Judges, public authorities and EU soft law in Italy - How you cannot tell a book by its cover

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I. INTRODUCTION

This chapter focuses on the use of EU soft law by national courts and public authorities in Italy. Our point of departure is that the Italian legal system rests on a traditional – pyramidal – understanding of the sources of law, where non-binding measures do not have a place. As a consequence, one might expect to find little evidence of the use of EU soft law in the administrative and judicial practice, and even less evidence of EU soft law producing legal effects. This chapter partially contradicts this view by showing that, at least in some policy fields, national administrations and courts make frequent use of EU soft law and endow it with binding effects.

By studying a selected sample of EU soft law measures and carrying out interviews as well as a case law analysis, this chapter demonstrates that Italian civil servants and judges use EU soft law regularly, at least in the fields of competition and State aid, financial regulation and environmental policy.

In particular, we have conducted 17 interviews with Italian judges, administrative officials and representatives of the private sector (so as to also include the perspective of addressees of the soft law instruments) acting across three of the four European Network of Soft Law Research (SoLaR) policy fields.[1]

* Even though this chapter is the result of common reflections by the authors, sections I and II can be attributed to M Eliantonio, and sections III, IV and V to J Alberti.

[1] These 17 interviews were completed in the period from November 2017 to October 2019 in the following way: three interviews in the context of environmental policy, five in relation to financial

We have furthermore examined case law from both first instance and appeal courts, namely tribunals, Courts of Appeal and the Court of Cassation with regard to civil litigation, and Regional Administrative Tribunals and the Council of State for administrative justice. When required, other courts' case law also has been analysed; in particular, the Constitutional Court's judgments in the competition policy field, as well and the decisions of the Arbitrator for Financial Litigation *(Arbitro per le controversie finanziarie*: a peculiar arbitrator with competences in the field of financial regulation in Italy) have been analysed. Drawing on these interviews as well as on case law research, we describe when and how Italian authorities and courts use EU non-binding norms and to what end.

This chapter proceeds as follows. Section II briefly describes the sources of law in the Italian legal system, focusing on the most common 'domestic' soft law measure, namely the *circolare*, and discusses the more recent developments in this field of soft law in Italy and the impact of these developments on the advancement of the debate on soft law in general. We will show that while there is a rich literature on domestic soft law, research on EU soft law has remained in the shadows in the Italian academic debate. In fact, EU soft law does not seem to have been conceived as a specific conceptual category in the Italian legal system and, crucially, no doctrinal links are generally made between the functionally similar domestic and EU soft law measures. Section II also discusses the various and very diverse transposition practices of EU soft law with respect to the measures selected for the SoLaR project.

Section III discusses the findings from the interviews and the case law research with respect to the use of EU soft law by national courts and civil servants in three of the four SoLaR focus areas, namely financial regulation, competition and State aid law, and environmental policy. Section IV then further analyses the data, focusing on how EU soft law is affecting the principle of transparency and democratic legitimacy. Even though EU soft law generally has a very good press at least in those policy fields where it is used the most (competition and financial regulation), some problematic issues still arise with regard to the general amount of both soft and hard rules (ie, overregulation) and the legitimacy of the procedures through which soft law is adopted, in particular because of the lack of transparency on how public consultation is conducted. By way of a conclusion, this chapter argues that the Italian approach to EU soft law seems to be rather pragmatic and 'utilitarian', in that soft law seems to be used somewhat 'at random', without a clear dogmatic or theoretical underpinning, and largely because of its perceived concrete benefits in solving cases and deciding on applications.

policy and nine in the context of competition and State aid. No interviews were carried out for the social policy field. Out of 17 respondents, eight were judges, seven worked in administration and two were employees (a top manager and a medium-level officer) of different private banks, who have been interviewed in the fields of competition and financial regulation. For the methodology, see M Hartlapp and E Korkea-aho, ch 4 in this volume.

II. THE STATUS AND EFFECTS OF DOMESTIC AND EUROPEAN SOFT LAW IN ITALY

A. Kelsen is Dead, Long Live Kelsen? Italian Soft Law in the Hierarchy of Sources

The Italian legal system is anchored in a Kelsenian positivistic understanding of the sources of law, which sees at the apex the Constitution and laws which either have constitutional relevance or contain amendments to the Constitution. Below the constitutional sources are laws adopted by the Parliament, laws adopted by the Regions within their constitutionally attributed competences, and other acts which, by virtue of the Constitution, have the same normative force as law, namely acts adopted by the government under conditions which are clearly regulated in the Constitution itself.[2] Under this group are the normative acts issued by competent administrative authorities, namely governmental regulations (by ministers or the government as a whole), and regulations issued by local authorities. At the bottom of the pyramid are unwritten sources of law, such as customary law.

From this picture, one might be tempted[3] to conclude that soft law does not exist in the Italian legal environment. However, this would be very far from the truth.

