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# Soft Law Behind the Scenes

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ARTICLE

# Soft Law Behind the Scenes: Transparency, Participation and the European Union's Soft Law Making Process in the Field of Climate Change

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## Abstract

The global climate crisis poses many risks; for instance, relating to the environment, to the economy and to public health. The mitigation and management of such risks create a complex and multifaceted regulatory conundrum that requires quick, flexible, efficient and adaptive policy solutions that transcend the state level. A quick look in the body of regulatory instruments employed in the field of climate change policy will reveal that soft law is used very frequently by the European Commission to aid with the application, transposition and interpretation of European Union (EU) environmental legislation relating to climate change. While soft law has become ever more prominent in the EU legal order and has been studied extensively at the *ex-post* phase (ie concerning its effects or effectiveness), little academic attention has been paid to the process of soft law-making. In simple terms, we know very little about how soft law instruments are made. This article peeks behind the scenes of soft law and examines the transparency and participation credentials of the articulation process of Commission Guidance Documents in the field of climate change regulation adopted under key legal acts in the field.

**Keywords:** climate change governance; environmental law; EU soft law; participation; transparency

## I. Introduction

The global climate crisis poses many risks. Some of these risks relate to the environment, to the economy, to the well-being of humankind or to public health. Yet the climate crisis also poses a risk to democratic governance that might not be directly obvious but is just as important. The mitigation and management of the climate crisis creates a complex and multifaceted regulatory conundrum that requires quick, flexible, efficient and adaptive policy solutions that transcend the state level. In the legal landscape of the European Union (EU), alternative modes of governance, commonly based on soft law instruments, are often able to meet this requirement. Due to their flexible and non-binding nature, soft law instruments – such as Recommendations or Guidance Documents – operate somewhere between the realms of law and politics. They fulfil different functions, ranging from agenda-setting to policy-steering, which bring about practical and legal effects without a binding legal force or a threat of sanctions.[1]

[1] L Senden, *Soft Law in European Community Law: Its Relationship to Legislation* (London, Hart 2004); M Eliantonio, E Korkea-aho and O Stefan (eds), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (London,

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This quality of soft law instruments makes them act as a sort of "legal passe-partout" that is highly valuable in the technically, scientifically and politically complex field of environmental law at large or climate change law in particular. In fact, already by the early 2000s, soft law instruments were considered to be an important aspect of EU regulation.[2] A quick look at the body of (both binding and non-binding) regulatory instruments employed in the field of environmental policy will reveal that soft law is used very frequently by the European Commission to aid with the application, transposition and interpretation of EU environmental legislation.[3] From the perspective of the Member States as well, soft law seems to be perceived as prescriptive and authoritative.[4] In short, soft law is a major player in the Union's efforts to tackle environmental concerns and to mitigate the ongoing climate crisis, and its volume is only expected to rise in the coming years with the gradual introduction of new climate change legislation.

While soft law instruments are, indeed, able to provide quick and tailored solutions to complex problems, their employment does not come without issues (or criticism). As the articulation and adoption soft law occurs, by design, in the periphery of the legislative process,[5] and as soft law instruments remain largely unchecked throughout by bypassing policymaking and decision-making avenues,[6] the soft law construct raises a number of questions in terms of authority, legitimacy, democracy and organisation.[7] Nevertheless, although soft law has become ever more prominent in the EU legal order and EU environmental legislation, it has, for the most part, been studied extensively only at the *ex-post* phase (ie by focusing on the effects or use of soft law instruments in the Union).[8] Thus far, little academic attention has been paid to the process of soft law making itself. In essence, we know very little about how soft law instruments are made (ie how they come about, who is involved in the process, who is consulted and at what stage, etc.). Prompted by the recent publication of an open public consultation for the revision of a Guidance Document adopted under the Habitats Directive[9] and the generally increasing prominence of soft law

Hart 2021); F Snyder, "Soft Law and Institutional Practice in the European Community" in S Martin (ed.), *The Construction of Europe: Essays in Honour of Emile Noel* (Alphen aan den Rijn, Kluwer 1994); K Abbott and D Sindal, "Hard and Soft Law in International Governance" (2000) 54 International Organization 421.

[2] A Jordan et al, "The Rise of 'New' Policy Instruments in Comparative Perspective: Has Governance Eclipsed Government?" (2005) 53 Political Studies 477, 481; Y Papadopoulos, "Accountability and Multi-Level Governance: More Accountability, Less Democracy?" (2010) 33 West European Politics 1030, 1030.

[3] O Stefan et al, "EU Soft Law in the EU Legal Order: A Literature Review" (2019) SoLaR Working Papers, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346629> (last accessed 9 May 2020), 3.

[4] Interview 4, with Deputy Head of Unit at DG CLIMA, European Commission (25 March 2022, online).

[5] Senden, supra, note 1, 112.

[6] M Eliantonio and O Stefan, "Soft Law Before the European Courts: Discovering a Common Pattern?" (2018) 37 Yearbook of European Law 457; M Tsakatika, "A Parliamentary Dimension for EU Soft Governance" (2007) 29 Journal of European Integration 549; M Eliantonio, "Judicial Review of Soft law Before the European and the National Courts: A Wind of Change Blowing from the Member States?", in M Eliantonio, E Korkea-aho and O Stefan (eds), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (London, Hart 2021); D Petropoulou Ionescu and M Eliantonio, "Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective" (2021) 17 Journal of Contemporary European Research 43; L Senden and A van den Brink, "Checks and Balances of Soft EU Rule-Making" (2012) <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462433/IPOL-JURI_ET(2012)462433_EN.pdf> (last accessed 22 December 2021).

[7] U Mörth, "Soft Law and New Modes of EU Governance – A Democratic Problem?" (*Network of Excellence CONNEX Conference*, Darmstadt, November 2005) <http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/6/Papers_Soft%20Mode/Moerth.pdf> (last accessed 22 December 2021).

[8] See, for instance, Eliantonio et al, supra, note 1; Eliantonio and Stefan, supra, note 6; A Kovács, T Tóth and A Forgács, "The Legal Effects of European Soft Law and Their Recognition at National Administrative Courts" (2016) 2 ELTE Law Journal 53; and all contributions to the Special Issue of the *European Journal of Risk Regulation* "COVID-19 and Soft Law: Is Soft Law Pandemic-Proof?" edited by M Eliantonio, E Korkea-aho and S Vaughan.

[9] D Petropoulou Ionescu, "Habemus Legitimacy? The European Commission Opens Public Consultation for a Guidance Document" (2021) 12 European Journal of Risk Regulation 861.

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in the areas of environment and climate change, we argue that a closer look at this aspect of soft law is long overdue.

This uncertainty about how soft law is made creates a major blind-spot in the study and practice of EU governance, as we know little of whether principles of good governance, such as participation or transparency, are complied with, which in turn would risk undermining the legitimacy of the Union's soft governance actions as a whole. In this article, we peek behind the scenes of soft law and examine the articulation process of EU soft law instruments relating to climate change. We argue that the urgency surrounding the climate crisis and the scientific uncertainty that that entails call for additional attention to be given to issues of transparency and participation – and legitimacy in general – in terms of the Union's regulatory response to the "wicked problem" of climate change. After all, the importance of the values of transparency and participation, as foundational principles of the EU enshrined in the Treaties, does not cease to exist in a crisis context.[10] Quite the contrary. As the climate crisis will, seemingly, become an even greater part of EU regulation in the future and require increasingly adaptable and effective policy solutions, a specific and close look into the legitimacy of environmental governance practices in particular – in which soft law plays a central role – is justified and necessary. The climate crisis calls for a new way forward, and this call extends to governance as well.

Against this background, this article proceeds as follows: the next section provides some conceptual context on the overall topic at hand and outlines the analytical and methodological approach of the study. Thereafter, we delve into the complicated relationship between soft law and procedural legitimacy, with a specific focus on the principles of transparency and participation. Having set the theoretical and conceptual foundations of our study, the article then presents empirical findings in terms of how transparency and participation are accounted for in the process of environmental soft law making. Following the analytical framework laid out in Section II, the empirical analysis addresses the results relating to transparency and participation in turn. The last section offers some concluding thoughts on the larger implications of our findings and places specific focus on potential future research avenues for soft law.

