

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

1806 Note on the use of soft law instruments under EU law, in particular in the area of freedom, security and justice, and its impact on fundamental rights, democracy and the rule of law

9 April 2018

Background and objective of this note

The Meijers Committee notes an increase in recent years of the use of soft law instruments in EU law in areas relevant to fundamental rights, democracy and the rule of law.¹ Soft law instruments may have different denominations, such as opinions, recommendations, guidelines or best practices.

This development deserves attention, because:

- On the one hand, the various types of soft law instruments under EU law may not be binding, but they may have legal effects requiring EU institutions, authorities of the Member States and (possibly) national courts to take them into account. The CJEU confirms this in the case law starting with *Grimaldi*, as explained below.
- On the other hand, EU law does not provide for safeguards ensuring the involvement of democratically chosen bodies or interested citizens or organisations in the adoption of these instruments. It does not guarantee any influence on its substance either.

This is in particular problematic in the areas of EU law where fundamental rights of individuals are most at stake: the area of freedom, security and justice, and related areas. The Meijers Committee holds the view that soft law instruments may play a useful role in the implementation of EU laws and policies in the areas mentioned. However, the use of these instruments should be subject to appropriate safeguards, enabling parliamentary influence (by the European Parliament as well as by national parliaments) and ensuring transparency. These safeguards should be specifically designed to protect the rights of the individual. Soft law instruments should be sufficiently precise, to allow for judicial control on the use of these instruments.

This note discusses the increased use of soft law instruments in the domain of freedom, security and justice and concludes with recommendations on appropriate safeguards, relating to procedural matters, to substance and to review. It aims to contribute to a fundamental discussion on these instruments within the relevant bodies of the Union and the Member States.

Typology of instruments in EU law, introducing soft law instruments

Article 288 TFEU distinguishes regulations, directives, decisions, recommendations and opinions. Regulations, directives and decisions are binding while recommendations and opinions are not legally binding instruments.

The binding instruments (regulation, directive or decision) are in most cases adopted under the ordinary legislative procedure (joint adoption by the European Parliament and the Council on the basis of a proposal from the Commission). They can be implemented or further specified at EU level

¹As, AG Bobek notes, “the changing legislative landscape of (not only) EU law [...] is marked by a proliferation of various soft law instruments”, Opinion in Case C-16/16P, *Belgium v. Commission*, ECLI:EU:C:2017:959.

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by delegated and implementing acts, in accordance with Articles 290 and 291 TFEU. These are also binding instruments of EU law. They must be based on an explicit competence provided for in a regulation, a directive or a decision. Examples of such competences can be found in Art 12 (8) and Art 42 (8) and (9) of the General Data Protection Regulation. These are just examples of a widespread use of delegated and implementing acts. Procedural rules for their adoption are included in and on the basis of Articles 290 and 291 TFEU, already mentioned.

In addition, non-binding instruments are available for the implementation or further specification of binding EU law. Non-binding instruments are also adopted at EU level, without a specific mandate in the Treaties, in a regulation, a directive or a decision.

These non-binding or soft law instruments are the subject of this note and are introduced as follows.

1. Opinions and recommendations as mentioned in Article 288 TFEU are non-binding. Their aim is to exhort and to persuade.² However, the fact that they are not binding and excluded from review by the CJEU does not mean that they lack legal effect. This will be discussed below.
2. Their validity and interpretation can be part of a preliminary ruling under Article 267 TFEU,³ but they are excluded from judicial review by the CJEU in Article 263 TFEU.
3. In exceptional cases, this judicial review is nevertheless possible, if an “act, by reason of its content, does not constitute a genuine recommendation.”⁴
4. The Treaties do not contain procedural rules as to their adoption.
5. There is one exception: Recommendations adopted by the Council under Art 292 TFEU (not further discussed in our note). Article 292 states that in those cases, normally, the Council acts upon a Commission proposal. Article 292 TFEU also mentions that the Commission may adopt recommendations, but without any further specification on procedure.
6. The European Commission and other EU bodies do not only adopt opinions and recommendations, but also other documents which can be called soft law, such as guidelines, communications, codes of conduct, notices, inter-institutional agreements, conclusions, statements, resolutions,⁵ as well as working documents/non papers and best practices. These instruments are often used but they do not have a basis in the Treaties.
7. The Meijers Committee is not aware of any difference in legal effect between opinions, and recommendations, on the one hand, and guidelines, communications, codes of conduct, notices, inter-institutional agreements, conclusions, statements and resolutions, on the other hand.
8. However, we assume that “best practices” do not have a similar legal effect.⁶ These are examples that could help the application of the law, not more. Also working documents and non-papers will presumably lack legal effect, simply because they are of an informal nature.
9. A further distinction that could be made concerns, on the one hand, soft law instruments of the Commission (or other bodies) which are based on a mandate in a regulation, directive or decision and, on the other hand, instruments without explicit (legal) basis. The latter

²Case C-16/16P, Belgium v. Commission, ECLI:EU:C:2018:79, at 26.

³Case C-16/16P, Belgium v. Commission, ECLI:EU:C:2018:79, at 44.