Since time immemorial, and with a tradition going back to Roman law[4] and the military context, the Italian legal system recognises formally non-binding norms and, in particular, the so-called *circolari*. These have traditionally been considered as purely internal measures, through which administrative authorities gave instructions to hierarchically subordinated authorities. Their use has only increased throughout the years, and the Italian doctrine has come to distinguish a number of types of circulars according to their – interpretational, decisional, explicative – content.[5] However, what has remained clear and has consistently been repeated in case law is that circulars do not constitute sources of law and ought only to be regarded internal measures through which

[2] There are the so-called law-decrees (*decreti legge*), which, pursuant to art 77 of the Constitution, can only be issued in cases of urgency and need to be converted into law by the Parliament within 60 days of their adoption, and the so-called legislative-decrees (*decreti legislativi*), which can only be issued upon delegation by the Parliament.

[3] It is worth noting that in 1961, Bobbio argued somehow prophetically and provocatively that the dichotomy between binding and non-binding rules would soon be treated as a novelty, despite its long-standing roots in the Italian legal tradition: see N Bobbio, 'Comandi e consigli' (1961) *Rivista trimestrale di diritto e procedura civile* 369 ff.

[4] T Gziaro, 'Dal soft law moderno al soft law antico' in A Somma (ed), *Soft law e hard law nelle società postmoderne* (Turin, Giappichelli, 2009) 83.

[5] See further MS Giannini, 'Circolare' in *Enciclopedia Giuridica*, vol VII (Milan, Giuffrè Editore, 1960); MP Chiti, 'Circolare – I) Circolare amministrativa' in *Enciclopedia Giuridica*, vol VI (Rome, Treccani, 1988).

public authorities organise their activities.[6] As a consequence, circulars do not possess any external relevance vis-a-vis individuals, and even lower authorities, according to the Italian Council of State, are not bound by circulars issued by higher authorities, since in the Italian legal system, the only parameter of legality for the administrative action is the law; hence, it is perfectly possible for a lower authority to refuse to apply a circular which it deems to be in violation of the law.[7] Furthermore, it has been considered that circulars do not have any self-binding effect for the issuing authority: an opposite conclusion would lead to the paradoxical conclusion that the administration is entrusted with normative powers that it does in fact not have.[8] Finally, it has been consistently held that circulars do not bind the judiciary, as the illegality of an administrative measure only arises in cases of the violation of national or EU sources of binding law.[9]

B. The 'Soft Law Turn' in the Italian Legal System and How it Did (Not) Affect EU Soft Law

While Italian soft law in the form of *circolari* has been an important part of the Italian administrative law, a new soft law phenomenon has emerged in the last few years, which has shaken the foundations of the Italian understanding of binding and non-binding norms. Specifically, in 2016, the so-called Public Procurement Code (*codice dei contratti pubblici*)[10] has conferred upon the National Anti-Corruption Authority (Autorità nazionale anticorruzione (ANAC)) the power to adopt so-called 'guidelines' (*linee guida*).[11] Those guidelines which do not have binding force[12] have been qualified by the Council of

[6] See, eg, Regional Administrative Court of Milan, 20 September 1996, no 1383; Regional Administrative Court of Basilicata – Potenza, 28 March 2000, no 197.

[7] Council of State, chamber IV, 27 November 2000, no 6299; Council of State, chamber IV, 29 January 1998, no 112.

[8] Consiglio di Stato, chamber VI, 13 September 2012, no 4859, citing Consiglio di Stato, chamber IV, 15 October 2010 no 7521: 'It is undisputed in the case law that the administrative circulars, as interpretative measures, are not binding for the subjects outside the administration, while for the authorities which are the addressees, they are binding only if they are lawful, so that they may be set aside if they are unlawful.'

[9] Regional Administrative Court of Lazio, 30 August 2012, no 7395, para 10.

[10] Enacted through the Legislative Decree 18 April 2016 no 50.

[11] According to art 213 of the Legislative Decree 18 April 2016 no 50, ANAC is tasked with the regulation, monitoring and control of public contracts, and may, for this purpose, adopt, amongst other things, guidelines and other instruments of 'flexible regulation'. See on this MP Chiti, 'Il nuovo codice dei contratti pubblici – Il sistema delle fonti nella nuova disciplina dei contratti pubblici' (2016) 4 *Giornale di diritto amministrativo* 436; M Delle Foglie, 'Verso un "nuovo" sistema delle fonti? Il caso delle linee guida ANAC in materia di contratti pubblici', 5 July 2017, https://www.giustamm.it/ga/id/2016/6/5253/d; G Morbidelli, 'Linee guida dell'Anac: comandi o consigli?' (2016) 3 *Diritto amministrativo* 273.

[12] It should be noted that ANAC can issue three types of 'guidelines': those that are later incorporated into Ministerial Decrees, those that remain guidelines but have been granted binding force and, finally, non-binding guidelines.

