

A Comparative Study on Soft Law: Lessons from the COVID-19 Pandemic

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Abstract

This article aims to map how soft law tools have complemented and supported the overall regulatory strategies implemented by European countries to counter the Covid-19 crisis (*the soft law atlas*), to shed light on some key topics of general interest for legal theory and practice: how soft law tools interact and complement one another including on different levels (*the soft law web*), how soft law tools interact and complement the sources of pandemic law (*the interplay between soft and hard law*), and the positive and negative impacts on governance and policy-making of soft law tools during the pandemic and beyond (*soft law bright and dark sides*).

Keywords: soft law, hard law, governance, effectiveness, resilience, emergency, pandemic

I. PRELIMINARY REMARKS: SCOPE, STATE OF THE ART, AND METHODOLOGY

This article aims to map how soft law fitted around and supported the overall regulatory strategies implemented by European countries to counter the systemic and multi-faceted Covid-19 crisis (*the pandemic soft law atlas*¹), and to shed light on some key aspects: more specifically, how pandemic soft law tools interact and complement one another including on different levels (*the pandemic soft law web*), how pandemic soft law tools interact and complement the sources of pandemic law to the point that they have created a sort of expanded normative dimension able to back up

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¹ The word ‘atlas’ is used as a synonym for ‘map’ when referring to one of the article’s main objectives, which is that of tracing and comparing the differential uses of soft law during the Pandemic crisis in a set of European Countries, as described below, in Section II.B.

the overall regulatory process, at all stages (*the interplay between pandemic soft and hard law*), and the positive and negative impacts on sovereignty and individual freedoms, as well as on governance and policy making during the pandemic and beyond (*the pandemic soft law bright and dark sides*).

Although the policy responses to Covid-19 have been analysed in depth from many different perspectives,² including as regards the use of soft law,³ a comparative analysis on the use, operation, effectiveness, and potential of pandemic soft law on such policy responses has still not been made. This article, based on a set of country-specific experiences ranging from February 2020 to May 2021, aims to fill this gap and to assess the true added value of soft law at a time of systemic emergency, where sovereignty becomes more apparent but where there is also an urgent need to get private and public players' consent over decisions deeply affecting individual freedoms. Decisions that may even involve tragic constitutional choices, shaping behaviours outside a merely prescriptive paradigm and enhancing legal resilience and effectiveness throughout the regulatory process and in a holistic sense.

A clear methodology is key to the success of the research work. First, it is essential to define and set out what soft law means.⁴ Here soft law is interpreted broadly, in

² 'Comparative Covid Response: Crisis, Knowledge, Politics, Interim Report' (Harvard Kennedy School, 12 January 2021); N González Martín and D Valadés (eds), *Emergencia sanitaria por Covid-19. Derecho constitucional comparado* (Universidad Nacional Autónoma de México, 2020); C Blumann, 'L'adaptation du fonctionnement du système institutionnel à la crise Covid' (2020) *Revue trimestrielle de droit européen* 621; D Blanquer (ed), *COVID-19 y derecho público* (Tirant lo Blanch, 2020); D Ritleng, 'L'Union européenne et la pandémie de Covid-19 : De la vertu des crises' (2020) *Revue trimestrielle de droit européen* 483; E Brosset, 'Le droit de l'Union européenne des pandémies à l'épreuve de la crise de la Covid-19: Entre confinement et déconfinement' (2020) *Revue trimestrielle de droit européen* 493. See also The Oxford Compendium of National Legal Responses to Covid-19 first published on 26 April 2021 and available from <https://oxcon.ouplaw.com/page/919>, and the related Lex-Atlas: Covid-19 (LAC19) project, <https://lexatlas-c19.org>.

³ It is worth mentioning that the *European Journal of Risk Regulation* recently published a dedicated issue on the use of soft law in dealing with COVID-19 at the EU level in seven EU Member States (Finland, Germany, Greece, Hungary, Italy, Spain, and Sweden), China and the UK (see 'Special Issue on COVID-19 and Soft Law' (2021) 12(1) *European Journal of Risk Regulation*).

⁴ The literature on soft law is broad. On international soft law, see P Weil, 'Vers une normativité relative en droit international?' (1982) *RGDIP* 7; G Abi-Saab, 'Éloge du 'droit assourdi'. Quelques réflexions sur le rôle de la soft law en droit international contemporain' in *Nouveaux itinéraires en droit. Homage à François Rigaux* (Bruylant, 1993); R Baxter, 'International Law in "Her Infinite Variety"' (1980) 29(4) *International and Comparative Law Quarterly* 549; T Gruchalla-Wesierski, 'Framework for Understanding Soft Law' (1984) 30 *McGill Law Journal* 39; C Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) *International and Comparative Law Quarterly* 18; J Klabbbers, 'The Undesirability of Soft Law' (1998) 67 *Nordic Journal of International Law* 382; H Hillgenberg, 'Soft Law im Völkerrecht' (1998) *Zeitschrift für europarechtliche Studien* 81. Doctrine on European soft law: GM Borhardt and KC Wellens, 'Soft Law in European Community Law' (1989) 14 *European Law Review* 267; R Alonso Garcia, 'El soft law comunitario' (2001) *Revista de Administración Pública* 63; L Senden, *Soft law in European Community Law* (Hart Publishers, 2004); M Eliantonio, E Korkea-aho, and O Stefan (eds), *EU Soft Law in the Member States* (Hart Publishing, 2021); see also the project 'Effects of EU soft law across the multilevel system', <https://www.efsolaw.eu/research/index.html>. Many studies on soft law have been developed in France; *ex multis*: M Ailincăi (ed), *Soft law et droits fondamentaux*, actes du

order to encompass the various tools used by institutions when implementing their policies and goals that aim to shape and regulate the behaviour of individuals, businesses, and/or other private and public institutions without recourse to the prescriptive or authoritative paradigm that traditionally applies in the public sphere.⁵ These tools may include guidelines and collections of best practices and cases, FAQs, public statements and speeches, alerts and press releases, recommendations and warnings, conference proceedings and working papers, information and awareness campaigns, and even silence.⁶ In this broad(er) meaning, soft law works as a descriptive legal category that encompasses the multi-faceted complexity of an increasingly important normativity essential to the effectiveness and resilience⁷ of contemporary legal systems and their institutional apparatus.⁸

(*F*note continued)

colloque organisé par le « Groupe de recherche sur les droits et libertés fondamentaux » (GRDLF) du Centre de recherches juridiques (CRJ), Grenoble, 4–5 février 2016, Pédone, Paris, 2017; C Thibierge, ‘Le droit souple, Réflexion sur les textures du droit’ (2003) *Revue trimestrielle de droit civil* 4; Conseil d’État, *Le droit souple, Etude annuelle* 2013, www.conseil-etat.fr. As highlighted by M Hartlapp, A Hofmann and M Knauff ‘Soft Law in Germany: Still Opposing Dynamics in Status and Effect’ in *EU Soft Law in the Member States*, *ibid*, p 154), ‘soft law has become an object of intense legal research in Germany’. See, *inter alia*: M Knauff, *Der Regelungsverbund: Recht und Soft Law im Mehrebenenensystem* (Mohr Siebeck, 2010); DE Arndt, *Sinn und Unsinn von Soft Law* (Nomos, 2011); C Giersch, *Das internationale Soft Law: Eine völkerrechtsdogmatische und völkerrechtssoziologische Bestandsaufnahme* (LIT Verlag, 2015). For a comparative analysis on soft law, see E Mostacci, *La soft law nel sistema delle fonti: uno studio comparato* (CEDAM, 2008); B Boschetti, ‘Soft Law e normatività. Un’analisi comparata’ (2016) *Rivista della regolazione dei mercati* 32; G Weeks, *Soft Law and Public Authorities* (Hart Publishing, 2016).

⁵ As noted by the French *Commission de terminologie et de néologie en matière juridique* in the *Vocabulaire des affaires étrangères (liste de termes, expressions et définitions adoptés)*, JORF No 0245 du 19 octobre 2008, 16049, texte No 36, the phrase ‘soft law’ encompasses the French expressions/concepts of *droit flou* (not predictable), *droit mou* (not prescriptive), and *droit souple* (not sanctioned). On soft law essential features (such as general applicability and formulation in abstract terms; *de jure* or *de facto* influence on affected parties; open format and irrelevance of materialisation in the form of guidance, recommendations, alerts, etc), see the recent *AFIFAE* (29 May 2020, No 440452) and *Gisti* (12 June 2020, No 418142) cases decided by the French *Conseil d’État*. On traditional normativity and its features, see J Bell, ‘Sources of Law’ (2018) 77(1) *Cambridge Law Journal* 40.

⁶ With reference to silence, it is worth noting here that its normativity derives from and is strictly linked to two factors: the public authority’s role and powers, together with its prestige or authoritative-ness. See Boschetti, note 4 above; see also the introduction to *EU Soft Law in the Member States*, note 4 above.

⁷ The term resilience has recently officially entered the legal sphere. According to Article 2, Section 1 (5) of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021, establishing the Recovery and Resilience Facility, ‘resilience’ means ‘the ability to face economic, social and environmental shocks or persistent structural changes in a fair, sustainable and inclusive way’. With this meaning, the resilient approach clearly aims to meet the challenges identified in the context of the European Semester, including the European Pillar of Social Rights and the UN Sustainable Development Goals.

⁸ B Boschetti and MD Poli, *The Soft Law Web: A Fluid Normativity Against Hybrid Threats* (conference paper, presented at the international conference on ‘Legal Resilience in an Era of Hybrid Threats’, University of Exeter, 8–10 April 2019).

Second, despite the fact that the term soft law contains echoes of law-making power and reveals the complex world of an ancillary normativity, its roles and features can only be fully understood and studied in conjunction with, and throughout, the entire regulatory process/cycle,⁹ from law making to law implementation and enforcement. This is precisely the landscape in which public policies and governance are developed, carried out, tested, and adjusted on an ongoing and quite open basis, and it is exactly where soft law comes into play. Consequently, as soft law is a regulatory strategy instrumental to an *augmented governance*,¹⁰ it would be more appropriate to refer to it as *soft regulation*. This terminology variation may serve to clear the field of potentially misleading interpretations and narratives connected to the use of the word 'law', in which soft law tools are only measured on a par with law making and soft law is compared with hard law, and soft law sources with hard law sources.

Third, the study and mapping of soft law cannot ignore the complexity of governance, ie the multitude of players, goals, and areas of application. Soft law is a fluid normativity that originates and operates in a composite and highly flexible web of international, supranational, domestic, and sub-state players, both public and private. This is an open-source environment in which norms, regulations, and institutional decision-making can be continuously inspired, tested, changed, and exchanged through adaptive and dynamic processes. In this respect, drawing lines between institutional soft law, self-regulation and even judicial soft law is not enough, and is far from satisfactory. Moreover, in order to understand how soft law sources and soft law makers influence one another, the study of this soft law web requires a *system-minded approach*.¹¹

Fourth, a comparative perspective may add significant value to the analysis and mapping of the roles soft law has played in countering the Covid-19 pandemic in Europe.¹² In fact, country-specific cultural, socio-economic, legal, and institutional

⁹ Boschetti, note 4 above; F Bignami, 'Introduction: A New Field: Comparative Law and Regulation' in F Bignami and E Zaring, *Comparative Law and Regulation* (Edward Elgar Publishing, 2016).

¹⁰ The concept of augmented governance is derived from IT sciences (ie augmented reality) and the IoT, and refers to the expanded potential determined by the combination of different realities and worlds. For an augmented governance new compass, see D Piana, *Legal Services and Digital Infrastructures. A New Compass for Better Governance* (Routledge, 2020); C Coglianese, *Achieving Regulatory Intelligence* (Brookings Institution Press, 2017). On the concept of governance: UNDP, 'Governance for Sustainable Human Development' (1997); M Shapiro, 'Administrative Law Unbounded: Reflections on Government and Governance (2001) 8(2) *Indiana Journal of Global Legal Studies* Article 6, <https://www.repository.law.indiana.edu/ijgls/vol8/iss2/6>. Thanks to the interplay between hard and soft regulatory measures, augmented governance is much more than soft governance. On soft governance, see D Utrilla Fernández-Bermejo, 'Soft Law Governance in Times of Coronavirus in Spain' (2021) 12(1) *European Journal of Risk Regulation* 111.

¹¹ Boschetti and Poli, note 8 above; for a new systems-minded regulatory intelligence: A Corbett, 'A Systems Approach to Regulatory Excellence' (Penn Program on Regulation), <https://www.law.upenn.edu/live/files/4713-corbett-ppr-bicregulatordiscussionpaper-062015pdf>; for a systems approach to administrative processes and proceedings, see B Boschetti, *La de-strutturazione del procedimento amministrativo. Nuove forme adattative tra settori e sistemi* (Edizioni ETS, 2018). With a focus on competition law: I Maher, 'Revisiting Soft Law: Governance, Regulation and Networks' in *EU Soft Law in the Member States*, note 4 above.

