A legal-argumentative framework for persuasive EU soft law: The case of the European Commission's recommendations

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DOI
10.4337/9781802208917.00013

Publication date
2023

Document Version
Final published version

Published in
The Legal Effects of EU Soft Law

7. A legal-argumentative framework for persuasive EU soft law: The case of the European Commission's recommendations

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1. INTRODUCTION

Reliance on so-called 'soft law instruments' has become gradually but surely an entrenched trait of the European Union's (EU) regulatory governance. Since the first Commission notices, reported back in the 1960s,[2] various EU institutions, agencies and bodies have increasingly been enacting recommendations, opinions, communications, guidelines and other such instruments in a remarkably large number of policy areas.[3] In spite of its current popularity, the term 'soft law' is a relative newcomer in the legal field with an extraneous origin rooted in international relations and political science theories.[4]

[1] The author order is alphabetical. Both authors have contributed equally to this study. The authors would like to thank the editors of this volume and Dr. Alberto Quintavalla for their valuable feedback and comments on this chapter.

[2] See Oana Stefan, Matej Avbelj, Mariolina Eliantonio, Miriam Hartlapp, Emilia Korkea-aho Nathalie Rubio, 'EU Soft Law in the EU Legal Order: A Literature Review' (2019) (March 4, 2019). King's College London Law School Research Paper Forthcoming 3, available at http://dx.doi.org/10.2139/ssrn.3346629 accessed 24 January 2023.

[3] Joanne Scott and David M. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union (2002) *European Law Journal* 8(1) 8.

[4] See Oana Stefan, 'The Future of European Union Soft Law: A Research and Policy Agenda for the Aftermath of COVID-19' (2020) *Journal of International and Comparative Law* 7(2) 329, 330–331; she indicates as a crucial milestone in the development of this notion and its influence on the legal field recently the special issue on 'legalization' of the International Organization journal published in 2000 (vol. 54, issue 3), in which prominent political science and international relations theorists made the case for and advanced an elaborated conceptual framework for soft law. Yet the concept of soft law had already been introduced in legal scholarship, first in the field

Praised for its flexibility and adaptability, as well as for its capacity to enable effective cooperation between actors with different interests and values, soft law has also been criticized, among others for its conceptual fuzziness[5] and for bringing a degree of relativism to the notion of law,[6] thereby generating confusion and uncertainty up to the point of menacing the very integrity of the legal system.[7] One particular illustration of these problems is represented by the so-called 'hardening' of EU soft law[8] entailing that overt soft law instruments may hide unexpected hard legal effects or turn out to be pretty much as 'hard as hard law itself.'[9] This in turn may heavily affect the principles of legal certainty, institutional balance and distribution of powers between the EU institutions, as well as the limits and exercise of EU competence, thereby threatening ultimately the 'very effectiveness, legality and legitimacy of EU action'.[10]

Soft law is undoubtedly appealing as a descriptive concept, depicting the increasingly complex EU regulatory landscape that features, alongside legally binding acts, various other (nevertheless potentially effective) measures and instruments often combined in diverse ways. But soft law has obvious limits as a normative concept.[11] From the latter perspective, soft law seems to be bound to an inherent degree of vagueness and ambiguity, by failing to fully elucidate the perplexing complexity surrounding the idea that legal instruments could be

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of international law, by René-Jean Dupuy in the 1970s, see Karel C. Wellens and G.M. Borchardt, 'Soft Law in European Community law' (1989) *European Law Review* 14(5) 267, 268 and Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic J. Int'l Law* 167, 173.

5 See Klabbers (n 4) 167, 168–70.

6 See Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 *Nordic J. Int'l Law* 381, 386–87.

7 See Wellens and Borchardt (n 4) 268–74, and in particular the view of Virally in footnote 9; see also Klabbers (n 6) 391.

8 See on the meaning and implications of the 'hardening' of EU soft law, Florin Coman-Kund and Corina Andone, 'European Commission's Soft Law Instruments: In Between Legally Binding and Non-binding Norms' in Patricia Popelier, Helen Xantaki, William Robinson, João Tiago Silveira and Felix Uhlmann (eds.), *Lawmaking in Multi-level Settings* (Oxford: Hart-Nomos Publishing 2019) 175–95; Cf. also in the same volume Petra Lea Láncos, 'The Phenomenon of 'directive-like recommendations' and their Implementation: Lessons from Hungarian Legislative Practice' 199–218.

9 Klabbers (n 6) 391.

10 See Corina Andone and Florin Coman-Kund, 'Persuasive Rather Than 'Binding' EU Soft Law? An Argumentative Perspective on the European Commission's Soft Law Instruments in Times of Crisis' (2022) *The Theory and Practice of Legislation* 10(1) 22, 27–28, available at https://www.tandfonline.com/doi/pdf/10.1080/20508840.2022.2033942 accessed 24 January 2023.

11 See Klabbers (n 6) 386–87.

legally binding/non-binding to different extents or degrees, and to address the multifarious consequences flowing from this.

Against this background, we suggest addressing the inextricable soft law dilemma by cutting the 'Gordian knot' with the 'sword' of a novel interdisciplinary legal-argumentative theoretical perspective. First, from a legal perspective, this entails going 'back to basics' to the formal delineation between EU legally binding and non-binding instruments and assigning soft law to the category of non-binding instruments with a view to assessing it against the framework of the EU Founding Treaties. In a second step, by acknowledging that EU soft law could be highly effective in practice, for instance by being massively complied with or relied on by its addressees, we suggest laying the emphasis on assessing and improving the intrinsic quality of these instruments, in particular their persuasive value through the lenses of argumentation theory insights. By construing 'EU soft law' as *legally non-binding, but in practice potentially effective instruments mainly due to their persuasive force*,[12] we argue that it is essential for EU soft law instruments as legally non-binding tools, to be 'clearer and more convincing about their intended effects as a way to foster compliance by addressees and acceptance by the public at large'.[13] By making argumentation a core concern of EU soft law instruments, we maintain that their effectiveness 'should not depend so much on their "hardened" ambiguous status, but on their capacity to act as argumentative tools persuading addressees to adopt the desired course of action'.[14] We operationalize our theoretical approach by putting forward a legal-argumentative framework for the purpose of assessing and improving EU soft law instruments, which is then put to the test by reference to the category of 'Commission recommendations' as exemplary, from a normative perspective, of EU soft law instruments of a persuasive nature, but which nevertheless, in practice, often resemble legally binding acts.

This chapter starts with some reflections on the concept of 'soft law' (section 2). This is followed by a concise portrayal of the diversity of EU soft law instruments, with special emphasis on the European Commission's recommendations as an illustration of the problematic 'hardening' phenomenon displayed by these tools, besides examining the legal framework deemed relevant for understanding the rationale, aims, functions, content and effects, working and limits of EU (Commission's) soft law against the backdrop of the EU Founding Treaties and the jurisprudence of the Court of Justice of the

[12] For a slightly different version of this definition, see Andone and Coman-Kund (n 10) 24.
[13] Ibid., 31.
[14] Ibid., 47.

European Union (CJEU). Special attention is paid to the applicability of the duty to state reasons as a legal and normative parameter deemed particularly relevant for EU soft law understood as non-binding but persuasive legal instrument (section 3). Arguing that from a legal perspective, persuasiveness is a distinctive core virtue of EU soft law, we suggest to approach EU soft law from an argumentation theory perspective 'focusing on the content, design, effectiveness and soundness (…) as core normative parameters for assessing and enhancing the persuasive force and, thereby, the quality of these governance tools'.[15] Next, we propose an analytical legal-argumentative framework encompassing the four argumentative parameters listed previously, as well as legal parameters pertaining to the duty to state reasons, as a toolbox for appraising and drafting EU soft law instruments (section 4). This legal-argumentative framework is then applied to Commission Recommendation (EU) 2020/518 as a case in point of a 'hardened' soft law instrument (section 5).

2. REFLECTIONS ON THE CONCEPT OF 'SOFT LAW'

The concept of 'soft law' reportedly made its entrance in the field *of public international law* in the 1970s in an attempt to overcome the limited list of international legal sources in Article 38 of the Statute of the International Court of Justice in light of the dynamics of the international legal order largely stimulated by the 'new international economic order' movement.[16] In the 1980s, renewed and enlarged interest in soft law has been shown in international public law, due in particular to the proliferation in practice of various international instruments (e.g., resolutions, declarations, guidelines, codes of conduct) taking a different form than a treaty,[17] as part of a so-called phenomenon of international 'soft legalization' reflecting the increasing role of international organizations and private actors in the shaping of the international legal order.[18] Throughout this period, the rise of soft law has to be seen also against the backdrop of the broader discussions and developments, taking place in the US and globally since the 1980s, revolving around the shift from government to governance under the influence of approaches like New Public

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15 Ibid., 47.
16 Wellens and Borchardt (n 4) 267–68.
17 Ibid., 268 and 274-277.
18 See Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) *International Organization* 54(3) 421, 423 and 450–55; see also Anna di Robilant, 'Genealogies of Soft Law' (2013) 58 *Scandinavian Studies in Law* 217, 218–19.

