in European Community Law: A Study of Directives and their Enforcement by National Courts*, Oxford University Press, 2005, available at: <https://global.oup.com/academic/product/directives-in-ec-law-9780198268321?cc=ro&lang=en&> (accessed 11.06.2025)

⁴³ M. Eliantonio, E. Korkea-aho, "Democratic legitimacy and soft law in the EU legal order" in *Journal of European Contemporary Research*, 17(1), 2024, pp. 43–65, available at: <https://www.jcer.net/index.php/jcer/article/view/1139>

⁴⁴ Ibidem 20, Ibidem 33

⁴⁵ D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, Oxford University Press, 2009 available at: <https://global.oup.com/academic/product/executive-power-of-the-european-union-9780199264094?cc=ro&lang=en&> (accessed 12.06.2025).

try-specific recommendations that the European Commission⁴⁶ formulates annually for each Member State, following a detailed analysis of economic indicators, national reforms and budgetary strategies⁴⁷.

Although these recommendations are not legally binding, they are an integral part of the macroeconomic and fiscal surveillance process and function, in fact, as powerful instruments for influencing public policies. The Commission does not formally impose measures, but sets out clear directions for action, which are subsequently assessed within the annual monitoring cycle. The Court of Justice of the European Union has confirmed, moreover, that recommendations adopted under Article 121(2) TFEU cannot be challenged before the courts, precisely because they are not binding. However, they can have considerable practical effects, in particular from a political, budgetary, or reputational point of view⁴⁸.

Their importance has increased significantly with their integration into European financing mechanisms, such as the Recovery and Resilience Mechanism. In this context, compliance with the recommendations becomes an essential criterion for access to European funds. Thus, even if formally they are only indicative, the recommendations acquire a concrete influence on national political decisions, indirectly conditioning the adoption of economic reforms or measures. This example highlights how soft law can become, in practice, an effective means of governance with real normative and financial impact.

6.2. The Impact on National Policies

The Commission's recommendations have, in many cases, led to changes in national legislation, without this process being the result of any formal legal constraint. For example, Italy, Spain and France have adopted tax or labour market reforms under the influence of Semester recommendations, to avoid reputational sanctions or pressure from financial markets⁴⁹. According to comparative analyses carried out by the European Parliament, the degree of implementation of the recommendations varies considerably from one Member State to another, but their influence on the political agenda is indisputable⁵⁰. This illustrates that, although not legally binding, the recommendations function as powerful instruments of economic governance.

6.3. Reception at the level of public administrations in the Member States

National public administrations tend to perceive the recommendations issued under the European Semester as "semi-binding", even if, formally, they are not legally binding. This perception derives in particular from the fact that the recommendations are often accompanied by periodic evaluations, progress reports and, in some cases, financial

⁴⁶ Ibidem 4

⁴⁷ European Commission, *2025 European Semester: Country Specific Recommendations / Commission Recommendations*, available at: https://commission.europa.eu/publications/2025-european-semester-country-specific-recommendations-commission-recommendations_en (accessed 12.06.2025).

⁴⁸ Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, available at: <https://eur-lex.europa.eu/eli/reg/2021/241/oj/eng> (accessed 12.06.2025).

⁴⁹ J. Zeitlin, B. Vanhercke, "Socializing the European Semester: EU Social and Economic Policy Coordination in Crisis and Beyond" in *Journal of European Public Policy*, vol. 25(2), 2018, pp. 149–174, <https://doi.org/10.1080/13501763.2017.1363269>

⁵⁰ European Parliament, *Implementation of Country-Specific Recommendations*, 2023 Study, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/741525/IPOL_STU\(2023\)741525_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/741525/IPOL_STU(2023)741525_EN.pdf) (accessed 12.06.2025).

conditionality. As a result, national authorities frequently adopt a voluntary compliance behaviour, but with a well-calculated strategic dimension – in the sense that they choose to follow the Commission's guidelines to avoid possible institutional conflicts, losses of external credibility, or limitations in accessing European funds⁵¹.

This dynamic reflects more than just a power relationship. It also reveals a form of functional collaboration, where the Member State adjusts its domestic policies to match informally agreed but closely monitored priorities. A report by the European Fiscal Board shows that, although some authorities are critical of the non-binding nature of these instruments and the lack of legal clarity, they recognise the value of the Semester as a mechanism for anchoring structural reforms in national policies⁵².

In practice, this anchoring functions as a catalyst for reforms that, in the absence of external pressure, could be postponed or blocked for domestic political reasons. Thus, soft law not only guides the decision but also creates a framework of mutual accountability between the European and national levels, which gives the process a functional, if not a formal, legal legitimacy.

CONCLUSIONS

Soft law has emerged as a key weapon in the arsenal of European governance. Its capacity to provide quick, flexible, and tailored responses to difficult integration problems has greatly appealed to EU institutions. This article has demonstrated the contribution of soft law to the effectiveness of administration, be it facilitating cross-sectoral coordination, allowing speedy institutional responses, or encouraging a spontaneous policy convergence on voluntary grounds among Member States.

But there are crucial risks to these very practical advantages. Soft law's non-binding nature, the lack of judicial review, and the uncertainty regarding its legal implications challenge legal certainty and democratic legitimacy. These risks are most pronounced when soft law is applied in politically sensitive fields, without transparency or public debate. In these contexts, the distinction between recommendation and obligation is increasingly difficult to maintain.

From the point of view of a legal scholar, this tension between the flexibility of soft law and the requirement for justiciability is not just theoretical. From here, it becomes evident in the daily living of EU policymaking, where you must balance efficiency and accountability every day. Although soft law can stimulate innovation and cooperation, it also highlights vulnerabilities in the EU's legal and institutional architecture.

The research has pointed towards the uneven impact of (soft) law on domestic policy transfer, with the European Semester standing out as a central case. While its recommendations do not have binding force in the formal sense, they are powerful weapons that exert enormous pressure on governments and influence them in their reforms. In other cases, for example, in digital or environmental therapies, there are arguments for a more comprehensive comparative analysis of soft law and its function in different policy fields.

Although the rapid case of the European Semester has been given special consid-

⁵¹ A. Bíró-Nagy, G. Laki, "Non-compulsory compliance with the EU: Implementation of European Semester recommendations in the Visegrad countries", in *Intersections: East European Journal of Society and Politics*, 8(1), 2021, pp. 149–169.

⁵² European Fiscal Board, *Annual Report 2023*, available at: <https://ideas.repec.org/p/aon/annual/2023.html> (accessed 12.06.2025).

eration in this analysis, owing to its maturity and institutional significance, other policy fields contain an equally broad array of soft law instruments. Initiatives like those of the European Green Deal or the AI Ethics Guidelines, even if under construction (or less constraining) in their impact effects, evidence a progressive expansion of their normative interferences beyond economic governance.

Given this, the Semester is one of the best examples available when it comes to examining how soft law can make a difference in national policy direction outside the legal realm and so provides us with a more solid prism for thinking about its transformative power or lack thereof.

At the end of the day, making soft law legitimate means designing a governance process that puts administrative flexibility together with proper procedural guarantees. Soft law instruments need to have attached mechanisms of transparency, public involvement, and evaluation that are able to measure their real impact. Only by striking this balance, soft law will be able to live up to its potential as a constructive, accountable, and democratic element of European integration.

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