¹² Boschetti, note 4 above.

factors profoundly affect the selection of strategies based on soft law tools, the power and efficacy of soft law, its role within the framework of emergency sovereignty, deeply affecting individual freedoms but more than ever in need of people's consent and spontaneous compliance. Besides, country-specific factors significantly affect the interplay between hard and soft law, throughout the entire regulatory process. That said, due to the way the soft law web operates, a comparison of different soft law practices and experiences is key to understanding soft law's bright and dark side and, in the end, to furthering our knowledge of the mercurial regulatory strategy we call soft law. Moreover, precisely because it developed at a time of such a systemic emergency, the paradoxical alliance between sovereignty and soft law-based strategies clearly shows the extent to which soft law is linked to the effectiveness of law, at all stages of the regulatory process, and to the capacity of legal systems and their institutional apparatus to deal with rapid changes and systemic shocks such as those brought about by the Covid-19 pandemic.¹³ Thus, it has proved itself a strategic ally for augmented governance in a future of rapid change and unknown risks.

II. SOFT LAW IN THE PANDEMIC: THE ATLAS

A. General Overview and Structure of the Atlas-Country Selection

As highlighted by the French *Conseil d'État* in its 2013 report on soft law (*droit souple*),¹⁴ during times affected by new phenomena that evolve rapidly and require prompt and appropriate public policies, reactive governance, and legal resilience, soft law/soft regulation finds its place. Bearing this in mind, the extensive and substantial use of soft law/soft regulation in the fight against Covid-19 cannot be considered either surprising or coincidental. Besides, the fluid and grey-zone normativity represented by soft law has proved to be 'particularly adapted to deal with emergencies such as the current pandemic'.¹⁵

Furthermore, it is worth mentioning that the use of soft law in the context of pandemics and/or diseases is not new, either at international/European level or at national level, so the current frequent recourse to soft law to counter the Covid-19 pandemic can rely on previous experiences.¹⁶ For example, the guidance for pandemic preparedness developed by the World Health Organisation (WHO) in 1999¹⁷ and

¹³ It comes as no surprise that pandemic soft law in Germany is regarded as 'business as usual'. See M Knauff, 'Coronavirus and Soft Law in Germany: Business as Usual?' (2021) 12(1) *European Journal of Risk Regulation* 45; see also, eg: E Slautsky, 'Public Law Values in Times of Lockdown: Lessons from the Belgian Case' (*UKAJI*, 30 April 2020).

¹⁴ *Conseil d'État*, note 4 above, p 91.

¹⁵ S Oana, 'Covid-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda' (European Papers, 3 June 2020), p 1.

¹⁶ See the analysis of S Sekalala, *Soft Law and Global Health Problems. Lessons from Responses to HIV/AIDS, Malaria and Tuberculosis* (Cambridge University Press, 2017).

¹⁷ WHO, 'Influenza Pandemic Plan. The Role of WHO and Guidelines for National and Regional Planning' (Geneva, Switzerland, April 1999), <https://www.who.int/csr/resources/publications/influenza/whocdscsredc991.pdf>.

revised in 2005¹⁸ and 2009¹⁹ comes to mind, along with national pandemic plans adopted on the basis of such guidance²⁰ (nowadays partially reviewed and updated), also taking into account the latter's relevance in the field of fundamental rights and their substitutive function with respect to hard law.²¹ The extensive recourse to soft law at all levels during the SARS epidemic is also tangible evidence of this (see the WHO Guidelines for the global surveillance of severe acute respiratory syndrome issued in 2003 and revised in 2004,²² the EU guidance documents and the measures implemented at national level²³). It has also to be highlighted that at international and European level soft law is the only tool, given the lack of competence and/or of binding powers on such matters. Furthermore, the use of soft law at European and international level has been generally increasing over time.²⁴

However, awareness is not enough. In order to determine the effectiveness of soft law in addressing the pandemic's many challenges (from health to the economy) and, on a more general and theoretical level, the impact it is having and will have on legal systems and individual freedoms, together with the reasons for its success (or perhaps lack thereof), we need to measure and map the soft law web (see Part I). This means tracking the way the soft law web operates, starting with the soft law makers (Section B below), the type of soft law tools they use (Section C below), the functions/benefits soft law helps them achieve (Section D below), and, last but not least, linking the various domestic soft law experiences (Section E below). Based on the proposed methodology, different domestic jurisdictions are here taken into account, in order to both widen the research and evidence base, and offer a significant comparative overview between Italy,²⁵

¹⁸ WHO, 'WHO Global Influenza Preparedness Plan. The Role of WHO and Recommendations for National Measures before and during Pandemics' (Switzerland, 2005), https://www.who.int/csr/resources/publications/influenza/WHO_CDS_CSR_GIP_2005_5.pdf.

¹⁹ WHO, 'Pandemic Influenza Preparedness and Response. A WHO Guidance Document' (France, 2009), https://apps.who.int/iris/bitstream/handle/10665/44123/9789241547680_eng.pdf?sequence=1.

²⁰ About the national preparedness plans see: <https://www.euro.who.int/en/health-topics/communicable-diseases/influenza/pandemic-influenza/pandemic-preparedness/national-preparedness-plans>.

²¹ Critically in this respect: A Klafki, *Risiko und Recht* (Mohr Siebeck, 2017), p 289.

²² See: https://www.who.int/csr/resources/publications/WHO_CDS_CSR_ARO_2004_1/en.

²³ A summary of such measures is provided for by the European Commission. See: European Commission, 'Measures Undertaken by Member States and Accession Countries to Control the Outbreak of SARS' (5 June 2003), https://ec.europa.eu/health/ph_threats/com/sars/sars_measures_en.pdf.

²⁴ For a quantitative analysis of the evolution of soft law in the European Union, showing a constant inflation of the number of acts between 2004 and 2019 in different policy sectors see the recent study by B Cappellina, 'EfSoLaw: A New Data Set on the Evolution of Soft Law in the European Union' (ECPR Virtual General Conference 2020, August 2020, Innsbruck (Virtual), Austria, January 21, 2021), <https://hal.archives-ouvertes.fr/hal-03117788/document>.

²⁵ On the Italian reaction to the COVID-19 pandemic: 'L Cuocolo, I diritti costituzionali di fronte all'emergenza Covid: La reazione italiana', *DPCE Online* (February 2020); C Damiani, 'L'emergenza sanitaria da Covid-19 alla luce della normativa vigente' (2021) *Quaderni amministrativi* 60; L Mezzetti, 'La pandemia de la Constitución: El impacto del COVID-19 en el sistema constitucional italiano' in *Emergencia sanitaria por Covid-19. Derecho constitucional comparado*, note 2 above; B Boschetti

Germany,²⁶ France,²⁷ the United Kingdom,²⁸ and

(*F'note continued*)

and MD Poli, 'Il ruolo della soft law nella lotta contro il Covid-19' in B Boschetti and E Vendramini (eds), *FuturAP. Rapporto sul Futuro e l'innovazione dell'Amministrazione Pubblica - 2021* (EDUCatt, 2021), p 65 (English edition available); F Aperio Bella, C Lauri, and G Capra, 'The Role of COVID-19 Soft Law Measures in Italy: Much Ado about Nothing?' (2021) 12 *European Journal of Risk Regulation* 93; S Civitaresse Matteucci, A Pioggia, G Repetto, D Tega, M Pignataro, and M Celepija, *Italy: Legal Response to Covid-19* (The Oxford Compendium of National Legal Responses to Covid-19, April 2021), <https://oxcon.oup.com/view/10.1093/law-occ19/law-occ19-e11>.

²⁶ On the German response to COVID-19 see, *ex multis*: V Baldini, 'Emergenza sanitaria e stato di diritto: una comparazione Italia-Germania', *Dirittifondamentali.it* 597 (31 May 2020); E Buoso and C Fraenkel-Haeblerle, 'La Germania alla prova del coronavirus tra Stato di diritto e misure emergenziali', *Federalismi.it* 75 (24 June 2020); A De Petris, 'Un approccio diverso: L'emergenza "collaborativa" del federalismo tedesco', *Rivista AIC* 429 (March 2020); L Hering, 'Covid-19 and Constitutional Law: The Case of Germany' (*Comparativecovidlaw.it*, 12 December 2020), J Gallon, 'Informeller Föderalismus statt öffentlicher Deliberation: Oder: Warum die Öffentlichkeit bei der Bund-Länder Koordination in der Pandemiebekämpfung beteiligt werden sollte' (*VerfBlog*, 9 February 2021); S Kropp, 'Zerreißprobe für den Flickenteppich? Der deutsche Föderalismus in Zeiten von Covid-19' (*VerfBlog*, 26 May 2020); G Taccogna, 'L'ordinamento tedesco di fronte al Virus Sars-CoV-2' in L Cuocolo (ed), *I diritti costituzionali di fronte all'emergenza Covid-19. Una prospettiva comparata* 78 (*Federalismi.it*, 5 May 2020); J Woelk, 'La gestione della pandemia da parte della Germania: "Wir schaffen das!"', *DPCE Online* 1713 (February 2020); A Zei, 'Germania Covid-19. Documentazione normativa', *Nomos: Le attualità nel diritto* 1 (January 2020); F Hatke and H Martin, 'Collective Action during the Covid-19 Pandemic: The Case of Germany's Fragmented Authority' (*Administrative Theory & Praxis*, September 2020); A-B Kaiser and R Hensel, *Federal Republic of Germany: Legal Response to Covid-19* (The Oxford Compendium of National Legal Responses to Covid-19, December 2020), <https://oxcon.oup.com/view/10.1093/law-occ19/law-occ19-e2>; Knauff, note 13 above.

²⁷ On the French experience: A Deffenu and F Laffaile, 'Stato di emergenza sanitaria e Covid-19: (breve) lettura francese di un fenomeno giuridico abnorme' (*Costituzionalismo.it*, January 2020); B Mathieu, 'La crise sanitaire: Un reveleateur de la crise de la democratie liberale. Reflexions sommaires a partir de la situation française in JM Serna de la Garza (ed), *Covid-19 and Constitutional Law. Covid-19 et droit constitutionnel* (Universidad Nacional Autónoma de México, 2020); C Sartoretti, 'La risposta francese all'emergenza sanitaria da Covid-19: Stato di diritto e Costituzione alla prova della pandemia', *DPCE Online* 1637 (February 2020); P Costanzo, 'Brevi note sulle soluzioni apprestate in Francia per contrastare la pandemia nei giudizi di costituzionalità', *Consulta online* 242 (January 2020); P Piciacchia, 'La democrazia francese alla prova del Covid-19 tra imperativi sanitari e profili giuridici dell'emergenza', *Nomos. Le attualità nel diritto* 1 (January 2020); R Bourget, 'El marco jurídico de la gestión de la crisis sanitaria del COVID-19 en Francia' in *Emergencia sanitaria por Covid-19, Derecho constitucional comparado*, note 2 above; E Chambas and T Perroud, 'France: Legal Response to Covid-19' (The Oxford Compendium of National Legal Responses to Covid-19, April 2021), <https://oxcon.oup.com/view/10.1093/law-occ19/law-occ19-e9>.

²⁸ About the United Kingdom and Covid-19 see: A Torre, 'Dal Coronavirus alla Corona. Emergenza pandemica ed evoluzione costituzionale nel Regno Unito', *DPCE Online* 1781 (February 2020); M Amos, 'Covid-19 and Constitutional Law in the United Kingdom' in JM Serna de la Garza (ed), *Covid-19 and Constitutional Law. Covid-19 et droit constitutionnel*, note 27 above; J Grogan, 'Rule of Law and Covid-19: The Need for Clarity, Certainty, Transparency and Coordination' (*LSE British Politics and Policy Blog*, October 2020), <https://blogs.lse.ac.uk/politicsandpolicy/rule-of-law-and-covid19>; J Grogan and N Weinberg, 'Principles to Uphold the Rule of Law and Good Governance in a Public Health Emergency' (*RECONNECT Policy Brief*, August 2020); J King and N Byrom, 'United Kingdom: Legal Response to Covid-19' (The Oxford Compendium of National Legal

Luxembourg.²⁹ The countries were selected to respond to specific criteria. First of all, the selected countries have different levels of decentralisation, so it is possible to assess not only the use of soft law/soft regulation in the light of the different forms of state, but also the role soft law plays as a tool bridging the centre and the peripheries of legal systems.³⁰ Secondly, in the aftermath of Brexit and given the peculiar features of the United Kingdom's legal (and constitutional) system, understanding how the UK used soft law to counter Covid-19 or to improve the efficacy of its overall Covid-19 regulatory strategy, the many challenges posed by the pandemic—in terms of both the resilience of the healthcare system and socio-economic recovery—and the impact EU soft law may have had (and may still have), adds dramatic tension to the present research and its proposed scope. Finally, the case of Luxembourg is worth mentioning because of some best practices put in place to combat Covid-19, which have been possible precisely due to its small size.

In the next paragraphs, the article will aim to put together a pandemic soft law scenario, taking into account the players, the forms, and the roles of soft law, as it has evolved throughout the pandemic crisis, in order to offer a frame of reference as a basis for a better comprehension of the value and of the drawbacks of using soft law in the current emergency situation and beyond.