Management and good governance.[19] *Within the EU*, though a first comprehensive scholarly account of soft law instruments dates back to the end of the 1980s,[20] this phenomenon has become prominent since the beginning of the 2000s; in particular under the impetus of the 2000 Lisbon Strategy,[21] soft law has become one of the tools of 'new' (multilevel) EU governance signaling a deviation from 'command-and-control' type regulation embodied by the 'community method.'[22]

Soft law remains until today a contested category, receiving simultaneously frenetic support and heavy criticism.[23] Soft law has been *praised* for its flexibility and adaptability, for its capacity to reduce transaction costs, to deal with uncertainty, to enable effective cooperation between actors with different interests and values, as well as for its ability to 'create normative "covenants" and discourses that can reshape international politics'.[24] In the EU context specifically, soft law has been seen 'as a promising tool for the [informal and gradual] harmonization of European law (…) and for the strengthening of the European market (…), providing a viable complement, or even alternative, to traditional hard law'.[25] As such, EU soft law could better take into account diversity and alternative solutions, helps finding more easily consensus among Member States, as well as 'make it easier to revise strategies and knowledge in light of evolving knowledge',[26] which in turn would enable it to solve governance problems and 'bring about legal change more effectively than traditional hard legislation'.[27] As to the *curses* of soft law, these pertain to the ambiguity of this concept and its normative premises/foundations, with all its related problems, consequences and risks, as well as to its appropriateness and

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[19] See R.A.W. Rhodes, 'The New Governance: Governing Without Government' (1996) *Political Studies* 44(4) 652–67; see also Kenneth Armstrong, 'The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance' (2011) *Current Legal Problems* 64 179, 181–82.

[20] See Wellens and Borchardt (n 4).

[21] di Robilant (n 18) 222.

[22] Scott and Trubek (n 3) 1, 6; Colin Scott, 'Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU' (2009) *European Law Journal* 15(2) 160.

[23] For an overview of the various views of the supporters and opponents of EU soft law and their main tenets, see di Robilant (n 18) 222–28.

[24] Abbott and Snidal (n 18) 423 and 456.

[25] di Robilant (n 18) 220.

[26] Scott and Trubek (n 3) 6.

[27] di Robilant (n 18) 225; see also David M. Trubek and Louise G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination' (2005) *European Law Journal* 11(3) 343, 356–59.

effectiveness as a governance tool.[28] In this context, the very normative foundation of soft law, departing from the traditional-positivist binary approach to law, and premised on the idea of various 'shades of grey',[29] 'infinite variety',[30] or a continuum between legal bindingness and non-bindingness,[31] comes under attack.[32] EU soft law specifically is said to create legitimacy problems, by circumventing formal decision-making bodies and procedures, as well as unnecessary and unwanted legal complications through the blurred legal effects it might arguably entail, to the extent that this concept 'is likely to undermine the very principles it is meant to foster'[33] and, therefore, it should be discarded as redundant[34] or, more drastically, as undesirable.[35] In substantive terms, recourse to soft law is said to mark a 'surrender to the market'[36] and, more generally, to endanger the rule of law by increasing arbitrariness and risks of abuse of power.[37]

With its contours and legal effects remaining nebulous,[38] according to some, soft law is ultimately condemned to fall back on the traditional concepts of legally binding/non-binding for its definition,[39] which in turn prompts the suggestion that the latter concepts can still sufficiently reflect the complexities and nuances of current EU regulation.[40] Another suggested way to address the shortcomings of soft law is by taking a hybrid approach focusing on the various combinations and synergies between soft law and hard law as a way to overcome 'the terms of the hard/soft debate' and gain 'a new and richer

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[28] See di Robilant (n 18) 225–26; see also Mariolina Eliantonio, Emilia Korkea-AHO,and Oana Stefan, 'Introduction' in 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), 1–18.

[29] Klabbers (n 4) 179–81.

[30] See Richard Baxter, 'International Law in "her infinite variety"' (1980) *The International and Comparative Law Quarterly* 29(4) 549.

[31] See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, 'The Concept of Legalization' (2003) *International Organization* 54(3) 401, 401–2 and Fabien Terpan, 'Soft Law in the European Union – The Changing Nature of EU Law' (2015) *European Law Journal* 21 68–96.

[32] See in particular Klabbers (n 4) 167 and Klabbers (n 6) 381.

[33] Oana Stefan, (n 4) 330.

[34] Klabbers (n 4).

[35] Klabbers (n 6).

[36] See di Robilant (n 18) 226 and the views presented there.

[37] See Klabbers (n 6) 391.

[38] See Stefan et al. (n 2) as an attempt to clarify the practical and legal effects of EU soft law.

[39] Klabbers (n 6) 382.

[40] Klabbers (n 4) 168 and 180–82.

understanding of what we mean both by "law" and "European integration"'.[41] This approach, however, only shifts the focus to the descriptive dimension of the EU regulatory reality, without solving the conceptual objections as well as the whole array of legality, legitimacy and accountability issues pertaining to soft law.[42]

Most definitions of EU soft law concur in acknowledging that this category encompasses legally non-binding norms, which nevertheless may entail some practical and even legal effects,[43] or which are given 'a legal scope' materializing in their influence on 'the conduct of Member States, institutions, undertakings and individuals, however without containing Community rights and obligations'.[44] One of the most popular definitions is the one put forward by Francis Snyder in 1993 construing soft law as 'rules of conduct which, in principle, have no legally binding force but which, nevertheless, may have practical effects'.[45] While being appreciative of the descriptive value of soft law, we also want to avoid as much as possible the 'conceptual and normative ambiguity' trap highlighted earlier by linking this concept to established EU legal categories. Our understanding of EU soft law as 'legally non-binding norms which may entail effects in practice/practical effects' thus draws largely on Snyder's definition of soft law; as to the 'practical effects' of soft law, our focus in this context lies *on effectiveness understood as the level of observance/compliance with such instruments in practice, the persuasive force of these tools being seen as an essential ingredient in this respect*.[46] While recognizing that soft law instruments can be legally relevant, in particular through effective observance/compliance by addressees, we are rather cautious regarding the 'legal effects' EU soft law could allegedly entail. Since the very idea and scope of 'legal effects' of EU soft law remain ambiguous and convoluted,[47] we believe that in any case soft law instruments cannot be intended to produce legal effects directly (creating, modifying, extinguishing legal rights and obligations) without them turning into legally binding acts. It has been argued

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41 Trubek and Trubek (n 27) 343, 364; see also di Robilant (n 18) 225 and Oana Stefan, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer law International 2013) 29–32, Stefan et al. (n 2) 46.

42 Stefan et al., ibid., 33.

43 See among others Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) *Modern Law Review* 56(1), 32; Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 112; Stefan (n 41) 11.

44 Wellens and Borchardt (n 4) 285.

45 Snyder (n 43) 32.

46 See Andone and Coman-Kund (n 10) fn 41.

47 See Stefan et al. (n 2) 24–26.

that soft law instruments could entail certain legal effects indirectly.[48] Yet such potential legal effects do not seem to stem from the soft law instrument *per se*, but from the applicability of relevant legal principles and provisions triggered in the context of the complex legal-policy-institutional framework within which it is adopted and implemented.

3. THE PRACTICE AND LAW OF EU SOFT LAW

3.1 EU Soft Law Practice

EU soft law instruments as defined in this chapter are characterized by a large degree of diversity in terms of label, form, enacting actor, addressees, content, aim and function of the instruments against the backdrop of the specific legal-institutional-policy context in which they are used.[49] Without claiming exhaustivity, labels, often used inconsistently in practice,[50] range from 'recommendation', 'opinion', 'notice', 'guidelines', 'communication', 'code of conduct' to 'resolution', 'conclusions', '(joint) declaration', 'press release', 'letter', 'statement', 'arrangement', 'memorandum', 'programme', 'strategy', '(common) position', '(joint) action', 'white paper', 'green paper', 'non-paper', etc.[51] Some soft law instruments are formally enshrined in the Founding Treaties but most of them are not. They are enacted by various EU institutions, agencies and bodies, whereas their addressees are other EU institutions, agencies and bodies, the Member States, as well as legal and natural persons. Their aims, functions, structure and content may vary significantly, depending on institutional practice, the policy area concerned or the relevant legal framework.

This 'heterogeneity' prompted the observation that it is difficult to draw general conclusions regarding the 'nature, function, possible legal effect and other characteristics (…)' of EU soft law instruments.[52] Yet attempts have been made to bring some 'order in the chaos' by systematizing or devising taxonomies of EU soft law instruments. For instance, Wellens and Borchardt attempt to systematize EU soft law instruments according to three main criteria: enabling actor/forum; form; and content of the instrument.[53] Senden proposes a functional taxonomy based on the combined criteria of function and objective of EU soft law instruments, resulting in three main categories:

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48 Senden (n 43) 112; Stefan (n 41) 12.
49 See on the heterogeneity of EU soft law instruments, Senden (n 43) 112.
50 Ibid., 107.
51 See also Wellens and Borchardt (n 4) 297–302; Senden, ibid., 115–257.
52 Senden, ibid., 107.
53 Wellens and Borchardt (n 4) 298–301.

preparatory and informative instruments; interpretative and decisional instruments; and steering instruments (the latter further sub-divided into formal and informal instruments, depending on whether they are (or not) formally enshrined in the EU Founding Treaties).[54] Similarly to Senden's sub-division within the latter category of steering soft law instruments, Advocate-General Bobek advanced recently a distinction between typical (listed under Article 288 TFEU) and atypical (not listed in Article 288 TFEU) acts more generally;[55] the main analytical relevance of this distinction is that 'typical' acts 'are in principle conducive as to their (binding/non-binding) legal nature until proven to the contrary, while the 'atypical' acts 'are always assessed by the CJEU with a view to determine their legal nature, in particular whether they are intended to produce legal effects'.[56]

An extensive examination of all diverse EU soft law instruments being beyond the boundaries of this study, this chapter focuses on EU (Commission) recommendations as formal or typical (non-binding steering) acts enshrined in the EU Founding Treaties. The main reason for this choice is that these instruments are symptomatic of the problematic 'hardening' of soft law phenomenon, in particular because of their great resemblance with hard law/legally binding acts (i.e., directives) qua structure, wording and content.[57]

3.2 The Legal Framework of EU Soft Law

One may say that soft law instruments have been enshrined in EU law well before the very appearance of this concept. The Founding Treaties of the three European Communities already formalized the opinions of the High Authority,[58] as well as the recommendations and opinions of the Council and the Commission[59] as non-binding acts. Currently, the main constitutional/legal

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[54] Senden (n 43) 109–10.