⁴Case C-16/16P, Belgium v. Commission, ECLI:EU:C:2018:79, at 29

⁵All mentioned by AG Bobek, Opinion in C-16/16P, at 81.

⁶Best practices are a category of soft law instruments which is, e.g., included as separate category in Article 70 GDPR.

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instruments are a method for the Commission to give effect to its general mandate under Article 17 TEU, as guardian of the Treaties. Recommendations without a specific legal basis in a regulation, directive or decision refer usually to Article 292 TFEU, which states that the Commission may adopt recommendations.

10. Finally, in the literature a different distinction can be found, between soft law instruments of a merely interpretative nature, instruments with a more decisive nature (explaining how the Commission uses its own discretionary power) and instruments which are meant to guide national interpretation.⁷

The legal effect of soft law instruments

Soft law instruments often include wording which suggest a (certain) binding nature. One finds wording comparable to EU directives (or, where relevant, regulations or decisions). Whereas directives usually lay down that Member States “shall”, non-binding instruments provide that Member States “should” take action. The same terminology is used in recitals of binding instruments. Although soft law instruments are not formally binding, this practice is in line with the *Grimaldi-case* law of the CJEU. The following quote is taken from the judgement in *Alessini a.o.*:⁸

In that connection, it should be borne in mind that the Court has consistently held that, even if recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on before a national court, they are not without any legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes brought before them, in particular where such recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding provisions of EU law (see Case C-322/88 *Grimaldi* [1989] ECR 4407, paragraphs 7, 16 and 18, and Case C-207/01 *Altair Chimica* [2003] ECR I-8875, paragraph 41).

The Court also ruled, in the same case, that, as a result of the principle of loyal cooperation, national courts should interpret issues before them as much as possible in conformity with an opinion or recommendation.

The Meijers Committee identifies various types of legal effects:⁹

(i) The legal effects as a result of reliance and legitimate expectations;

- A body will be bound itself by guidance it gives.
- Self-bindingness possibly extends to the members of an EU body, for reasons of legitimate expectations. Example: Guidance by the European Data Protection Board will bind the national data protection authorities which are the members of this Board.
- To a lesser extent: national authorities and courts, bound by Commission guidance.
- This is all closely related to the principle of loyal cooperation as laid down in Article 4(3) TEU.

(ii) their interpretative role;

⁷ There are variations of this distinction and the distinction, though very useful, is not always complete. Reference can be made to Linda A.J. Senden, “Soft law and its implications for institutional balance in the EC”, *Utrecht Law Review*, Volume 1, Issue 2 (December) 2005.

⁸ Joint cases C-317/08 to C-320/08, para 40.

⁹ This is in line with the categories identified in the Opinion of AG Bobek in Case C-16/16P, *Belgium v. Commission*, ECLI:EU:C:2017:959, at 89.

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- In the national legal context, in vertical situations (the relation between the government and the individual), as well as – to a lesser extent – in horizontal situations (the relation between private parties). There may be a parallel with the direct effect of directives.¹⁰

and (iii) the potential of recommendations to generate parallel sets of rules.

- This may pre-empt the legislative process and thus have an impact on the institutional balance, including democratic safeguards, and the protection of individuals under the rule of law.

Examples

Some examples are provided with a view to illustrate some of the risks of the use of soft law instruments for the individuals' fundamental rights.

- Commission Recommendation of 27.11.2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, 2013/C 378/02 final. This Recommendation calls upon Member States to strengthen certain procedural rights of vulnerable suspects or accused persons in criminal proceedings and of vulnerable persons who are subject to European arrest warrant proceedings.¹¹ Legal basis: Article 292 TFEU.
- Commission Recommendation of 27.11.2013 on the right to legal aid in criminal proceedings (C(2013) 8179/2). This recommendation aims to reinforce the right to legal aid for suspects or accused persons in criminal proceedings. Legal basis: Article 292 TFEU.¹²
- Commission recommendation of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey, C(2015)9490. The Recommendation establishes, e.g. a Standardised humanitarian admission procedure. Legal basis: Article 292 TFEU.
- Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C/2017/1600, OJ L 66/15. This recommendation is addressed to the Member States and incites them to reinforce the mechanisms to ensure that illegal immigrants are returned. The requirements are formulated in a precise manner, and include, e.g., matters of procedural and substantive administrative law. The direct impact on individuals is evident. Legal basis: Article 292 TFEU.
- Commission Recommendation of 12.5.2017 on proportionate police checks and police cooperation in the Schengen area (C(2017) 3349 final). This recommendation is addressed to the Member States and incites them to intensify certain police activities, sometimes with direct impact on individuals. Legal basis: Article 292 TFEU.
- Commission recommendation of 27.9.2017 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks, C(2017)6506. Legal basis: Article 292 TFEU.
- Commission Recommendation (EU) 2017/1803 of 3 October 2017 on enhancing legal pathways for persons in need of international protection, OJ 2017 L 259/21. This

¹⁰ Directives which are not (yet) implemented in national law have direct effect, binding governments. In horizontal relations, this binding effect is not (fully) recognised.