B. The Soft Law Makers

In actual fact, and in normal circumstances, soft law is not only omnipresent,³¹ it also operates in a composite and highly flexible web of international, supranational, domestic, and sub-state players, both public and private. It cuts across different legal systems (both vertically and horizontally) at all stages of the regulatory processes, allowing for highly flexible and direct forms of communication/dialogue across the international order on the one hand, and between individuals and businesses on the other. The complexity of the *soft law web*—the number of players and levels involved, and their interaction—depends on many country-specific factors. These include: the form of state and government, the level of institutional fairness and culture of cooperation (both public-to-public and public-to-private), the structure and functioning of the administrative apparatus, and the specific features of the legal system concerned. The question is whether the pandemic has added further complexity to the already complex soft law web. To answer this question, we

(Footnote continued)

Responses to Covid-19, October 2020), <https://oxcon.ouplaw.com/view/10.1093/law-occ19/law-occ19-e17>; J Sorabji and S Vaughan, “‘This Is Not A Rule’: COVID-19 in England & Wales and Criminal Justice Governance via Guidance”, 12(1) *European Journal of Risk Regulation* 143 (March 2021); interesting comments have been posted on <https://ukconstitutionallaw.org/tag/covid-19>.

²⁹ On the situation in Luxembourg (especially from a labour law perspective) see: L Ratti, ‘Covid-19 and Labour Law in Luxembourg’, 11(3) *European Labour Law Journal* 314 (2020).

³⁰ CJ Fridrich, *Trends of Federalism in Theory and in Practice* (Pall Mall P, 1968).

³¹ Conseil d’État, note 4 above, p 7.

need to map the spectrum of ‘anti-Covid19’ soft law makers at the various levels (1), and how they operate and interact with one another (2).

With regards to the spectrum of ‘anti-Covid19’ soft law makers, it is worth emphasising beforehand that the (huge) number and (varied) type of players depend primarily on the pandemic’s multi-faceted and systemic impacts. It is a health-related, but also a socio-economic crisis which raises serious constitutional issues³² and the need to re-think cultural and development models.³³ Besides, to counter the Covid-19 emergency, a new pandemic-related form of governance has emerged, which has developed rapidly in all countries surveyed, bringing new players to the forefront, altering roles and powers, and forcing the system into institutional cooperation at all levels with the involvement of all affected parties (both public and private³⁴). Notwithstanding the fact that national experiences differ from one another in terms of their governance structure and its legal basis,³⁵ pandemic governance has tended to work alongside, and to partially overlap with the institutional and administrative apparatus, adding a further level of complexity. Countries with an existing specific legal framework (and related administrative apparatus) for tackling emergency situations and healthcare crises, are no exception.³⁶ In short, the vast spectrum of soft law makers mirrors, on the one hand, the intense, multi-faceted and systemic effects of the Covid-19 crisis, and, on the other hand, the organisational aspect of the pandemic that has added so much complexity to governance frameworks in all countries. In this respect, soft law is at once a cause and effect of this complexity, in the way that it triggers changes to the governance framework and gives voice to many governmental and non-governmental players.

Moving on to map the soft law makers, starting from an international level, since the Covid-19 crisis broke out, the United Nations (UN), and its specialised agency responsible for international public health (the WHO), have played a leading role

³² IA Nicotra, *Pandemia costituzionale (Editoriale Scientifica, 2020)*; B Brancati, A Lo Calzo, and R Romboli, *Coronavirus e Costituzione. Una integrazione al Manuale di diritto costituzionale* (Pisa University Press, 2020); A Jr Golia, L Hering, C Moser, and T Sparks, ‘Constitutions and Contagion. European Constitutional Systems and the COVID-19 Pandemic (MPIL Research Paper Series), No 42/2020; Cuocolo, note 26 above; Torre, note 28 above; C Ayala Corao, ‘Challenges that the Covid-19 Pandemic Poses to the Rule of Law, Democracy, and Human Rights (MPIL Research Paper Series), No 23/2020; A Greene, *Emergency Powers in a Time of Pandemic* (Policy Press, 2020).

³³ M Mazzucato, *Mission Economy: A Moonshot Guide to Changing Capitalism* (Allen Lane, 2021). See also Next Generation EU’s flagship areas for investments and reforms, https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_it.

³⁴ Italian Constitutional Court, ‘Annual Report (on 2019 Activity)’ (28 April 2020), <https://www.cortecostituzionale.it/actionRelazioniPresidenti.do>.

³⁵ As regards the UK, see Grogan, note 28 above; as regards Italy, Cuocolo, note 25 above; as regards France, Mathieu, note 27 above; as regards Germany, Hering, note 26 above.

³⁶ For the UK, see the Public Health (Control of disease) Act 1984; for Italy, Legislative Decree No 1/2018, Civil Protection Code, Law on Civil Protection and Law No 833/1978 on the National Healthcare System; for France, the Code of Public Healthcare (1953). As noted by Deffenu and Laffaile, note 27 above, p 180, the French law No 2020-290 (Emergency Law to Counter the Covid-19 Pandemic) has given rise to a new executive-driven emergency government framework parallel to the one already in place.

in addressing the current pandemic and the response strategies put in place by nation states.³⁷ However, the pandemic-driven collapse of the economy has also led the Organisation for Economic Co-operation and Development (OECD) to enter the field, and to develop data, analysis, and recommendations on a vast range of topics. Such measures focus on the vulnerable sectors of society and the economy (such as tourism), in an attempt to boost a resilient recovery through coordinated policy responses across countries. The International Monetary Fund (IMF) also provides policy advice, issuing special series notes on Covid-19 to help members address the economic effects of the pandemic,³⁸ and FAQs on the IMF's response to Covid-19.³⁹ The final component of the framework is the Council of Europe, which has issued a toolkit for governments across Europe on respect for human rights, democracy, and the rule of law during the COVID-19 crisis.⁴⁰ The importance of this document cannot be underestimated, since it highlights the fact that anti-Covid-19 measures must remain proportionate and limited in time in order to avoid undermining human rights, democracy, and the principle of the rule of law. In this context, it is also worth mentioning that in its Statement on derogations from the Covenant in connection with the COVID-19 pandemic,⁴¹ the UN Human Rights Committee has also stressed the importance of the limitation in duration, geographical coverage and material scope, and on the proportionality of any measures taken. This crucial issue is gradually being dealt with by Constitutional Courts, in their key role of guardian of fundamental rights and individual freedoms, called upon to establish both the constitutional features of pandemic law and the constitutional parameters to assess the sustainability of anti-pandemic measures, even if based on soft law.⁴²

At a supra-national level, the response to the coronavirus crisis has been led by the European Commission. On the one hand, the Commission 'has assumed, along with

³⁷ On the role of international law against the Covid-19: A von Bogdandy and P Villarreal, 'International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis' (MPIL Research Paper Series), No 7/2020; A von Bogdandy and P Villarreal, 'Derecho internacional público y la respuesta frente a la pandemia de COVID-19' in *Emergencia sanitaria por Covid-19. Derecho constitucional comparado*, note 2 above. Specifically on WHO: A von Bogdandy and P Villarreal, 'Die Weltgesundheitsorganisation in der COVID-19 Pandemie', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 293 (2020); A von Bogdandy and P Villarreal, 'Critical Features of International Authority in Pandemic Response: The WHO in the COVID-19 Crisis, Human Rights and the Changing World Order' (MPIL Research Paper Series), No 18/2020; S Izzo, 'Brevi considerazioni sul ruolo dell'OMS nel contrasto alla pandemia di Covid-19', *DPCE Online* 2247 (February 2020).

³⁸ See: <https://www.imf.org/en/Publications/SPROLLS/covid19-special-notes>.

³⁹ See: <https://www.imf.org/en/About/FAQ/imf-response-to-covid-19>.

⁴⁰ Council of Europe, 'Respecting Democracy, Rule of Law and Human Rights in the Framework of the Covid-19 Sanitary Crisis. A Toolkit for Member States' (April 2020), p 7, <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>.

⁴¹ United Nations, Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic, CCPR/C/128/2 (April 2020), p 30, <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf>.

⁴² With reference to Germany, see Knauff, note 13 above.

national authorities, its own share of responsibility to respond properly to the serious public health issues related to the COVID-19 crisis⁴³ and, on the other hand, it has given ‘its contribution in term of solidarity, ie the quintessential normative value of the EU construction’.⁴⁴

Under this umbrella, other significant European soft law players in the pandemic are the European Central Bank, the three European Supervisory Authorities (the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA)), the European Data Protection Board, and the various EU Agencies, each in its field of expertise.⁴⁵ Their action is particularly relevant, since they have engaged both with the equivalent authorities/agencies at national level and with private institutions/organisations and individuals, giving an extraordinary boost to mitigation of the crisis in the various sectors.

On a domestic level, the emergence of pandemic governance frameworks has been responsible for the most significant changes, especially in the use of soft law and the variety of different soft law makers. Although the spectrum of soft law makers very much depends on the country-specific pandemic governance framework (its complexity, operational mechanisms, constitutional setting, and so on), to say that the soft law web simply mirrors it is to sin by neglect. In fact, soft law is a powerful game-changer. It contributed to the framework for pandemic governance in the first place, together with its informal bodies and advisory boards, and helped many players find their place within this framework (irrespective of formal legal boundaries). Their roles promptly and informally adapted to developments in the pandemic crisis, other players’ behaviour and the effectiveness of pandemic-driven regulatory strategies. Mapping the pandemic governance framework is therefore key, as all its players have proved themselves to be soft law makers, in the sense that they have, at least to a certain extent, made use of soft law as a regulatory strategy to tackle the pandemic’s many challenges. It is also worth mentioning here that many of the pandemic governance framework players have had an important role precisely as soft law makers. Quite frankly, were it not for soft law, they would have played a less important, or very different role.

As the following rapid overview shows, this is common to all the countries surveyed. The crisis outbreak has led to quite a composite governance framework, the essential features of which are: a strengthening of the head of government’s role together with that of the executive and that of central government;⁴⁶ a call for the presence of supportive, encouraging and charismatic high-level institutional figures (starting with the head of state⁴⁷); substantial, continuous, and relatively

⁴³ 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’, 5(1) *European Papers* 370 (2020).

⁴⁴ *Ibid*, p 366.

⁴⁵ Please note that the list of the European soft law players is not exhaustive, but is only illustrative.

⁴⁶ Deffenu and Laffaile, note 27 above, pp 180 ff.

⁴⁷ Even at the EU level, as Ursula von der Leyen’s frequent public statements and press releases prove.

informal cooperation between different levels of government (regional and municipal councils first and foremost);⁴⁸ the empowerment of extraordinary emergency bodies (and related advisory and scientific committees) operating side by side, and in partial overlap with other emergency bodies and administrative structures already provided for by law;⁴⁹ independent agencies acting as facilitators in many key areas (such as financial and banking markets);⁵⁰ consolidation of the proactive role of unions and trade associations in shaping anti-pandemic regulatory measures and (hard and soft) regulations and in assisting workers and/or businesses;⁵¹ and engagement of the scientific community in policy-making to support anti-pandemic regulatory strategies and their effectiveness.⁵² These changes have paved the way to a broad and varied spectrum of soft law makers—public and private, national, regional, and local—interacting with one another and with soft law makers at supranational and international level.

Before considering how soft law makers interact with one another, it is worth pointing out how they operate (2). In this respect, it is noticeable that many soft law makers have shown themselves to rely heavily on soft law to address tasks and to make their contribution to anti-pandemic governance.⁵³ A few examples may be useful here. Notwithstanding the strong regulatory powers conferred upon him by emergency laws, the former Italian Prime Minister Giuseppe Conte relied strongly on soft law (public statements and press releases above all, frequently given in the presence of other institutional figures or members of scientific advisory bodies) to enhance his leading role in the pandemic governance framework and the effectiveness of anti-pandemic strategies in terms of citizens' responsiveness. Similarly, the UK Prime Minister Boris Johnson has been shoring up his political standing and decision-making powers with a strong narrative: '*our great national drama*'⁵⁴ and '*we must act like any wartime government*',⁵⁵ echoed by Her

⁴⁸ However, at least as regards the Italian experience, on the verge of the second epidemic wave, relationships between central government and local authorities became more formal and new methods of coordination were regulated throughout emergency decree laws.

⁴⁹ On French law enacted since the start of the crisis, see <https://www.vie-publique.fr/covid-19-les-textes-publies-au-journal-officiel>. On the emergency law (*Loi organique d'urgence pour faire face à l'épidémie de Covid-19*): https://www.assemblee-nationale.fr/dyn/15/dossiers/alt/loi_organique_urgence_epidemie_covid-19.

⁵⁰ Boschetti and Poli, note 25 above, p 70.

⁵¹ *Ibid*, p 71. In France, trade associations have also played a key role in soft law in the fight against the pandemic: see the recent *AFIFAE*, note 5 above, a case decided by the French *Conseil d'État*.