## II. Definitions, approach and methodology

Soft law comes in many shapes and sizes – ranging from Recommendations and Opinions as prescribed in Article 288 TFEU,[11] to Guidance Documents or Notices – and is thus difficult to study and systematise it in its entirety. In this article, we follow the definition provided by Senden, which sees soft law as "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects".[12] Senden's research finds that soft law measures as such can be broadly classified under three categories: preparatory or informative (eg White Papers), interpretational or decisional (eg Guidelines or Notices) and formal or informal steering measures (eg Recommendations).[13]

With this definition in mind, we focus on soft law adopted under key legal acts in the field of climate change policy, and specifically on soft law instruments providing post-legislative guidance (ie falling under the broad category of soft interpretative rules of

[10] C Armeni and M Lee, "Participation in a Time of Climate Crisis" (2021) 48 Journal of Law and Society 549; S Jodoin, S Duyck and K Lofts, "Public Participation and Climate Governance: An Introduction" (2015) 24 Review of European, Comparative & International Environmental Law 117.

[11] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47.

[12] Senden, supra, note 1.

[13] For a detailed overview of the different types of soft law measures, see Senden, supra, note 1, 119–20.

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**Table 1.** Case selection table.

| Legal act | Soft law instruments |
|---|---|
| Accreditation and Verification Regulation (AVR) ETS Directive 2003/87/EC | 16 Guidance Documents |
| Monitoring and Reporting Regulation (MRR) ETS Directive 2003/87/EC | 9 Guidance Documents |
| Joint AVR and MRR ETS Directive 2003/87/EC | 4 Guidance Documents |
| Carbon Capture and Storage Directive (CCS) | 4 Guidance Documents |
| Fluorinated Greenhouse Gases Regulation (F-gases) | 4 Guidance Documents |
| Land Use and Forestry Regulation (LULUCF) | 2 Guidance Documents |
| | Total: 39 Guidance Documents |

conduct) adopted under five pieces of legislation in the field of climate change: (1) the CCS Directive,[14] (2) the LULUCF Regulation,[15] (3) the F-gases Regulation[16] and finally (4) the ETS Directive[17] and the two subsequent implementing regulations (the AVR Regulation[18] and the MRR Regulation[19]). The reason for this focus is due to the particular function of post-legislative Guidance Documents that positions them in a "legal limbo"[20] and due to their prominent role in EU environmental law.[21] A detailed breakdown of the dataset, including an overview of the selected soft law instruments, is presented in Table 1.[22]

The aim of this enquiry is to examine the previously unexplored process of EU soft law making and to determine the transparency and participation credentials of EU climate

[14] Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 [2009] OJ L 140/114 (hereafter CCS Directive).

[15] Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU [2018] OJ L 156/1 (hereafter LULUCF Regulation).

[16] Regulation (EU) No 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) No 842/2006 [2014] OJ L 150/195 (hereafter F-gases Regulation).

[17] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC [2003] OJ L 275/32 (hereafter ETS Directive).

[18] Commission Implementing Regulation (EU) 2018/2067 of 19 December 2018 on the verification of data and on the accreditation of verifiers pursuant to Directive 2003/87/EC of the European Parliament and of the Council [2018] OJ L 334/94 (hereafter AVR Regulation).

[19] Commission Implementing Regulation (EU) 2018/2066 of 19 December 2018 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council and amending Commission Regulation (EU) No 601/2012 [2018] OJ L 334/1 (hereafter MRR Regulation).

[20] J Scott, "In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law" (2011) 48 Common Market Law Review 329.

[21] Jordan et al, supra, note 2; M Eliantonio, "Soft Law in Environmental Matters and the Role of the European Courts: Too Much or Too Little of It?" (2018) 37 Yearbook of European Law 496; J Schoenefeld and A Jordan "Towards Harder Soft Governance? Monitoring Climate Policy in the EU" (2020) 22 Journal of Environmental Policy and Planning 774.

[22] Please note that the case set corresponds to the volume of Guidance Documents published up to 1 January 2022. Guidance Documents published by the European Commission after this date are not taken into account in this research. A list of all examined soft law instruments can be found in Annex 1.

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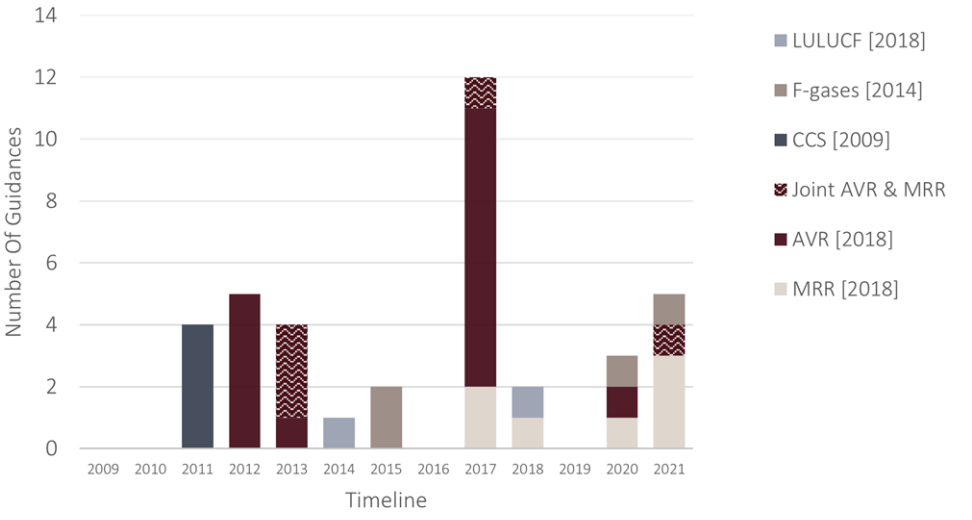


**Figure 1:** Year of enactment of the selected Guidance Documents. AVR = Accreditation and Verification Regulation; CCS = Carbon Capture and Storage Directive; F-gases; Fluorinated Greenhouse Gases Regulation; LULUCF = Land Use and Forestry Regulation; MMR = Monitoring and Reporting Regulation.

change soft law. Given the novelty of this line of research, our article aims to provide both quantitative and qualitative insights into the transparency and participation credentials of the articulation and adoption processes of EU environmental soft law relating to climate change. This methodological approach will give us the opportunity to look at the "bigger picture" of how the soft law making process fares in terms of transparency and participation in general terms and across multiple levels, but also to focus on case-by-case intricacies that can reveal patterns and best practice examples that will be theoretically and practically valuable to both scholarship and governance practices beyond the specific case study of climate change law and policy.

Figure 1 presents a chronological overview of the year of enactment of the selected Guidance Documents analysed in this study. While we do not argue that the year of enactment plays a role in the transparency and participation credentials of the soft law making process – though in more recent years there has been increased political attention to matters of good governance – this overview does demonstrate that soft law measures, and in particular Guidance Documents, have played a central role in the implementation of each legal act from the very beginning. This, in a sense, confirms the importance of ensuring that transparency and participation are accounted for in the development of Guidance Documents or soft law instruments in general.

How can we assess the transparency and participation of EU soft law? This study has operationalised the concepts of transparency and participation in the following manner. Firstly, we study transparency on the basis of two standards: (1) the accessibility of relevant information and (2) the intelligibility of the decision-making process. Similarly, we study participation on the basis of: (1) the openness of the soft law making process and (2) the inclusivity of the soft law making process. Each of these standards has been assigned specific indicators to ensure the consistent and coherent collection of data. These can be found in Table 2.