State as so-called 'general administrative acts' (*atti amministrativi generali*),[13] which, according to the Italian conceptualisation of this dogmatic category, imply that administrative authorities may decide not to apply them when adopting an individual administrative act. However, if they do so, they have to provide an adequate reason.[14] It is with the introduction of this new instrument that the Italian doctrine expressed an interest for the topic and terminology of 'soft law'.[15]

This recent development is significant both from the perspective of the legislator who used the – unusual for Italy– terminology of 'flexible regulation' and that of the Italian doctrine that had to engage with soft forms of regulation beyond the traditional circulars. However, it is too early to conclude that a true 'soft law turn' is taking place in Italy. It is even less straightforward to conclude that these new developments had any influence on raising the profile of EU soft law in Italy. Indeed, while there has been a rich and old doctrinal debate on Italian soft law,[16] the discussion of EU soft law has remained relatively limited.[17]

[13] MC Romano, 'Atti amministrativi generali' in S Cassese (ed), *Dizionario di diritto pubblico* (Milan, Giuffrè Editore, 2006) 491 ff.

[14] Consiglio di Stato opinion no 1767 of 2016; and repeated in opinion no 1257 of 29 May 2017.

[15] N Mari, 'Linee Guida ANAC: la soft law e la gerarchia delle fonti', 4 April 2017, www.italiappalti.it/leggiarticolo.php?id=3392; M Chiarelli 'La soft regulation e il caso delle nuove linee guida ANAC', 6 February 2009, www.federalismi.it/nv14/articolo-documento.cfm?Artid=38024; P Mantini, 'Autorità nazionale anticorruzione e soft law nel sistema delle fonti e dei contratti pubblici', 2017, www.giustamm.it/print/dottrina/5516.

[16] A Catelani, *Le circolari della pubblica amministrazione*, 2nd edn (Milan, Giuffrè Editore, 1984); A Amorth, *Efficacia esterna delle circolari amministrative* (Milan, Giuffrè Editore, 1941); R Lucifredi, *Osservazioni sull'efficacia delle circolari amministrative* (Naples, CEM, 1947); G Salemi, *Le circolari amministrative* (Palermo, A Reber, 1913); F Garri, 'Le circolari amministrative' (1972) *L' amministrazione italiana* 481; A Catelani, 'Aspetti e attualità delle circolari normative della pubblica amministrazione' (1993) *Rivista trimestrale di diritto pubblico* 999; F Saitta, 'Sulle circolari amministrative e sul loro trattamento processuale' (2012) XXI *Nuove autonomie* 487; Giannini (n 5); Chiti (n 5); more recently, see Somma (n 4).

[17] For the very few early examples, see M Antonioli, 'Le comunicazioni della Commissione fra diritto comunitario e diritto interno' (1995) *Rivista italiana di diritto pubblico comunitario* 41; A d'Atena, 'L'anomalo assetto delle fonti comunitarie' (2001) *Il Diritto dell'Unione Europea* 591. More recently, one can find more interest in the topic of EU soft law; see, eg, E Mostacci, *La soft law nel sistema delle fonti: uno studio comparato* (Padua, Cedam, 2008); A Poggi, 'Soft law nell'ordinamento comunitario' in Associazione italiana dei costituzionalisti, *L'integrazione dei sistemi costituzionali europeo e nazionali. Atti del XX Convegno Annuale dell'Aic, Catania, 14–15 Ottobre 2005* (Padua, Cedam, 2007) 372; G de Minico, 'La soft law: nostalgie e anticipazioni' in F Bassanini and G Tiberi (eds), *Le nuove istituzioni europee. Commento al Trattato di Lisbona* (Bologna, Il Mulino, 2008) 327; P Costanzo, 'Hard law e soft law: il senso di una distinzione' in P Costanzo, L Mezzetti and A Ruggeri (eds), *Lineamenti di diritto costituzionale dell'Unione europea* (Turin, Giappichelli, 2014) 261; B Pastore, 'Soft law, gradi di normatività, teoria delle fonti' (2003) 1 *Lavoro e diritto* 5; B Pastore, 'Il soft law nella teoria delle fonti' in Somma (n 4) 123; A Algostino, 'La soft law comunitaria e il diritto statale: conflitto fra ordinamenti o fine del conflitto democratico?', 29 January 2017, www.costituzionalismo.it/la-soft-law-comunitaria-e-il-diritto-statale-conflitto-fra-ordinamenti-o-fine-del-conflitto-democratico; G Fiengo, *Gli atti 'atipici' della Comunità europea* (Naples, Editoriale Scientifica, 2008); P de Luca, *Gli atti atipici nel diritto dell'Unione Europea* (Turin, Giappichelli, 2012); F Ferraro, 'Natura ed effetti degli atti atipici della Comunità europea' in G Guzzetta (ed), *Le forme dell'azione comunitaria nella prospettiva della Costituzione europea* (Padua, Cedam, 2005) 64; D Strazzari, 'Tra soft e hard law: prime riflessioni in favore della giustiziabilità degli atti emanati