⁵² As the recurring use of public statements by virologists and pandemic experts to support government decision making and lockdown measures proves, as observed in all the surveyed countries.

⁵³ On soft law governance, see Utrilla Fernández-Bermejo, note 10 above.

⁵⁴ B Johnson, Speech: PM's Address to the Nation, 31 January 2020, <https://www.gov.uk/government/speeches/pm-address-to-the-nation-31-january-2020>. This speech is mentioned in the essay by Torre, note 28 above, p 1791.

⁵⁵ B Johnson, Speech: Prime Minister's Statement on Coronavirus (COVID-19), 17 March 2020, <https://www.gov.uk/government/speeches/pm-statement-on-coronavirus-17-march-2020>. On the use of the wartime language by Boris Johnson see: "This Enemy Can Be Deadly": Boris Johnson

Majesty's official addresses to the nation,⁵⁶ and conveyed through frequent public statements (almost on a daily basis in the first wave of Covid-19).⁵⁷ The same narrative has been used in France by President Emmanuel Macron: '*Nous sommes en guerre*'.⁵⁸ The German Chancellor, Angela Merkel, has also benefited from her scientific background (she has a PhD in quantum chemistry)—which confers more authority to her messages, increasing the power of their persuasion on the public opinion—to strengthen anti-Covid-19 distancing measures by inspiring trust and dependability.⁵⁹ In Luxembourg it should be noted that, in accordance with Article 32(4) of the Constitution, the declaration of a state of emergency on national territory was anticipated by the statement of the Prime Minister Xavier Bettel at the Chamber of Deputies telling people to 'Stay at home!'⁶⁰ The subsequent measures to counter the pandemic were always announced or accompanied by statements made by the Prime Minister or press conferences by the latter together with the Minister of Health, Paulette Lenert: a strategic interplay/alliance between hard and soft regulatory measures in order to underpin people's consent and trust in the institutions together with their effectiveness.

The same approach can be observed at both higher (international and/or supranational) and lower levels (state, regional, and local government level, based on the country-specific form of state and the devolution in place), where high-level institutional figures have frequently used soft law to ramp up their dialogue with interested parties and/or citizens with the aim of promoting coordinated approaches, building consensus and trust in governance, and preventing stricter lockdown and social distancing measures. In this respect, it is worth mentioning that the UN Secretary-General António Guterres has issued many public statements, press releases, statements to UN member states (also via video-message), and opinions.⁶¹ Among others, these include the following statements: his comparison between the virus and a 'war that needs a war plan to fight it' at the G-20 summit on the Covid-19

(*Note continued*)

Invokes Wartime Language' (*Guardian*, 17 March 2020), <https://www.theguardian.com/world/2020/mar/17/enemy-deadly-boris-johnson-invokes-wartime-language-coronavirus>.

⁵⁶ Eg Queen's Coronavirus Broadcast, 5 April 2020. Depending on the authority and authoritative-ness of the speaker, these communication strategies play a key normative role not only because they convey recommended behaviours, but also in that they give a nudge to regulatory measures already in place (based on both hard and soft law sources).

⁵⁷ See: <https://www.gov.uk/government/speeches/pm-statement-on-coronavirus-22-march-2020>.

⁵⁸ President Macron's Broadcast, 16 March 2020, https://www.youtube.com/watch?v=m_pXUmz5qN0.

⁵⁹ Merkel's explanation on the transmission of the COVID-19 ran around the world and on social media, having a great impact for its clarity. See: 'Angela Merkel Draws on Science Background in Covid-19 Explainer' (*Guardian*, 16 April 2020), <https://www.theguardian.com/world/2020/apr/16/angela-merkel-draws-on-science-background-in-covid-19-explainer-lockdown-exit>.

⁶⁰ See: Declaration of the Prime Minister at the Chamber of Deputies: Stay at Home!, 17 March 2020, https://gouvernement.lu/en/actualites/toutes_actualites/communiques/2020/03-mars/17-declaration-premier-chd.html.

⁶¹ See: <https://www.un.org/en/coronavirus/un-secretary-general>.

pandemic on 26 March, 2020;⁶² his warning against ‘a dangerous epidemic of misinformation’; and his invitation to trust in science and solidarity on 14 April, 2020.⁶³ Similarly, the President of the European Commission has made frequent official public statements to EU citizens (and has even been interviewed on national TV networks), to help narrow distances between European institutions and raise awareness about EU measures and strategies to counter Covid-19 and support the recovery of EU member states.⁶⁴

Other institutional bodies have relied heavily on soft law. In Italy, 71 of 134 Covid-related Health Ministry⁶⁵ measures (from February to December 2020) not only fall into the category of soft law tools, but also circulate the soft law of scientific advisory bodies (best practices and recommendations, guidelines, and safety measures), leading to what could be described as a *soft law loop*.⁶⁶ It is probably less surprising to find out that 34 of the 38 Interior Ministry’s pandemic-related measures (enacted before 31 December 2020) fall into the category of soft law tools. In Germany, the Federal Ministry of Health has made wide use of its power to issue recommendations, a power that is now expressly recognised by Article 5, paragraph 6 of the Infection Protection Act (*Infektionsschutzgesetz*, IfSG), as amended in 2020.⁶⁷ Here the Robert Koch Institut (RKI), the German federal government agency and research institute responsible for disease control and prevention, has played a pivotal role through a broad range of soft law measures (from the supplement to the pandemic plan cited sub C to its constantly updated FAQ). The Institute’s coordination role in the event of an epidemic outbreak of national importance is set out in the Infection Protection Act, as amended in 2020.⁶⁸ It is also worth mentioning that Article 4, paragraph 2, of the Act expressly mentions soft law instruments that can be issued by the Robert Koch Institut: guidelines, recommendations, leaflets and other information for the prevention, detection and prevention of the spread of

⁶² See: <https://www.un.org/en/coronavirus/war-needs-war-time-plan-fight-it>.

⁶³ See: <https://www.un.org/en/un-coronavirus-communications-team/time-science-and-solidarity>.

⁶⁴ See: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655.

⁶⁵ See: Boschetti and Poli, note 25 above, p 69.

⁶⁶ The formula soft law loop refers to crosslinks and circuits between soft law tools generated at different levels of government and even by private players (acting both globally and locally). This phenomenon is of relevance in the legal sphere in so far as it reveals an expanded dimension of governance, cutting through legal boundaries and opening up unexpected direct connections between hard and soft law sources, internationally, transnationally, nationally, and locally.

⁶⁷ Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz - IfSG), <http://www.gesetze-im-internet.de/ifsg/BJNR104510000.html>. Article 5, paragraph 6 of the IfSG, as amended in 2020, states: ‘Aufgrund einer epidemischen Lage von nationaler Tragweite kann das Bundesministerium für Gesundheit unter Heranziehung der Empfehlungen des Robert Koch-Instituts *Empfehlungen* abgeben, um ein koordiniertes Vorgehen innerhalb der Bundesrepublik Deutschland zu ermöglichen’ (‘Due to an epidemic outbreak of national importance, the Federal Ministry of Health can issue recommendations based on the recommendations of the Robert Koch Institute in order to enable a coordinated approach within the Federal Republic of Germany’ (our translation)).

⁶⁸ IfSG, note 67 above, Art 5, para 7.

transmissible diseases.⁶⁹ Moving onto independent agencies,⁷⁰ these have undoubtedly been key facilitators in sector-specific markets by combining a broad range of soft law tools (from FAQs to guidelines). Their approach is clearly aimed at embracing all market players—consumers, customers, and savers first and foremost—and at operating in close conjunction with sector-specific regulators and supervisory bodies at European level.

It is also important to highlight that European and constitutional judges are key soft law makers. Indeed, the aforementioned broad concept of soft law also needs to include the soft approach of judicial dialogue.⁷¹ This is the implicit or unseen conversations between courts based on the work of judges' assistants, or the informal meetings between judges that take place through their own personal networks or through seminars/conferences organised by the courts or by international organisations and universities. Such dialogue provides a significant stimulus for the establishment and dissemination of an international/European legal culture capable of dealing with the challenges of our time, without lowering the threshold on the protection of rights.⁷² Judicial soft law instruments are also the reports and analyses drafted by the courts such as the one on *droit souple* by the French *Conseil d'État*,⁷³ the first annual report published in 2020 by the German Federal Constitutional Court⁷⁴ that—not by chance—includes a brief overview of the decisions on measures taken to combat the Covid-19 pandemic,⁷⁵ or the report on the activities of the Italian Constitutional Court in 2020 made by its President Giancarlo Coraggio on 13

⁶⁹ IfSG, note 67 above, Art 4, para 2: 'Das Robert Koch-Institut erstellt im Benehmen mit den jeweils zuständigen Bundesbehörden für Fachkreise als Maßnahme des vorbeugenden Gesundheitsschutzes Richtlinien, Empfehlungen, Merkblätter und sonstige Informationen zur Vorbeugung, Erkennung und Verhinderung der Weiterverbreitung übertragbarer Krankheiten'.

⁷⁰ Such as, for example, in Italy, the Bank of Italy, or the supervisory commission on financial markets (CONSOB), the National Anti-corruption Authority (ANAC); in Germany *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin); in Luxembourg, the *Commission de Surveillance du Secteur Financier* (CSSF).

⁷¹ On the different categories of judicial dialogue see: MD Poli, 'The Judicial Dialogue in Europe. Adding Clarity to a Persistently Cloudy Concept' (2017) 3 *Vienna Journal on International Constitutional Law* 351. Specifically on the horizontal dialogue among Constitutional Courts: MD Poli, 'Der horizontale Dialog zwischen Verfassungsgerichten bzw. Rechtsvergleichung in den Verfassungsgerichtssälen. Die deutschen, französischen und italienischen Erfahrungen' in R Broemel, P Krell, O Muthorst, and J Prütting (eds), *Prozessrecht in nationaler, europäischer und globaler Perspektive* (Mohr Siebeck, 2017).

⁷² Poli, note 71 above. See also: MD Poli, 'Der justizielle Pluralismus der Europäischen Verfassungsgemeinschaft: "Babylonische Gerichte" oder "Gerichte für Babylon"?' (2016) 3 *Der Staat* 373.

⁷³ *Conseil d'État*, note 4 above.

⁷⁴ The 2020 annual report is available on the website of the German Federal Constitutional Court both in German and in English. See: 'Federal Constitutional Court Publishes Annual Report for the First Time', Press Release No 19/2021, 3 March 2021, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-019.html>.

⁷⁵ Federal Constitutional Court, 'Annual Report 2020', English version, pp 59–60, <https://jahresbericht.bundesverfassungsgericht.de/en>.

May 2021,⁷⁶ which contains a reference to the problem of a lack of coordination between State and Regions in the context of the current pandemic and to the unity of action and regulation required by the national dimension of the emergency.⁷⁷ In addition, another aspect worth mentioning is the current development of a new procedural judicial soft law, composed of guidelines and hearing memoranda, which aims to introduce exceptional procedural regulation for Covid-19 times,⁷⁸ thanks to the flexibility and dynamism that enable it to adapt to a constantly changing situation.

This overview would not be complete without reference to research institutions/centres/associations as soft law makers in the contest of the fight against Covid-19. If scholars' works are always a stimulus for the development of strategies and solutions, the formal recourse to soft law instruments by research institutions/centres/associations specifically aimed to spread anti-pandemic strategies or guidance is worth of mention. Two cases are: (1) the joint statement dated 28 April 2020 by the Fraunhofer Society, Helmholtz Association, Leibniz Association, and Max Planck Society on possible coping strategies for the coronavirus pandemic from a modelling perspective based on mathematical analyses of the data situation,⁷⁹ and (2) ad hoc statements on the coronavirus pandemic by the German National Academy of Sciences Leopoldina.⁸⁰ The fact that both the cases are in Germany is not surprising, given the importance of university and non-university research organisations in the country. Finally, also in Germany the Society for Legislation has acted as a soft law maker by issuing guidelines for parliamentary and executive law-making in the present Covid-19 situation,⁸¹ focusing on significant items such as the need to guarantee the core contents of public debate, the protection of fundamental rights, and judicial control over regulatory laws.

C. Pandemic Soft Law Comes in Different Shapes

This new and important normativity called soft law is multi-faceted, as it comes in many different shapes and at all stages of the regulatory process, from law making to law implementation and enforcement, supporting the resilience of contemporary legal systems and augmenting the potential of all its components (*augmented governance*). According to the proposed methodology and definition (see Part I above), the

⁷⁶ Italian Constitutional Court, 'Report on the Activities of the Constitutional Court in 2020', English version, https://www.cortecostituzionale.it/documenti/interventi_relazioni/1042_P/relazione_annuale_eng_def_20210514154024.pdf.

⁷⁷ Ibid, p 7.

⁷⁸ On this topic with reference to the Italian legal system see: C Mancuso, 'La giustizia di fronte all'emergenza: il rinnovato ruolo del soft law' (*Judicium*, 30 June 2020).