Given the largely exploratory and investigative nature of this line of enquiry, our analysis is based on several sources of data. On a general level, the data have been retrieved through available documents obtained through public databases or through access to document requests, such as meeting records and minutes of relevant bodies involved in the

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**Table 2.** Analytical framework.

| Principle | Standard | Indicator |
|---|---|---|
| Transparency | Accessibility of relevant information | Document accessibility<br>Language accessibility |
| | Intelligibility of the decision-making process | Documentation of the decision-making process<br>Record of authorship |
| Participation | Openness of the soft law making process | Public or targeted consultations<br>Fora of participation |
| | Inclusivity of the soft law making process | National-level participation<br>Accessibility to different types of actors |

soft law making process (eg Commission expert group meetings), on the metadata of the Guidance Documents themselves, as well as from six interviews with relevant stakeholders.[23]

## III. Transparency, participation and soft law: a complicated relationship

What is the value of examining the transparency of and participation in the soft law making process? Why should soft law be legitimate at all? As soft law instruments are not binding and not obligatory, the link between these aspects of procedural legitimacy – and the necessity thereof – and soft law is not instinctively clear. In fact, it is often argued that since soft law does not rely on traditional means of coercion, in contrast to its "hard" counterpart, there is no need for control. Before delving into the empirical findings of this study, in the following paragraphs we aim to explore the – often troubled – relationship between transparency, participation and soft law. We find that there are two levels to this relationship, which each carry separate implications: a normative and a legal one. We discuss these in turn.

Why does the procedural legitimacy of soft law instruments, as a norm, matter in this specific context? Why should we care about the transparency and participation of the soft law making process? There are two potential ways to answer this question. First, one answer would simply state that soft law is an important part of EU (environmental) governance and, thus, as any other mode of governance in any other field, it needs to be legitimate and to adhere to certain standards of transparency and openness throughout. A second way to answer this speaks to the specific nature of soft law instruments, their function in the EU legal order and the legal and practical effects that they may bring about. Indeed, while soft law may lack a mandatory or legally binding character, its authoritative and normative power rests on other grounds of coercion. For instance, aspects inherent to soft law as a practice – such as peer pressure, shaming, moral persuasion or imitation – have been proven to be major drivers of behaviour in both individuals and collectives.[24] From this perspective, while indeed not coercive in the traditional sense, as they lack legal sanctions, soft law measures do impose authoritative definitions and can be coercive, albeit in a different manner from hard law. From a similar standpoint, the lack of legal bindingness of soft law can also be contested as, despite an absence of a *legally* binding

[23] A list of interviews is available at the end of this article.

[24] F Zerilli, "The Rule of Soft Law: An Introduction" (2010) 56 Focaal Journal of Global and Historical Anthropology 3, 6.

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force, soft law may in fact be binding otherwise. For instance, due to its noteworthy effects, soft law norms may gradually become politically, morally or socially binding.[25]

The point here is to demonstrate that while indeed soft law does not share the same characteristics as hard law, it is nevertheless an appropriate object of scrutiny when it comes to legitimacy in general and transparency and participation in particular. While, traditionally, the need for legitimacy has been preserved for binding legal measures that rely on sanctions or the threat thereof and perform an authoritative allocation of values, we argue that such an allocation may very well be performed without the use of conventional forms of coercion. In this way, as soft law measures have the capacity to influence behaviour to the point that they become socially, morally and politically binding, they do, indeed, require consideration in terms of their political legitimacy.[26]

The legal justification for the need for a *procedurally* legitimate EU soft law is much more complicated. As mentioned previously in this article, soft law "falls through the cracks" of how legitimacy as a whole or transparency and participation specifically are operationalised in EU law. For instance, soft law instruments do not qualify as any of the measures listed under Articles 7 and 8 of the Aarhus Convention, the foremost instrument on participation in EU environmental matters, as they are neither plans, programmes, policies nor regulations and hence are not subject to the public participation requirements foreseen by the Convention.[27] Generally speaking, in terms of transparency, we can see two main streams regarding how the principle is operationalised in EU law: as a value and as a practice. The former refers to references to the salience of transparency in governance without providing a framework or roadmap as to how that is to be realised in practice, and the latter addresses practical roadmaps as to how transparency is to be operationalised. For instance, Articles 10(3) and 11(2) TEU only recognise the importance of openness or transparency in decision-making procedures, without imposing any obligations on the Union institutions or establishing any rights for the general public. In this sense, those references remain rather vague and can tell us very little regarding how these provisions are to be related to the soft law making processes. Where transparency is operationalised as a practice, this occurs mostly in terms of access to documents or information. This is exemplified, for instance, in Article 15(3) TFEU, Articles 1, 4 and 5 of the Aarhus Convention or Regulation 1049/2001,[28] many of which do not even apply in the case of soft law. While, certainly, access to documents and information is critical for transparency in the Union, this rather limited practical understanding of this fundamental value poses an obstacle to the legitimacy of soft governance, as there is a lot more to transparency than access to documents.

The operationalisation of participation in EU law follows similar lines to transparency and is also predominantly referred to as either a value or a practice. Nevertheless, one can observe more clarity in the rights and obligations related to participation as a practice than when related to transparency as a practice. In more detail, similarly to the case above, references to participation as a value remain rather vague and generic – although less so than the case of transparency – and highlight the importance of participation in EU decision-making. For example, Article 11(2) TEU, stating that "the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil

[25] Eliantonio and Stefan, supra, note 6, 459; Stefan et al, supra, note 3, 26; K Jacobsson, "Between Deliberation and Discipline: Soft Governance in the EU Employment Policy" in U Mörth (ed.), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Cheltenham, Edward Elgar 2004) p 82.

[26] Tsakatika, supra, note 6; Petropoulou Ionescu and Eliantonio, supra, note 6; Mörth, supra, note 7; S Borrás and T Conzelmann, "Democracy, Legitimacy and Soft Modes of Governance in the EU: The Empirical Turn" (2007) 29 Journal of European Integration 531.

[27] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("Aarhus Convention") 2161 UNTS 447 (25AD).

[28] And in particular Art 2 of the Regulation.

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society", highlights the significance of participation and transparency as democratic values without specifying how these are to be achieved. While these references often also address specific aspects of participation (eg openness or inclusivity), little practical information as to how that may translate in practice can be retrieved. In the cases where participation is described as a practice, the discussion seems to centre consultations as the only means of participation. This is the case, for instance, in Articles 11(1) and 11(3) TEU, which respectively outline the obligation of the Union institutions to provide participatory opportunities and the obligation of the Commission to carry out consultations for the Union's actions. Nevertheless, while this is indeed a central part of the discussion of participation in the EU, there is more to participation than just consultations. Increasingly, the mere existence of consultations does not necessarily mean that the consultations fulfil the criteria of openness or inclusivity. The point here is that, while participation is clearly a principle that is addressed repeatedly in EU law, the practical aspect of it leaves a lot to be desired when it comes to the process of soft law making.

What can we conclude about the relationship between soft law and the principles of transparency and participation? It is certainly complicated. Insofar as the process of soft law making is concerned, the procedural frameworks relating to the principles of transparency and participation are scarce, and even when present they are notably limited. In practical terms, transparency seems to be understood as access to information and documents, while participation is understood in terms of consultations. Though valuable, this narrow understanding of procedural legitimacy principles, as with transparency and participation, leaves little room for appropriate procedural frameworks that are meant to promote or ensure the legitimacy of the soft law making process. This issue is exacerbated when taking into account that even in instances where transparency and participation are operationalised and where relevant practical obligations exist, very few (if any) of those apply directly to soft law – in short, EU law has a major blind-spot when it comes to the procedural legitimacy of soft law. Thus, it can only provide a partial justification for the legitimacy of soft law, as only a few general requirements regarding transparency and participation and only a few narrow remarks are envisaged for EU soft law making specifically. In terms of the broader question of this study concerning the overall throughput legitimacy credentials of the EU soft law making process in environmental legislation,[29] this piece of the puzzle leaves a lot to be desired. Be that as it may, we argue that even in the absence of a concrete framework applicable to soft law – or, perhaps, specifically due to this absence – soft law merits a close examination through a legitimacy lens. Yet it is clear that the typical understanding of legitimacy, commonly reserved for hard legislative action, is not sufficient for such an examination. Thus, our understanding of legitimacy, from a legal and normative perspective, needs to be reviewed and adjusted in order to include more forms of public action than hard law and sanctions and thus to accommodate soft law and alternative types of governance.