Those who have – especially more recently – engaged with EU soft law agree that there is no clear place for it in the Italian legal system and, as reported by other chapters in this collection, there does not even seem to be an Italian translation for the term (and the English phrase 'soft law' is commonly used in Italian-language publications). In general, the Italian academic debate seems to be struggling to doctrinally place EU soft law in the Italian hierarchy of norms and sees opposing camps: those who see EU soft law as non-binding law, and therefore as being unable to produce any legal effects whatsoever (albeit ascribing to soft law an important interpretational function),[18] and those who subscribe to a view of gradual normativity where soft law may find a place as a source of law.[19]

Second, no dogmatic link has traditionally been made between the doctrine and case law on Italian soft law with the – relatively new for the Italian system– phenomenon of EU soft law. Instead, it seems that the discussions have continued in 'silo mode', with administrative lawyers discussing the nature and legal effects of circulars, and EU lawyers interrogating themselves on the very same questions with respect to functionally equivalent – yet EU-born – soft law measures, with the debate on the ANAC guidelines only recently beginning to timidly and partially shake this landscape.

C. EU Soft Law in Italy: Uneven Status and Transposition Practices

This blurred picture in terms of the place of EU soft law in the Italian hierarchy of sources does not become clearer once the transposition practices are examined. Even though limited to a small sample of instruments within an equally small sample of EU policy areas, it is clear that there are many variations on the theme. In the environmental field alone, it has been found that some of the relevant EU soft law is transposed into 'domestic' non-binding manuals,[20] while other measures are simply translated into Italian and published on the

nell'ambito del metodo aperto di coordinamento' in M Barbera (ed), *Nuove forme di regolazione: Il Metodo Aperto di Coordinamento delle Politiche Sociali* (Milan, Giuffrè Editore, 2006) 317; A Gardella, 'L'EBA e i rapporti con la BCE e con le altre autorità di supervisione e regolamentazione' in MP Chiti and V Santoro (eds), *L'Unione bancaria europea* (Pisa, Pacini Editore, 2016) 115; C Figliolia, 'Il Meccanismo di vigilanza unico e i rapporti con le banche centrali nazionali' in Chiti and Santoro, above, 225; V Ferraro, 'Il rapporto tra il "Comitato unico di risoluzione" e le pubbliche amministrazioni nazionali' in Chiti and Santoro, above, 341.

[18] R Bin, 'Soft Law, No Law' in Somma (n 4) 35 (in particular, the author argues that 'deviating from the orthodox way of rule-making entails the loss of one of the strongholds of the rule of law').

[19] Pastore uses the concept of 'sources of law' in a broad sense ('there are sources that provide immediately a valid norm and sources that provide only ideas, inspiration, guidance, directions'). See B Pastore, 'Soft law, gradi di normatività, teoria delle fonti' (n 17) 12–14.

[20] See, eg, 'Manuali per il monitoraggio di specie e habitat di interesse comunitario (Direttiva 92/43/CEE) in Italia: specie animali' no 141 (2016), www.isprambiente.gov.it/public_files/direttiva-habitat/Manuale-141-2016.pdf, which transposed the 'Guidance Document on the strict protection of animal species of Community interest under the 'Habitats' Directive 92/43/EEC'.

website of the national competent authority.[21] Other soft law measures are instead transposed into hard law, either at the central[22] or the regional[23] level. Finally, for other measures, only a link to the EU soft law is offered on the website of the competent authority.[24]

In a similar yet distinct way, in the field of financial regulation, the soft law measures under scrutiny (ie, European Securities and Markets Authority (ESMA) guidelines) are usually transposed into Italian law mainly through guidelines (*orientamenti*) or communications (*comunicazioni*). These acts are formally non-binding and they are adopted only after all the interested parties have been heard through a public consultation. Recently, and particularly for transposing the guidelines related to the so-called second 'Markets in Financial Instruments Directive' (MiFID II),[25] the Italian competent authority has been experimenting with a new method of implementation, namely transposing EU soft law through national binding regulations. Therefore, at least in this case, ESMA guidelines become 'hard' through their national implementation.[26]

In the field of social policy, it is remarkable that out of the three selected soft law measures, one – the Buying Social guide – has been transposed into hard law,[27] another – the Recommendation 'Investing in children: breaking the cycle of disadvantage' – into a number of policy documents,[28] while the third – the Recommendation on strengthening the principle of equal pay between men and women through transparency – does not seem to have been transposed at all.[29]

[21] See the 'Documento di orientamento sull'articolo 6, paragrafo 4 della direttiva "Habitat" (92/43/CEE)' (2007), https://www.minambiente.it/sites/default/files/archivio/allegati/rete_natura_2000/Documento_di_orientamento_sullxarticolo_6x_paragrafo_4x_della_direttiva_xHabitatx_92-43-CEE_-_Gennaio_2007.PDF, which is a translation of the 'Guidance Document on Article 6(4) of the Habitats Directive 92/43/EEC'.