⁷⁹ 'Stellungnahme der Präsidenten der außeruniversitären Forschungsorganisationen auf Basis von mathematischen Analysen der Datenlage', 28 April 2020, <https://www.fraunhofer.de/de/presse/press-einformationen/2020/april/strategien-zur-eindaemmung-der-covid-19-pandemie.html>.

⁸⁰ See: <https://www.leopoldina.org/presse-1/nachrichten/ad-hoc-stellungnahme-coronavirus-pandemie>.

⁸¹ Deutsche Gesellschaft für Gesetzgebung, 'Leitlinien für die Gesetzgebung in Covid-19-Krisenzeiten', 14 April 2020, <https://www.dggev.de/2020/04/14/leitlinien-fuer-die-gesetzgebung-in-covid-19-krisenzeiten>.

term soft law is here intended in a very broad meaning, capable of embracing and bringing together a varied set of tools comprising up pandemic soft law governance, from plans,⁸² guidelines and collections of best practices and cases, and FAQs, to public statements and speeches, alerts and press releases, recommendations and warnings, conference proceedings and working papers, information and awareness campaigns, and even silence. All of these differential measures have been placed at the service of an expanded normative dimension, instrumental to hard law and regulatory strategies during the pandemic crisis. That said, it remains to be specified which soft law tools were specifically used, at what stage, for what purpose, and how. This step will be useful for mapping soft law tools based on their function and operation.

Research outputs show that pandemic soft law has been used not only in all its varied shapes by different players at all levels of government and at all stages of the regulatory process, but also in combination or in crosslinks aiming to enhance the impact and recognition of soft law (the *soft law loop*). Moreover, as will be analysed in greater depth further on (in Part III), the pandemic has led to quite an intricate interplay between soft law and hard law sources that has transformed and reshaped hard law from the inside, together with law making processes and the system of law sources (*interplay between hard and soft law*). In addition, as analysed later (in Part IV), pandemic soft law has significantly complemented and supplemented the traditional toolbox in the hands of regulators and supervisory agencies and bodies, allowing them to partially recalibrate their institutional role so to counterbalance the impact of the pandemic on sector-specific markets.

Apart from these more general considerations, the research work provides more specific insights into pandemic-related soft law. In particular, it helps to understand what type of soft law has mainly been used, by whom and why.

As typical soft law instruments of pandemics developed under the impulse of the WHO, pandemic plans were also applied during the Covid-19. Germany is a primary example, where due to the Covid-19 pandemic, the Robert Koch Institut (RKI) published a supplement to the national pandemic plan (*Ergänzung zum Nationalen Pandemieplan – Covid-19 – neuartige Coronaviruserkrankung*) on 4 March 2020. This included new recommendations based on the three identified epidemiological phases ('Containment, Protection and Mitigation').⁸³ As a consequence, some *Länder* updated their pandemic plans,⁸⁴ in the process remedying some problems of coordination with the Federation and with the other *Länder*.

⁸² Eg European Commission's Vaccines Strategy, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1103 or Influenza pandemic preparedness plans (the full list is available at <https://www.ecdc.europa.eu/en/seasonal-influenza/preparedness/influenza-pandemic-preparedness-plans>).

⁸³ Robert Koch Institut, 'Ergänzung zum Nationalen Pandemieplan – COVID-19 – neuartige Coronaviruserkrankung', 4 March 2020, https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Ergaenzung_Pandemieplan_Covid.pdf?__blob=publicationFile.

⁸⁴ The pandemic plans of the *Länder* are available at the following link: https://www.rki.de/DE/Content/InfAZ/I/Influenza/Pandemieplanung/Pandemieplaene_Bundeslaender.html;jsessionid=309F7F404C02C1B5C6667A229B6CC99E.internet091.

Guidelines and collections of best practices and cases are probably the most common and widespread formats in the soft law family. At times of emergency, when there is little room for selecting and collecting best practice and cases, and knowledge progresses experimentally and by means of rapid adjustments based on a learning-by-doing approach,⁸⁵ health and safety guidance (and guidelines) have proved themselves key to promoting uniform behaviours and practices by means of easily adaptable standards, reaching vast audiences comprising public and private institutions, businesses and individuals.⁸⁶

Starting from an international and European level, the analysis shows that soft law takes many different shapes. The WHO and the European Union have issued several measures and, more specifically, technical guidance, statements, releases, press conferences, communications, guidance, roadmaps, situation reports, resolutions, and plans. Examples at the European level include the Communication on a coordinated economic response to the COVID-19 outbreak of 13 March 2020;⁸⁷ the Communication from the European Commission of 20 March 2020 on a temporary framework to support the economy;⁸⁸ and the Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy of 30 March 2020.⁸⁹

Policy briefs are also frequently used, for example by the UN Secretary-General. Classified by theme, population group, and region, such briefs are very interesting because they cover many different topics (food security and nutrition, people on the move, mental health, human rights, debt, socio-economic impact, jobs, cities, tourism, inequality, education, and universal health), and take into account different perspectives, ie the belonging to specific categories (people with disabilities, older

⁸⁵ (Anti-pandemic plans, risk-based approach), Trans-national transfer of knowledge Doctors from Wuhan.

⁸⁶ On the widespread use of soft law measures for businesses, employers, and workspaces in general in France during the pandemic ('Protocole national de déconfinement pour les entreprises'), see F Champeaux, *Semaine sociale Lamy*, No 1925, 19 October 2020, available online. For the UK, see the guidance: 'Coronavirus Support from Business Representative Organizations and Trade Associations' (part of the guidance 'Coronavirus Support For Businesses and Self-Employed People During the Coronavirus, <https://www.gov.uk/guidance/coronavirus-support-from-business-representative-organisations-and-trade-associations?priority-taxon=09944b84-02ba-4742-a696-9e562fc9b29d>).

⁸⁷ COM/2020/112, Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup, Coordinated Economic Response to the COVID-19 Outbreak, 13 March 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0112>.

⁸⁸ Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01, C/2020/1863, 20 March 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC_2020_091_I_0001.

⁸⁹ Communication from the Commission, COVID-19 Guidance on the Implementation of the Temporary Restriction on Non-essential Travel to the EU, on the Facilitation of Transit Arrangements for the Repatriation of EU Citizens, and on the Effects on Visa Policy, 30 March 2020, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200327_c-2020-2050-report.pdf.

people, children, and women) and to geographic areas that are less equipped to deal with the pandemic (Africa, the Arab States, South-East Asia, Latin America, and the Caribbean).⁹⁰

In the UK, the Cabinet Office's *Staying at home and away from others* Guidance catered for the very first lockdown measures in the country, paving the way to the Coronavirus Act of 25 March 2020.⁹¹ Thanks to the Coronavirus Act, the executive's guidance was thereafter not only formally recognised as a strategic tool to address the pandemic's many challenges, in England as well as in the devolved countries of the United Kingdom, but also, at least to a certain extent (depending on the wording used and interpretation given), made legally binding.⁹² In order to move faster and ensure uniformity and coordination across different levels of government, after the first chaotic early stages of the spread of Covid-19, standards developed internationally or by the EU have been copied and/or adopted domestically thanks to cross-referencing mostly by soft law sources. Hard law has sometimes stepped in, to facilitate these soft law loops and to boost and strengthen the dissemination of guidelines domestically. In Italy, the WHO's guidelines and standards, as transposed into Ministry of Health guidelines, have been made mandatory for all medical staff. Aside from health and safety guidance, easy-to-read and clear guidelines about how to address public policies and procurement in emergency situations, based on legal tools and practices already in place, have also played a very important role. An example is the European Commission's Guidance on using the public procurement framework in the emergency situation brought about by the COVID-19 crisis⁹³ and, domestically, the *vade-mecum* on faster and simpler public procurements issued by A.N.AC., the Italian anti-corruption authority.⁹⁴

The huge mass of anti-pandemic hard and soft law measures (the latter, as previously mentioned, in the form of guidance, vademecums, and guidelines) has been accompanied by additional anti-pandemic soft law mostly comprising recommendations, warnings,⁹⁵ and clarifications. A superficial examination of such

⁹⁰ See: <https://www.un.org/en/coronavirus/UN-response>.

⁹¹ And again at the end of July 2020 when new guidance for Greater Manchester, Lancashire, and West Yorkshire was issued, whereas formal *regulations* entered into force only one week later (5 August 2020).

⁹² Coronavirus Act, Art 17, paras 16, 41, 44. Critically on the use of guidance by the UK Government: T Hickman, 'The Use and Misuse of Guidance during the UK's Coronavirus Lockdown', 4, 9 September 2020, <https://ssrn.com/abstract=3686857>.

⁹³ Communication from the Commission, Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis', 2020/C 108 I/01, 1.04.2020, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401\(05\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0401(05)&from=EN).

⁹⁴ See: <http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anadocs/Comunicazione/ComunicatiStampa/Anac.Vademecum.appalti.rapidi.pdf>.

⁹⁵ See Mario Draghi's famous 'Whatever it takes' speech. The 'Whatever it takes' speech was pronounced on July 26, 2012 during the euro crisis (Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012, <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>). The motto was relaunched by Draghi during the

complementary anti-pandemic soft law would give the impression of a highly complex and fragmented situation. Recommendations and warnings may be conveyed in the form of public statements and speeches, press releases, conference proceedings, information and awareness campaigns, alerts on institutional websites, and even silence. Similarly, clarifications may take the form of circulars, FAQs on institutional websites, but also be made orally in public statements and speeches, delivered in press releases and so on. In the majority of cases these soft law tools are combined, and sometimes even mixed together. In their official addresses to the nation and/or to the public, top institutional figures have frequently made recommendations (sometimes bordering on paternalism) warning about the consequences of non-compliance and threatening stricter measures (in line with a traditional stick and carrot strategy). On other occasions, recommendations made by one of the institutional soft law players (the PM, the Minister of Health, etc.⁹⁶) have been combined with warnings made by other soft law players (experts, members of advisory boards, head of emergency administrative bodies, and so on). In their circulars (eg the circulars of the Italian Interior Ministry), Ministers have frequently mixed clarifications and recommendations with warnings and alerts, enhancing the overall normative impact of soft law.⁹⁷ Combinations of different soft law tools have also been made possible thanks to new Covid-19 webpages on most soft law players' institutional websites (eg those of independent agencies and trade unions). These act as shared platforms for a wide range of soft law tools varying in form, content and origin (recommendations, press releases, alerts, conference proceedings, and international, domestic, and sub-national standards). A very interesting soft law tool, which has already been used in the healthcare sector, is that of information and awareness campaigns, which have played a key role in drawing public attention to Covid-19-related effects and risks, and the healthcare measures to be put in place. Such campaigns have generally complemented existing hard or soft law measures, with the aim of promoting awareness and compliance and countering fake news and denial of the Covid-19 pandemic.⁹⁸

(*F*'note continued)

Covid-pandemic on the pages of the *Financial Times*: M Draghi, 'Draghi: We Face a War Against Coronavirus and Must Mobilise Accordingly' (*Financial Times*, 25 March 2020), <https://www.ft.com/content/c6d2de3a-6ec5-11ea-89df-41bea055720b>. The expression 'Whatever it takes' became a key phrase of the pandemic, recognised by the *Enciclopedia Treccani*: [https://www.treccani.it/vocabolario/whatever-it-takes_\(Neologismi\)](https://www.treccani.it/vocabolario/whatever-it-takes_(Neologismi)). On the application of 'Whatever it takes' by the European Central Bank during the pandemic: G Claeys, *The ECB in the COVID-19 Crisis: Whatever it Takes, Within its Mandate, Monetary Dialogue Papers June 2020*, [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648811/IPOL_IDA\(2020\)648811_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648811/IPOL_IDA(2020)648811_EN.pdf).

⁹⁶ The recourse to soft law by institutional players can be justified by the need to overcome the limits set by conferred powers and competences in order to build comprehensive strategies. For a more in-depth analysis, see sub-paragraph D, below.

⁹⁷ A complete overview is offered by Boschetti and Poli, note 25 above, pp 65 ff.

⁹⁸ J Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control', 80 *Michigan Law Review* 1466 (1982).

In this context, particular attention needs to be paid to the letters or emails sent by the Grand Duchy of Luxembourg during the Large-Scale Testing project to monitor the evolution of Covid-19 infection within the population, in order to maintain the infection rate at a very low level by regularly testing representative samples of the population.⁹⁹ These were a formal invitation to citizens to help resolve the problem and an effective way of soliciting their sense of civic duty, as the text shows: ‘Dear Sir or Madam, We are all part of the solution. By participating in the Large-Scale Testing, you help to protect yourself and your fellow citizens in the best possible way. For this reason, we invite you today to a Covid-19 test’. Such an invitation can indeed be regarded as a sort of recommendation addressed to the residents of the country and can therefore be included in the broad concept of soft law outlined above.

This brief overview allows us to conclude that a substantive approach to pandemic-related soft law is more than ever necessary to analyse this multifaceted phenomenon and the new developments it has brought about. The only soft law tool largely used by regulators in strategic markets, but left to one side during the pandemic, was silence. As explained in more detail, below (in Part III), pandemic-related soft law has given rise to a fluid, experimental, and ongoing normativity, creating a conversational-style regulatory cycle.

