EUROPEAN LAW JOURNAL
Review of European Law in Context

European Law Journal, Vol. 19, No. 1, January 2013, pp. 57–75.
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Soft Post-Legislative Rulemaking: A Time for More Stringent Control

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Abstract: *The Commission's soft post-legislative rulemaking by way of communications, notices, codes and similar instruments has become an increasingly important tool for the adequate functioning of the system of shared administration in the EU. However, the development of its legal framework has not kept pace with this, as the Treaty on the EU nor the Treaty on the Functioning of the EU (TFEU) recognise this regulatory phenomenon. As a result, its current procedural control is of a very ad hoc nature. Given the risks this rulemaking involves for the legitimacy of the EU, its practical and legal importance for legal practice and the way in which the Treaty of Lisbon has sought to condition and control the behaviour of the Union institutions, it is argued that the time is ripe for a more stringent and consistent procedural control of soft post-legislative rulemaking. Some options to realise this are presented for further research.*

I Introduction

The catalogue of sources and hierarchy of norms in Articles 288 to 291 of the Treaty on the Functioning of the EU (TFEU) are of misleading simplicity, to the extent that one may be tempted to think that a comprehensive system of sources has now been established in formal EU law. It comprises legislative, delegated and implementing acts, to be laid down in the form of regulations, directives or decisions, but does not recognise many other instruments that have emerged in the Union's institutional practice over time. The EU institutions thus also resort to the use of various types of soft law instruments, including communications, notices, codes and like-minded instruments. The Commission adopts such instruments with a view to further implementing EU law. This soft post-legislative rulemaking has in the meantime become part and parcel of the implementation process of EU law in the Member States. Yet, over the years scholarly attention for this regulatory phenomenon—even in general EU (administrative) law handbooks[1]—and concern about its legal embedment have

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[1] A recent exception being H. Hofmann, A. Rowe and A. Türk, *Administrative Law and Policy of the European Union* (OUP, 2011).

been fairly limited[2] and rather sector specific.[3] One reason for this might be that the risks that soft post-legislative rulemaking entails for the legitimacy of the Union's actions and functioning are not recognised or underestimated. Such a risk lies, amongst other things, in the fact that the Commission can escape Council, parliamentary or comitology control by regulating certain aspects in a soft post-legislative act rather than by a formal—delegated or implementing—act. The latter would require that the decision-making procedure of Article 290, respectively Article 291, TFEU be followed.

A political and regulatory system that is built on democracy and the rule of law as the EU claims and that is increasingly made up of different governance modes can only be legitimate if it is functioning both effectively and in a democratically and constitutionally acceptable way. This implies not only that the exercise of public power must be limited and subject to some higher form of control by reference to the law[4] but also that the social acceptance of the EU is ensured. In other words, both substantive and procedural legitimacy concerns must be met. Substantive legitimacy relates to policy consistency and the expertise and problem-solving capacity of the regulators,[5] thereby placing emphasis on effective policy outcomes. In terms of output legitimacy, people may agree on the existence of a particular structure because of the benefits that it brings.[6] Procedural legitimacy demands that those being affected by a norm have somehow been included in the process of its formulation. It implies the creation of regulatory authorities on the basis of democratically enacted statutes, and entails that decision making follows certain formal rules, often requiring public participation, and that it is justified and open to judicial review.[7] As such, it can be said to put more emphasis on *ex ante* and *ex post* control mechanisms of the rulemaking process. This links with the notion of input legitimacy, understood as meaning that

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[2] Some exceptions being Melchior, 'Les communications de la Commission, contribution à l'étude des actes communautaires non prévus par les traités', in (1979) *Mélanges Dehousse vol. II*, at 248; F. Snyder, 'Soft Law and Institutional Practice in the European Community', in S. Martin (ed), *The Construction of Europe: Essays in Honour of Emile Noël* (Kluwer, 1994), at 197; H. Adam, *Die Mitteilungen der Kommission: Verwaltungsvorschriften des Europäischen Gemeinschaftsrechts? Eine Untersuchung zur rechtsdogmatischen Einordnung eines Instrumentes der Kommission zur Steuerung der Durchführung des Gemeinschaftsrechts* (Nomos, 1999); L.A.J. Senden, *Soft Law in European Community Law* (Hart, 2004).

[3] cf F. Rawlinson, 'The Role of Policy Frameworks, Codes and Guidelines in the Control of State Aid', in I. Harden (ed), *State Aid: Community Law and Policy* (Schriftenreihe der Europäischen Rechtsakademie Trier, 1993), at 52; Jestaedt and Häsemeyer, 'Die Bindungswirkung von Gemeinschaftsrahmen und Leitlinien im EG-Beihilfenrecht', (1995) Heft 23 *Europäische Zeitschrift fur Wirtschaftsrecht* 787; and G. Pampel, 'Rechtsnatur und Rechtswirkungen horizontaler und vertikaler Leitlinien im reformierten europäischen Wettbewerbsrecht', (2005) Heft 11 *Europäische Zeitschrift fur Wirtschaftsrecht* 11; H. Hofmann, 'Negotiated and Non-Negotiated Administrative Rulemaking: The Example of EC Competition Policy', (2006) 43 *Common Market Law Review* 153–178 and J. Scott, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law', (2011) 48 *Common Market Law Review* 329–355. For further references, see Senden 2004, n 2 *supra* and Senden and Van den Brink 2012, n 1 *supra*.

[4] See C. Scott, Regulatory Governance and the Challenge of Constitutionalism, *EUI Working Paper RSCAS* 2010/07, at 1. Available at http://cadmus.eui.eu/bitstream/handle/1814/13218/RSCAS_2010_07.pdf?sequence=1.

[5] In this sense G. Majone, *Regulating Europe* (Routledge, 1996), at 291–292.

[6] D. Curtin and A.J. Meijer, 'Does transparency strengthen legitimacy?' (2006) 11 *Information Polity* 112. cf also the notions of input and output legitimacy as developed by F. Schrapf, *Governing in Europe: Effective and Democratic* (OUP, 1999).

[7] Majone 1996, n 5 *supra*.