[55] Opinion of Advocate-General Bobek in Case C-16/16P *Belgium v Commission* EU:C:2017:959 paras 55–62.

[56] Andone and Coman-Kund (n 10) 34.

[57] Andone and Coman-Kund (n 10) 33–35; see also Wellens and Borchardt (n 4) 301, noting that 'recommendations and opinions although these are legally non-binding explicitly by virtue of Article 189 Treaty, they are often drafted in the shape of binding acts including considerations'.

[58] Art. 14 of the Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951). Interestingly, this provision also mentioned 'recommendations' among the acts adopted by the High Authority, but this label actually designated legally binding acts corresponding to the directives in the other two 'European Communities'.

[59] Art. 189 of the Treaty establishing the European Economic Community (EEC) and Art. 161 of the Treaty establishing the European Atomic Energy Community (EURATOM) of 25 March 1957.

reflection of EU soft law is found in Article 288 TFEU which maintains 'recommendations' and 'opinions' as the two categories of EU formal non-binding acts, but extends the scope of enacting actors to all EU institutions.[60] Another important constitutional provision for this chapter concerns specifically recommendations; Article 292 TFEU thus stipulates that recommendations are adopted as a rule by the Council, while the Commission and the European Central Bank may adopt recommendations only 'in the specific cases provided for in the Treaties'. In our view, an important consequence stemming from this provision is that the Commission should always indicate (and convincingly explain) in the respective recommendation the specific legal basis in the Treaties enabling it to adopt such an instrument.[61]

To be sure, in spite of its academic popularity, the concept of 'soft law' is not formally enshrined in the EU Founding Treaties, nor is it used in CJEU's jurisprudence.[62] Instead, the EU constitutional framework and EU courts still rely on the binary distinction between legally binding and non-binding acts. In this vein, far from engaging in soft law considerations, the CJEU normally applies its notorious *ERTA* 'substance prevails over form' test[63] to determine whether, no matter the label used, the instrument under consideration pro-

[60] It should be noted that the EU Founding Treaties also refer in specific provisions to various measures or instruments enacted by EU institutions that could arguably qualify as soft law instruments or at least as instruments with an unclear legal status; labels used include 'guidelines' adopted by the European Council (Arts 50(2) TEU and 68 TFEU) or by the Council (Arts 5 and 148 TFEU), 'conclusions' enacted by the European Council (Art. 148 TFEU), as well as interinstitutional agreements that 'may be of a binding nature' according to Art. 295 TFEU. Sometimes these measures/instruments are cast in the form of one of the legal acts listed under Art. 288 TFEU (for instance, Art. 121 states explicitly that Council's broad guidelines on economic policy are to be adopted as a recommendation), while in other instances additional factors need to be used to clarify the legal nature of the instrument, such as its wording and content, the position and powers of the enacting institution, the procedure used for its adoption, or other contextual factors such as the publication of the instrument, see Coman-Kund and Andone (n 8) 178–83.

[61] As will be illustrated later on in the case study analysis, the Commission sometimes only mentions the generic Art. 292 TFEU as the legal basis, without indicating the Treaty provision enabling it to specifically adopt that recommendation, see Andone and Coman-Kund (n 10) 12.

[62] In practice, however, this concept has been used in interinstitutional agreements between the EU institutions (see Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L 304/47, paras 15, 43, Annex I and Annex IV), and lately supported ardently by Advocate-General Bobek, most remarkably in his Opinion in Case C-16/16P (n 55).

[63] Case 22/70 *Commission v Council. European Agreement on Road Transport (ERTA)* EU:C:1971:32 para. 42.

duces binding legal effects or not.[64] As a result, a regulatory instrument cast as a 'recommendation' (or other non-binding denomination like 'opinion', 'communication', 'guidelines', 'notices') may turn out to be either a genuine non-binding act[65] or a binding act, but not something 'in-between' non-binding and binding.[66]

Yet, while 'genuine soft law measures' have no binding force, they still represent legal instruments through which EU institutions exercise their competence and tasks, and therefore they are legally relevant though not necessarily subject to full judicial review.[67] First, EU non-binding legal instruments are subject to the confines of the EU constitutional framework. Thus, an EU institution adopting such an instrument must still observe the rule of law with its reflection in the principle of legality, the principles of conferral, proportionality and subsidiarity, as well as the principle of institutional balance.[68] As already emphasized by the CJEU, the fact that a legal instrument is non-binding is not 'sufficient to confer on that institution the competence to adopt it',[69] but the principles of distribution of powers and institutional balance in the respective policy area must be observed/respected.[70] Another more general consequence

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[64] See Coman-Kund and Andone (n 8) 178–80, and the jurisprudence mentioned there.

[65] EU non-binding instruments have also been called 'genuine soft law measures' by Advocate-General Bobek (n 55) paras 40 and 52.

[66] See specifically on Commission recommendations, Case C-16/16P *Belgium v Commission* EU:C:2018:79 paras 29–31.

[67] Art. 263 TFEU excludes *prima facie* genuine non-binding measures from CJEU's legality review in the framework of the annulment procedure, while Art. 267 TFEU enables the Court to give a preliminary ruling on the interpretation and validity of both legally binding and non-binding acts of EU institutions, bodies, offices and agencies, see Case C-322/88 *Grimaldi v Fonds des maladies professionnelles* EU:C:1989:646 paras 8–9 and, most recently, Case C16/16P *Belgium v Commission* (n 66) para. 44, Case C-911/19 *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution* (ACPR) EU: C:2021:599 paras 56–57 and Case C-501/18 *BT v Balgarska Narodna Banka* EU:C:2021:249 para. 82, in the latter case a recommendation issued by the European Banking Authority (EBA) being actually declared invalid by the Court (para. 101); see also Koen Lenaerts, Ignace Maselis, Kathleen Gutman, Janek Tomasz Nowak, *EU Procedural Law* (OUP 2014) 464.

[68] See for an extensive discussion on this, Senden (n 43) 482–501.

[69] Case C-233/02 *France v Commission* EU:C:2004:173 para. 40.

[70] Ibid. and Case C-660/13 *Council v Commission* EU:C:2016:616 paras 31–46; in the latter case, the Court actually annulled on these grounds a Commission decision on the signature of an addendum to a non-binding Memorandum of Understanding between the EU and Switzerland. While the previous judgments dealt with specific instruments in the Union's external relations field, the Court reaffirmed this position in very recent case law concerning non-binding instruments (guidelines) issued by the European Banking Authority (EBA) stating that '(…) to accept that the EBA may freely

inferred by scholars is that soft law instruments cannot deviate from hard law/legally binding instruments.[71] In this context, in particular the use of 'hardened' soft law as a way to achieve harmonization of EU policies, to extend the sphere of EU competences or to impose 'obligations' not underlined in binding acts, for instance via Commission recommendations resembling EU legislative acts, triggers important questions as to the competence to do so and the legality of such instruments.[72] The suspicion here is that such discreet and legally obscure acts could actually entail quite far-reaching effects disturbing the distribution of powers between the EU and its Member States, and the balance of powers between EU institutions, while circumventing established decision-making procedures and ultimately the principle of democracy.

Second, the fact that EU soft law instruments are effective in practice is not particularly problematic as long as this amounts to voluntary compliance by the addressees of the act, also called 'purely *de facto* effect'.[73] Things become more entangled, however, once we consider potential legal effects of acts formally devoid of legally binding force. In this respect, the CJEU's famous finding in *Grimaldi* that non-binding recommendations cannot be regarded 'as having no legal effect',[74] from which the Court further derived a duty of national courts to take recommendations into consideration, ignited intensive and endless debates regarding the legal effects of EU soft law. It has been claimed that EU non-binding acts could somehow gain certain legal effects indirectly, through 'the operation of other legal methods and principles'.[75] As to the 'triggers' of alleged legal effects of EU soft law instruments, these encompass the application of EU legal principles, in particular the duty of sincere cooperation, legitimate expectations, equal treatment, legal certainty,[76] as well as various constellations with EU binding instruments, for instance

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issue guidelines, irrespective of the specific framework established by the EU legislature, *would be liable to undermine the allocation of powers between the institutions, bodies, offices and agencies of the European Union'* (emphasis added), Case C 911/19 *FBF* (n 66) para. 72.