## IV. How it's made: procedural realities of soft law making

How does the soft law making process take place in reality? How are climate change guidances created in practice? And, most importantly, how does this process fare in terms of transparency and participation? In this section, we present the empirical findings of our enquiry into the procedural realities of EU soft law making in the field of EU climate change regulation. This piece of the empirical puzzle will provide the necessary insight

[29] V Schmidt, "Democracy and Legitimacy in the European Union Revisited: Input, Output, and 'Throughput'" (2013) 61 Political Studies 2.

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to evaluate how legitimate the soft law making process is in its entirety. This section is divided into two main parts addressing transparency and participation, respectively.

### *1. How transparent is the soft law making process?*

As set out in Section II, we study the transparency of the soft law making process on the basis of two standards: (1) the *accessibility* of relevant information and (2) the *intelligibility* of the decision-making process. The first standard speaks to the overall accessibility of the selected guidances and is broken down into two indicators, relating to the accessibility of the publications and the availability of translations in the official languages of the EU. Similarly, the second standard speaks to the intelligibility of the soft law making process and is also broken down into two indicators, relating to the documentation of the decision-making process and the assignment of authorship. We examine these in turn.

#### *a. Accessibility and the soft law making process*

How accessible are soft law documents? Accessibility – as a core component of transparency – is a basic precondition for the overall openness of governance processes. For instance, for standards of participation to be fulfilled, the public and interested parties ought first to know that a guidance exists or is being prepared, how to access the process and so on. In light of the available data, the accessibility of documents relating to the selected guidances is examined in two ways. We have mapped the accessibility of the guidances themselves by mapping where each guidance is published. Further, through the route of access to documents, we have attempted to locate documents (eg minutes, reports, etc.) relating to the drafting of the selected guidances. This will help us assess the accessibility of these instruments throughout. For the second indicator of accessibility (ie relating to language accessibility and the availability of translations), we have taken stock of the languages in which climate change guidances have been translated.

Where are EU environmental guidances published? Is there a dedicated platform where soft law instruments as such are made available to interested parties? As is demonstrated in Figure 2, the overwhelming majority of the selected cases utilise the website of the European Commission to publish the relevant Guidance Documents to the public. These are usually found under headings such as "documents" or "relevant publications", together with other documents such as commissioned studies by research institutions, brochures or press statements. Due to the manner in which these guidances are listed together with other relevant documents, it is often not entirely clear which of these documents are intended as guidance for the Member States and which documents are there for the sake of information. While in some cases (eg the CCS guidances) the title of the document (eg "Guidance Document 1") can clearly indicate its purpose and function, this is by no means a regular or standard practice. The only exception to this publication approach seems to come from the guidances adopted under the LULUCF, which are all systematically published on the EU Publications Office website. Of the selected guidances, none are available in the Official Journal.

The second component of this indicator relates to the accessibility of documents related to the drafting and endorsement of the guidances. These could, for instance, take the form of presentation slides or minutes from meetings where the progress of developing the guidances was discussed. Overwhelmingly, the accessibility of these documents is rather disappointing, as no public documents as such were able to be retrieved from the Commission's document register or from the public Communication and Information Resource Centre for Administrations, Businesses and Citizens (CIRCABC). As a result, the accessibility of the soft law making process is severely impacted, which in turn undermines the overall transparency and openness of the Union's soft governance practices in

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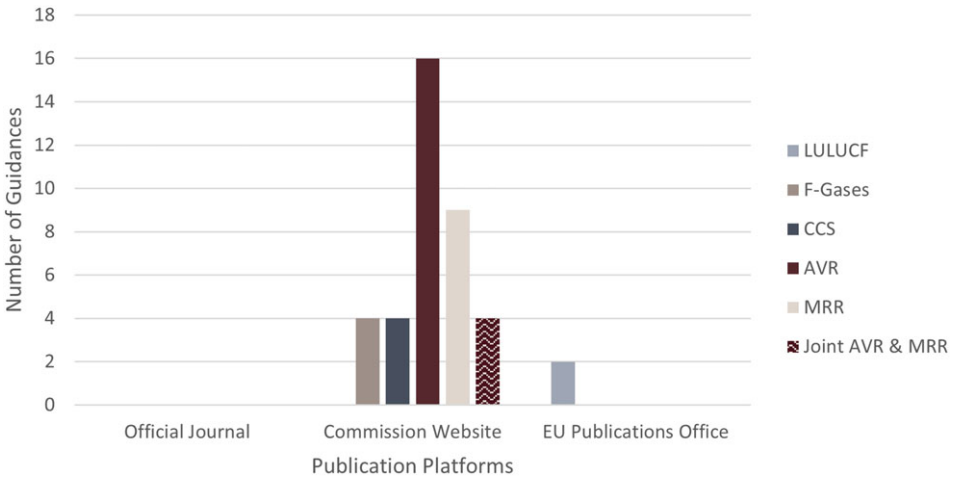


**Figure 2:** Overview of Guidance Document accessibility. AVR = Accreditation and Verification Regulation; CCS = Carbon Capture and Storage Directive; F-gases; Fluorinated Greenhouse Gases Regulation; LULUCF = Land Use and Forestry Regulation; MMR = Monitoring and Reporting Regulation.

the field of climate change. What is more, although such documents could in theory be requested through an official access to documents request, the general uncertainty relating to them (ie not being fully aware of whether they exist, in which format, by which actor, etc.) renders the exercise of requesting documents somewhat futile and, by extension, significantly reduces the transparency of the process.

Moving on to the second indicator relating to accessibility, we ask: in which languages are EU environmental guidances available? Are guidances available in all EU official languages? Is there a balance in the use of languages? When it comes to administrative documents, such as guidances, language accessibility plays a significant role in ensuring transparency. This assertion is certainly not something new.[30] The EU itself has often declared its commitment to linguistic diversity and has acknowledged institutional multilingualism as one of the Union's founding principles.[31] In this sense, we can argue that language accessibility – and specifically the availability of instruments of the EU in all EU official languages – is an important criterion for their openness and transparency. As Figure 3 shows, from the information available across the platforms where guidances are published, we can see that all guidances under examination here are exclusively available in the English language, without a single translation to any other official language of the Union. It goes without saying that this practice severely impacts the accessibility of the soft law making process and of soft law in general, and by extension the transparency of the process as well.

[30] The connection between transparency, accessibility and multilingualism is firmly rooted in the Union's rhetoric around cultural diversity. See, for instance, Commission, "Many Tongues, One Family – Languages in the European Union" (2004) <https://op.europa.eu/en/publication-detail/-/publication/40fe66da-d886-403b-94b7-e0facfa03161> (last accessed 1 June 2022); Commission, "Communication of the Commission. A New Framework Strategy for Multilingualism" COM (2005) 596 final. For a more in-depth discussion on this matter, see C Baaij, "The EU Policy on Institutional Multilingualism: Between Principles and Practicality" (2012) 1 Global Perspectives on the Language of Law 14.

[31] For instance, already by 1958, Regulation No 01 determining the languages to be used by the European Economic Community set multilingualism as a core value of the Union, which is now reflected in the Treaties in, *inter alia*, Art 55 TEU and Arts 20, 24 and 342 TFEU.