D. The Many Roles Played by Soft Law in the Pandemic

In its 2013 comprehensive study on *droit souple*, the French *Conseil d’État* outlined four soft law basic functions: soft law (1) replaces hard law when it is not possible, or it is too difficult to use it; (2) supports the effectiveness of hard law; (3) is a long-lasting alternative to hard law; and (4) helps in the event that new phenomena appear on the horizon.¹⁰⁰ While the analysis of soft law measures adopted in the pandemic confirms the multifaceted nature of soft law and its ability to carry or accept these four functions, it also reveals that this classification cannot be considered exhaustive. At least to a certain extent, it needs to be expanded and completed. In this respect, comparison between different country experiences significantly adds to the study of the soft law world, far beyond the quite exceptional pandemic experience.¹⁰¹ Furthermore, such comparison shows that soft law often plays multiple roles, sometimes even resulting in a *continuum* in which the different roles cannot be clearly separated from one other, and in which the role played depends on who, how and when, requiring case-by-case analysis. It follows that in this respect no classification could ever be conclusive or any mapping complete.

Bearing this in mind, the analysis focuses on the most important functions of soft law since the onset of the pandemic. The first can be called an *anticipatory*

⁹⁹ See: <https://covid19.public.lu/en/testing.html>.

¹⁰⁰ Conseil d’État, note 4 above, pp 86 ff.

¹⁰¹ Boschetti, note 4 above.

function.¹⁰² Given the high degree of uncertainty and the consequent stress placed on decision makers, soft law acts as a sort of preparatory base for the future adoption and implementation of binding acts. In other words, soft law paves the way for hard law and/or for formal decisions by public authorities and agencies in the exercise of their powers. The anticipatory function, apparent in the first phase of the pandemic in all the countries surveyed, may to a certain extent echo the experimental role which soft law frequently has for agencies. Notwithstanding some similarities, pandemic-related anticipatory soft law, mainly consisting of healthcare and safety measures, is unique because it aims to give the institutions and the legal system enough time to frame a legal and regulatory strategy to counter the emergency, acting as an early warning mechanism. These early healthcare and safety standards and guidelines were either developed by states in conjunction with international organizations (the WHO first and foremost), or based on standards and guidelines already developed internationally or domestically (ie by China or Italy) as the pandemic spread. A good example comes from the German experience: on 16 March 2020 both the federal and *Länder* governments issued the first guidelines to combat the Covid-19 epidemic,¹⁰³ which were subsequently reinforced.¹⁰⁴ In the UK, the Cabinet Office's *Staying at home and away from others* guidance paved the way for the very first lockdown measures in the country, and for the Coronavirus Act of 25 March 2020.

A second important function is the *linking* or *coordinating* one. We refer to coordination here in a very broad sense, both between different levels of government, and between the various public and private players. Soft law helps create connections and links and to create a shared environment by (1) promoting convergent objectives and/or, where necessary, uniform behaviours; (2) reducing potential conflicts among the many players involved regardless of their public or private nature; and (3) soliciting recourse to the subsidiarity principle, thus overcoming some of the rigidities deriving from the distribution of competences.¹⁰⁵ This coordinatory role has been performed with success especially by international and European law makers. Indeed, as

¹⁰² As noted by C Piveteau, 'La tentation de la soft law en période d'urgence sanitaire ou le tour de passe-passe des mesures de confinement au Royaume-Uni', *Revue de droits et libertés fondamentaux* No 61 (2020), http://www.revuedlf.com/droit-fondamental/la-tentation-de-la-soft-law-en-periode-durgence-sanitaire-ou-le-tour-de-passe-passe-des-mesures-de-confinement-au-royaume-uni/#_ftn10, this function is somehow co-essential to the definition of soft law. In this respect see also J Cerone, 'A Taxonomy of Soft Law. Stipulating a Definition', in S Lagoutte, T Gammeltoft-Hanse, and J Cerone, *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press, 2016), p 18; J Salmon (dir), *Dictionnaire de droit international public* (Bruylant, 2001), pp 1039 ff; M. Mekki, 'Propos introductifs', in *Le droit souple*, Dalloz, Thèmes et commentaires, 2009, Actes du colloque organisé par l'Association Henri Capitant, Paris, Dalloz, 2009.

¹⁰³ Bundesregierung, 'Erste Leitlinien' (16 March 2020), <https://www.bundesregierung.de/breg-de/themen/coronavirus/leitlinien-zum-kampf-gegen-die-corona-epidemie-vom-16-03-2020-1730942>.

¹⁰⁴ Bundesregierung, 'Erweiterung der Leitlinien' (22 March 2020), <https://www.bundesregierung.de/breg-de/themen/coronavirus/besprechung-der-bundeskanzlerin-mit-den-regierungschefinnen-und-regierungschefs-der-laender-vom-22-03-2020-1733248>.

¹⁰⁵ Constitutional legal basis or not.

pointed out by A von Bogdandy and P Villareal in relation to the WHO (but this is also true in relation to other international organisations and European institutions), without the legal framework they provide, ‘the various responses of many countries under high pressure would be even more diverse and the degree of uncertainty even higher’.¹⁰⁶ As regards country-specific experiences, the analysis shows that the linking function is also crucial in federal and regional states, such as the cases of Germany, Italy, but also the UK,¹⁰⁷ prove. Were it not for soft law, the design of swift and shared anti-pandemic strategies would have added significantly to the tension between levels of government and made it more difficult for central governments to act in accordance with the principle of subsidiarity. The tendency for centralisation in Germany culminating with the introduction of the nationwide emergency brake on the one hand, and the need for standardised action highlighted by the Constitutional Court in Italy in decision 37/2021¹⁰⁸ on the other, does not make this less true.

Besides, soft law, and the process of discussion and negotiation that has led to soft law have helped to actively involve private players (albeit through unions and trade associations) in anti-pandemic regulatory strategy design (with positive impacts also on law effectiveness). This important function¹⁰⁹ has been carried out thanks to a variety of soft law measures, such as guidance, standards of practice, informal agreements, protocols,¹¹⁰ and the setting up of informal bodies and consultations developed and/or performed alongside formal sources, bodies, and sources.

¹⁰⁶ A von Bogdandy, P Villareal, *Critical Features of International Authority in Pandemic Response* (MPIL Research Paper Series), No 2020-18, pp 28–29.

¹⁰⁷ See J Harrington, E Thomas, and B Hughese-Moore, ‘Is There a Welsh Health Law? Values, Divergence and Devolution after Covid-19 (25 January 2021, available at UKCLA website).

¹⁰⁸ Italian Constitutional Court, Judgment No 37/2021, available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza%20n.%2037%20del%202021%20red.%20Barbera%20EN.pdf. See the following comments: B Caravita, ‘La sentenza della Corte sulla Valle d’Aosta: come un bisturi nel burro delle competenze (legislative) regionali’ (*Federalismi.it*, 21 April 2021); M Mezzanotte, ‘Pandemia e riparto delle competenze Stato-Regioni in periodi emergenziali’ (*Consulta Online*, 26 April 2021); D Morana, ‘Ma è davvero tutta profilassi internazionale? Brevi note sul contrasto all’emergenza pandemica tra Stato e regioni, a margine della sent. n. 37/2021’ (*Forum di Quaderni costituzionali*, 17 April 2021); G Menegus, ‘Osservazioni sulla prima sospensione cautelare (ordinanza n. 4/2021) di una legge regionale da parte della Corte costituzionale (e sulla sent. n. 37/2021)’ (*Ivi*, 12 May 2021); C Caruso, ‘Il regionalismo autarchico è incostituzionale: dal Giudice delle leggi una pronuncia che mette ordine nella gestione territoriale della pandemia’ (*Questione giustizia*, 13 April 2021).

¹⁰⁹ It is important to highlight that such function of the soft law developed over years and is the product of many processes (liberalisation, deregulation, the disaggregation of the socio-economic context, transformation of the public administration, etc) that have required the adoption of non-traditional tools of coordination.

¹¹⁰ In France, the Covid-19 response at work/in workspaces has been significantly developed through soft law measures, namely protocols for businesses and employers in responding to Covid-19, which have brought about legal concerns and interesting case law. See the recent *AFIFAE*, note 5 above. In the UK, see the Guidance, *Working safely during coronavirus (Covid-19)*, <https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19> - and the different guidance applicable to the devolved administrations.

A third, very important role soft law has played in the pandemic can be described as a *stepping up* function aimed at augmenting governance potential and overall resilience (*augmented governance*). On the one hand, soft law has helped design cross-sector anti-pandemic strategies, bridging different public policy areas so as to tackle the pandemic's many challenges more consistently. In this respect, soft law has also facilitated the creation of a new ecosystem-friendly governance, in which one can see the reflection of the complexity of institutional, economic, and social players and processes. In the light of this, it comes as no surprise that this stepping-up function has become particularly important as the pandemic scenario has evolved and the economic and social impacts have increased. On the other hand, soft law fosters the rapid adaptation of institutions, agencies, and administrative bodies to changes. Safe for some differences in legal systems, any time public power is at stake, due to the fundamental applicable standards of the rule of law (legislative supremacy and the principle of legality in the first place), formal adaptation processes can come to terms with the emergency scenario and legal resilience issues it opens up. Soft law specifically helps to complement, counterbalance, and redirect the roles each institution is called on to play in the anti-pandemic governance framework. Put differently, it helps find a place in the anti-pandemic governance framework, as the role played by the Minister of the Interior, independent agencies, and trade unions in the Italian experience clearly shows. In this respect, it is worth mentioning the extent to which soft law contributed to re-shaping independent agencies' role as facilitators in many key areas, including banking, finance, antitrust issues and public procurement (see Section B above).

There is also a fourth (*last but not least*) key function, which consists of supporting law effectiveness and boosting legal resilience throughout the overall regulatory process, from law making to law enforcement. Besides adding clarity to anti-pandemic emergency law (through FAQs, circulars, guidance, and memoranda), promoting basic homogeneity in the application of anti-pandemic emergency law and regulatory measures while taking into account the different conditions and situations of the territories¹¹¹ (thanks to vademecums on already implemented or tested emergency practices and strategies¹¹²), counter-balancing or avoiding stricter hard law/authority-based responses and regulatory strategies severely impacting on fundamental rights and freedoms,¹¹³ one should also consider that soft law has helped rebut

¹¹¹ The coordination function of soft law is evident, especially in Germany and Italy. Nevertheless, as the German case shows, when the need for uniformity is considered prevalent and differences are perceived as a problem, hard law is used for centralisation purposes (the introduction of the nationwide emergency brake described below in Section II.D constitutes a prime example).

¹¹² See Italian Anti-Corruption National Authority Guidance on public procurement during the Covid-19 Pandemic, available at the Agency's website.

¹¹³ On emergency law and on the impacts on fundamental rights, *ex multis*: R Albert, and Y Roznai (eds), *Constitutionalism under Extreme Conditions: Law, Emergency, Exception* (Springer, 2020); A Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Bloomsbury Academic, 2018); K Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge University Press, 2016); NC Lazar, *States of Emergency in Liberal Democracies* (Cambridge University Press, 2009).

fake news and negationist narratives (sometimes even inflamed by top political institutional actors in order to delay lockdown measures¹¹⁴). This has boosted awareness and spread an institution-driven narrative about the seriousness of the pandemic and the danger posed by Covid-19. This function was outlined in clear terms by the French *Conseil d'État* in its 2013 Report on *droit souple*, and can probably be considered not only the most common soft law role, but also the one that most attracted scholars' attention, due to the fact that it calls into question the relationship between hard and soft law, and entire system of law sources as traditionally structured. Notwithstanding this, as soon as we look at it from a regulatory process perspective, the traditional soft law role has a number of different nuances, depending on the who (the soft law player), the how (the soft law measure used), and the when (the stage of the regulatory process at which soft law operates). Once the Pandora's box has been opened, it is finally possible to see what lies beyond the surface of law or rule making and to better understand soft law's *back-up* or *accompanying* function. It goes without saying that in this role, soft law has been extremely important during the pandemic, to a point that it has created a sort of expanded normative dimension able to back up the overall regulatory process, at all stages. To create such soft law continuity throughout the regulatory process, regulators have drawn from the multi-coloured palette of soft law measures, established links between different soft law measures and exploited the interplay between hard and soft law (see Part III below).

In conclusion, the research outputs show that all traditional soft law functions have come into play to help countries and institutions, at all levels of government, fight against Covid-19 and the pandemic's negative impacts on the economy and society. This converging and aggregate strategy, amplified by the vast range of both soft law players and tools described above (Sections B and C), clearly aims to fully exploit soft law's potential. Moreover, there is evidence that, thanks to its multiple roles, soft law has not only supported law effectiveness at all stages of the regulatory process—from law making to law enforcement—but it has also enhanced and expanded overall resilience of legal systems and their capacity to address public policies in large ecosystems, thus connecting multiple areas of scope and objectives and reaching out to vast audiences and numbers of interested parties.