71 See Wellens and Borchardt (n 4) 274; Senden (n 43) 270–72.

72 See Senden (n 43) 495–96.

73 Senden (n 43) 269.

74 Grimaldi (n 67) para. 18.

75 Senden (n 43) 267.

76 See ibid., Paul Craig, *EU Administrative Law* (OUP 2018) 630–36, Stefan et al. (n 2) 27–30; see also Case C-213/02 *P Dansk Rørindustri A/S v Commission* EU:C:2005:408 paras 211 and 213, Case C-226/11 *Expedia Inc v Autorité de law concurrence and Others* [2011] EU:C:2012:795 paras 27–28, Joined Cases C-357/19 *Euro Box Promotion and Others*, C-379/19 *DNA- Serviciul Teritorial Oradea*, C-547/19 *Asociația 'Forumul Judecătorilor din România'*, C-811/19 FQ e.a., C-840/19 NC EU:C:2021:1034 paras 173–175.

when non-binding measures supplement EU binding acts or contribute to their implementation.[77] Yet the duty to take into account enshrined in the *Grimaldi* jurisprudence, arguably stemming from the principle of loyal cooperation[78] and relevant in particular in the context of EU recommendations,[79] still does not amount to a duty of consistent interpretation or further, to a duty to comply with the instrument at issue.[80] This prompts the observation that the only relatively clear legal effects EU soft law instruments may entail consist of the self-binding effects on the EU actor enacting the instrument as a result of the general principles of legitimate expectations, equal treatment or legal certainty.[81] It should be noted, first, that the legal effects of such instruments are not applicable to their addressees,[82] meaning that the instruments still cannot be seen as binding acts 'intended to produce legal effects vis-à-vis third parties'. Second, the self-binding effect has been established by the CJEU only in cases

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[77] Grimaldi (n 67) para. 18; Case C-207/01 *Altair Chimica v Commission* [2003] ECR I-8875 para. 41; see also Andone and Coman-Kund (n 10) 27.

[78] Actually, in *Grimaldi* (n 67) and follow-up jurisprudence, including the recent Case C-501/18 *BT* (n 67) para. 80, the Court does not explicitly refer to the principle of sincere cooperation as a 'trigger' of the 'duty to take into consideration,' but scholars maintained that the former can be seen as legal foundation of the latter, see Senden (n 43) 407 and 414.

[79] Senden (n 43) argued that the 'Grimaldi obligation' should apply only with regard to recommendations and not be extended to other EU soft law instruments, 408–9; yet very recently, the Court extended this obligation also to EBA's 'guidelines' on the ground that they fully resemble EBA's recommendations based on Article 288 TFEU, Case C-911/ 19 *FBF* (n 67) paras 42 and 71.

[80] See Senden (n 43) 406–9. In recent jurisprudence concerning the specific 'recommendations' included in the Commission reports adopted within the framework of the post-accession Cooperation and Verification Mechanism (CVM) for Romania, the CJEU pushes the 'taking into consideration' duty, this time with explicit reference to the principle of sincere cooperation, to its outer limits, by ascertaining that the binding 'benchmarks' enshrined in Commission Decision 2006/929 establishing a mechanism for cooperation and verification of progress in Romania post-accession entail that:

> Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, *taking due account*, *under the principle of sincere cooperation laid down in Article 4(3) TEU*, of the reports drawn up by the Commission on the basis of that decision, *and in particular the recommendations made in those reports* (emphasis added).

Joined Cases C–83/19, C–127/19, C–195/19, C–291/19, C–355/19 and C–397/19, *Asociaţia 'Forumul Judecătorilor din România'* EU:C:2021:393 para. 178 and *Euro Box Promotion and Others* (n 76) para. 175.

[81] See Stefan (n 33) 329, 342 and Craig (n 76) 631–36, who focus in particular on the Commission's soft law instruments in the field on competition and state aid.

[82] Case C-360/09 *Pfleiderer* EU:C:2011:389 para. 21; Case C-226/11 *Expedia* (n 76) paras 27–29; Case C-526/14 *Tadej Kotnik and Others v Državni zbor Republike Slovenije* EU:C:2016:570 paras 43–45.

involving 'atypical' or 'informal' (Commission) acts,[83] so not with regard to formal non-binding instruments like recommendations. It thus seems that the 'legal effects' of EU formal non-binding instruments essentially boil down to the duty to take them into consideration, which, however, does not amount to an overt obligation to comply with them neither by their addressees, nor by courts.

3.3 The Duty To State Reasons – A Legal and Normative Parameter for EU Soft Law?

In view of the ambiguity and controversy surrounding the 'legal effects' of EU soft law instruments and of their problematic 'hardening' through (too) great resemblance with legally binding acts or due to their knotty relationship with such acts, we suggest to take one step back before jumping forward in advancing scholarship in this field. In an attempt to attenuate the current complexity, we first take one step back by simply conceiving of EU soft law instruments, in line with the EU constitutional legal framework and CJEU jurisprudence, as legally non-binding acts or as legal acts with no binding force. In a second move, we make the jump forward by identifying the persuasive force of EU soft law instruments as their distinctive feature as legal acts and the key to their effectiveness.[84] The CJEU already emphasized the persuasive nature of recommendations as typical or formal steering EU non-binding acts in that 'Article 288 TFEU intended to confer on the institutions which usually adopt recommendations *a power to exhort and to persuade* (emphasis added), distinct from the power to adopt acts having binding force',[85] but we think that this formula extends beyond this category of EU soft law instruments.

EU soft law instruments as legally non-binding but persuasive instruments require, in our view, a special focus on the intrinsic quality of these instruments, in particular, to 'be clearer and more convincing about their intended effects/results as a way to foster' [voluntary] 'compliance by addressees and acceptance by the public at large'.[86] In view of their fundamental persuasive

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[83] Commission notices (Case C-360/09 *Pfleiderer* (n 82)), Commission communication (Case C-526/14 *Kotnik* (n 82)), Commission guidelines (Case C-520/09P *Arkema v Commission* EU:C:2011:619).

[84] See Andone and Coman-Kund (n 10) 30–33.

[85] Case C-16/16P *Belgium v Commission* (n 66) para. 26, further confirmed with regard to the recommendations and guidelines of the European Banking Authority in Case C-501/18 *BT* (n 66) para. 79 and Case C-911/19 *FBF* (n 67) para. 48.

[86] See Andone and Coman-Kund (n 10) 31.

dimension, we suggest that the duty to state reasons is of particular relevance for EU soft law instruments both as a legal and as a normative parameter.[87]

The duty to state reasons is constitutionally enshrined in Article 296 (2) TFEU providing that '[l]egal acts shall state the reasons on which they are based'. A systematic reading of 'legal acts' in light of Article 288 TFEU situated in Part Six, Chapter 2, Section 1 'The legal acts of the Union' of the TFEU suggests that the duty to state reasons in Article 296 (2) TFEU covers both legally binding acts and acts with no binding force (at least the recommendations and opinions formally enshrined in Article 288 TFEU).[88] Regarding the scope and content of the 'duty to state reasons', although there are variations depending on the nature of the EU act concerned[89] and other factors,[90] the CJEU generally held that the statement of reasons:

> (…) must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable

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[87] Ibid. According to Craig (n 76), the duty to state reasons serves multiple purposes: (1) 'from the perspective of affected parties, it makes the decision-making process more transparent, so that they can know why a measure has been adopted'; (2) '[f]rom the perspective of the decision-maker, an obligation to give reasons helps to ensure that the rationale for the action has been thought through'; (3) [f]rom the perspective of the CJEU, the existence of reasons facilitates judicial review' 370.

[88] Some legal scholars seem to support such an extensive reading of the scope of the 'duty to state reasons'; Hofmann, for instance, argues that Art. 296 (2) TFEU includes a general obligation 'to support all acts in the EU with reasons', Herwig C.H. Hofmann, 'General Principles of EU Law and EU Administrative Law' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, OUP 2017) 218, while Craig (n 76) 370, notes that 'the scope of Article 296 TFEU is broad and applies to all legal acts'; Senden also maintains that 'the statement of reasons requirement' should be extended to soft law acts, but seemingly only for the purpose of establishing their legally binding force, Senden (n 43) 288. Historically, Art. 190 EEC and Art. 162 EURATOM, later on replaced by Art. 253 TEC, mentioned explicitly only regulations, directives and decisions under the duty to state reasons, whereas Art. 15 ECSC included not only the (binding) decisions and recommendations, but also the (non-binding) opinions of the High Authority under the scope of this obligation; from this perspective, the shift to the more generic category of 'legal acts' in Art. 296 (2) TFEU entails *a fortiori* a broader coverage of the duty to state reasons, encompassing both binding and non-binding legal acts.

[89] In particular depending on whether the act concerned is of general application or is an individual act, see Case 5-67, *W. Beus GmbH & Co. v Hauptzollamt München* EU:C:1968:13 p. 95.

[90] I.e. 'the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure (…) may have in obtaining explanations', see Case C-367/95 P *Commission v Sytraval and Brink's France SARL* ECLI:EU:C:1998:154 para. 63.