[22] This is the case for the 'Guidance document on Managing Natura 2000 sites', which was implemented through the Decree of the Ministry of Environment of 3 September 2002 (Decreto del Ministero dell'Ambiente e della Tutela del Territorio 3 September 2002, GU no 224 of 24 September 2002).

[23] 'Guidance document on the Assessment of Plans and Projects significantly affecting Natura 2000 sites (November 2001)', which has been transposed through the Decree of the President of the Regional Council of Campania no 9 of 29 January 2010 (Decreto del Presidente della Giunta Regionale della Campania 29 January 2010, no 9, Bollettino Ufficiale della Regione Campania no 10 of 1 February 2010).

[24] https://va.minambiente.it/it-IT/Comunicazione/DettaglioNotizia/230.

[25] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II) [2014] OJ L173/349.

[26] For an in-depth discussion on the implementation of ESMA guidelines into Italian law, see J Alberti, 'The Unbearable Lightness of ESMA's Soft Law: An Italian Perspective' in M Buscemi, N Lazzerini, L Magi and D Russo (eds), *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law* (Leiden, Brill, 2020) 307 ff.

[27] Interministerial Decree of 11 April 2008.

[28] See F Spera and M Eliantonio, 'National Report on Italy: The Use of EU Soft Law by National Courts and Administration in the Field of EU Social Policy' in M Hartlapp (ed), 'Studying Soft Law Effects in Social Policy' (2020) SoLaR Working Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668981.

[29] ibid.

Finally, EU competition soft law is applied directly without any implementation at the national level. However, in the field of competition, EU soft law may well be taken as a model by the national authorities to develop their own soft law measures to rule on situations that fall outside the scope of application of EU soft law: the most remarkable example in the Italian legal order is provided by the guidelines of the Italian Competition Authority on setting fines.[30]

III. EU SOFT LAW IN THE HANDS OF THE ITALIAN COURTS

A. The Judges' Voices: The 'Official View' on Soft Law

Against this fragmented and unclear framework, it does not come as a surprise that what emerges from interviews is that both judges and national administrations have felt compelled to stick to the 'official view' on soft law: namely, its inability to produce legal binding effects vis-a-vis third parties.

In the field of competition law, neither civil nor administrative judges have come so far to admit that the Commission's soft law creates rights and obligations for private parties, but they did confirm that legal effects can be produced vis-a-vis the enacting authority.[31] For instance, once the Commission adopts 'procedural' guidelines (eg, those on setting fines or on cooperation within the Network of Competition Authorities), then judges have to follow those provisions in order to respect the legitimate expectations of private parties.[32]

In the environmental sector, the interviewed judges were unanimous in maintaining that in their view, soft law does not constitute a benchmark of legality of the administrative action and is therefore incapable of creating rights and imposing obligations on national authorities and individuals. They do not feel bound by soft law, but they have all recognised that it can be useful for the interpretation of hard law.[33]

[30] See Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato), 'AGCM Resolution no. 25152 of October 22th, 2014 – Guidelines on the method of setting pecuniary administrative fines pursuant to Article 15, paragraph 1, of Law no 287/90', 22 October 2014, no 25152.

[31] J Alberti and F Croci, 'National Report on Italy: The Use of Soft Law by National Courts and Administration in the Field of EU Competition and State Aid Law' in O Ştefan (ed), 'EU Competition and State Aid Soft Law in the Member States: Finland, France, Germany, Italy, the Netherlands, Slovenia and the UK', (2020) SoLaR Working Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3667387, 95.

[32] It is worth noting that such an approach can be deemed to be coherent with the recent case law of the Court of Justice affirming that, at least in the field of State aid, the Commission cannot act in contrast with the provision that the same Commission has stated within a Communication. See Case C-431/14P *Greece v Commission* [2016] EU:C:2016:145, paras 69–70.

[33] G Lisi and M Eliantonio, 'National Report on Italy: The Use of EU Soft Law by National Courts and Administration in the field of EU Environmental Law', in M Eliantonio and G Lisi (eds), 'EU Environmental Soft Law in the Member States: A Comparative Overview of Finland, France, Germany, Italy, the Netherlands, Slovenia and the UK', (2020) SoLaR Working Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656418.

Only with regard to the financial sector, some contrast appears. ESMA guidelines are deemed as being fully binding, mainly because hard law is made up of general principles, which are too broad to be applied without guidelines. However, it is worth noting that in this case, the respondent was not a judge, but a member of the Arbitrator for Financial Litigation. It is an important and influential alternative dispute resolution (ADR)-like body that has much more technical knowledge than a normal court.[34]

B. The Case Law Analysis: Some Common Features in the Use of EU Soft Law …

While the interviews have brought to the fore a rather formalistic approach to EU soft law, in our case law analysis, a different scenario has unfolded. Indeed, despite the Kelsenian approach in Italy and the 'mainstream' answers received in all but the financial policy interviews, national judges seem quite confident in using soft law.

