Review of Eliantonio, M.; Korkea-aho, E.; Stefan, O. (2021) EU soft law in the member states: theoretical findings and empirical evidence

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Mariolina Eliantonio, Emilia Korkea-aho and Oana Stefan (Eds.), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*. Oxford: Hart Publishing, 2021. xii + 382 pages. ISBN: 9781509932030. GBP 90.

Soft law has become part and parcel of the EU regulatory landscape, its popularity being demonstrated once again during the COVID-19 crisis. The booming of soft law related to COVID-19 is mentioned in the introduction of this book – signalling the importance and omnipresence of soft law measures, as well as the urgency of studying this phenomenon and its reception in the Member States. Indeed, in the literature, EU soft law has been studied from a merely theoretical perspective, whilst empirical studies largely focus on the role that EU soft law plays at the EU level, and in particular in rulings of the ECJ.

This book presents a fresh and much-needed empirical study on the use of EU soft law at the *national* level. It combines "theoretical assumptions" with "empirical evidence" on the

reception of EU soft law in several Member States, as well as in countries from outside the EU (the UK and China). The three editors have brought together a diverse team of contributors, from a variety of countries, with both legal and non-legal backgrounds. A distinguishing feature of the book is the socio-legal approach to study empirically the national reception of EU soft law measures. In order to provide insights into the use of EU soft law, it is not sufficient to study law in the books; instead, this book sets out to study "(soft) law in action". This approach requires going beyond classic research methods, such as literature review and case law analysis. An important part of the empirical study consists of expert interviews with officials and judges in the Member States.

Studying the use of EU soft law by national authorities and national courts requires a lot of time, resources and effort. This project started with the establishment of the Soft Law Research Network (SoLaR Network) more than three and half years before the book was published. In the context of this network, seminars were organized where the SoLaR members and other "EU soft law friends" discussed the first findings on the use of EU soft law in the four selected policy areas: environmental law, social policy, competition and State aid law, and financial regulation. This resulted in working papers presenting the empirical findings and placing them in a comparative perspective. The chapters in the book rely on and refer to these working papers, yet also go further complementing the SoLaR research with insights from other studies on (EU) soft law.

The book consists of 21 chapters, structured in three parts. A common theme is noticeable in all three parts: the search for common patterns and idiosyncrasies as to the ways in which EU soft law is received in the Member States. The first part on "Normative Assumptions" reflects on the concept of EU soft law and its reception at the national level in light of theoretical research, whilst also providing a conceptual framework for studying soft law at the national level. The contribution by Maher (Ch. 2) clarifies the interrelated relationship between "governance, soft law and networks". Maher explains that in the EU, soft law often supports hard law resulting in hybrid legal regimes such as the European Competition Network, and shows that both soft law and networks can shape the exercise of public power. The notion of hybridity also takes centre stage in the next chapter. Hofmann shows that soft law instruments that have a close relationship to EU hard law (interpretative or decisional acts) have a higher chance of being taken into account by national authorities and courts than so-called "steering instruments" that provide guidance independently from or as an alternative to EU hard law.

The conceptual framework is further elaborated by Hartlapp and Korkea-Aho (Ch. 4). Drawing inspiration from "hard law implementation research", the authors argue that the study of EU soft law requires a (more) nuanced lens that allows for identifying a wide range of responses at the national level. This results in a typology of differential soft law reception, ranging from "formal compliance" to "active defiance". Furthermore, the authors argue that the way in which soft law finds its way in the national legal order is shaped not only by the specificities of soft law instruments (as argued by Hofmann), but also by interests and processes at the national level. A differential impact of EU soft law is also observed by Gentile (Ch. 5), who observes that national soft law measures implementing EU soft law measures generate different (binding) legal effects than the effects of the original EU soft law measures. This risk of fragmentation poses a threat to legal principles such as legal certainty, uniform application and legitimate expectations.

The second part of the book, "Country analyses", includes contributions on the reception of (EU) soft law in 11 countries: Cyprus, Finland, France, Germany, Hungary, Italy, the Netherlands, Slovenia, Spain, the UK and China (Chs. 6 to 16). From the country analyses, the picture emerges that in most of EU Member States (and the UK) EU soft law documents (increasingly) play a role in administrative and judicial practices. However, despite some common patterns, in many respects the reception of EU soft law at the national level is highly differential, as "predicted" by Hartlapp and Korkea-Aho. Here are some main findings that illustrate this.

First, as pointed out in several contributions, EU soft law finds its way in national implementation processes in various ways. EU soft law may be translated into national hard

law, into national soft law or both. References to EU soft law can be found on websites and in Q&A documents, or the documents are applied directly without incorporation into national measures. Nonetheless, the use of soft law by national authorities often remains highly invisible to the outside world. For instance, the EU origin of soft law norms is often not directly referred to even when they are "transposed" into national regulatory acts (see e.g. the chapters on France, Hungary and Slovenia).

Second, in nearly all EU Member States that are studied, EU soft law norms are reported to (increasingly) play a role in rulings of national courts. In this respect, EU soft law is reported "first and foremost" to fulfil the role of a judicial interpretation aid. Yet, in some Member States, cases are reported where EU (competition) soft law has been used by national courts in the same way as EU hard law. Furthermore, the rulings of national courts rarely refer to the normative or legal status of guidance documents (see e.g. the chapters on Finland, Italy and Slovenia). Hence, as pointed out in several places in the book, the status and legal effects of EU soft law instruments remain largely uncertain when looking at national judicial practices.