E. Drawing Lines between Countries

If comparative law has always been a source of inspiration, the current pandemic shows an emulative trend among countries. Many are the similarities among the measures adopted by the selected countries to counter Covid-19. The completely new nature of the threat, absence of precedents to be taken into account, and consequent experimentalism has pushed law makers to observe each other and to opt for the same solutions, when these have proved to be successful. As Italy copied China, so the other European countries took inspiration from Italy, despite their initial criticism regarding the first Italian lockdown. Indeed, Italy was the first country in Europe

¹¹⁴ Such as former President Trump's statements on Covid-19 and herd immunity.

to introduce restrictions, followed by Germany, France, and others. In this ongoing open-learning environment, also thanks to soft law, experimentalism becomes learning by doing.

Such similarity can also be regarded to some extent as the product of the close link between science and law during pandemics.¹¹⁵ Indeed, the current situation has shown very clearly that public strategies to fight the pandemic must be based on scientific knowledge and expertise,¹¹⁶ and that Covid-19 legislation depends on the progress made by those latter, on the level of agreement between scientists¹¹⁷ and on the result of the experimentation (eg in relation to the types of vaccines). In this context, soft law takes on a remarkable importance, being able, on the one hand to manage the difficulties of incorporating science in law, and on the other hand to keep up the continuous development of scientific research with the uncertainty and at times predictability of its outcomes as well as to take into account differences of views among health experts. In other words, soft law acts as an important filter and adaptor.

Furthermore, in all the selected countries, soft law was used at the beginning of the Covid-19 crisis in order to bypass various deadlocks at different stages of the pandemic crisis, depending on country-specific features (socio-economic, political, legal, and cultural). Nevertheless, the nature of these impasses is as different as their solutions, given the peculiarities of the forms of government, equilibrium between the powers, and different level of decentralisation. In Germany in March 2020, the issuing of common guidelines by federal and state governments looked to be the only choice that both respected German cooperative executive federalism

¹¹⁵ See: L Netto, ‘The Right to Science and the Pandemic: At the Crossroads of Law and Politics’ (*International Journal of Constitutional Law Blog*, 4 February 2021), <http://www.icconnectblog.com/2021/02/the-right-to-science-and-the-pandemic-at-the-crossroads-of-law-and-politics>; M Malvicini (ed), *Politica, scienza e diritto al cospetto della pandemia COVID-19* (Editoriale Scientifica, 2021); L Del Corona, ‘Le decisioni pubbliche ai tempi del coronavirus: tra fondatezza scientifica, principio di precauzione e tutela dei diritti’, *BioLaw Journal – Rivista di BioDiritto* 2/2020, <https://www.biodiritto.org/content/download/3789/45303/version/1/file/18+Del+Corona.pdf>; B Brancati, ‘L’integrazione tra scienza e diritto, in relazione all’ammissione ai trattamenti di terapia intensiva durante l’emergenza Covid 19’, *DPCE Online* 3/2020 (16 October 2020), <http://www.dpceonline.it/index.php/dpceonline/article/view/1087/1043>. The close link between science and law in the current context has been recognised also by the judiciary, which on the one hand highlights the complexity of the situation and on the other hand takes a deferential stance towards scientific knowledge. In this context, it is worth mentioning—also because it addresses a recommendation, ie a soft law act—the decision of the of the French *Conseil d’État* to suspend the ban on outings imposed on EHPAD (French elderly care home) residents (*Conseil d’État*, *Ordonnance du 3 mars 2021*, No 449759, <https://www.conseil-etat.fr/actualites/actualites/le-conseil-d-etat-suspend-l-interdiction-generale-et-absolue-de-sortie-des-residents-d-ehpad>).

¹¹⁶ Although the internalisation of science by public strategies is a very difficult and complex phenomenon. On this topic in relation to the UK see: A Stevens, ‘Governments Cannot Just “Follow the Science” on COVID-19’, *Nature Human Behaviour* 4/2020, p 560, <https://www.nature.com/articles/s41562-020-0894-x>.

¹¹⁷ The difficulty of taking decisions on the basis of scientific knowledge depends also on the divergences existing between scientists in relation to the virus and, in particular, to the treatments against it as well as the difficulties evaluating the reliability of the different thesis/approaches. The case of the use of hydroxychloroquine for Covid-19 patients in France, initially permitted and then banned by the French government, is a clear example of such difficulty.

and the competences in the case of contagious diseases laid down by the Infection Protection Act of 20 July 2000. Thus, soft law can be regarded as a preliminary coordination tool that is deferential in respect of the setup of competences between the Federation and the *Länder*. However, on 27 March 2020, the Infection Protection Act was substantially amended by the Act on the Protection of the Population in the Event of an Epidemic Situation of National Importance,¹¹⁸ which introduced the concept of an epidemic outbreak of national importance (*Epidemische Lage von nationaler Tragweite*), conferring in such a case more powers on the Federation and the Federal Ministry of Health. The aforementioned act was approved very quickly thanks to the grand coalition and some precautionary actions (reduced attendance at the *Bundestag* and temporary amendment of the parliamentary regulation on the structural *quorum*).¹¹⁹ As a result, the Bundestag declared the Covid-19 crisis an epidemic outbreak of national importance. Therefore, the German Federal Government did not resort to declaring a state of emergency in accordance with Article 35, paragraph 3 of the German Basic Law. This was a path that could have been legally possible, albeit with some difficulties linked to the fact that the rule does not explicitly mention the epidemic scenario, presupposes that the *Länder* are unable to deal with the situation, and does not confer substitutive power on the Federation. The Covid-19 crisis law instead passed through the German Parliament, which further intervened in April 2021. Indeed, on 21 April 2021, the Infection Protection Act was again amended to remedy the heterogeneity of the solutions adopted by the *Länder* (the so-called ‘federaler Flickenteppich’)¹²⁰ and introduce a nationwide emergency brake (‘bundeseinheitliche Notbremse’), according to which if the seven-day incidence in a district or town exceeds 100 new infections per 100,000 inhabitants on three consecutive days, additional measures standardised at national level and listed in Article 28b of the Infection Protection Act apply.¹²¹ In Italy, after an early stage regulated by a mix of soft law acts (mainly Health Minister’s circulars) and Civil Protection’s ordinances, the Government largely relied on the legislative power granted by article 77 of the Italian Constitution, which allows it to pass decree laws in the event of emergency situations, to introduce the first nationwide lockdown measures.¹²² Based on these decree laws (subject to subsequent conversion into law by Parliament), the Prime Minister was delegated to decree, based on the pandemic risks, the list of healthcare, distancing, and lockdown measures. This example of subsidiarity dramatically reinforced the central level of government, whereas due to the constitutional framework in place, coordination with the regions

¹¹⁸ ‘Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite’, 27 March 2020, in *BGBl I*, p 587.

¹¹⁹ Buoso and Fraenkel-Haerberle, note 26 above, p 91.

¹²⁰ The expression ‘federaler Flickenteppich’ means ‘federal patchwork rug’. See: Kropp, note 26 above.

¹²¹ On the nationwide emergency brake see: <https://www.bundesregierung.de/breg-en/news/nationwide-emergency-brake-1889136>.

¹²² Starting with the decree law dated 23 February 2020 followed by the Prime Minister’s decree of 23 February 2020.

and local authorities was inevitably mainly carried out on the basis of a soft law method of coordination. It was only between the first and the second wave of Covid-19 that traditional coordination bodies came back into vogue, alongside soft law coordination methods. In France, Parliament passed a new emergency government framework law, parallel to the emergency framework already provided for by the National Healthcare Law and which provided the legal basis for the first lockdown measures at the very beginning of pandemic crisis,¹²³ whereas soft law became widely used later on, especially to regulate health and security standards in workplaces. This is a national direction centre in the hands of the executive. In the UK, following the Cabinet's initial Stay at Home soft law Guidance, the Coronavirus act provided the necessary legal basis for both central government and the devolved countries, explicitly allowing the use of certain soft law measures by public authorities. The use of soft law as a pre-law in the UK clearly shows the effort to safeguard, at least formally, Parliament and its legislative supremacy (together with its key constitutional importance).

Another aspect worth mentioning is the difference in the use of soft law between the first and the second wave of Covid-19 at the government level. In the first phase, soft law was the principal means for the introduction of the initial restrictions, undertaking an essential anticipatory and coordinating function. In the second phase, soft law to an extent played a secondary role, being absorbed and incorporated into hard law. Nevertheless, it played an important part in providing a major boost to the vaccination campaign, given the difficulties in imposing a legal obligation on receiving the vaccination for both material and procedural reasons: the right to the self-determination of individuals and decision making on the matter (Article 32, paragraph 2, of the Italian Constitution¹²⁴ and Article 2, paragraph 2, of the German Basic Law¹²⁵ contain a statutory reservation).¹²⁶

In addition, it has to be considered that if 'taking soft law seriously' is to a certain extent easier in common law systems because of a legal culture based on case law and on precedent, which is also proven by the fact that in common law jurisdictions direct

¹²³ See J-P Derosier and G Toulemonde, 'Parliament on Life Support', in E Cartier, B Ridard, and G Toulemonde (eds), *The Impact of the Health Crisis on the Functioning of Parliaments in Europe* (A Publication of the Fondation Rober Shuman), pp 32 ff, https://www.robert-schuman.eu/en/doc/ouvrages/FRS_Parliament.pdf.

¹²⁴ Article 32, paragraph 2, of the Italian Constitution: 'No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person'.

¹²⁵ Article 2, paragraph 2, of the German Basic Law: 'Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law'. The right to the self-determination of individuals finds its basis in the guarantee of human dignity foreseen by Article 1, paragraph 1 of the German Basic Law.

¹²⁶ The regulation of the obligation of vaccination is very complex and depends on countries. For a comparative overview (on France, Germany, United Kingdom, Spain, and the United States) see: P Passaglia (ed), *La disciplina degli obblighi di vaccinazione* (Corte Costituzionale, Servizio Studi, October 2017).

court actions against soft law instruments are regarded as admissible,¹²⁷ it is also true that the distance between common law and civil law and their traditional differences have progressively shortened and lessened.¹²⁸ After all, the circumstance that in the context of the current pandemic the French *Conseil d'État* has not only reviewed, but also suspended recommendations issued by the French Ministry for Solidarity and Health for residential care facilities for the elderly is a clear signal in this direction.¹²⁹

Moreover, it cannot be overlooked that in all the countries analysed, liberalisation and deregulation have strongly stimulated the use of soft law and involvement of private players in the regulatory process through soft law in many fields (eg the banking and financial sectors¹³⁰), so that such use becomes not only generally accepted, but also internalized and treated as an ordinary tool.

Finally, trust in soft law is a growing phenomenon that goes beyond the type of legal system and could be boosted by leveraging the sense of civic duty of citizens and the principle of subsidiarity between public and private sectors.

III. HARD LAW AND SOFT LAW INTERACTION IN THE PANDEMIC

Based on the soft law comparative atlas outlined above, we can now draw a few conclusions regarding the impact soft law has on hard law, on the system of law sources (Part III) and the bright and dark side of soft law (Part IV).

In spite of only being the tip of the iceberg, the interplay between hard and soft law sources¹³¹ has not only been the new normal during the pandemic, it has also given rise to new forms of mutual support and exchange which have reshaped law making and hard law sources.¹³² However, in accordance with the proposed methodology, it is important to consider this phenomenon within the wider context of the overall regulatory process.

As described above, in its *back-up* or *accompanying* function (see Section II.D), pandemic soft law creates a sort of expanded and amorphous dimension able to hold together and improve the overall regulatory process, at all stages. The output

¹²⁷ See: 'Research Note: Admissibility of Court Actions against "Soft" Law Measures' (*Curia*, June 2017), p 12, https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-06/ndr-2017-007_synthese_en_neutralisee_finale.pdf.

¹²⁸ On the development of common law and civil law systems and their current juxtaposition: GF Ferrari, '«Civil Law» e «Common Law»: aspetti pubblicistici' in P Carrozza, A Di Giovine, and GF Ferrari (eds), *Diritto costituzionale comparato*, Vol II; G Napolitano, 'Introduzione al diritto amministrativo comparato' (Il Mulino, 2020); on the emerging legality/legal significance of specific cases in civil law legal systems, Boschetti, note 11 above, pp 76 ff.

¹²⁹ *Conseil d'État*, note 115 above.

¹³⁰ Cf., *ex multis*, V Lemma, '«Soft law» e regolazione finanziaria', *Nuova giurisprudenza civile commentata*, 11/2006, pp 600 ff.

¹³¹ U Baxi, 'The softening of Hard Law and the Hardening of Soft Law: An Extended Synopsis' in DD Bradlow and D Hunter (eds), *Advocating Social Change through International Law. Exploring the Choice between Hard and Soft International Law* (Brill, 2020).