Four elements should be highlighted in this regard.

From a quantitative perspective, in the field of competition and State aid, the use of soft law is particularly intense. The Italian database counts up to 175 judgments,[35] a figure that is four to five times higher than in other Member States analysed in the SoLaR research project.[36] Financial litigation (ie, cases involving ESMA guidelines) is also more extensive in Italy than in other Member States of the SoLaR project, thanks to the case law of the already-mentioned Arbitrator for Financial Litigation, which often uses ESMA guidelines.[37] An intense use of EU soft law has also been noted with respect to the environmental policy field,[38] a result that stands in contrast to the situation in France, another legal system examined in the SoLaR project, which has a similar tradition in administrative law.[39]

Moreover, in all the examined policy fields, the use of EU soft law is usually not subject to any justification. This is something that deserves to be highlighted; for instance, French judges use EU competition soft law, usually adding some caveats such as 'without taking away its judicial discretion, the

[34] J Alberti (n 26) 314.

[35] For further details on the time framework, the acts under scrutiny, the keywords and the databases used for the research, see Alberti and Croci (n 31) 98.

[36] See the other chapters in this part.

[37] J Alberti, 'The Implementation of ESMA's Guidelines at National Level – Italian Report' in M Avbelj (ed), 'EU Financial Regulation Soft Law in the Member States: Finland, France, Germany, Italy, the Netherlands, Slovenia and the UK' (2020) SoLaR Working Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668793.

[38] Lisi and Eliantonio (n 33).

[39] G Lisi, M Eliantonio, S Maljean-Dubois and Eve Truilhé-Marengo, 'National Report on France: The Use of EU Soft Law by National Courts and Administration in the field of EU Environmental Law' in Eliantonio and Lisi (n 33).

court observes that the recommendations of the European Commission [may be relevant for the present purposes] …'.[40] Given the affinity between the Italian and the French legal orders concerning the use of soft law and the sources of law, it seems remarkable that Italian judges appear to be much more free in terms of mentioning and using EU soft acts, since only in a minority of cases do they provide reasons for doing so.

Furthermore, civil judges in the field of competition and arbitrators in financial regulation have reported that if they want to argue against a soft law act (be it a Commission's Communication or ESMA guidelines), they always provide reasons for this.[41] The case law of the Court of Justice of the European Union (CJEU) is a primary source of 'justification' for this purpose. For the sake of clarity, there is no evidence in the case law of such an approach: indeed, in both policy fields, there are only few cases of explicit rejection of soft law.[42] However, this 'duty of providing reasons' seems paradoxical and serves to emphasise that the value of soft law goes far beyond the simple self-commitment of the enacting authority.

A variation of the duty to provide reasons can also be found in the field of environmental law, where one of the interviewed judges stated that if a piece of (EU or national) soft law were relevant to decide on an application, and the competent administrative authority decided in a way that is not in line with the relevant soft law without giving reasons for this in the decision, the administrative judge would be capable of annulling this decision on grounds of *détournement de pouvoir* (*eccesso di potere*), that is, on the grounds of a lack of adequate reasons-giving.[43] Interestingly, this bears some resemblance to the approach adopted with respect to the ANAC guidelines mentioned above in section II.

[40] M Lamoureux and N Rubio, 'National Report for France: The Use of EU Soft Law by National Courts and Administration in the Field of EU Competition Law and State Aid' in Ştefan (n 31).

[41] It is worth noting that this approach is certainly 'inspired' by the case law of the Court of Justice, according to which an institution should provide motivations when acting against a soft act that it has adopted. See Case 148/73 *Louwage v Commission* [1974] EU:C:1974:7, para 12; Case C-520/09 P *Arkema v Commission* [2011] EU:C:2011:619, para 88; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri et al v Commission* [2005] EU:C:2005:408, paras 209–11; Case C-667/13 *Banco Privado Portugues* [2015] EU:C:2015:151, para 69.

[42] For the concept of 'explicit rejection' in the field of competition law, see Z Georgieva, 'The Judicial Reception of Competition Soft Law in the Netherlands and the UK' (2016) 12 *European Competition Journal* 54; Z Georgieva, 'Soft Law in EU Competition Law and its Judicial Reception in the Member States: A Theoretical Perspective' (2015) 16(2) *German Law Journal* 223; Z Georgieva, 'Competition Soft Law in French and German Courts: A Challenge for Online Sales Bans Only?' (2017) 24(2) *Maastricht Journal of European and Comparative Law* 175. For its application in the Italian context, see Alberti and Croci (n 31) 98–110. For a deeper discussion on Italian financial case law, see Alberti (n 26) 312 ff. Please note that in this latter field, there are some cases of explicit (albeit unmotivated) rejection of soft law, but only looking at the (scant) judgments delivered by courts; in the decisions of the Arbitrator for Financial Litigation, there are none.