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the 'social acceptance of the structure in question derives from a belief that citizens have a fair chance (. . .) to influence decision-making and scrutinise the results.'[8]

When it comes to the use of EU soft law, the traditional trade-off can be said to be more geared towards realising substantive (output) legitimacy than procedural (input) legitimacy. For, in and of themselves soft governance modes are very much connected with features of informality so that they can be used in a rather flexible way to address new or urgent problems. Such governance modes are therefore often linked to the efficiency and effectiveness of law and policy making.[9] Adopting a discursive approach, this article seeks primarily to identify the developments and arguments that may advocate another balancing of substantive and procedural legitimacy concerns in the regulation of Commission soft post-legislative rulemaking and a reinforcement of the latter. The focus is thus on the role that the law plays, or better, should play in conditioning the use of soft post-legislative rulemaking. Its main question concerns the extent to which the current legal framework of soft post-legislative Commission rulemaking can be said to represent an acceptable degree of procedural legitimacy, taking into account the way in which soft post-legislative rulemaking has evolved in EU law (section II) and the risks its use entails in view of core Union principles and interests (section III). In its discussion of the legal framework for the procedural control of soft post-legislative rulemaking, which also includes a consideration of emerging institutional practices,[10] it seeks not only to divulge certain weaknesses in the current framework (section IV) but also to identify possible ways in which to deal with these weaknesses in the future (section V). It will end with some final remarks (section VI).

II The Phenomenon of Soft Post-Legislative Rulemaking

The implementation of EU law is first and foremost a duty for the Member States as Article 291(1)TFEU now explicitly states. This is only otherwise when uniform conditions for implementing legally binding acts of the Union are needed, in which case usually the Commission has implementing powers which it has to exercise under the shadow of comitology (see Article 291(3)). The Commission—through direct administration—and national institutions—through indirect administration—can thus be said to bear shared responsibility for the implementation of Union law, requiring certain cooperation or a partnership between them. As will be seen, the Commission's soft post-legislative rulemaking is a highly relevant phenomenon from this perspective of shared administration.[11] But also post-Lisbon, the TFEU and TEU are silent on the existence of soft post-legislative instruments, the only formally recognised soft law instruments having remained in Article 288 TFEU being the recommendation and the opinion. One can thus only gain an understanding of the nature and role of soft post-legislative rulemaking by analysing the text of such acts, evolving institutional practice, the case-law of the Union Courts and legal doctrine.

[8] Curtin and Meijer 2006, n 6 *supra*, 112.

[9] cf Ch. Möllers, 'European Governance: Meaning and Value of a Concept', (2006) 43 *Common Market Law Review* 313–336.

[10] The discussion thereof does not seek to be exhaustive but to signal certain relevant developments.

[11] On shared administration see H. Hofmann and A. Türk, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar, 2009).

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A Its 'Post-Legislative' Nature

Soft post-legislative rulemaking concerns acts that provide further general rules and guidance to national authorities and interested parties on the proper interpretation, transposition, application and enforcement of already existing EU law.[12] As such, they can be said to fulfil a post-law function and do not, in principle at least, aim to lay down or create new legal rules.[13] On the basis of the Commission's practice as this evolved over time, one can make a further distinction between 'interpretative' and 'decisional' acts.

Interpretative acts establish rules that indicate or summarise the way in which—according to the Commission—Union law should be understood and applied. As appears from the text of such acts, they seek to make more transparent and to clarify the meaning of EU law for national authorities, economic operators and those deriving rights from the EU law. This should also lead to a better and more uniform application of EU law and thereby contribute to its effectiveness as well.[14] As such, they are geared towards the level of indirect administration. Ever since its first use of the terminology of interpretative communication in its Internal Market White Paper in 1985,[15] the Commission frequently labels communications as such. One of the first manifestations concerns the Cassis de Dijon Communication,[16] but many other examples can be found in the area of the internal market and flanking areas, such as environmental law,[17] public procurement,[18] tax law[19] and social policy.[20] *Decisional acts*[21] are often of an interpretative nature as well, but they go beyond this by indicating how the Commission intends to apply EU law in individual cases, in those areas in which it has been given an implementing, discretionary power. This concerns primarily the area of competition law and state aid. A very early example is the Notice on exclusive dealing constructs with commercial agents dating back to 1962.[22] Other examples are the guidelines on the method of setting fines,[23] the Communication on the Commission's enforcement priorities in applying Article 82 EC Treaty to abusive exclusionary conduct by dominant undertakings[24] but also the Communication on the implementation of Article 260(3)TFEU, setting out how the Commission will apply the newly added paragraph with a view to stimulating Member States' compliance

[12] cf Scott 2011, n 3 *supra*, 329–355.
[13] Senden 2004, n 2 *supra* at 143–144.
[14] *ibid*, 146–148.
[15] COM (1985) 310 final, para. 155.
[16] *OJ* 1980, C 256/2.
[17] eg the interpretative communication of the Commission to the Council and the European Parliament on waste and by-products, COM(2007)59. Extensively on this see Scott 2011, n 3 *supra*.
[18] eg the Commission Interpretative Communication of 5 February 2008 concerning the application of Community law on public procurement and concession agreements on institutionalised public–private cooperation/partnership, C(2007)6661.
[19] eg Communication 'Exit taxation and the need for coordination of Member States' tax policies', COM (2006) 825 final.
[20] eg the Communication from the Commission to the European Parliament and the Council on the interpretation of the judgments of the Court of Justice on 17 October 1995 in Case C-450/93, *Kalanke v Freie Hansestadt Bremen*, COM (96) 88 final.
[21] The Commission does not use this terminology itself; this was first introduced by Melchior 1979, n 2 *supra* at 243.
[22] *OJ* 1962, 139/2921. See also the Notice on patent licensing agreements, *OJ* 1962, 139/2922.
[23] Resp. *OJ* 2002, C 45/3 and *OJ* 2006, C210/2.
[24] *OJ* 2009, C 45/7.

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with their Union law obligations.[25] More recently, certain EU-level committees,[26] networks and agencies have also been gaining soft rulemaking powers with a view to securing the implementation and enforcement of EU law, entailing also the establishment of decisional rules.[27]

While decisional acts are geared in principle towards the direct administration of EU law by Union bodies, mostly the Commission, they will clearly also have an effect on the organisation of the implementation of EU law on the national level and are therefore also relevant from the perspective of indirect and shared administration. More in particular, it also emerges from the text of decisional acts that they are considered to enhance transparency and effectiveness by providing greater legal certainty for economic operators and by ensuring greater compliance and a more uniform application of EU law in the Member States.[28] This also explains why the shift to the decentralised enforcement of EU competition law has in fact entailed an impetus for the use of decisional acts in this area.[29] It should also be noted that more recently, another type of Commission decisional acts has emerged that appears to be specifically geared towards influencing the level of indirect administration, by seeking to guide the way in which Member States use their discretionary powers in implementing EU law. Such acts can be found *inter alia* in the area of public procurement and the free movement of services and are published under other denominations, such as the 'Commission Staff Working Document—Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest.' This act goes beyond being interpretative by seeking explicitly 'to clarify the options available to the Member States to set or maintain a regulatory framework for these services.'[30]

In itself, EU soft post-legislative rulemaking is not to be considered as an 'alien' regulatory phenomenon, as it mirrors, to some extent, the developments that have taken place at the national administrative level. Many national legal systems are thus familiar with some form of soft interpretative and decisional rules or policy guidelines,[31] which is not to say that they are comparable in themselves and that they should be assessed in the same way. Yet, one could see the progressive development of soft post-legislative rulemaking in the context of the EU as a token of a maturing regulatory system, for being demonstrative of the capability and flexibility of the system to develop different regulatory responses to needs for guidance that emerge in the Union's and Member States' practice. As such it can be considered as an increasingly important tool for the adequate functioning of the system of shared

[25] COM (2010)1371 fin and *OJ* 2011, C12/1.