> the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its powers of review.[91]

Based on this jurisprudence, Craig distilled that the duty to state reasons 'will normally require specification of the Treaty article on which the measure was based; the factual background to the measure; and the purposes behind it'.[92] With the disclaimer of the different intensity of review applied by the Court to acts of general application (more lenient)[93] as compared to the individual acts (more strict),[94] these criteria could hold by analogy also with regard to EU soft law acts. Accordingly, under Article 296 (2) TFEU, soft law instruments should provide reasons and explanations regarding the chosen legal basis, the legal-factual background prompting the adoption of the instrument, including considerations of subsidiarity and proportionality, as well as the intended aims/objectives of the instrument.[95] In view of their distinctive persuasive nature, we suggest that the higher intensity 'duty to state reasons' test regarding in particular individual binding acts[96] should be extended in principle to all genuine EU soft law acts, be they general or individual in scope.

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[91] *Commission v Sytraval* (n 89); see also Craig (n 76) 370 and the case law mentioned there.

[92] Craig (n 76) 371.

[93] The Court held that for acts of general application '(…) the preamble may be limited to indicating the general situation which led to its adoption (and) and the general objectives which it is intended to achieve', see Case 5-67 *Beus* (n 90) 95 and Case C-342/03, *Spain v Council* EU:C:2005:151 para. 55.

[94] In order to enable, inter alia:

> Member States and all interested nationals of ascertaining the circumstances in which the Commission has applied the treaty (…) it is sufficient for the decision to set out in a concise but clear and relevant manner, the principal issues of law and of fact upon which it is based and which are necessary in order that the reasoning which has led the Commission to its decision may be understood.

Case 24-62 *Federal Republic of Germany v Commission of the European Economic Community* EU:C:1963:14 p. 69.

[95] A breach of the duty to state reasons in genuine non-binding soft law acts is not likely to lead to judicial review under the annulment procedure, unless that act turns out to be a genuine binding act, see Case C 16/16P *Belgium v Commission* (n 66) para. 28, though, in the past, in the context of an application for annulment, the Court declared that a letter of the High Authority was inexistent as a non-binding opinion because of the lack of the statement of reasons, deemed as an essential element of that opinion, Joined Cases 1-57 and 14-57 *Société des usines à tubes de la Sarre v High Authority of the European Coal and Steel Community* ECLI:EU:C:1957:13 p. 112. However, such a breach could arguably be covered by the judicial review of the validity of such an act under the Art. 267 TFEU preliminary ruling procedure.

[96] In such cases, the Court often moves on to examine more in-depth the reasons upon which the act is based, by looking at the clarity, sufficiency and internal validity of the reasoning, and finding that an inadequate, vague and inconsistent statement

From a broader normative perspective, we maintain that the 'duty to state reasons' is of particularly great relevance for the purpose of increasing the intrinsic quality and effectiveness of EU soft law instruments by persuading addressees to follow them and by ameliorating the overall public acceptance of such tools. Accordingly, the emphasis should lie on the validity, soundness and completeness of the reasoning used in such instruments, as an essential condition for their effectiveness as non-binding instruments.[97] Furthermore, closer attention should be paid also to the design of EU soft law instruments. Thus, in order to highlight their specific nature and function as more persuasive and less prescriptive acts, and mark a neater distinction from legally binding acts,[98] the design of soft law acts could be characterized by the intertwining between arguments and proposed rules of conduct throughout the instrument (instead of the standard format, featuring a clear delineation between the Preamble and the prescriptive part, used in EU binding acts), in combination with a non-binding wording and a more argumentative style.[99] Examining and assessing EU soft law instruments as non-binding but (potentially highly) persuasive instruments thus requires complementing legal analysis with insights from argumentation theory,[100] resulting in the legal-argumentative approach taken in this chapter.

4. A LEGAL-ARGUMENTATIVE PERSPECTIVE ON EU SOFT LAW

As we argued, EU soft law instruments need to be examined beyond the boundaries of legal scholarship. The main issue is to ensure that such instruments devoid of legally binding force remain relevant by being effective in convincing addressees to comply due to their persuasive nature rather than due to their 'legally binding-like' prescriptive character. If such instruments should remain ideally non-binding (in line with the Treaty provisions), then their persuasive capacities need to be fully taken into account. In these instruments, argumentation employed to persuade addressees should play a crucial role for their effectiveness, as this should not depend so much on their 'hardened'

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of reasons does not meet the requirements of the duty to state reasons, see Case 24-62 *Germany v Commission* (n 94) 69–70.

97 Andone and Coman-Kund (n 10) 32.

98 This is relevant in particular for 'hardened' EU soft law instruments, such as Commission recommendations resembling EU binding acts qua structure and language.

99 Some atypical non-binding acts adopted in practice by the Commission actually feature such a 'persuasive format,' e.g., Commission, 'Communication on additional COVID-19 response measures' COM(2020) 687 final.

100 For an account of what argumentation theory has to offer for the analysis and evaluation of EU soft law instruments, see Andone and Coman-Kund (n 10) section 3.

ambiguous status, but on their capacity to induce acceptance by addressees. This should be reflected accordingly in the instrument's format by intertwining arguments with suggested rules of conduct throughout the instrument, instead of borrowing the delineation between Preamble and prescriptive part characterizing legally binding acts.

In earlier studies, we have identified four argumentative parameters for the analysis and assessment of EU soft law instruments.[101] First, we argued that the *argumentative content* of EU soft law instruments should enable distinguishing them from legally binding instruments. Second, we called for particular attention to be paid to the *argumentative design* of EU soft law instruments in such a way that their formally non-binding nature is matched by persuasive suggestions inviting addressees to follow a course of action. Third, we pointed out that the *argumentative effectiveness* of EU soft law instruments plays a significant role in fostering compliance in the absence of legal coercion. Finally, we emphasized that *argumentative soundness* is vital to obtain compliance with EU soft law instruments through non-fallacious means. For the purpose of examining EU soft law instruments as non-binding persuasive acts, we advance a legal-argumentative analytical framework. The framework links up the legal parameters of the duty to state reasons (i.e., legal basis, legal-factual background, aims of the instrument) – assessed in light of the judicially forged criteria 'clarity', 'consistency,' 'adequacy' – to the four argumentative parameters mentioned above encompassing also the broader normative dimension of the 'duty to state reasons' discussed previously. Our normative approach assumes that both substance and form (style, language and structure) should consistently reflect the nature and particular features of EU soft law instruments. Table 7.1 below shows the legal-argumentative framework for assessing and drafting EU soft law instruments.[102]

5. FROM 'HARDENED' TO NON-BINDING BUT PERSUASIVE LEGAL INSTRUMENTS: A CASE STUDY

5.1 Commission Recommendation (EU) 2020/518

Based on the legal-argumentative framework sketched out above, we provide a detailed analysis and evaluation of the Commission's Recommendation (EU) 2020/518 regarding a common Union toolbox for the use of technology and

[101] See Coman-Kund and Andone (n 8) and Andone and Coman-Kund (n 10).
[102] This framework partly draws on Andone and Coman-Kund (n 10) 45.

Form	
Argumentative style Non-binding/inviting language Intertwining arguments with suggestive rules of conduct throughout the instrument	
Substance	
Legal parameters (duty to state reasons)	*Argumentative parameters* (normative dimension of duty to state reasons)
Legal basis ***Legal-factual background*** ***Aims of the instrument*** abiding by standards of clarity consistency adequacy	***Argumentative content*** Criteria/requirements • The arguments should reflect the specificities of the situation and the policy area • The argumentative patterns should be distinguishable from their counterparts in legally binding instruments • Arguments should be provided in support of the legal basis as well as the of necessity and desirability for enacting the instrument • Argumentation should as much as possible integrate relevant evidence and information • Arguments should be employed throughout the instrument
	Argumentative design Criteria/requirements • Arguments should be designed as to reflect consistency between its legally non-binding nature and its verbal presentation • Arguments should feature non-binding formulations merely inviting addressees to adopt the proposed measures
	Argumentative effectiveness Criteria/requirements • Argumentation should be employed to increase chances that the instruments are complied with in the absence of legal coercion • Argument types should be adapted to the preferences and values of the addressees depending on the specific goal that is aimed to be achieved by means of the instrument and the relevant policy area
	Argumentative soundness Criteria/requirements • Argumentation should be encompassing and complete by enabling the addressees to judge whether to accept or not accept the proposed measures • Arguments should be reasonable, logically valid and accurately reflecting the objectives and legal nature of the instrument, as well as the legal-institutional-policy context within which the instrument is enacted • Fallacious arguments should be avoided

Table 7.1 A legal-argumentative framework for assessing and drafting EU soft law instruments

data to combat and exit from the COVID-19 crisis.[103] This recommendation has been selected because it is illustrative of the hardening pattern discussed in this chapter. This case study offers valuable descriptive data about the

[103] OJ L 114, 14.4.2020, p. 7.

argumentation in such EU soft law instruments and enables us to ultimately propose guidelines for improving their drafting and effectiveness. More specifically, the case study is pertinent in order to explore, characterize and explain how the Commission attempts to convince the Member States about taking certain controversial measures, and also to spell out how the content and design of the recommendation should be drafted in order for the instrument to be persuasively effective and sound. Our analysis concerns mainly the Preamble of the recommendation (comprising Recitals). The incidental examination of the prescriptive part (comprising points), which contains rules of conduct rather than arguments, serves to reinforce our observations concerning the hardening character of the instrument by pointing at elements indicative of a binding-like instead of a persuasive instrument that should be characterized by an argumentative style and inviting language.