[43] Lisi and Eliantonio (n 33).

Finally, the case law analysis reveals that, besides interpretative purposes, EU soft law is also endowed with hard legal effects in the decisional practice. In all three policy fields where there is case law on EU soft law, the interpretative function of soft law is prominent and EU soft law is routinely used by the courts to give flesh to the underlying national or EU hard law.[44] What is even more striking that in some cases, Italian judges use EU soft law acts exactly as if they were hard law.

For example, soft law is regularly used as hard law in the litigation concerning financial matters, even if only by the Arbitrator for Financial Litigation. Here ESMA guidelines are used as hard law in nearly 60 per cent of cases.[45] It should be noted that this outcome might (also) be generated by the fact that the Arbitrator is an ADR-like body, of a very technical nature, also composed of civil servants having a financial and not purely legal background. Less frequently but still remarkably often, in the field of antitrust, the Commission soft law is treated as binding in around 30 per cent of cases, all of them decided in normal courts, by judges having a purely legal background.[46] Moreover, similar examples stand out with regard to the EU environmental soft law, where the national administrative courts have considered that the relevant soft law actually imposed a certain interpretation of the underlying hard law provision.[47]

C. … and Some Difficulties in Finding a Common Rationale for its Use

Even though some common features in the use of EU soft law by Italian judges can definitely be highlighted, it is nevertheless hard to identify general patterns for predicting how EU soft law is used in the Italian courts and the extent to which it has an impact on litigation.

This chapter argues that, at least for the time being, the main divide is still to be found in each policy field. In particular, each policy sector has its own practices and habits concerning soft law: the more the field is used to soft law, the more the judges are open to overlooking the ambiguous nature of soft acts and, consequently, to go over the very well-known hard/soft law divide.

Indeed, according to our research, the use of EU soft law in Italian courts does not depend on its characteristics and taxonomy. For instance, there are cases in which soft law has a strong legal basis in hard law, which states that a certain issue will be regulated through soft law. However, the existence of the

[44] ibid; Alberti and Croci (n 31); Alberti (n 37).

[45] Alberti (n 26) 314 ff.

[46] For a deeper discussion on this, see J Alberti and F Croci, 'L'impatto del soft law dell'Unione europea nei giudizi interni: un'analisi sul campo' in G Palmisano (ed), *Il diritto internazionale e dell'Unione europea nei giudizi interni – atti del Convengno annuale della Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea,* Naples, 2020, 323 ff.

[47] Lisi and Eliantonio (n 33).

legal basis does not necessarily mean that soft law will be used as hard law by judges. Indeed, both the ESMA guidelines and Commission Communications are sometimes used as hard law in Italian case law, although only the former enjoy (in certain cases) a strong connection to hard law.[48]

Moreover, paradoxically enough, the use of EU soft law by Italian judges seems impromptu. What emerges both from the interviews and the case law analysis is that there is no reasoning on how to use soft law and on the relationship between soft and hard law. EU soft law is used because it is handy and practical. In the field of State aid, during an interview a judge stated that he/she uses Commission's Communication because 'there's everything you need there! A collection of the relevant case law and the interpretation given by the European Authority in charge of the regulation of that sector'.[49]

Finally, the instinctive (and, in our view, sometimes rather naive) way in which Italian judges use EU soft law is also shown by the fact that there seems to be no consensus among judges or in the case law on two crucial issues for the use of EU soft law in court, namely the two principles of *iura novit curia* (can soft law be used by judges even if the parties have not mentioned it?) and *tempus regit actum* (can soft law be used even if it was not existing at the time when the challenged act was enacted?).[50]

IV. THE IMPACT OF EU SOFT LAW ON THE PRINCIPLES OF TRANSPARENCY AND DEMOCRATIC LEGITIMACY: THE ITALIAN AUTHORITIES' PERSPECTIVE

In the fields of competition law and financial regulation, where the interviewees agreed to provide their 'evaluation' on the phenomenon, soft law has generally been assessed in a positive light. Almost no interviewee acknowledged it forming a threat to the legislative prerogatives of the Parliament. When direct questions on this were posed to the interviewees, virtually every respondent answered that the possible erosion of democratic legitimacy was offset by the possibility offered by soft law to take swift decisions on detailed issues on which no law-maker no longer has the necessary expertise.[51]

[48] On this point, see A Hofmann, ch 3 in this volume.

[49] Alberti and Croci (n 31).

[50] This point stands out in particular in the field of competition law, which is also the one where judges mostly engage with EU soft law. For a deeper discussion, see Alberti and Croci (n 31) 102–03.

[51] Such an approach raises some doubts: several soft instruments in the field of competition are actually dated and they have not been amended. Therefore, the argument for the necessity of swift decision-making process does not always seem to be well founded. Furthermore, the lack of expertise in the Parliament – and the fact that the main actors involved in those policy fields explicitly recognise such a shortage – may well imply some problems for law-makers attempting to hold to account the independent authorities that enact soft measures in these policy fields (ie, the European Commission and ESMA, together with their national counterparts). However, this debate is very well known in the academic literature and cannot be dealt in detail here; the interviews conducted with SoLaR hope to bring some new insights to this discussion.