Third, and remarkably, several country analyses report a predominantly pragmatic approach of national authorities and courts *vis-à-vis* EU soft law documents, which is even detected in Member States whose legal culture is coloured by a deep respect for the formal sources of law (such as France, Germany and Italy) and where soft law has not been recognized as a distinct legal category (such as in Germany and Finland). At the same time, it is noted that the use of EU soft law cannot be seen isolated from national legal culture. For instance, it comes more naturally to the UK's common law system to use EU soft law only "when useful or appropriate", as explained by Dobbs and Ştefan. In Hungary, the traditions of post-socialist State and text-positivism contribute to the still limited role of EU soft law in courts and administrative practice. And, last but not least, Snyder's chapter on China reminds us that culture is pivotal for shaping the social meaning of rules, including soft law.

The third part of the book, "Evaluation", sets out with a critical assessment by Eliantonio and Xanthoulis of the ECJ's case law concerning the direct reviewability of EU soft law under Article 263 TFEU (Chs. 17 and 18). Eliantonio speaks of a "wind of change" at the national level (and in the French *Conseil d'État* in particular) towards an opening up of judicial review to challenge national soft law measures. Just as Rubio and Ştefan do in their chapter on France, Eliantonio expresses the hope that the French Council of State's preliminary reference in *FBF* (C-911/19) – which was still pending at the time the book was published – will lead the ECJ to widen the scope of judicial review of EU soft law measures. By now, the authors have probably been disappointed with the ECJ's answer, in which the Court reconfirmed its established case law concerning the availability of an action for annulment.

As part of the country analyses, several authors already noted that principles such as consistency, legal certainty, transparency, as well as democratic legitimacy, are not always well served by the way in which EU soft law is received at the national level. The principle of transparency is given special attention in the chapter by Ştefan (Ch. 19), which shows that the transparency-enhancing function of EU soft law is not always fulfilled in practice, pointing at obstacles relating to the access and content of EU soft law documents, as well as translation and transposition issues. The challenges that EU soft law poses to democratic (input) legitimacy are addressed by Mörth, taking the open method of coordination (OMC) and social employment soft law in Sweden as an example (Ch. 20). The author argues that a better understanding of the tension between input and output legitimacy is necessary in order to understand what is at play (or at risk) when having recourse to EU soft law measures.

Finally, the main conclusion of the book can be found in the introduction (Ch. 1), which not only introduces the research and its three parts, but also reflects on the research findings. Those findings show, as concluded by the editors, that national administrations and national courts are confronted with "legitimacy, clarity and transparency" questions, impeding a smooth reception of EU soft law at the national level. Those issues are felt across "all levels of government", not only by national courts as was their initial expectation. The editors also note that those issues are not the result of national deficiencies or national "legal-cultural peculiarities". Therefore, the editors argue, the problems identified can only be addressed at the EU level – it is not something

that can be solved by national authorities and national courts. This conclusion results in concrete policy recommendations directed at the EU level: 1) better accessibility of soft law; 2) providing translations of key soft law documents and encouraging national dissemination and implementation of EU soft law; 3) adopting guidelines for the adoption of non-binding rules; and 4) engaging in a dialogue with Member States.

Without doubt, these recommendations will contribute to help solve the legitimacy, clarity and transparency issues experienced at the national level. At the same time, in my view, this conclusion still raises some questions in light of the observations made in the empirical analysis. The country analyses show that the use of EU soft law is (also) shaped by national interests, culture, and processes. This implies that not only EU level factors, but also national factors may influence the way in which EU soft law promotes, or detracts from legal principles. In light of this, would it not be appropriate and effective to also issue (additional) guidelines at the national level that advise national authorities and national courts on how to best deal with EU soft law measures? In brief, about the conclusion that "soft law issues" can only be addressed by taking action at the EU level, the last word may not have been said.

Food for thought and an incentive for further research is certainly also given by the other extensive empirical insights provided in the book. The empirical findings and theoretical discussions outlined in the second part of the book offer valuable ingredients and research material for further analysis on (EU) soft law. For instance, the country analyses provide useful insights into further exploring what factors influence the reception of EU soft law at the national level. Such future research could also decipher how the effectiveness of EU soft law documents is best guaranteed. Indeed, in the book the risk that soft law poses to democratic (input) legitimacy and legal principles is given considerable attention, yet the output legitimacy dimension of governance through EU soft law remains somewhat under-explored or taken for granted. Hence, this point of "effectiveness" can be put on the research agenda as well.

In his final thoughts, Jääskinen concludes that the participants to SoLaR "have raised our understanding of soft law to a new level, especially from an empirical point of view". I can only agree with this conclusion. The editors have succeeded in accomplishing the difficult task of complementing theoretical assumptions on EU soft law with tangible empirical findings, resulting in a book that provides new, comparative insights into the reception of EU soft law in the Member States. It is a book that without doubt will serve as a catalyst for further empirical, and interdisciplinary research on the use and legitimacy of EU soft law.

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