5.2 Legal Parameters

5.2.1 Legal basis

Recommendation 2020/518 mentions as a legal basis Article 292 TFEU without further explanations. This is problematic as that Treaty provision merely indicates that the Commission's recommendations shall be adopted 'in the specific cases provided for in the Treaties'. This would require ideally that the Recommendation clearly indicate and explain the specific Treaty provision enabling the Commission to adopt it, or at least convincingly explain why Article 292 TFEU can serve alone as the legal basis of the instrument. Further in the Preamble (Recital 5), the Commission refers to Decision 1082/2013/EU,[104] enshrining in Article 2(5) a coordination role for the Commission regarding information exchanges under that legal act, in an attempt to find additional legal support for its recommendation; yet that provision enshrined in an act of secondary legislation (itself based on Article 168 (5) TFEU) does not arguably equate a specific case 'provided for in the Treaties,' nor does it explicitly refer to recommendations as a means through which the Commission may exercise its coordinative function, which however must be discharged 'in liaison with the Member States' and within the framework of the Health Security Committee created under Article 17 of Decision 1082/2013/EU. As such, in the absence of convincing and sufficient explanations in the Preamble of Recommendation 2020/518, one may question the chosen legal basis and the underlying competence of the Commission to adopt this legal instrument

[104] Decision 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC (OJ L 293, 5.11.2013, p. 1).

covering such diverse issues like the use of digital technologies, interoperability between mobile applications, processing (including exchanges between national health authorities) of sensitive personal data as well as data protection and data security issues.

5.2.2 Legal-factual background

Quite differently from the issue of legal basis, the Preamble of the Recommendation features an elaborated legal-factual background, including several EU legal acts and policy documents (including inter alia, Directive 2011/24/EU on patients' rights in cross-border healthcare,[105] Regulation (EU) 2017/745 on medical devices,[106] the Directive on Privacy and Electronic Communications,[107] the General Data Protection Regulation[108] and Commission's Communication on 'A European Strategy for Data'[109]) relevant for various aspects covered by the instrument. It provides detailed factual and legal explanations underlying the need for EU level-coordinated action regarding the use of digital technologies and data processing in response to COVID-19, the approach and measures envisaged, as well as subsidiarity and proportionality aspects. Yet, to begin with, one may wonder whether the collection of legal and policy instruments displayed in the Preamble is sufficient to justify the creation of the seemingly quite far-reaching digital 'toolbox' envisaged in the Recommendation; in particular one may question the appropriateness of the Directive on patients' rights in cross-border healthcare, the Regulation on medical devices, or of the Communication on 'A European Strategy for Data' to cover the EU coordinated collection and processing of

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[105] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (OJ L 88, 4.4.2011, p. 45).

[106] Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC (OJ L 117, 5.5.2017, p. 1).

[107] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

[108] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

[109] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European strategy for data, COM/2020/66 final.

sensitive medical data collected via (interoperable) mobile applications.[110] Next, the Commission's narrative is built on the premise, expediently dealt with, that measures taken or envisaged by Member States necessarily lead to fragmentation, hampering the effectiveness of the fight against COVID-19, and harming the single market as well as fundamental rights (see Recitals 2 and 22). The Commission seems to use a three-step approach corresponding largely to the main tenets of the subsidiarity principle: (1) Member States cannot succeed alone in combating the COVID-19 crisis (Recital 1); (2) the different approaches/solutions applied by the Member States amount inevitably to fragmentation (Recital 2); (3) therefore an EU-level common approach is needed to effectively address the problem (Recital 3). The common approach put forward is supposed to effectively support national authorities in their fight against COVID-19, as well as to preserve the integrity of the single market and the fundamental rights and freedoms allegedly threatened by the fragmented measures of the Member States (Recital 3). However, besides calls for consultation, coordination, reporting and observance of the relevant legal framework, the Preamble does not explain too extensively what the EU level common approach entails precisely and how it will help better addressing the COVID-19 crisis; this is in slight contrast with the prescriptive part of the Recommendation, where the digital 'Toolbox' against COVID-19 is laid down in some degree of detail. What is more, the Commission takes a rather light approach regarding the potential side effects of its common approach, in particular the impact on data protection and fundamental rights resulting from the far-reaching interoperability between mobile applications and data sharing across the European Union and beyond (see Point 12 of the prescriptive part) engendered by the Recommendation. This in turn raises questions from a proportionality perspective.

5.2.3 Aims of the instrument

The aims of the Recommendation are generally stated in the Preamble (Recitals 3–4 and further articulated in Point 1(1) of the prescriptive part. What becomes, however, apparent is that by aiming at the creation of a 'toolbox' entailing a 'pan-European approach for the use of mobile applications' and

[110] While the Directive on Privacy and Electronic Communications does not explicitly foresee derogations from its protection regime on public health grounds, Art. 9 (i) of the GDPR allows exceptionally the processing of health-related and other sensitive personal data for public health purposes 'on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject'; since for the time being such law does not exist *per se* at EU level but at national level, one may argue that the digital 'toolbox' in the Recommendation lacks a proper foundation in EU legislation.

a 'common scheme for using anonymized and aggregated data on mobility of populations', the Commission Recommendation seems to go beyond mere coordination, and seeks to achieve a certain degree of harmonization between the Member States on very concrete COVID-19-related mobile applications involving personal data and the use of mobility data for modelling and predicting purposes (Point 4 of the prescriptive part). This again raises questions about the suitability of a recommendation for reaching such ambitious aims, and about the 'orthodoxy' of the Commission's practice to use such an instrument in order to nudge Member States into things that do not normally belong to the EU competence, or, if they did, they should normally be regulated via an EU binding act.

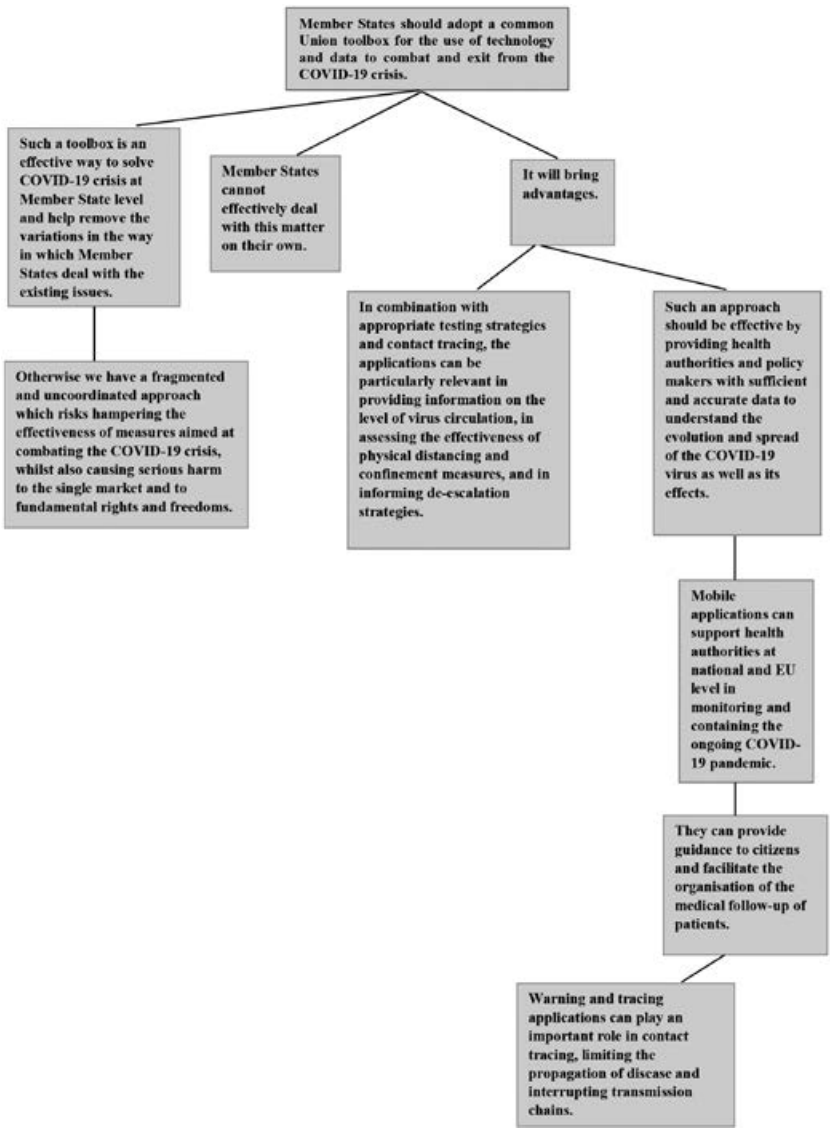
5.3 Argumentative Parameters

5.3.1 Argumentative content

The term 'argumentative content' refers to the propositional content of standpoints and arguments and how they are structured[111] in an attempt to convince Member States of the acceptability of measures concerning the use of technology and data to combat the COVID-19 crisis. The reconstruction of the standpoints and arguments of the recommendation at issue (see Figure 7.1 below) brings to light an argumentative structure that is arguably identical to the argumentative pattern of directives. The standpoint, implicitly advanced as a practical claim for action, requests Member States to adopt a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis. One of the main arguments to support this is that such a toolbox is an effective way to solve the COVID-19 crisis at Member State level and helps remove the variations in the way in which Member States deal with the existing issues. Such variations are seen as a problem which can only be solved at EU level. Two other coordinative (implicit) arguments can be reconstructed from the Preamble, namely that Member States cannot effectively deal with the matter on their own and adopting a common toolbox will yield advantages. A number of such advantages are subsequently enumerated. Particularly obvious in this argumentation structure is not only that it is practically the same as in the case of legally binding instruments such as directives,[112] but also that the argument types do not always match the type of standpoint that is advanced. At the main level, a so-called pragmatic argumentation

[111] Andone and Coman-Kund (n 10) 37.