[26] eg the Conclusions of the Customs Committee in Case C-311/04, *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609.

[27] This is beyond the scope of this article, but see the report mentioned in footnote (*) and the contributions in this issue by Chiti and Busuioc.

[28] Senden 2004, n 2 *supra*, at 151–152.

[29] cf O.A. Ştefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' (2008) 14 *European Law Journal* 753–772.

[30] SEC (2010) 1545 final, 7.12.2010, at 15. Another example is the Handbook on Implementation of the Services Directive, Luxembourg: Office for Official Publications of the European Communities, 2007, Available at http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf.

[31] See, eg G. Winter, *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Nomos, 1996), concerning the British, Danish, Dutch, French, Spanish, Italian and German legal systems. cf also various contributions in the (1994) 1 *Maastricht Journal of European Law*.

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administration in the EU. It also fits in with the quest of the EU to ensure, more effectively, the effectiveness and the coherence, consistency and continuity of the Union's actions, as is now explicitly stipulated in Articles 11(3) and 13 TEU, as well as 7 TFEU.

B Its 'Soft' Nature

Given that soft post-legislative acts are not a formally recognised category of acts under EU law, they lack legally binding force as a general feature of law; neither the TEU, TFEU nor any other legal text has attributed this to them. Yet, they constitute 'soft law' in the sense that they establish rules of conduct that may not only have practical effects but also certain indirect legal effects. Obviously, within the scope of this article, the discussion of these legal effects cannot be comprehensive; it rather seeks to demonstrate the existence and importance of such effects as well as the fact that their full scope still raises quite some questions and uncertainty.[32]

Following the case-law of the European Court of Justice (ECJ), it has appeared that indirect legal effects can come about as a result of judicial interpretation and general principles of law. In the Grimaldi Case, the Court thus held that '*national courts are bound to take recommendations into consideration* in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions [emphasis added].'[33] If we venture into the thesis that this obligation also applies to interpretative acts that do not take the form of a recommendation,[34] the legal effect of such acts could be understood in terms of being a mandatory interpretation aid. While this does not oblige national courts to interpret national law in conformity with interpretative acts, it does impose upon them a duty to take them into account whenever they can help to clarify the meaning of Union or national (implementing) law.[35]

Decisional acts can have binding effects beyond that. In case the Commission has set guidelines for its single case decision making in such acts, such as in the area of competition law and state aid, it follows from the Court's case-law that the Commission may be bound to such guidelines *vis-à-vis* concerned companies on the basis of the principles of legitimate expectations, legal certainty and equal treatment.[36] In a number of cases, the Union Courts have even taken the self-binding effect of such acts as a matter of fact without indicating any legal ground for this. They simply examined whether the Commission's decisions had been adopted in conformity with the conditions laid down in the decisional acts.[37] The full scope of this case-law is not yet clear.

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[32] cf A. Sanchez Graells, 'Soft Law and the Private Enforcement of the EU Competition Rules', paper presented at the International Conference on the Private Enforcement of Competition Law, University of Valladodid, 14–15 October 2010, Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639851.

[33] See Case C-322/88, *Grimaldi* [1989] ECR I-4407, para. 16, confirmed in Cases C-317/08-C-320/08, *Alassini* [2010] ECR I-2213, para. 40.

[34] Occasionally interpretative and decisional acts take the form of a recommendation. For an example other than the one at issue in the Grimaldi Case, see the next subsection.

[35] In more detail, see Senden 2004, n 2 *supra*, at 387–393.

[36] See already joined cases 40 to 48, 50, 54 to 56, 111, 113 to 114/73 *Sugar* [1975] ECR 1663, paras. 555–556. See also Hofmann, Rowe and Türk 2011, n 1 *supra*, at 576.

[37] See, eg Case T-380/94, *AIUFASS and AKT v Commission* [1996] ECR II-2169, para. 57.

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Arguably, the fact that the administration has to act in a consistent and non-arbitrary way entails that it must apply the rules it has set for exercising its implementing powers. The principles of consistency and equality as introduced by the Treaty of Lisbon in Articles 13(1) TEU and 7 TFEU, respectively 9 TEU, reinforce this line of reasoning. The very adoption of decisional acts can then be said to mean that the administration has bound itself to the rules laid down therein as a matter of good administration. Yet, it must be understood that deviation from decisional acts is possible if this is sufficiently reasoned and depending on the scope of discretion they actually leave and their degree of clarity.[38]

Member States may also be bound when there is question of a specific duty of cooperation—as in the area of state aid—and they have accepted or approved the Commission's guidance rules.[39] Legal effects may also come about as a result of secondary law acts providing for the adoption of such rules and for—a certain level of—compliance by the Member States or national authorities (see section II.C for an example). Clearly, given the binding effect of such decisional rules for the Commission and Member State authorities, they will have a bearing on the legal position of economic operators and individuals as well. They can thus rely thereon in national courts not merely as an interpretation aid but possibly invoke them as standards of judicial review.

C Its Legal Foundations and the Choice of Instruments

The use of soft post-legislative acts needs to be traced back to the general competences and duties of the Commission. According to Article 17(1) TEU the Commission shall promote the general interest of the Union, taking all the 'appropriate initiatives' to that end, and ensure the application of the Treaties and of measures the institutions have adopted pursuant to them. The adoption of *interpretative acts* fits in with this general task of being a guardian of the Treaties; with a view to its effective performance, the Commission should be able to also act proactively and not merely retroactively by initiating infringement proceedings against the Member States.[40] The case-law of the ECJ lends support to this view.[41] The Commission's competence to adopt *decisional acts* can be traced back primarily to its executive task. Such acts can find their legal foundation in a specific Treaty provision. From the Court's case-law, it can thus be derived that in areas where the Commission has been attributed single-case decision making power, it also has the power to adopt general rules setting out how it will apply EU law in such cases.[42] This concerns, for instance, (now) Articles 107 and 108 TFEU in the area of state aid.[43] These provisions impose a specific duty of cooperation on the Commission and the Member States, which has led the ECJ also to rule that in such an area the Commission may not proceed to the

[38] Senden 2004, n 2 *supra*, at 448.