In the field of financial regulation, the reason for the positive approach towards soft law can also be found in the fact that the conferral of soft powers to ESMA has certainly contributed to ensuring financial stability within the EU. Soft law-making has fostered a common culture of supervision and has laid the foundations for creating a level playing field among market operators. The utmost importance of these goals has certainly played a role in making accepted and appreciated the means through which the objectives have been achieved.

Furthermore, the fact that ESMA guidelines are drafted together with national authorities and are 'implemented' by the latter has also fostered their legitimacy and popularity at the national level. According to our interviews, the Italian Securities and Markets Authority trusts EU-level decision-making processes, since whatever comes from ESMA is the outcome of several compromises among the 27 Member States. Therefore, in order to refuse the national implementation of ESMA soft law acts, 'the most relevant national interests have to be at stake'.[52] From another perspective, such a positive approach (it is worth noting that Italy has implemented all the guidelines issued so far) also seems to demonstrate the warm reception of the same guidelines within the national financial industry. Indeed, Italian banks are very much in favour of the adoption of guidelines for the harmonisation of EU financial law and therefore push the Italian regulator as much as possible to implement them faithfully.[53]

However, it has to be highlighted that the multi-level nature of soft financial law also seems to have some shortcomings, in particular since it creates a complex and burdensome regulatory structure with too many legal texts at different levels.

Indeed, both the private sector and the public sector expressed concerns about overregulation, arguing that regulatory complexity increases uncertainty about obligations to which actors are subject. Thus, a single rulebook has been indicated as a more efficient solution; interestingly enough, both the respondents from the private sector and those from the Italian Securities and Markets Authority argued that the power to draft such a single legal text should be given to ESMA.[54] Therefore, also from this perspective, the cooperation between ESMA and the Italian Securities and Markets Authority seems remarkable.

As regards the field of competition, our research has shown that soft law performs some peculiar functions that are able to affect – sometimes positively, sometimes negatively – the principles of transparency and democratic legitimacy.

On the positive side is the use of soft law as a tool to increase transparency, through a 'crystallisation' of the outcome of a political negotiation process and/or of specific policy choices.

[52] Alberti (n 37).
[53] ibid.
[54] ibid.

A noticeable example arose in an interview with a civil servant of the Department of European Affairs – State Aid Office, who made a reference to a 'non-paper' issued by the Commission with regard to State aid to the tourism sector, to which they could not give any specific reference because the decision on the matter had not yet been made. According to the Commission, such a 'non-paper' was allegedly a purely internal document; however, surprisingly enough, it was notified to the national administrations of all the Member States. The Member States have therefore ended up taking this document into consideration, even though it was not made public and allegedly has no legal value. In this context, as reported by the interviewee, some national administrations asked the Commission to adopt the 'non-paper' at issue *as a soft law measure*, thus making the position of the institution on the matter explicit and clearly recognisable. However, the Commission, responded in the negative.

Although this might appear paradoxical, the above-mentioned case shows that soft law-making – traditionally regarded as an ambiguous process and open to criticism – is likely to be more respectful of basic principles than some other regulatory practices. In other words, soft law should be considered not only as a form of intervention that is less structured (and accountable) than hard law, but also as an instrument that – paradoxically enough – offers greater protection and transparency than other institutional practices or behaviour, such as the adoption of non-papers and other even more ambiguous acts.

On the other hand, some criticism has also been voiced against soft law, deeming it a regulatory tool that can be more easily captured by influential interest groups/Member States than hard law.

This argument was put forward in particular with regard to public consultations. For instance, some respondents both from the private and public sectors highlighted the fact that, very often, the text of a draft Communication of the Commission submitted to public consultation already represented a locked-in compromise between different interests. In this way, the Commission substantially transforms the consultation into a de facto formality, which is not really capable of influencing the content of the measure at issue, since it had been previously defined in its essential aspects.[55]

V. CONCLUSION

This chapter has shown that despite a pyramidal view of the hierarchy of sources, where non-binding norms do not have an official place, at least in some of the SoLaR policy fields, national administrations and courts make frequent use of EU soft law and endow it with binding legal effects. However, this research argues that – despite a growing and unpredicted use of EU soft law by Italian

[55] Alberti and Croci (n 31) 110.

courts and the increasing attention given to the phenomenon in the doctrine – no real 'mentality shift' has occurred. Italian judges and authorities do engage with soft law, albeit cautiously, and they use EU soft law when it is considered useful and as long as it provides relevant arguments for solving the legal disputes in question. However, there is still no legal reasoning about (and legal acceptance of) its new and hybrid nature. There is an elephant in the room, but no one seems willing to point it out and tackle the legal consequences that it implies.