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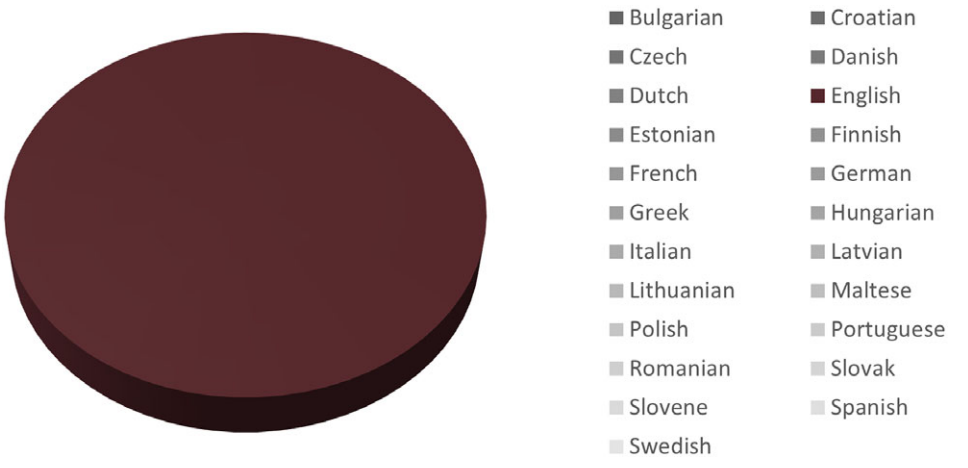


**Figure 3:** Overview of language accessibility.

Overall, we see that, in terms of accessibility, the soft law making process in this particular context performs rather poorly. While the actual Guidance Documents are easily available on the Commission website or the EU Publications Platform, they are exclusively available in the English language, and no supporting documents concerning the development of the documents are made available to the public without further research.

*b. Intelligibility and the soft law making process*

How much do we know about the authors of soft law instruments? Very often, when talking about Commission soft law or Commission guidances in particular, the credit of authorship is (perhaps intuitively) given to the European Commission as a whole. Yet each guidance is written by (a group of) specific actors. To what extent are these authors credited? Do Guidance Documents make clear who was responsible for the development and the drafting of each document? This indicator explores whether or not an explicit assignment of authorship is provided within the guidances. The relevance of this discussion rests on the role of transparency as a precondition for accountability. Firstly, an explicit assignment of authorship – be that to an institutional actor, an external consultant or a working group – opens the road to accountability. Simply put, if we know who is responsible for the production of an instrument, we are also able to evaluate and contest its normative power. This connection of authorship and accountability (and, eventually, to participation) is made even more clear due to the very character of these types of instruments. As Guidance Documents are meant to act as interpretational aids (ie fulfilling a norm-setting capacity) of the provisions of the legal act under which they have been adopted, it is reasonable to ask *who* has a say in this process.

The analysis of the data is based on three empirically founded categories of assignment of authorship, which have been deduced after close examination of the data, specifically on (1) a full record of authorship, (2) a partial record of authorship and (3) no record of authorship. A full record indicates the explicit mention of authorship and a full listing of individual contributors and their affiliations. This is often evident through a section dedicated to the articulation of the document that provides the names of the actor(s) involved in the drafting group, their contact information and the capacity in which they joined the drafting group (eg as a member of a scientific institution or a consultancy). A partial record refers to the explicit mention of authorship but without the provision of specific details of the authors. This, for instance, would be indicated through a general

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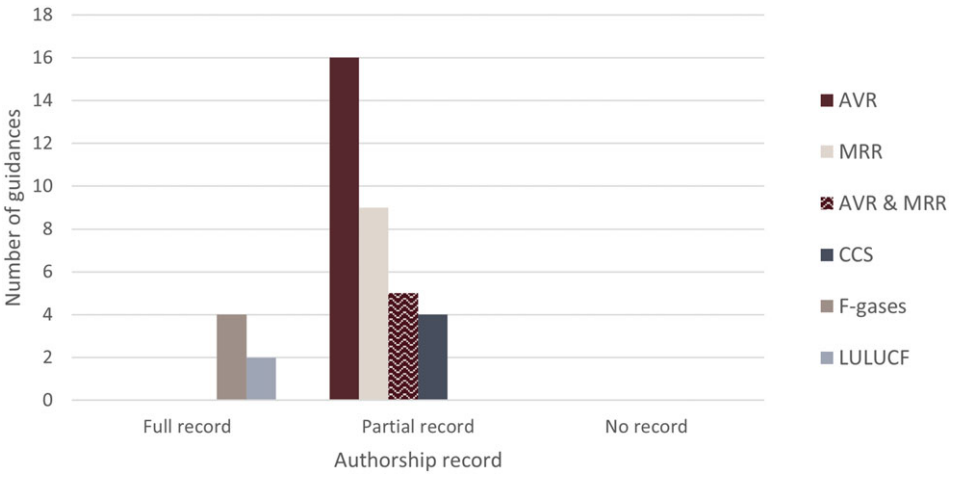


**Figure 4:** Availability of authorship records: all cases. AVR = Accreditation and Verification Regulation; CCS = Carbon Capture and Storage Directive; F-gases; Fluorinated Greenhouse Gases Regulation; LULUCF = Land Use and Forestry Regulation; MMR = Monitoring and Reporting Regulation.

reference to an external consultancy or a working group. Finally, no record indicates the lack of an explicit mention of authorship and the absence of a reference to individual authors.

As we can see in Figure 4, the overwhelming majority of the selected guidances only include general references to authorship without providing any concrete information regarding their authors. This, for instance, is particularly exemplified in the guidances stemming from the ETS Directive, and specifically the MRR and AVR Regulations, which include a standard template with a reference to the "Informal Technical Working Group on the Monitoring and Reporting Regulation under the WGIII of the Climate Change Committee" without ever providing any information about the composition or the responsibilities of the working group. While this tells us *something* about the soft law making process, it certainly does not tell us much – and arguably raises more questions than it answers. Nevertheless, the guidances adopted under the LULUCF and the F-gases Regulations seem to break the pattern, as they do provide full authorship records of all authors who were involved in the drafting of the guidances[32] – and at times, though rarely, even records of participants who provided comments or expertise during the process.

Moving on to another aspect related to the intelligibility of the soft law making process, we ask a number of questions relating to whether or not (and to what extent) we can retrieve information about how each guidance has been developed. As no supporting documents have been located, examining the intelligibility of the drafting process of the guidances required some investigative work. In short, the intelligibility of the soft law making process is *prima facie* very poor, primarily due to the lack of accessibility. Thus, a first step

[32] For instance, the Guidance on developing and reporting Forest Reference Levels in accordance with Regulation (EU) 2018/841 adopted under the LULUCF Regulation provides a full list of responsible authors and their institutional affiliations on p 4, while the Technical Guidance on Mainstreaming climate change into rural development policy post 2013 of the same Regulation also provides a full list of consulted participants on p 2 of the document. Commission, "Guidance on developing and reporting Forest Reference Levels in accordance with Regulation (EU) 2018/841" (2018) <https://op.europa.eu/en/publication-detail/-/publication/5ef89b70-8fba-11e8-8bc1-01aa75ed71a1/language-en> (last accessed 1 June 2022); Commission, "Mainstreaming climate change into rural development" (2014) <https://op.europa.eu/en/publication-detail/-/publication/b8d43e0b-1732-491e-9ca2-4d728d4cf180/language-en/format-PDF/source-243271617> (last accessed 1 June 2022).

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of analysis was to identify references within the guidances that pointed to specific processes that took place during the preparation of the documents. For the most part, the selected guidances make vague references to the process (similarly to the above on the ETS Informal Technical Working Group), state that the guidance has benefitted from discussions with the Member States or present the dates in which the documents were revised, approved or endorsed. For example, the four CCS Guidance Documents include a standardised reference in the title page of the document claiming that the guidance has benefitted from discussions with and information supplied by experts from Member States and key stakeholders within the framework of a targeted stakeholder consultation.[33] While, again, this gives us a glimpse into the process, no substantial information about the process of developing the guidance in question can be retrieved. In fact, on that basis we can only raise even more questions: what does it mean legally to *endorse* a guidance? How do the Member States contribute? These questions persist.

Nevertheless, our analysis shows that – for the most part – there seems to be a set process to developing and adopting Commission guidances. However, that process does change per legal act, and it is seemingly dependent on the particular subfield and the particular requirements put forth in the legal act itself.[34] For instance, though most guidances adopted under the two Implementing Regulations of the ETS Directive[35] seem to follow the same process,[36] that process starkly differs from the one employed to adopt the guidances under the LULUCF Regulation.[37] This tells us two things. Firstly, through the interviews conducted in the context of this study, we find that, somewhat surprisingly given the findings up to this point, the soft law making process is relatively intelligible and seems to follow somewhat set steps. However, this does not seem to be deliberate. Commonly and in simplified terms, the process follows five main steps, as illustrated in Figure 5.