[112] See Corina Andone and Sara Greco, 'Evading the Burden of Proof in European Union Soft Law Instruments: The Case of Commission Recommendations' (2018) *International Journal for the Semiotics of Law* 31(1).



Source: Author's own.

Figure 7.1 Argumentation structure of Commission Recommendation (EU) 2020/518

is put forward, comprising an implicit practical standpoint recommending

a course of action (reconstructed as 'Member States should adopt a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis'), constituting the statement that is arguably the subject of disagreement between the Commission and the Member States. This standpoint is supported by a causal proposition (reconstructed as 'Such a toolbox is an effective way to solve COVID-19 crisis at Member State level and help remove the variations in the way in which Member States deal with the existing issues') and an evaluative proposition in which positive consequences are mentioned (reconstructed as 'It will bring advantages').[113]

At first sight, this pragmatic argumentation would be sufficient to accept the main standpoint of the recommendation. Yet the causal and the evaluative propositions are further complemented by a third argument according to which Member States cannot effectively deal with this matter on their own. This argument contains a descriptive proposition which stands in sharp contrast with the prescriptive standpoint, normally supported by a causal and an evaluative proposition.[114] Moreover, this descriptive proposition is not further justified. Such a way of arguing is most likely to lead to resistance on the side of the Member States, if only because they have already adopted measures at national level, which are discarded by the Commission. The only reference to national level measures (Recital 22: 'Certain Member States have taken measures to simplify access to necessary data') is immediately countered by pointing at fragmentation of approaches impeding combating the virus (Recital 22: 'However, the EU's common efforts combating the virus are hampered by the current fragmentation of approaches'). Instead, the Commission focuses on bringing to the foreground six arguments supporting the benefits of adopting a common Union toolbox for the use of technology and data to combat and exit from the COVID-19 crisis.

The specifics of the crisis situation in which the recommendation is enacted would require arguments about the urgency of the situation, threats and correlated risks.[115] No arguments supporting the urgency of the situation (Point 2: 'Member States should take these actions as a matter of urgency') are advanced to argue for the necessity, usefulness and desirability of the proposed measures. The same holds for the fact that a situation of threat is at issue, which is only pointed out in the Preamble (Recitals 5 and 7). Risk is acknowledged in connection with 'a fragmented and uncoordinated approach' which may hamper the effectiveness of measures aimed at combating the

[113] See Constanza Ihnen, *Pragmatic Argumentation in Law-making Debates* (Amsterdam: Sic Sat 2012) 14–18 for the full inferential structure of pragmatic argumentation.

[114] Ibid.

[115] Andone and Coman-Kund (n 10) 38.

COVID-19 crisis with 'serious harm to the single market and to fundamental rights and freedoms' (Recital 2). But there is no justification provided as to why a common approach would lead to effectiveness of measures aimed at combating the crisis and how fundamental rights and freedoms would be safeguarded in a common approach. On the contrary, the risk that 'applications and inaccurate data could result in stigmatization of persons who share certain characteristics because of a perceived link with the disease' is mentioned under Recital 24 and dealt with under Recital 25 when the principle of data minimization is explained. While the justification of risks is certainly to be saluted, the omission of some vital aspects regarding urgency and threats is likely to decrease trust in the Commission on the side of the Member States, which may feel that a top-down approach is being imposed on them by the decision-maker under time and administrative pressure.

The similarity with legally binding instruments such as directives is further reinforced in the prescriptive part of the instrument by the strikingly detailed manner in which the objective is explained, alongside specific and precise guidelines to be followed. After a number of definitions, highly detailed explanations are provided regarding the process for developing a toolbox for use of technology and data, a pan-European approach for COVID-19 mobile applications, privacy and data protection aspects of use of the mobile applications, and the use of mobility data to inform measures and exit strategy. Even if the instrument is labelled a 'recommendation,' it sets strict and detailed rules for action restraining the discretion of the Member States to the point of obfuscating the instrument's true legal nature. As AG Bobek argued,[116] a legitimate expectation is created that is analogous to legally binding acts by creating the misleading impression that addressees must comply with the instrument.

5.3.2 Argumentative design

The term 'argumentative design' refers to the way in which argumentative content is presented in the EU soft law instrument.[117] In previous studies, we pointed out that such presentation should not be evaluated only at the level of modals such as *shall/will/should*, etc., which drafting manuals and courts traditionally favour.[118] Such modals provide only a partial indication of the strength of obligations being expressed in the recommendation. We argue for a much broader interpretation of argumentative design which should comprise all formulations that give an indication of the legal nature of the instrument.

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[116] Opinion of AG Bobek in Case C-16/16P (n 56) paras 89 and 119.
[117] Andone and Coman-Kund (n 10) 39.
[118] See AG Bobek (n 56) para. 86.

In modal terms, and following the CJEU previous interpretations of similar cases,[119] we might at first sight conclude that the examined recommendation is worded in non-mandatory terms. CJEU jurisprudence assessing the wording of legal acts without any exception concludes that the use of *should* is a reliable indicator of a lack of obligation. Yet this modal does not always indicate an invitation to do something. When employed as a deontic modal verb, *should* conveys obligation and necessity, just as *must*, *have to, need and could.*[120] Such a mandatory use of *should* occurs in this recommendation both in the Preamble and the prescriptive part, as when it is mentioned that 'This Recommendation *should*, where necessary, be complemented by additional guidance by the Commission, including on the data protection and privacy implications of the use of warn and prevent mobile applications' (recital (32)) and under Purpose (Point 2) when foreseeing that:

> Member States *should* take these actions as a matter of urgency and in close coordination with other Member States, the Commission and other relevant stakeholders, and without prejudice to the competences of the Member States in the domain of public health. They *should* ensure that all actions are taken in accordance with Union law, in particular law on medical devices and the right to privacy and the protection of personal data along with other rights and freedoms enshrined in the Charter of Fundamental Rights of the Union.

Obviously, Member States are not invited, but compelled to consider other guidelines for data protection, to act urgently in this crisis situation and to ensure that all actions are in accordance with EU law.

Furthermore, while the recommendation does not include a clear indication in the Preamble as to the non-binding nature of the instrument requiring voluntary compliance, it includes nevertheless further indicators reinforcing the likely intended 'hardening' of the recommendation. The instrument is designed with a structural compliance mechanism of reporting and reviewing,[121] which can be seen as rather pressuring Member States to comply (instead of persuading them) in that should they not want to adopt the proposed common tool, they would otherwise be seen as uncooperative. By requesting Member States to report to the Commission on actions taken pursuant to the recommendation by 31 May 2020 and on a periodic basis thereafter (Point 22), and share best practices, there is a certain degree of 'bindingness' on the addressee which cannot be denied by simply pointing at the absence of explicitly mentioned

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[119] See for details Andone and Coman-Kund (n 10).

[120] Laura Hidalgo-Downing, 'Stance and dialogicity in Barack Obama and George W. Bush's farewell addresses to the nation: Effectivity, epistemicity and (contrastive) negation' (2021) *Journal of Pragmatics* 185–96, Table 1.

[121] Opinion AG Bobek (n 56) para. 121.

legally binding effects. This is all the more obvious when mentioning that 'The Member State concerned should take utmost account of such observations,' (Point 23) making it quite clear that the recommendation has not been enacted with the intention of being disregarded by the addressee as it may see fit. By asking Member States to 'take *utmost* account' of the Commission's observations, and to follow precise deadlines for submitting observations on the proposed measures ('within a week'), it can be presumed that the addressee is expected to comply and to do so immediately. The lexical intensifier 'utmost' could just as well be left aside, instead the Commission strongly emphasizes its indirect request for compliance. Moreover, the Commission plans to 'assess the progress made and the effect of this Recommendation' with a view to making 'further recommendations to Member States, including on the timing of the measures applied in the areas covered by this Recommendation' (Point 24).

Our interpretation of the argumentative design is reinforced by the argumentative content of this recommendation. Recital 22 of the recommendation acknowledges that 'Certain Member States have taken measures to simplify access to necessary data. However, the EU's common efforts combating the virus are hampered by the current fragmentation of approaches.' It can be presumed that the recommendation is not adopted with the intention simply to be disregarded by their addressees, particularly if they are likely to be otherwise accused of hampering efforts at EU level to combat the crisis.

5.3.3 Argumentative effectiveness

The term 'argumentative effectiveness' refers to the capacity of the recommendation to obtain compliance from the addressee in the absence of legal coercion.[122] The main issue is how arguments – the most important means for obtaining persuasion[123] – are advanced strategically in an attempt at convincing the addressees of the value, importance, necessity, desirability and advantages of taking certain measures, the more so when such measures are controversial. Most importantly, the Commission needs to convince Member States that the measures they have already adopted need to be coordinated with those of the other Member States. They also need to convince Member States that new measures as proposed by the Commission need to be taken.

Since the instrument at issue is non-binding, voluntary compliance should be sought to avoid resistance on the part of the Member States, and possible litigation. We have already seen that the Commission does not always leave

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[122] Andone and Coman-Kund (n 10) 41.