[39] See Case C-311/94, *Ijssel-Vliet* [1996] ECR I-5023, Case C-313/90, *CIRFS* [1993] ECR I-1125 and Case C-288/96, *Germany v Commission* [2000] ECR I-823.

[40] See also in this sense Hofmann, Rowe and Türk 2011, n 1 *supra* at 569. For an opposing view, see U. Ehricke, 'Vermerke der Kommission zur Umsetzung von Richtlinien', (2004) 15 *Europäische Zeitschrift fur Wirtschaftsrecht* 360, as cited by Hofmann, Rowe and Türk 2011, 569 and footnote 160.

[41] See Case C-146/91, *KYDEP v Council and Commission* [1994] ECR I-4199, para. 30.

[42] eg Case C-169/95, *Spain v Commission* [1997] ECR I-315, para. 19.

[43] Case T-149/95, *Ducros v Commission* [1997] ECR II-2031, para. 61.

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unilateral modification of decisional rules if these have been accepted by the Member States and have become binding upon them.[44]

Secondary legislation may also empower the Commission to adopt decisional rules or it may even contain an obligation to this effect. The Framework Directive[45] forms an interesting example in this regard, its Article 15 stipulating that the Commission adopts a recommendation concerning the relevant market for products and services and that it publishes guidelines for market analysis and the assessment of considerable market power. The Directive clarifies that such acts do not only aim to guide the Commission in its application of competition rules in the area of electronic communications but expressly also the application thereof by the national regulatory bodies; these are to take 'the utmost account' thereof. In providing this in the basic legislative act, the Council and European Parliament (EP) can be said to have imposed—or delegated in a sense—an important power upon the Commission to adopt soft implementing rules, which it needs to carry out in cooperation with national bodies. The existence of such a specific secondary law empowerment or obligation needs to be identified on an individual basis, as well as the scope and procedural modalities thereof. Clearly, this way of acting also raises questions in relation to the newly devised categories of delegated and implementing acts in Articles 290–291 TFEU (see section IV.B).

The question also emerges whether the Commission is always free to proceed to the adoption of soft post-legislative acts. Here, the new Article 296(1) TFEU comes into play:

> [W]here the treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality. [. . .] When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.

Clearly, the first sentence leaves room for the choice of the regulatory instrument only in the case of enabling, openly framed Treaty legal bases. The fact that this choice has to comply with the proportionality principle—which according to Article 5(4)TEU relates to both form and substance—means that the level of regulatory interference should not go beyond what is necessary. This principle can thereby actually incite the choice for soft law devices,[46] as long as the chosen means and instruments are capable of achieving the set objectives.[47] The limit imposed by the second sentence cannot be considered to have a bearing on the adoption of Commission soft post-legislative acts, as it does not cover Commission acts at all.

III Risks

It has appeared from the analysis so far that it is the desire to enhance the transparency, legal certainty and correct and uniform interpretation of EU law, as well as the

[44] See, eg Case C-135/93, *Spain v Commission* [1995] ECR I-1673, para. 38.

[45] Dir 2002/21/EC, *OJ* 2002, L108/33 on a common regulatory framework for electronic communications networks and services, as amended by Dir 2009/140/EC, *OJ* 2009, L337/37 and Reg 544/2009, *OJ* 2009, L167/12.

[46] cf also the Commission's White Paper on European Governance, COM(2001)428 final and the Interinstitutional Agreement on better law-making, *OJ* 2003, C321/1.

[47] cf Case 13-83, *Parliament v Council* [1985] ECR 1513.

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equal treatment of those concerned, that has inspired the use of soft post-legislative acts. However, this does not mean that their actual use meets these goals. There are certain risk factors at play that endanger the realisation of these goals as well as other Union interests and principles, in particular the institutional balance between the EU institutions, the vertical division of power between the EU and the Member States and democratic legitimacy. The following factors appear to be the most prominent from institutional practice, policy documents,[48] the Court's case-law and legal doctrine.

As already noted in the introduction, the Commission can escape Council, parliamentary or comitology control—but in fact also Member State and public control—by proceeding to the use of soft post-legislative acts or deciding to regulate certain issues by such an act. One can thus find various examples of how the Commission has proceeded to the use of soft post-legislative rulemaking to the detriment of the position of the Council and the European Parliament in the decision-making process. This was clearly the case when the Commission laid down an earlier directive proposal on an internal market for pension funds in the form of an interpretative communication because of political deadlock. Another example relates to the adoption of the Golden Share Communication, in respect of which the EP observed that its content 'cannot be seen as binding, since the Commission clearly overstretched its powers by not discussing this important item of "soft law" with the Council and the European Parliament.'[49] In relation to the Commission's proposed review of its Communication of 20 March 2002 concerning the relations with the complainant in respect of infringements of EU law, the European Parliament urged the Commission not to make use of soft law but to propose a regulation 'in order for Parliament to be fully involved as a co-legislator in such an essential element of the EU's legal order.'[50] With respect to the area of competition law more generally, it has been observed that Member States are rarely involved in the creation of the Commission's administrative guidelines and that private parties are involved in their establishment only to a very limited degree.[51]

More generally, the procedure for the adoption of soft post-legislative acts may be characterised by an (extreme) absence of transparency. Scott has noted this for instance with regard to the adoption of the large hydro guidelines and compliance template that were meant to counter the threat of fragmentation in the EU carbon market and to improve the mutual recognition of national project approval decisions of the Member States. While it is clear from the Commission's website that these have been established through 'a voluntary coordination process through the Climate Change Committee and its working group with the Member States involving also outside stakeholders,' the participating stakeholders have not been identified nor has information been provided on their views.[52]

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[48] Most importantly, the European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of soft law instruments (2007/2028INI), P6_TA(2007)0366.

[49] See on these examples the EP resolution mentioned in the previous footnote and the European Parliament resolution on the updating of certain legal aspects concerning intra-EU investment, minutes of 05/04/2011-Provisional Edition.

[50] European Parliament resolution of 14 September 2011 on the 27th annual report on monitoring the application of European Union law (2009) (2011/2027(INI)), P7_TA(2011)0377.

[51] Hofmann 2006, n 3 *supra*, 175.

[52] Scott 2011, n 3 *supra*, 336.