Secondly, the general practice of producing soft law instruments as described above also shows us that a substantial part of the soft law making process in the field of climate change occurs on the basis of "formalised informality". In short, while there are no formalised procedures on how to produce soft law, in the case of climate change and the guidances produced by the Directorate-General for Climate Action (DG CLIMA), it can be said that a common institutional practice has emerged and seems to be followed in most of the cases examined here. Yet this practice is not adequately communicated and is difficult to discern, with only a few exceptions. When asked about why this process is not communicated to the public, the main thrust of the responses indicated the highly technical nature of the field, the lack of legally binding force and the voluntary character of the Guidance Documents as key reasons for transparency and openness not being crucial considerations.[38] While this issue merits a larger discussion on the general relationship

[33] Commission, "Implementation of Directive 2009/31/EC on the Geological Storage of Carbon Dioxide Guidance Document $CO_2$ Storage Life Cycle Risk Management Framework" (2011) <https://ec.europa.eu/clima/system/files/2016-11/gd1_en.pdf> (last accessed 5 April 2022); Commission, "Guidance Document 2 Characterisation of the Storage Complex, $CO_2$ Stream Composition, Monitoring and Corrective Measures" (2011) <https://ec.europa.eu/clima/system/files/2016-11/gd2_en.pdf> (last accessed 8 April 2022); Commission, "Guidance Document 3 Criteria for Transfer of Responsibility to the Competent Authority" (2011) <https://ec.europa.eu/clima/system/files/2016-11/gd3_en.pdf> (last accessed 8 April 2022); Commission, "Guidance Document 4 Article 19 Financial Security and Article 20 Financial Mechanism" (2011) <https://ec.europa.eu/clima/system/files/2016-11/gd4_en.pdf> (last accessed 8 April 2022).

[34] See, for instance, the Information Exchange Group established under Art 23 of the CCS Directive 2009/31/EC.

[35] Commission Implementing Regulation (EU) 2018/2067; Commission Implementing Regulation (EU) 2018/2066.

[36] Interview 1, with Head of Unit at DG CLIMA, European Commission (14 January 2022, online); Interview 2, with Policy Officer at SQ Consult (11 March 2022, online).

[37] Interview 4, with Deputy Head of Unit at DG CLIMA, European Commission (25 March 2022, online); Interview 5, with former Research Scholar at IIASA (30 March 2022, online).

[38] Interview 1, supra, note 36; Interview 2, supra, note 36.

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**Figure 5:** Steps in the soft law making process.

between soft law or soft governance practices and issues of procedural legitimacy, it is evident that attention to this aspect is, for the most part, lacking.

## 2. *Participation in the soft law making process*

Having examined the transparency of the soft law making process, the analysis now moves to the principle of participation. This section addresses how the articulation and adoption processes of the selected guidances perform in terms of: (1) the *openness* of the soft law making process and (2) the *inclusivity* of the soft law making process.[39] As discussed previously, the standard of openness is measured through two indicators: the utilisation of consultations and the availability of specific participatory fora. The standard of inclusivity, on the other hand, refers to the national and institutional backgrounds of the actors involved in the soft law making process, and it aims to identify potential imbalances among national perspectives that are over- or underrepresented in the process and to explore the presence of a potential privileged access to the process by examining which types of actors have gained access.

### *a. Openness and the soft law making process*

How open is the soft law making process? Are there platforms or fora where different actors can contribute to the process? The openness of the soft law making process refers to the degree to which the process is accessible to different types of actors (eg the general public, such as industry representatives or non-governmental organisations (NGOs), experts, etc.). In essence, how open or closed the soft law making process is depends on the extent to which opportunities to participate in the soft law making process have been granted to different types of actors, such as through conducting open public consultations or establishing specific participation fora (eg dedicated conferences for different stakeholders to participate in and present their views on the content of the guidances). The Commission's own standards to consult, as elaborated in the White Paper on European Governance and the Commission's Communication on general principles and

[39] Prior to delving into the data, an important point to make here is that the following results do not present an exhaustive picture. This is simply due to the fact that a substantial number of guidances do not provide any information on participation. Thus, the results here are only indicative.

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minimum standards for consultation,[40] recognise the capacity of participation to increase the legitimacy of Union public action.

The overarching answer to this is rather underwhelming. Our analysis shows that, across all cases, there seem to be very few instances where actors outside the European Commission, the contractors and the Member States have been able to contribute to the development of Guidance Documents. Arguably, this can be partly attributed to the poor transparency of the process altogether – even in instances where we are able to trace the different steps in the development of the Guidance Document this seems mostly to be possible after the process is closed and the Guidance Document is published. Having said that, our analysis indicates that, for all cases, there seem to be dedicated platforms where stakeholders can provide input. These usually take the form of conferences or workshops where the actors in charge of developing the guidances on behalf of the Commission present their progress and set up an agenda for further discussion and comments from the audience.[41] The composition of the audience is what seems to differ per case. While for some guidances (eg under the LULUCF and F-gases Regulations) the responsible contractors hold workshops open to several actors (eg ministerial staff, experts, industry stakeholders or the Joint Research Centre of the European Commission),[42] for others, and in particular the guidances adopted under the ETS Implementing Regulations,[43] the conferences where the guidances are discussed are only open to representatives of national authorities and are, occasionally, observed by members of the European Environment Agency (EEA). Further, in some cases there is also evidence of interservice consultations (eg for the CCS guidances).

These findings tell us two main things. Firstly, they strengthen our conclusion that soft law making takes place on the basis of formalised informality, as we can see that there is a rather established institutional practice of creating participatory opportunities through the organisation of workshops and conferences. However, these opportunities remain accessible to few and seem to rely on informal fora.[44] Secondly, we find that the openness and participatory qualities of the soft law making process do not seem to be assigned particular priority, which has an impact not only on the openness of the process, but also on its inclusivity (as discussed below). Certainly, our analysis does identify an exception in the case of the LULUCF Regulation, which seems to pay particular attention to participation and even includes an extensive record of the actors who participated in the relevant workshops and who have provided input through targeted consultations. To date, no open consultations have been held.

### *b. Inclusivity and the soft law making process*

This brings us to the next question regarding the participatory quality of the soft law making process: how *inclusive* is it? This is where the standard of inclusivity arises in the context of participation. This standard is meant to identify common issues that arise with

[40] Commission, "European Governance – A white paper" COM(2001) 0428 final; Commission, "Communication from the Commission – Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission" COM(2002) 704 final.

[41] Interview 1, supra, note 36; Interview 2, supra, note 36; Interview 3, with Policy Officer at Aether UK (24 March 2022, online); Interview 4, supra, note 37; Interview 5, supra, note 37; Interview 6, with Managing Director at Verico SCE (8 April 2022, online).

[42] Interview 3, supra, note 41; Interview 4, supra, note 37; Interview 5, supra, note 37.

[43] Commission Implementing Regulation (EU) 2018/2067; Commission Implementing Regulation (EU) 2018/2066.

[44] This finding seems also to be in line with the recent conclusions on emergency soft law by O Stefan, "Entrenching Emergency Soft Law" (*European Law Blog*, 12 April 2022) <https://europeanlawblog.eu/2022/04/12/entrenching-emergency-soft-law/> (last accessed 12 April 2022).

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regard to the inclusivity of decision-making processes, such as unequal or privileged access of specific actors, power and influence dynamics between Member States or clientelistic politics.[45] In the context of soft law making – and general EU policymaking – inclusivity can, for the most part, be assessed on two (main) levels: (1) the accessibility of the process to different types of actors and (2) the participation of national-level actors. These are discussed in turn.