[123] See George A. Kennedy, *Aristotle on Rhetoric: A Theory of Civic Discourse* (Oxford 1991).

much room for the Member States not to comply with the proposed measures. But argumentation is not only important for supporting the proposed course of action, it should also be employed to facilitate shared decision-making between the Commission and the addressee through informed consent, the primary aim of which is to secure a collective agreement. Our analysis so far discloses an informative rather than a shared decision-making approach. In an informative approach, Member States are expected to comply after the Commission has disclosed information about benefits, risks and alternatives. But, as we have demonstrated, the Commission does not always provide full information and explanation, which reduces the Member States' capacity and ultimately willingness to comply, sometimes possibly not even trusting the Commission. In such a paternalistic approach, even just partly 'hardened' soft law instruments, as is the case of the current recommendation, could lead to contestation and ultimately credibility loss. In the case of shared decision-making, by contrast, the Commission and the Member States are in a partnership in which both parties have their arguments included in the recommendation. They acknowledge that both the Commission and the Member States hold valid standpoints, preferences, values, knowledge and experiences that have an impact on the identification of an agreed course of action.[124]

If EU soft law instruments need to be transformed from prescriptive tools resembling hard law into effective persuasive tools, to enhance the degree of compliance with these legally non-binding instruments, it is crucial to conceptualize argumentation as an instrument of rational persuasion[125] that can be employed to improve their quality. To do so, the Commission has to move away from imposing a course of action by facilitating a dialogue with the Member States in which national measures are not just acknowledged by simply mentioning them ('Certain Member States have taken measures to simplify access to necessary data'). In this recommendation, the Commission acts as if it is the only decision-maker, trying to convince the addressee of the legitimacy and validity of its position. The fact that addressees get to know and understand the reasons behind the recommendation can certainly be particularly helpful, especially in cases in which the EU's views concern crisis issues that are difficult for the addressee to accept. But more is needed for inclusive decision-making, namely the Member States' existing measures and underlying reasons need to be acknowledged. Only by means of such an

[124] See for similar views highlighting the dialogical dimensions of the duty to state reasons Senden (n 43) and Craig (n 76).

[125] Anthony Blair, 'Argumentation as Rational Persuasion' (2012) *Argumentation* 26(1) 73.

exchange does it become possible to engage with the addressee and create a strong foundation for the ultimate decision.

5.3.4 Argumentative soundness

The term 'argumentative soundness' refers to the reasonableness of the arguments advanced in the EU soft law instrument. The notion is employed to cover both logically invalid arguments (such as inconsistencies, circular reasoning) and informal fallacies which may hinder obtaining compliance reasonably, such as ambiguity, vagueness, false dichotomies, evasions of the burden of proof, false generalizations, etc.[126] In other words, the quality of the arguments is assessed by judging whether certain fallacies have been committed by the EU decision-maker.

One of the problematic uses of arguments in this recommendation concerns the *evasion of the burden of proof* by the Commission regarding the principle of subsidiarity. As in all legal acts, the Commission argues for action to be taken at EU level rather than maintaining the current situation in which Member States adopt their own measures. But instead of arguing why the different approaches taken at national level do not and cannot solve a certain issue, the Commission merely points at the necessity for common standards at European level. It fails to justify why instead of actions at national level, it is more effective to take action at EU level. Just by mentioning that such a situation risks creating fragmentation of the internal market and lack of coordination among Member States is not a reason to impose action at EU level. It is simply mentioned that taking different approaches to an issue is problematic because Member States take their own measures, but the Union's intervention remains unjustified. This way of arguing is indicative of an evasion the burden of proof with respect to the principle of subsidiarity. The Commission should present the advantages that Union action may have relative to Member States' action and should outline the situations in which EU action produces clear benefits compared to action at Member State level by reason of its scale or effectiveness.

The *fallacy of omission* of the positive effects of the actions taken by the Member States is employed to recommend uniform measures at EU level. It looks as if should the addressee not want to implement the recommended measures, it would act against 'a genuine spirit of solidarity', especially in times of crisis. It makes it look as if just by acknowledging the same problems (recital (1): 'an unprecedented challenge to […] health care systems, way of life, economic stability and values'), the Commission and the Member States also need to share the same solution, or otherwise the latter would not be coop-

[126] Andone and Coman-Kund (n 10) 42.

erative. It remains unclear why 'fundamental rights and freedoms' cannot be ensured if national measures remain in place and how these values would be respected if common EU action is taken.

Another unsound way of arguing that stands out in this recommendation consists of an inappropriate use of a causal relation. This fallacy, known by its Latin name of *argumentum ad consequentiam*, is characterized as 'the argument for accepting the truth […] of a proposition by citing the consequences of accepting that proposition […]'.[127] Under Recital 3 of the recommendation it is mentioned that 'It is […] necessary to develop a common approach to the use of digital technologies and data in response to the current crisis. That approach *should be effective* in supporting competent national authorities […]' (emphasis added). Similar to 'It can't be raining, because that would mean we'd have to cancel our picnic,'[128] the Commission advances a normative proposition to support a factual standpoint.

The quality of the argumentation is also affected by presenting the adoption of the common toolbox for the use of technology and data to combat and exit from the COVID-19 crisis as the only optimal solution, while suggesting that other options (such as the measures already taken by the Member States) are suboptimal by not discussing their advantages at all. In this way, a *false dichotomy* is created that erroneously limits the available options and dismisses those already in existence. Actions taken by individual Member States are arguably insufficient and inefficient in the current situation. Moreover, an exaggerated situation is sketched already under Recital 1 that '*No* single Member State can succeed alone in combating the COVID-19 crisis' (emphasis added). By downplaying the capacity of *all* Member States to take appropriate measures, the proposed solution (a common toolbox) is implied to be the most suitable course of action in the current circumstances.[129]

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[127] Douglas Walton, 'Historical Origins of Argumentum ad Consequentiam' (1999) *Argumentation* 13(3) 252.

[128] Frans H. van Eemeren and Francisca Snoeck Henkemans, *Argumentation. Analysis and Evaluation* (Routledge 2017) 117.

[129] In this case, also for reasons pertaining to subsidiarity and proportionality, it would perhaps be desirable for the Commission to undertake a thorough and (as much as possible) balanced comparative analysis of all the relevant regulatory scenarios potentially applicable (ranging from leaving the matter in the hands of the Member States, to light EU-level coordination, and to more enhanced harmonization-like EU-level coordination), similar to that carried out within the impact assessments for EU binding acts according the EU Better Regulation approach, see European Commission, 'Better Regulation Guidelines' SWD (2017) 350, https://ec.europa.eu/info/better-regulation-toolbox_en accessed 24 January 2023.

6. CONCLUSION

Moving away from the endless discussions regarding the legal ambiguity of soft law, we suggest to conceive of EU soft law instruments as essentially non-binding persuasive acts. Our view not only finds seemingly solid grounding in the Union's legal framework and jurisprudence, but it also allows for refocusing on assessing and improving the intrinsic quality and design of these EU governance tools with a view to enhance their effectiveness. The specific persuasive dimension of EU soft law requires, in our view, that particular importance is attached to the duty to state reasons both legally, through a rather strict stance on the clarity, consistency and adequacy of the reasoning employed, and more normatively, as a means to increase the effectiveness of these instruments. At the intersection of law and argumentation theory, we approach EU soft law by way of a unique legal-argumentative analytical framework encompassing legal parameters drawn from the duty to state reasons and four argumentative parameters aimed at assessing the quality of the reasoning used in such instruments.

The analysis and evaluation of Commission Recommendation (EU) 2020/518 in light of our legal-argumentative framework demonstrates that the EU decision-maker's standpoints and measures are only partly based on persuasive justificatory reasons. The examination of the argumentative content and design reveals that the recommendation is an ambiguous legal tool, with many aspects suggesting a legally binding instrument. Its effectiveness might thereby be affected, leading ultimately to resistance from the Member States rather than to voluntary compliance. The problematic argumentative soundness of the recommendation reinforces this conclusion, demonstrating that some of the advanced arguments fall short of good quality. Last but not least, the Recommendation falls short of convincingly explaining the chosen legal basis, and it displays shortcomings as to the clarity and adequacy of the reasoning pertaining to the legal-factual background and aims envisaged, which raises questions from the perspective of the principles of conferral, subsidiarity and proportionality. A sharp demarcation between legally binding and legally non-binding instruments imposes strong and sound argumentation, moving away from a 'hardened' quasi-binding legal act to a clear soft law instrument in which persuasion in the absence of legal coercion is central. In this respect, EU recommendations could easily mitigate their resemblance with legally binding acts and enhance their effectiveness as non-binding persuasive instruments, by adopting (1) an inviting language that leaves no doubts regarding the legal nature of the instrument, (2) an argumentative style observing the legal and argumentative parameters discussed in this chapter, (3) a different structure and design featuring the intertwining of reasons and

suggested measures/rules of conduct throughout the instrument. Finally, while our suggested approach could significantly help improving the 'status quo' regarding EU (Commission) soft law instruments, we make the disclaimer that it is not expected to 'solve everything' pertaining to the effectiveness of these governance tools, because of inherent limitations associated with other factors and circumstances, such as Member States' behaviour and interests, the relationship between the Commission and the Member States, and various legal, political, bureaucratic, economic or social aspects that might influence the implementation of EU policies.[130]

[130] We would like to thank Dr. Alberto Quintavalla for the suggestion to include this disclaimer.