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The above considerations already warrant attention for the issue of how *ex ante* control over and public involvement in the adoption of soft post-legislative acts is actually ensured, and what rules apply for this. The need for such control and involvement is underscored by a number of other factors. Post-legislative acts may thus also be inadequate from a substantive point of view and poorly reasoned, thereby falling short of capturing the actual demands and objectives imposed by the underlying legislation.[53] The aforementioned large hydro guidelines again provide an illustration of this, as these are not fully in line with the underlying directive and are framed in a narrower way by referring to only one specific source of international standards and by not acknowledging certain rights that are contained in the directive.[54] Furthermore, the Commission may not necessarily stick to the interpretation that the ECJ has given to EU law by adding subjective elements to its interpretative acts, thereby blurring the boundaries between the authoritative interpretation of the Court and its own interpretation. An example here concerns the Commission's communication on the Kalanke judgment in which it argued that the Court had considered positive action regarding 'the underrepresented sex' to be permissible, whereas the case itself and the Court's considerations concerned only positive action regarding women.[55]

A related factor concerns the Commission's use of soft post-legislative acts as a lawmaking device, by which it tries to impose new legal obligations upon the Member States and other parties that are not as such contained in the underlying primary or secondary EU law. It appears from the Court's case-law that such acts are not for that very reason non-existent but need to be annulled by the ECJ.[56] The fate of the aforementioned Pensions Communication exemplifies this, as the ECJ annulled it for imposing obligations upon the Member States which the Commission was not empowered to do so.[57] One may be tempted to think that even when such an annulment has not occurred, such Commission acts are rather harmless as they are devoid of legally binding force and would therefore not require compliance. Yet, such a conclusion ignores the fact that as long as an annulment has not taken place, the act must be considered lawful and will thus be capable of generating indirect legal effects as identified in section II.B. It must also be acknowledged that even if legal effects would appear to be limited, there may still be a question of a high degree of *de facto* persuasiveness and influence of interpretative and decisional acts upon legal practice in the Member States, as several authors in different fields have established.[58]

IV Current Procedural Control

Logically, as the T(F)EU do not explicitly acknowledge interpretative and decisional acts, they do not stipulate a particular procedure or procedural conditions for their

[53] *ibid*, 330.

[54] *ibid*, 335–336.

[55] For other examples, see Senden 2004, n 2 *supra*, 144–146. cf S. Lefèvre, 'Interpretative Communications and the Implementation of Community Law at National Level', (2004) 29 *European Law Review* 808–822, who makes a distinction between active and passive interpretation.

[56] See Case C-137/92 P, *Commission v BASF* [1994] ECR I-2555. A well-known example concerns Case C-57/95, *France v Commission* [1997] ECR I-1640.

[57] Case C-57/95, *France v Commission* [1997] ECR, I-1640.

[58] cf Scott 2011, n 3 *supra* 336; M. de Visser, *Netword-Based Governance in EU Law, The Example of EC Competition Law and EC Communications Law* (Hart, 2009), at 201, Graells 2010, n 32 *supra*.

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adoption. The newly introduced Article 292 TFEU merely prescribes the procedure that the Council has to follow when adopting recommendations; it needs to act on the basis of a Commission proposal and to act unanimously where the Treaty so prescribes, thereby forcing the Council to identify a legal basis for its recommendations and to follow the same procedure as required for adopting a binding act. This provision does not cover the Commission's use of recommendations nor its soft post-legislative rulemaking. This is striking, not only because Commission recommendations actually pose more legitimacy concerns than Council recommendations[59] but also because the Commission's soft post-legislative rulemaking gives rise to quite some concerns as seen above. It must therefore be considered what procedural principles and rules may otherwise ensue from primary, secondary and tertiary law that condition the Commission's use of soft post-legislative acts. In the light of the need for *ex ante* control as identified in section III, this discussion will focus on those Union principles and rules that concern the openness and transparency of the Commission's soft post-legislative rulemaking activities as well as the involvement therein of those actors whose interests may be at stake.

A The Principles of Openness and Transparency

The duty contained in the old Article 1 TEU that decisions are taken 'as openly as possible' merely crystallised in the right of access to documents, as stipulated in Article 255 EC Treaty. This provision did not specify what falls within the scope of 'documents.' Regulation 1049/2001/EC[60] clarifies that a 'document' shall mean 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility' (Article 3(a)). This broad definition clearly also encompasses soft rulemaking acts. Later, the right of access to documents was confirmed in Article 42 of the Charter of Fundamental Rights (CFR) 'whatever their medium.' However, the current legislative framework leaves a great deal of room for imposing restrictions. While, in themselves, these do not concern soft law acts more than hard law acts, it would seem that there is (far) less reason to invoke, for instance, the security and administrative rationales for imposing restrictions[61] on access to the preparatory acts of post-legislative acts. Such rationales may be considered to play a more important role in relation to negotiations on the legislation itself to which post-legislative acts are linked. The principle of good administration as now contained in Article 41 CFR is of little relevance for soft post-legislative rulemaking, as the right of access to files and the right to be heard that it contains is only geared towards single-case decision making. Moreover, Article 41 CFR itself does not contain a right to information. While such a right is implied in Article 22 of the European Code of Good Administrative

[59] Moreover, the Council already has a well-established practice of indicating a legal basis in its recommendations and of following the decision-making procedure prescribed by it. See Senden 2004, n 2 *supra*, at 162–173, 183–186 and 229.

[60] Reg 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents, *OJ* 2001, L145/43.

[61] See on these D. Curtin, 'States of secrecy: The European Union executive unbound', paper presented for the Transatlantic Conference on Transparency Research, Utrecht, June 2012, Available at http://www.transparencyconference.nl/wp-content/uploads/2012/05/Curtin.doc.

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Behaviour, which the European Ombudsman adopted to further substantiate Article 41 CFR, it also seems to be geared mainly towards instances of single-case decision making.

Article 297 TFEU does not require the publication in the *Official Journal of the European Union* (*OJ*) of legally non-binding acts. Looking at institutional practice, however, the Commission often publishes interpretative and decisional acts in the *OJ*, but it also occurs that certain acts are merely published as COM-documents or are made accessible on the Internet.

B The Principles of Consultation and Participation

Over the past decade, one can witness the development of a variety of procedural rules and mechanisms that seek to enhance consultation and participation in the Union's law and policy-making process, which also have—potential—relevance with regard to soft post-legislative rulemaking.