¹³² On this topic: V Desantis, 'Covid-19: Il dialogo di hard e soft law e le trasformazioni della norma-zione, Istituzioni del federalismo' (2020).

is a new *regulatory continuum*¹³³ where the sequencing between law making, law implementation, and law enforcement becomes weaker, less apparent, even illusive, and a new circularity adds dramatically to the dynamism and openness of regulatory processes. In this respect, we need to take into consideration the functioning and features of the soft law web as restructured according to the country-specific pandemic governance framework. More specifically, the number and type of soft law makers (operating at all stages of the regulatory process, including that of judicial review), extremely varied range of soft law measures and multi-faceted spectrum of functions all have a multiplier effect on the interoperability and interconnectivity of the soft law web and leave the regulatory process—at all levels and stages—widely exposed to soft law interference.

The new regulatory landscape operates as an open environment in which legal rules can be experimented, anticipated, tested, clarified, completed, and adapted, on an ongoing and mainly informal basis. Apart from recalibrating the traditional centrality of law making with respect to the other stages of the regulatory process,¹³⁴ this experimentalism¹³⁵ characterises and shapes the capability of emergency law and governance to react to pandemic threats, and proves itself to be an ally in the struggle for improving overall legal resilience in all the countries surveyed.

Incidentally, as briefly mentioned above, the continuous—if not chaotic—interplay between hard and soft law sources reshapes hard law sources from the inside and partially recalibrates the system of law sources. In this respect, research outputs show that pandemic (hard) law has sometimes posed as soft law, pretending to be non-binding and/or outside the prescriptive paradigm. For example, in the relatively complex anti-pandemic legal framework in Italy, expressions such as ‘*it is recommended*’ or ‘*it is strongly recommended*’ have frequently been used, generating interpretative uncertainty and requiring soft law further downstream in order to dissipate the confusion in which civil servants, businesses, and citizens had been left. Similarly, hard law legal vocabulary can be found in soft law sources, as in the British ‘*Staying at home and away from others*’ guidance, and subsequent guidance, which use expressions such as ‘*are effective immediately*’, or ‘*come into effect*’.¹³⁶ This lack of clarity has also been perceived by the courts. In fact, the Administrative Court of Bavaria (Germany) considered the provisions of the

¹³³ Doctrine, see Boschetti, note 4 above.

¹³⁴ Piveteau, note 102 above, n 61.

¹³⁵ On democratic experimentalism: apart from MC Dorf and CF Sabel, *A Constitution of Democratic Experimentalism* (Cornell Law Faculty Publications 120, 1998), <https://scholarship.law.cornell.edu/facpub/120>; CF Sabel and WH Simon, ‘Democratic Experimentalism’ in J Desautels-Stein and C Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017), Columbia Public Law Research Paper No. 14-549 (2017), https://scholarship.law.columbia.edu/faculty_scholarship/2038, see B Boschetti and N Marzona, ‘Amministrazione e sperimentalismo (democratico)’ in A Quadrio Curzio, F Cerniglia, F Bassanini, L Vandelli, and F Pizzolato (eds), *Il mostro effimero. Democrazia, economia e corpi intermedi* (Il Mulino, 2019).

¹³⁶ See also P Lancos, ‘Piercing the Soft Law Veil? The Hard Truth about Directive-Like Recommendations’, <https://www.solar-network.eu/wp-content/uploads/2018/12/SoLaR-Publication-Lancos-Piercing-the-Soft-Law-Veil-with-abstract.pdf>.

regulation of the Bavarian Ministry of Health and Care on the reduction of social contact and minimum interpersonal distance to be mere recommendations or policy positions also on the basis of the language used.¹³⁷

Moreover, in many domestic jurisdictions, pandemic (hard) law sources have tended to formally recognise soft law and the role it plays. Mainly due to soft law's permeability and ability to by-pass legal boundaries such as competences, areas of scope, and procedural standards unfit for the pandemic timing, they frequently shift onto soft law sources (including international sources) the task of 'regulating' or catering for healthcare and safety measures. On certain occasions, they explicitly endorse protocols signed by businesses and workers in affected market sectors.¹³⁸ Last but not least, they sometimes reinforce the legal significance of soft law by attributing binding force to it, or simply by copying it.¹³⁹ These forms of mutual support, and/or merging between hard and soft law sources are neither new nor surprising. The pandemic has simply facilitated the emergence and mixing of all the different forms of interplay between hard and soft law sources in regulators' attempts to boost the effectiveness of anti-pandemic regulatory strategies and policies. Apart from the risk of losing some of the benefit deriving from the use of soft law, it goes without saying that the more soft law gains ground on the area of traditional normativity, the more legal systems will be prepared to take its legal effects seriously and will be equipped to safeguard affected parties and interests, in terms of transparency and procedural rules, liability, and enforceability. In this respect, although for different reasons, the British and the French legal systems have proved themselves to be the frontrunners among surveyed countries: in the UK there is a clear general legal framework aimed at safeguarding transparency and democratic control over soft law making.¹⁴⁰ In France, interesting case law on soft law enforceability has been

¹³⁷ Taccogna, note 26 above, p 105.

¹³⁸ See note 110 above.

¹³⁹ As the French *Conseil d'État* points out in its 2013 Report on soft law, these crosslinks give rise to a grey normative area where the distinction between hard and soft law becomes blurred, if not actually determining the entrance of soft law sources into the hard law field. The normative/behavioural effects connected to this mutation depend on the reasons behind it: due to the many roles played by pandemic soft law (ie anticipatory, experimental, coordinating roles, etc), a simple remedy for soft law ineffectiveness cannot be taken for granted. See: Boschetti and Poli, note 25 above; Boschetti, note 4 above. Cf also Cabinet's Office Guidance Staying at home and away from others, 23 March 2020: 'Key parts of the measures are underpinned by law, which sets out clearly what you must and must not do—every person in the country must comply with this. The relevant authorities, including the police, have been given the powers to enforce the law—including through fines and dispersing gatherings' Exchequer's statement of 17 March 2020, <https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others>.

¹⁴⁰ Freedom of Information Act 2000, Article 35, on which ICO's Guidance on Government policy (Section 35), <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>, stating that: 'The purpose of section 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private'; and making it clear that: 'there is no inherent or automatic public interest in withholding information just because it falls within a class-based exemption'. In Italy, Independent Agencies apply notice-and-comment procedural standards in the adoption of certain

developed by the *Conseil d'État*, during the Covid-19 pandemic and precisely with reference to pandemic soft law measures.

Here again, as outlined above (Section E), country-specific legal (and constitutional) features and culture dominate in that they set the bar and draw lines which cannot be crossed (see Section II.E): ie common law constitutional principles such as those of parliamentary legislative supremacy and the separation of powers, the legal law making culture, and the soft law making regulatory framework in place account for many of the differences between the British and the Italian experiences in shaping the interplay between hard and soft law in countering the pandemic.

IV. THE BRIGHT SIDE AND THE DARK SIDE

Soft law operates outside the prescriptive paradigm and therefore avoids the enforcement trap and related non-implementation issues. It therefore has many merits, being able to:

- (1)) complement comprehensive/holistic strategies:
 - (a) by shaping and coordinating international, supranational, and domestic policies which are key to fighting an emergency situation like the present one;
 - (b) by developing and spreading global/international/transnational standards;
- (2) support and structure new alliances and networks, open to a multiple set of players promoting the aforementioned shared holistic strategies and standards;
- (3) enhance governance potential, allowing for the prompt adaptation of institutional players' roles; and
- (4) give rise to a fluid and shared resilient normativity, essential to extending the reach and boosting the effectiveness of both international and domestic laws and policy strategies at all levels and stages of regulatory processes.

Furthermore, in the event that new phenomena like the current Covid-19 pandemic arise, soft law has the added benefit of offering legal systems a powerful learning machine, in that it is a means to test legal frameworks and regulatory strategies throughout the regulatory process and to learn from experience, at all stages.

However, all that glitters is not gold. Indeed, the virtues of soft law can also be its vices. The complexity, informality, and volatility of the soft law web, driven by the pandemic, significantly increases the complexity of governance frameworks and regulatory scenarios, and may negatively affect the ability to tame the pandemic, generating a certain amount of confusion, and placing an additional burden on regulators, policymakers, and citizens. These risks, together with the lack of clear

(Footnote continued)

soft law measures (guidelines). The Italian Code on Public procurement (Legislative Decree No 50/2016, Article 213) provides for specific procedural standards for the adoption of soft regulatory measures by the National Anti-Corruption Authority.

borders between hard and soft law, could lead to a sort of regulatory schizophrenia/inflation, for which citizens, businesses, and legal practitioners are unprepared and by which they could be overwhelmed.

In addition, as a flexible and informal normativity, which can promote legal system resilience at a time of crisis and partially obviate hard law and governance inadequacy in tackling an emergency promptly, soft law also creates uncertainty and rule of law issues, due to the risk of falling into excess/abuse precisely in that, at least to a certain extent, it allows proper democratic (and scientific) accountability processes to be by-passed, and the risk of being subject to misleading pressure from private interests and foreign countries' influence.¹⁴¹ These risks are particularly dangerous in situations where fundamental rights are severely limited, as they have been by distancing and lockdown measures.

Moreover, it is worth noting that the positive impact of soft law on law effectiveness is proportionate to the effectiveness and enforceability of soft law itself. As soft law tools are non-binding, such enforcement mainly depends on the responsiveness of the different actors involved and on the country-specific sense of individuals' civic duty. Therefore, soft law effectiveness inevitably comes up against (1) the issue of its justiciability, and (2) any related liability for damages. In this respect, although the justiciability and enforceability of soft law measures are still regarded as a hot and controversial topic in civil law systems, significant steps have been taken in many domestic jurisdictions.¹⁴² Besides, courts tend to hold certain soft law measures in great respect, especially in the case of international and European soft law.¹⁴³ On the other hand, the non-binding nature of soft law measures makes the allocation of charges complicated, as the decision to comply with them is a free choice of the recipients of such measures and the damage suffered is therefore their own responsibility.

V. CONCLUSIONS

Soft law plays a crucial role in fostering the resilience of contemporary legal systems and, consequently, in increasing citizens' trust in law and institutions at different levels.¹⁴⁴ Indeed, while traditional legal instruments appear ill-equipped to face the challenges of the contemporary world, conversely, soft law—being a fluid

¹⁴¹ Boschetti and Poli, note 8 above.

¹⁴² *Gisti* case, note 5 above.

¹⁴³ See: D Utrilla, 'Governing a Pandemic through Soft Law: Challenges for Judicial Review' (*EU Law Live*, 12 June 2020). On this topic recently: M Eliantonio, 'Judicial Review of Soft Law before the European and the National Courts: A Wind of Change Blowing from the Member States?' in *EU Soft Law in the Member States*, note 4 above; with a specific focus on the Italian case: J Alberti and M Eliantonio, 'Judges, Public Authorities and EU Soft Law in Italy: How You Cannot Tell a Book by its Cover' in *EU Soft Law in the Member States*, note 4 above.

¹⁴⁴ See M Eliantonio and O Ştefan, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 in the EU' (2021) 12(1) *European Journal of Risk Regulation* 159.

normativity that operates in a composite and highly flexible web of international, supranational, domestic, and sub-state players—not only significantly underpins the effectiveness of legal systems at all levels (international, supranational, and domestic) and at all stages of the regulatory processes (from rule-making to law-enforcement), but also allows highly flexible direct forms of communication/dialogue across the international order on the one hand, and between institutions, individuals, and businesses on the other.

As the research outputs show, pandemic soft law has played a key role in all the countries surveyed. This success can only be partly justified by the features of soft law (informality and adaptability in the first place). Much of it has been determined by the emergence of new (anti-) pandemic governance frameworks, in which a different set of players and entities has appeared and the roles of all the institutional players have been sharply redefined. This complex collection of players has acted as an accelerator and a multiplier, opening up a scenario of creative testing of the use of soft law tools. The form, substance, and functions of soft law have therefore been mixed, paving the way to new practices and bringing innovation to the soft law atlas and its conceptualisation. Moreover, soft law measures have not only connected with each other and created soft law chains or loops, but they have also combined strongly with hard law sources and other regulatory tools, pushing forward the traditional interplay between hard and soft law as well as between hard and soft governance. Despite the fact that soft law has rapidly gained ground in the area of traditional normativity thanks to the pandemic, the analysis confirms that it must be studied in connection with the overall regulatory process, this being the broader landscape in which public policies are regulated, implemented, and enforced on an ongoing basis. That said, the research also proves that the traditional conceptualisation of hard and soft law as opposites (*the hard and soft law divide*) has become inadequate and needs to be redefined, moving towards the idea of an expanded normative dimension instrumental to regulation and governance goals. The decision on whether, and to what extent, soft law is to be taken more seriously in the legal field (ie in terms of complementarity with hard law sources, accessibility, procedural standards, enforceability, and limits) is for law and rule makers to make. However, this will obviously impact on the appeal of soft law and on its ability to support actively hard law and governance: a more expensive, difficult-to-issue, time-consuming, rigid, and harder soft law may end up being useless. An approach based on self-restraint seems to be highly preferable. Besides, as it has been made clear by pandemic case law, if there are areas that cannot be left uncovered by hard law sources, soft law is free to take its course by relying on its own strengths.