Which types of actors are included in the soft law making process? The most appropriate answer to this question is: it depends. If we operationalise inclusivity at the level of authors, as briefly mentioned in Section II and Table 2, our analysis shows that the inclusivity of different actors in the process differs per case. While some cases seem to only (or, at least, primarily) depend on the input of external consultancies, others include research institutions or representatives of national competent authorities. Figure 6 demonstrates the types of actors involved in the drafting of the guidances under each case examined in this study. As we can see, the results show internal consistency (ie the guidances adopted under each legal act seem to be developed by the same types of actors) but are inconsistent when compared to guidances adopted under a different legal act. This indicates that while there might be communication among the actors involved in the implementation of a specific Directive or Regulation – at least at the level of institutional practice – there is little or no communication among actors involved in the implementation of different legal acts. This gives rise to a number of separate institutional practices within the same Directorate-General or even unit. Nevertheless, what ought to be mentioned is that the pool of potential actors is rather limited, as we do not see any involvement from NGOs and civil society actors, parliaments or think tanks.

However, if we operationalise inclusivity to include not only authors but also other contributors (eg participants of the workshops and conferences or participants of interservice consultations), then the pool becomes much more extensive. In that case, we see broad involvement of national authorities, such as ministerial staff, or relevant experts. For example, as is shown in Figure 6, the ETS Guidance Documents are primarily *drafted* by third-party actors, but they do take into account contributions from the informal Technical Working Group on monitoring, reporting, accreditation and verification, which consists of Member State representatives from relevant national authorities,[46] and they are eventually endorsed (by vote) by the Climate Change Committee.[47] Similarly, in the case of the LULUCF Regulation guidances, we see that while the guidances are drafted by a consortium of third-party actors including national authorities, experts and consultants, they still include input from several actors, such as ministerial staff from the Member States, experts and other relevant stakeholders.[48] This seems to be with the specific intention of increasing the acceptance of the soft law measures and, in turn, increasing compliance with the Guidance Document[49] – "if we don't talk to them, they won't use it".[50]

[45] Schmidt, supra, note 29; J Wilson, *The Politics of Regulation* (New York, Basic Books 1980); A Bianculli, X Fernández-i-Marín and J Jordana (eds), *Accountability and Regulatory Governance: Audiences, Control, and the Politics of Regulation* (London, Palgrave 2015); C Scott, "Regulatory Capitalism, Accountability and Democracy" in A Bianculli, X Fernández-i-Marín and J Jordana (eds), *Accountability and Regulatory Governance: Audiences, Control, and the Politics of Regulation* (London, Palgrave 2015).

[46] Interview 1, supra, note 36; Interview 2, supra, note 36.

[47] Interview 1, supra, note 36.

[48] Interview 3, supra, note 41; Interview 4, supra, note 37; Interview 5, supra, note 37.

[49] This seems to be in line with the dynamics identified in the context of the comitology where the involvement of representatives from the Member States proved to be helpful for the application of EU implementing acts at the national level. For a more in-depth discussion, see P Craig, *EU Administrative Law* (Oxford, Oxford University Press 2012) p 113; G della Cananea, "Cooperazione e integrazione nel sistema amministrativo delle Comunitá europee: la questione della 'comitologia'" (1990) 3 Rivista trimestrale di diritto pubblico 655.

[50] Interview 3, supra, note 41.

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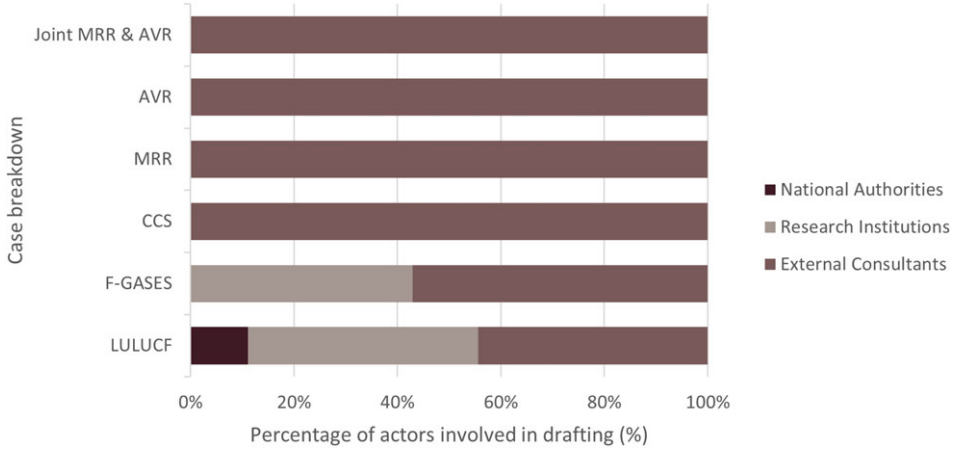


**Figure 6:** Case-by-case overview of the types of actors involved in the drafting of Guidance Documents. AVR = Accreditation and Verification Regulation; CCS = Carbon Capture and Storage Directive; F-Gases; Fluorinated Greenhouse Gases Regulation; LULUCF = Land Use and Forestry Regulation; MMR = Monitoring and Reporting Regulation.

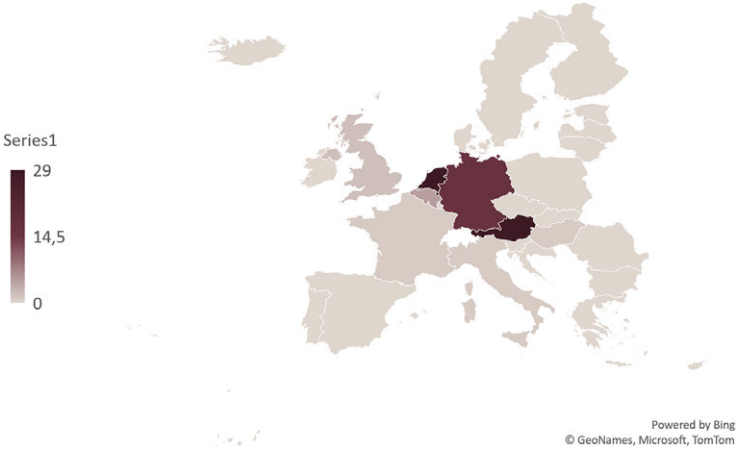


**Figure 7:** Overview of the national background of author organisations.

Having identified the types of actors involved in the soft law making processes, we now turn our attention to where these actors originate from. Is the participation of national actors in the soft law making process balanced? Are some EU Member States represented more than others? The analysis and the results as depicted in Figure 7 come with one caveat. As we saw previously, most cases only present partial records of authorship. This results in analysis that can only be regarded as preliminary and indicative, as the necessary data for an in-depth analysis simply do not exist at this point in time. Further research on this front is necessary to gain a more comprehensive picture. Nevertheless, from the available records, we can see that the national background of the respective authors – who, as explained above, are primarily affiliated with research institutions, national authorities and external consultancies – is not distributed across Europe in a balanced manner. While all Member States are involved in one way or another,

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mostly through the participation of actors from national competent authorities, the overwhelming majority of other actors (ie research institutions and external consultancies) seem to be stemming from a small group of Member States, particularly the Netherlands, Germany and Austria. Although we can see some participation from other (former) Member States (eg Italy, Belgium or the UK), most other states seem to be almost completely excluded from the process. However, given that the involvement of these actors is usually established through a public tender, the intentionality of this exclusion remains ambiguous and calls for further research. In any case, much remains to be done in terms of participation and there is much to be said about the privileged access to the soft law making process from both the "openness" and "inclusivity" perspectives.

## V. Conclusions and ways forward

With the aim of establishing the extent to which the process of soft law making in EU climate change regulation follows the procedural principles of transparency and participation, our objectives were to identify and map how soft law in the field of climate change is made in practice. We knew that the adoption of soft law (by design) occurs at the periphery of legislative procedures; however, we did not know the radius of said periphery. This study has shown that soft law making manages to selectively adhere to some legitimacy principles while escaping others, and that adherence to such is rather inconsistent. While some guidances provide full lists of authors and participants, thus enhancing their transparency and opening the road to accountability, others are solely credited as being produced by "the Commission" as a whole. Though some guidances are created on the basis of broad consultations of different stakeholders, others are drafted by external consultants with only some input from ministerial staff from the Member States – and so on and so forth.