First of all, in 2002 the Commission has put into place guidelines for the consultation of interested parties.[62] According to the Commission, good consultation serves a dual purpose 'by helping to improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties and the public at large.'[63] To this end, the document has set general principles and minimum standards for its consultation of interested parties regarding the content of the consultation process, the determination of the target groups, publication, the time limits for participation and acknowledgement and feedback. However, the document explicitly states that a legally binding approach to consultation is to be avoided; in particular, a situation must be avoided in which a Commission proposal could be challenged in the Court on the ground of an alleged lack of consultation with interested parties. According to the Commission, such an 'over-legalistic approach' would be incompatible with the need for the timely delivery of policy, and with the citizens' expectations that the European institutions should deliver on substance rather than concentrating on procedures.[64]

The principles and standards are also declared applicable only in respect of 'major policy initiatives,' meaning those initiatives that are subject to an extended impact assessment. The scope of the consultation process is thus made dependent on the scope of the impact assessment (IA) process. Whether an extended IA is required depends on whether the proposal represents a major policy reform, whether it will result in a substantial economic, environmental and/or social impact on a specific sector and whether it will have a significant impact on major interested parties.[65] The current Commission IA guidelines (2009) also declare the IA requirement applicable to 'all non-legislative initiatives (such as white papers, recommendations, action plans, expenditure programmes, and negotiating guidelines for international agreements) which define future policies and which set out commitments for future legislative action.'[66] Since soft post-legislative rulemaking is not geared towards establishing new

[62] Communication from the Commission. Towards a reinforced culture of consultation and dialogue—General principles and minimum standards for consultation of interested parties by the Commission, COM(2002)704 final, 11 December 2002.
[63] *ibid*, 3–5.
[64] *ibid*, 10.
[65] *ibid*, 15.
[66] European Commission, impact assessment guidelines, SEC(2009)92, 15 January 2009, 15–16.

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policies and legislation but towards the implementation of existing legislation, it must be considered to fall outside the scope of the IA obligation. This also then leads to the conclusion that formally the minimum standards for consultation do not apply to this rulemaking.

Yet, the Commission's institutional practice shows a rather pragmatic approach when it comes to both the initiation of IA processes[67] and consultation processes on soft post-legislative acts.[68] Increasingly, the Commission first adopts and publishes a draft version of its decisional acts and consults the interested parties involved.[69] The draft versions and the outcome of the consultation process are both regularly published, eg in informative communications. The finally adopted decisional rules may be publicly notified, in addition to publication in the C series of the *OJ*, but this occurs at the discretion of the Commission. However, it still remains largely unclear when such a consultation process is considered obligatory, whether the period for reaction is sufficient and to what degree the Commission actually takes the observations made by interested parties into account and whether all the interests involved and the views expressed are equally balanced, including those of other Union institutions. These consultations may not necessarily be in conformity with the substantive requirements which the consultation guidelines impose. Yet, it must also be noted that the requirements in the guidelines still leave quite some discretion to the Commission and that current consultation practices still reveal important shortcomings.[70]

Second, consultation requirements may also ensue from specific secondary law acts in certain areas. Most importantly, secondary law provisions that enable—or even oblige—the Commission to adopt a decisional act may also stipulate certain procedural requirements. The already mentioned Framework Directive (in section II.C) thus also provides that an open, public consultation of national regulatory bodies shall be held on the proposed guidelines for market analysis and considerable market power and the Commission recommendation concerning relevant markets for goods and services. More recently, such acts may in fact also prescribe that a particular type of comitology procedure be followed. A clear example is provided by Directive 2010/40, Article 9 of which states:

> The Commission *may adopt guidelines and other non-binding measures* to facilitate Member States' cooperation relating to the priority areas in accordance with the *advisory procedure* referred to in Article 15(2).'[71] [emphasis added]

The advisory procedure envisaged is that under the old Comitology Decision (1999/468/EC). Other directives seemingly provide for even more stringent control of national representatives and the European Parliament, such as Directive 2011/24/EC

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[67] See, eg the impact assessment report adopted on 20 December 2011 on the Communication from the Commission (notice) on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, to be found on: http://ec.europa.eu/governance/impact/ia_carried_out/cia_2011_en.htm.

[68] cf Lefèvre 2004, n 55 *supra*, 821 and Scott 2011, n 4 *supra*.

[69] See Senden 2004, n 2 *supra*, 152–153 and also the Commission's website Your Voice in Europe, Available at http://ec.europa.eu/yourvoice/index_en.htm.

[70] See J. Mendes, 'Participation and the Role of Law after Lisbon: A Legal View on Art 11 TEU', (2011) 48 *Common Market Law Review* 1859 and the studies she mentions in footnote 38.

[71] Dir 2010/40 of the European Parliament and the Council on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport, *OJ* 2010, L207/1. In a similar vein, Art 23(4) of Dir 2010/63 on the protection for animals used for scientific purposes, *OJ* 2010, L276/33.

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on the application of patients' rights in cross-border health care.[72] It provides that the Commission 'shall adopt guidelines supporting the Member States in developing the interoperability of ePrescriptions,' according to the regulatory procedure contained in the Comitology Decision. It does not specify whether these guidelines are to be of a binding or non-binding nature, so they could possibly also concern the adoption of soft post-legislative guidelines.

Importantly, from these examples one can infer that the legal framework that the Treaty of Lisbon has introduced for controlling the Commission's exercise of implementing powers in Article 291(3) TFEU is not necessarily restricted to the adoption of legally binding acts but apparently may also be declared applicable to soft implementing acts of the Commission. In other words, not only the delegation of hard implementing powers to the Commission may be subjected to comitology control but also that of soft implementing powers. The new Comitology Regulation seems to allow for such a reading, given that it generally speaks of 'implementing acts' without distinguishing between those that are binding and non-binding.[73] So far, the applicability of such procedures is decided upon in an *ad hoc* way.

Finally, it must be noted that the Inter-Institutional Agreement on Better Law-Making of 2003 (IIA) sought to promote the use of alternative methods of regulation, setting also institutional conditions for this, but this only concerned the use of co-regulation and self-regulation and not soft post-legislative rulemaking.[74] However, more recently, the Framework Agreement on relations between the European Parliament and the European Commission (2010) shows a reinforcement of parliamentary control over the Commission's use of soft law, to the extent that it provides that in areas where the Parliament is usually involved in the legislative process the Commission shall use soft law only where appropriate and on a duly justified basis after having given the Parliament the opportunity to express its views. When it adopts its proposal, the Commission is required to provide a detailed explanation to Parliament on how its views have been taken into account.[75]

V Towards a More Stringent Control

A Why Raise the Bar?