¹¹ Text from Art 1.1 of Recommendation. This recommendation was also discussed in CM Note on the package of Fair trial Rights, 18 March 2014, CM 1402.

¹² This recommendation was also discussed in CM Note on the package of Fair trial Rights, 18 March 2014, CM 1402

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recommendation is addressed to the Member States and increase their resettlement efforts. The impact on individuals is evident, but mainly indirect. Legal basis: Article 292 TFEU.

- Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online, C(2018) 1177 final. This recommendation is addressed to the Member States and to hosting service providers. This instrument “encourages” service providers to remove or disable access to content on line. Point 1 of the recommendation underlines that this should be done “in full compliance with the Charter,” and in particular with the freedom of expression. Legal basis: Article 292 TFEU.
- Various guidance instruments to be adopted on the basis of the General Data Protection Regulation, by the European Data Protection Board. These instruments are primarily directed to the national data protection authorities, affecting their margin of maneuver. They also provide for an authoritative interpretation which will be taken into account in the national legal contexts by various actors. This may directly affect the exercise of fundamental rights. Legal basis: Article 70 of Regulation 2016/679.
- Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification; COM(2014) 210 final. The communication gives an interpretation of various provisions of the directive, also in light of the case law of the CJEU. Legal basis: none.
- Guidance of the Council on the “handling of documents internal to the Council”, Document n°11336/11. This document explains, e.g., how the Council applies certain exceptions to the right to access to documents under Article 15 TFEU and Regulation 1049/2001. It explains how “LIMITE” documents should be handled, but does not contain criteria for the qualification of documents as “LIMITE.” This may directly affect the exercise of the fundamental right of access to information of the institutions. Main problem here is the absence of substantive guidance, allowing individuals to understand their rights. Legal basis: none.

Considerations

The nature of soft law instruments as mentioned above may be ambiguous, but it is nevertheless clear:

- EU soft law instruments may have a legal effect, yet they are not binding. The CJEU does not often refer to the legal effect of soft law instruments in its own rulings. However, the Court does refer in its case law to interpretations provided in guidance at EU level.
- In the review by national Courts, EU soft law will necessarily play a role, as a result of the principle of loyal cooperation (see above). It helps national courts to comply with EU law and to take it seriously. Soft law requires national courts to justify alternative interpretations and/or to make a reference for a preliminary ruling by the CJEU.
- EU soft law plays an important role in the uniform interpretation and application of EU law, by the institutions and in the Member States. This is based on notions such as reliance and legitimate expectations (see above).
- Soft law may provide clarity on texts in binding EU instruments which may be ambiguous because they are the result of a political compromise. It also may provide clarity on the interpretation of provisions of national law which have their origin in EU law.
- The European Commission uses soft law instruments to enhance the internal consistency of EU law. An example is the Commission’s guidance for the application of Directive 2003/86/EC on the right to family reunification, mentioned above.

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- The transparency of the adoption process is flawed. There are no guarantees that Member States are systematically involved in the adoption process. The same applies to the involvement of the European Parliament and national parliaments. Moreover, there is no consultation foreseen of interested parties.
- Sometimes, soft law instruments are quasi-binding, as normative instruments including rules of behaviour.
- Guidance instruments may contain interpretations which are disadvantageous for individuals. Challenging the validity of these instruments is not easy, in view of their non-binding nature and the lack of procedural guarantees surrounding their adoption.

Advice/Conclusion

The Meijers Committee concludes with recommendations on appropriate safeguards, relating to (1) the substance, (2) procedural matters, and (3) the review of soft law instruments. These recommendations are based on the view that checks and balances are of the utmost importance.¹³

(1) substance:

- Soft law instruments should NOT be used in following situations:
 - where soft law instruments have the risk of affecting individuals' fundamental rights
 - where soft law aims to implicitly or de facto change Union law
- Soft law instruments should always:
 - mention the Union law basis for adoption of the instrument by the institution. This legal basis could be Article 17 TEU for certain instruments adopted by the Commission
 - contain a summary of the relevant case law of the Court of Justice on the issues dealt with in the instrument or a reference to that case law.

(2) procedure:

- The Commission or other institutions should timely and in a systematic manner announce their intention to adopt a soft law instrument together with a short description of the issue(s) to be covered and invite interested parties to suggest problem areas, relevant topics as well as solutions.
- Adopt rules on the consultation and participation of other institutions, interested citizens and organisations in the adoption of soft law instruments

(3) review:

- In order to overcome the limited judicial review of non-binding instruments under EU law, soft law instruments should themselves provide for a periodical review of the instrument at least every four years.
- They should mention a person or body that can be contacted by interested citizens or organisations for the purpose of suggesting amendments or corrections of the instrument.

¹³ See Checks and Balances of Soft EU Rule-Making, Policy Department C: Citizens' Rights and Constitutional Affairs (2012), by A. (Ton) van den Brink and Linda Senden.

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The Dutch Government announced that it will commission further research on the use of soft law instruments at EU level.¹⁴ The Meijers Committee recommends that this research considers the issues raised in this note and is available for consultation in the context of this report.

¹⁴ In its reaction to the advice of the Council of State on the implementing law of the General Data protection Regulation.