There is little that one can say definitively about the EU soft law making process, as to date the evidence suggests that compliance with principles of procedural legitimacy only happens on a case-by-case basis and in an *ad hoc* manner. Further, we find that due to a lack of an overarching framework outlining how soft law instruments are to be developed and adopted, established institutional practices have emerged and have created a series of "formalised informal" soft law making processes. This further endangers the precarious standing of soft law in terms of political legitimacy and raises new questions about how to ensure transparency and participation in informal governance structures.

This research comes at an opportune time, as many developments in the field of environmental policy and new efforts at good governance in the Union are underway. With the prospect of the European Green Deal,[51] the EU finds itself in a governance conundrum where soft and hard law measures are likely to be used in combination to overcome the significant legal and political challenges that the European Green Deal necessarily entails. This will be due to the highly ambitious and far-reaching content of the European Green Deal, which is expected to be met with substantial resistance in the implementation stages – for instance, due to financial and administrative burdens or issues of political sensitivity (eg labour or fiscal matters). For this reason, soft law is expected to play a key role in the implementation of the European Green Deal. Thus, a critical review of current soft law making practices is necessary to the realisation of the transparency and public participation ambitions of the European Green Deal. These ambitions are also recognised in the Commission's proposal to amend the Aarhus Convention and the Communication on access to justice in environmental matters, where special emphasis

[51] Commission, "Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: the European Green Deal" COM(2019) 640 final.

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is put on the centrality of good governance principles for the success of the European Green Deal. Admittedly, neither of these instruments makes reference to soft law, which can be considered as a missed opportunity. Nevertheless, the expected increase of soft law in environmental regulation and the focus on good governance could (or should) entail an improvement in this area as well.

Further, after a "stock-taking exercise" by the Commission on the Better Regulation Guidelines in 2019,[52] the Commission published a Communication on improvements to the Better Regulation Guidelines, which includes several amendments to the Better Regulation Guidelines and also contains several references to the improvement of transparency and participation practices in EU policymaking.[53] Although only a speculation at this stage, shortly after the publication of the Communication, the Commission published an initiative on the Have Your Say platform, asking for input for the revision of a guidance under the Habitats Directive.[54] As the analysis performed here shows, this is the first time that a public consultation has been opened for a guidance in environmental law. While not definitive, this development is positive overall and shows evidence of improvement regarding the transparency and participation of soft law making in the Union. All of these developments create the perfect conditions for the critical revaluation and review of EU soft law making processes – within the bounds of EU environmental regulation and beyond. However, while these conditions certainly have the potential to breathe new life into this aspect of soft law, whether that will actually happen remains to be seen.

In the grand scheme of things, why are these findings significant? It is true that for a topic such as the soft law making process in EU environmental policy it is not intuitively clear whether such in-depth insights will be valuable on a larger scale. However, the threats and opportunities regarding the legitimacy of soft law making processes speak to a larger issue regarding legitimacy in EU administrative governance. Informal governance structures are inescapable in the Union and cover a myriad of different policy issues, from the Open Method of Coordination, to the European Semester or the High-Level Expert Group on Artificial Intelligence. Nevertheless, they remain notably under-structured and under-supervised. With policy issues becoming more and more complex and uncertain (eg the intersections between the fight against the climate crisis and the economy or between technology and ethics), such informal structures are likely to be relied upon heavily. Even at this stage, we know that soft law measures have significant effects. With increased complexity and uncertainty, it is likely that those effects will also be exacerbated. In that context, then, it becomes all the more important – and, arguably, necessary – to review, reflect and reframe the theoretical and practical expectations regarding soft law making practices in order to ensure that EU administrative governance is transparent, participatory and, ultimately, accountable and legitimate.

## List of interviews

Interview 1, with Head of Unit at DG CLIMA, European Commission (14 January 2022, online).
Interview 2, with Policy Officer at SQ Consult (11 March 2022, online).

[52] The process of reviewing the Better Regulation Guidelines included an open public consultation, the results of which can be found on the Commission website: Commission, "Public consultation on the stock-taking of the Commission's 'better regulation' approach" (2021) <https://ec.europa.eu/info/consultations/public-consultation-stocktaking-commissions-better-regulation-approach_en> (last accessed 8 April 2022).

[53] Commission, "Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions Better Regulation: Joining forces to make better laws" (2021) COM(2021) 219 final.

[54] Petropoulou Ionescu, supra, note 9.

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Interview 3, with Policy Officer at Aether UK (24 March 2022, online).
Interview 4, with Deputy Head of Unit at DG CLIMA, European Commission (25 March 2022, online).
Interview 5, with former Research Scholar at IIASA (30 March 2022, online).
Interview 6, with Managing Director at Verico SCE (8 April 2022, online).

## Annex 1. List of primary sources (Guidance Documents)

| Soft law instrument |
|---|
| Commission Implementing Regulation (EU) 2018/2066 (MRR) |
| EU ETS Monitoring and Reporting – Quick guide for stationary installations |
| EU ETS Monitoring and Reporting – Quick guide for aircraft operators |
| Guidance Document No. 8 – EU ETS Inspections |
| Guidance Document No. 2 – The Monitoring and Reporting Regulation – General guidance for aircraft operators |
| Guidance Document No. 4 – Uncertainty Assessment |
| Guidance Document No. 5 – Sampling and Analysis |
| Guidance Document No. 6 – Data flow activities and control system |
| Commission Implementing Regulation (EU) 2018/2067 (AVR) |
| The Accreditation and Verification Regulation – Process Analysis |
| The Accreditation and Verification Regulation – Sampling |
| The Accreditation and Verification Regulation – Competence |
| The Accreditation and Verification Regulation – Relation between the AVR and EN ISO 14065 |
| The Accreditation and Verification Regulation – Relation between the AVR and EN ISO/IEC 17011 |
| The Accreditation and Verification Regulation – Time allocation in verification |
| The Accreditation and Verification Regulation – Explanatory Guidance |
| The Accreditation and Verification Regulation – Objective and scope of verification |
| The Accreditation and Verification Regulation – Verifier's risk analysis |
| The Accreditation and Verification Regulation – Verification report |
| The Accreditation and Verification Regulation – Information exchange templates |
| The Accreditation and Verification Regulation – Certification |
| Verification Guidance for EU ETS Aviation |
| EU ETS Accreditation and Verification – Quick guide for verifiers |
| EU ETS Accreditation and Verification – Quick guide for National Accreditation Bodies |
| The Accreditation and Verification Regulation – Site visits |
| Joint MRR and AVR |
| Working Paper on Data Gaps and Non-Conformities |
| Making conservative estimates for emissions in accordance with Article 70 |
| Combined M&R and A&V Guidance on reviewing Annual Emissions and Verification Reports |

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| EU ETS Monitoring, Reporting, Verification and Accreditation – Quick guide for Competent Authorities |
| Continuous Emissions Monitoring Systems (CEMS) |
| Directive 2009/31/EC (CCS) |
| Guidance Document 1 $CO_2$ Storage Life Cycle Risk Management Framework<br>Guidance Document 2 Characterisation of the Storage Complex, $CO_2$ Stream Composition, Monitoring and Corrective Measures |
| Guidance Document 3 Criteria for Transfer of Responsibility to the Competent Authority |
| Guidance Document 4 Article 19 Financial Security and Article 20 Financial Mechanism |
| Regulation (EU) 2018/841 (LULUCF) |
| Guidance on developing and reporting Forest Reference Levels in accordance with Regulation (EU) 2018/841 |
| Mainstreaming climate change into rural development policy post 2013 |
| Regulation (EU) No 517/2014 (F-Gas) |
| F-Gas Regulation (Regulation (EU) No 517/2014): Technical Advice to Member States on implementing Article 7(2) |
| Information for technicians and users of refrigeration, air conditioning and heat pump equipment containing fluorinated greenhouse gases |
| Discussion paper on elements relevant for independent auditors verifying reports on bulk imports and production of hydrofluorocarbons (HFCs) in accordance with Regulation (EU) No 517/2014 on fluorinated greenhouse gases |
| Information for importers of equipment containing fluorinated greenhouse gases on their obligations under the EU F-gas Regulation. Guidance: Imports of pre-charged equipment |

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