It emerges from the above analysis that the current procedural framework demonstrates a strong desire to maintain the Commission's flexibility to the fullest extent possible when it comes to its use of soft post-legislative acts. Clearly, this framework is not so much geared towards enhancing the empowerment of the citizen in the Union's decision-making process—and with that of enhancing procedural legitimacy—but rather towards enhancing the effectiveness of EU action and thereby substantive legitimacy. As such, the analysis has laid bare already a number of reasons and arguments that advocate a more stringent control of the Commission's soft post-legislative rulemaking. Here, we will flesh these out further. Looking first at

[72] Dir 2011/24/EU of the European Parliament and the Council on the application of patients' rights in cross-border health care, *OJ* 2011, L88/45.

[73] Reg (EU) 182/2011 of the European Parliament and the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *OJ* 2011, L55/13.

[74] See n 46 *supra*, points 16 to 23.

[75] *OJ* 2010, L304/52, point 42.

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the measuring rod for the level of control that would be advisable, one can accept that the level of openness and transparency of an organisation is demonstrative of its willingness to allow citizens to monitor its performance and to participate in its policy processes; the more depth of access it allows, the more depth of knowledge about processes it is willing to reveal and the higher the level of attention to citizen response it provides, the more transparent it can be considered to be.[76] As such, transparency encompasses not only 'the rather passive right of every citizen to have access to information (. . .) but also the much broader and more pro-active duty of the administration itself to ensure that information about its policy and actions is provided in an accessible fashion.'[77] Consultation is considered to occupy 'a pre-eminent position among the tools of transparency.'[78] In its turn, transparency is generally presumed to enhance the public acceptance of organisations and institutions and thereby their legitimacy. A high level of transparency and participation is deemed particularly important from the perspective of declining general public trust in governments.[79] One can argue that the more distant government is perceived to be and the lower its level of (democratic) legitimacy—as is the case for the EU and the Commission—the more distrust there will be and the higher the need for transparency and participation.

The most prominent arguments that advocate improving the level of control in the light of the above standard can be summarised as follows.

First, while soft post-legislative rulemaking has become a common feature in the administration of EU law and can have important legal effects, the T(F)EU have remained silent thereon. This silence can be considered to be at odds with the (in principle) strengthening of the role of the European Parliament in controlling the Commission's adoption of delegated and implementing acts under Articles 290 and 291 TFEU, of the Court's control of these acts (as being regulatory acts) under Article 263 TFEU and the confirmation of national control on implementing acts through comitology in Article 291 TFEU. The Commission can now fairly easy escape such control by turning to the use of soft post-legislative rulemaking. As seen in section III, there are quite some other risks involved in this use that also call for—more—control.

Second, the Treaty blindness of soft post-legislative rulemaking is also at odds with the way in which the Treaty of Lisbon has positioned the principles of openness, transparency, consultation and participation in Articles 11 TEU and 15 TFEU as standards for assessing the behaviour of the EU institutions from the perspective of good administration and governance. The Treaty approach thus confirms the link that has been established in policy documents[80] and in legal and political theory between transparency and—the quest for more—legitimacy.[81] Even more so, the new Article 11 TEU can be said to postulate a normative shift and to have positioned

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[76] In this sense, Curtin and Meijer 2006, n 6 *supra*, at 111, with reference to E.W. Welch and C.C. Hinnant, 2002 'Internet Use, Transparency, and Interactivity Effect on Trust in Government', (2003) *Proceedings of the 36th Hawaii International Conference on System Sciences*.

[77] Curtin and Meijer 2006, n 6 *supra*, at 111.

[78] R. Deighton-Smith, 'Regulatory Transparency in OECD Countries: Overview, Trends and Challenges', (2004) 63(1) *Australian Journal of Public Administration* 66–73, 67.

[79] *ibid* at 68 and M. Shapiro, 'The Globalization of Law', (1993) 37 *Indiana Journal of Global Legal Studies* 55.

[80] See n 46 *supra*.

[81] See, eg P. Craig, 'Democracy and Rule-Making within the EC: An Empirical and Normative Assessment', (1997) 3 *European Law Journal* 120.

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participation even as a possible source of democratic legitimacy.[82] It has created a duty of both active and passive consultation,[83] but without its further legal substantiation in terms of it constituting a certain right[84]—in secondary rulemaking or by judicial interpretation—it runs the risk of being simply no more than rhetoric.

To the extent that soft post-legislative rulemaking has a concrete impact on the legal sphere of those involved—including national authorities, stakeholders and other parties such as consumers—by concretising the choices of the legislature and the parliamentary control on their adoption is low or even non-existent,[85] a more stringent, balanced and consistent consultation approach becomes imperative. This allows them to signal and to remedy possible substantive and legal inadequacies in the Commission's proposed interpretation and implementation of Union hard law rules and to anticipate the correct implementation of EU law more effectively, which will also contribute to legal certainty and legal protection. Yet, as the current consultation and impact assessment guidelines do not cover soft post-legislative rulemaking, no general rules—not even soft ones—exist with a view to ensuring control and involvement in soft post-legislative rulemaking.

Third, the voluntary consultation and impact assessment processes we have seen taking place in relation to soft post-legislative rulemaking and the imposition of specific procedural—comitology—constraints in some cases reveal an increasing awareness in the Union's institutional practice of the need for procedural limits to soft post-legislative rulemaking. The current situation is leading to a patchwork of procedural rules and practices which does not contribute to the predictability, consistency and coherence of EU action.

Fourth, the question of further proceduralisation must also be considered in connection with the level of judicial review, for one may argue that the lower the level of judicial review the system allows for soft post-legislative acts, the higher the need will be for certain procedural guarantees in their adoption process. Arguing the other way around; the less procedural guarantees are provided for in the soft rulemaking process, the higher the need may be for judicial review. Suffice it here to note that the judicial review of soft post-legislative rulemaking is problematic for at least the following reasons; the extent to which the ECJ requires the demonstration of the 'intent' of legal effects of an act for it to be open for review under Article 263 TFEU, the strict *locus standi* requirements for natural and legal persons this provision imposes, the precise meaning of a 'regulatory act' in the sense of this provision and the actual enforceability of the good governance principles discussed above.[86]

B How to Raise the Bar?

How could stronger procedural guarantees regarding soft post-legislative rulemaking be put into place that would reflect a more deliberate and adequate balancing of both substantive and procedural legitimacy concerns? In the analysis, three options have

[82] See Mendes 2011, n 70 *supra*, 1851.

[83] See on this distinction Deighton-Smith 2004, n 78 *supra*, at 67. Active consultation involves a dialogue between regulators and stakeholders and passive consultation refers to the approach of seeking written comment in response to published regulatory information.

[84] In more detail, Mendes 2011, n 70 *supra*.

[85] *ibid*, at 1877.

[86] In more detail, see the report mentioned in footnote (*).

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emerged that could be further explored in the research. The first one concerns the control of soft post-legislative rulemaking within the framework of impact assessments. A more in-depth analysis could be made of the cases in which the Commission has so far proceeded to an IA of soft post-legislative acts to discover the rationale behind it. To the extent that soft post-legislative rulemaking is co-determinative of the scope of legal obligations that are imposed upon individuals, one could argue that it should be included more systematically in the Commission's impact assessment process.

It must also be concluded that simply extending the application of the soft consultation guidelines to the adoption of soft post-legislative rulemaking would not be sufficient. The second option thus concerns the introduction of a more compulsory notice-and-comment type of procedure. Such a procedure was already proposed in the European Council's 1993 Inter-Institutional Declaration on Democracy, Transparency and Subsidiarity; a notification procedure according to which the Commission should publish a brief summary of the draft measure in the Official Journal and stipulate a deadline for interested parties to submit their comments.[87] It would enhance access to information and documents—given the legal obligation of publication—and allow for a more equal and consistent involvement of relevant actors in the decision-making process as well as a stronger duty to provide feedback and to give reasons. Article 11 TEU could provide the starting point for this.

The third option that could be analysed in more depth concerns a more structural role for comitology in the soft post-legislative rulemaking process. Scott has argued in this regard that when power is conferred upon the Commission to adopt implementing acts, the parties that have been given a right to control the Commission's exercise of implementing powers, such as in comitology procedures, should enjoy a similar right in the Commission's soft post-legislative rulemaking process.[88] Such a view seems indeed defendable with regard to the Commission's decisional acts which may have quite important legal effects as seen.

Clearly, the ECJ could also play a more important role. As soft post-legislative rules shape the way in which legally binding obligations are interpreted, enforced and applied, the judicial review possibilities thereof need to be enhanced, the Courts also ensuring that this form of rulemaking is not motivated by the wrong reasons, that is the circumvention of the more formal procedures contained in the Treaties for the adoption of implementing acts.[89] One may also argue that the Court should open up more as regards the grounds of review,[90] now that the principles of openness, transparency, consultation and participation have been anchored more firmly in the T(F)EU. Clearly, the creation of participation rights is an important means to put flesh on the bones of the normative shift postulated by Article 11 TEU.[91] Issues to further explore in this respect are the recognition of a 'dialogue dimension' to the giving reasons requirement—which would require the Union institutions to respond to arguments that parties have presented during the decision-making process—and

[87] Inter-institutional declaration on democracy, transparency, and subsidiarity, *Bulletin of the European Communities*, No. 10/93. at 118–120.

[88] Scott 2011, n 3 *supra*, 352–353.

[89] *ibid*, 350–353.

[90] cf A. Alemanno, 'The Better Regulation Initiative at the Judicial Gate. A Trojan Horse within the Commission's Walls or the Way Forward?' (2009) 15 *European Law Journal* 382–400.

[91] cf Mendes 2011, n 70 *supra*, 1876.

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the recognition of the duty of consultation and participation as an essential procedural requirement whose infringement might lead to the annulment of the act in question. The pros and cons of such steps require more in-depth analysis. So far, the Court has been reluctant to recognise such a dialogue dimension in its case-law.[92] As Shapiro has argued, if the only instrumental value of giving reasons is transparency, the courts will resist such demands because the institution's actions and purposes can be discovered without the need for the institution to rebut every opposing argument. So, if the ECJ were to stick to transparency as the sole goal of (now) Article 296 TFEU, it is unlikely to move towards a dialogue requirement. Yet, participation in government by parties affected by government decisions presents an increasingly compelling value in contemporary society,[93] as Article 11 TFEU can also be said to reflect.

The prospects for an enhanced administrative review by the European Ombudsman (EO) must also be considered. The opportunities for the EO to successfully influence other institutions and bodies seem to depend foremost on the intensity of the complaints it receives from the public, but so far the complaints that are (explicitly) related to the Commission's use of soft rulemaking powers still appear to be very limited. Yet, this issue also requires further analysis.[94] The EO could also take the lead in extending the scope of the European Code of Good Administrative Behaviour to general rulemaking actions by the Union institutions. The Council of Europe Code of Good Administration provides inspiration for this,[95] as it also covers regulatory decisions that 'consist of generally applicable rules,' without stipulating that these are to be of a formal legally binding nature. Such decisions are *inter alia* to be phrased in a simple, clear and understandable manner; be published; and be judicially reviewable, ie entitling private persons to seek, directly or by way of exception, a judicial review of an administrative decision which directly affects their rights and interests.

VI Final Remarks

Clearly, both the Union legislator and Courts have an important role to play in enhancing the procedural and judicial control of soft post-legislative rulemaking. Action on the part of the legislator would have the benefit of creating a more systematic and complete legal framework, thereby allowing for a higher level of legal certainty. It is also suggested here that any such strengthening should be part of the development of a more comprehensive better administration strategy, analogous to the better/smart regulation strategy, which the Union has framed over the past few years. Such a better administration strategy would tie in very well not only with the explicit introduction of the good governance principles in the T(F)EU but also with the explicit legal basis in Article 298 TFEU for the adoption of a regulation to ensure an 'open, efficient and independent European administration.' Both these principles and the legal basis put pressure on the legislator to take further action. If not

[92] M. Shapiro, 'The Giving Reasons Requirement', (1992) 179 *The University of Chicago Legal Forum* 203–204, as cited in P. Craig and G. de Burca, *EU Law. Text, Cases and Materials* (Oxford University Press, 2011), at 524.

[93] *ibid.*

[94] See the Report mentioned in footnote (*), at 60.

[95] Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration. Accessible on: https://wcd.coe.int/ViewDoc.jsp?id=1155877&Site=CM.

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politically feasible, a binding inter-institutional agreement could be envisaged for which Article 295 TFEU provides a legal basis. This provision would enable the adoption of an inter-institutional agreement on better administration or the adaptation of the existing IIA on Better Lawmaking,[96] so as to include certain procedural conditions regarding Commission soft post-legislative rulemaking. At the same time, as long as standing of individuals against soft post-legislative acts remains problematic, the European Parliament—as a privileged litigant under Article 263 TFEU—could put some more pressure on the ECJ to secure stronger judicial review of soft post-legislative rulemaking.

First submission: September 2012
Final draft accepted: October 2012

[96] The EP also proposed this in its soft law resolution, see n 49 *supra*.

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