The Significance of European Administrative Soft Law for the Implementation of ESI Funds in the Member States

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In the implementation of European Structural and Investment Funds (ESI Funds) the European Commission is increasingly using European administrative soft law. This article explores the legal effects of this for national authorities, responsible for the implementation of European Structural and Investment Funds, and national courts, confronted with disputes in this area. The central issue in this paper is: how to consider these legal effects, especially in the light of flexibility, legality, legal certainty, and transparency?

I. Introduction

The implementation of European Structural and Investment Funds is not only governed by European regulations (so-called hard law). The European Commission also steers the implementation of policy by Member States through soft law. European administrative soft law[1,2] involves rules and guidance to national authorities on the proper interpretation, transposition, application, and enforcement of existing EU law.[3] This can include working documents, guidelines and communications.

Unlike EU legal instruments, soft law is not legally binding.[4,5] This is confirmed by the standard disclaimer that the text concerned is without prejudice to any further position taken by the Commission or judgment of the European Court of Justice (ECJ). Nevertheless, soft law can have legal effects,[6,7,8,9] and affect the rights and obligations of actors, such as the Commission, Member States and beneficiaries of the EU subsidies.[10,11,12] For example, national authorities who grant subsidies through ESI Funds use soft law to decide whether a subsidy is compliant. European soft law therefore affects how ESI Funds are implemented and what beneficiaries receive.

This article explores the legal effects of European administrative soft law (hereafter: European soft law or soft law) for national authorities involved in the implementation of ESI Funds, and national courts, confronted with related disputes. The main aim is to appraise these effects in the light of issues of flexibility, legality, legal certainty, and transparency.

This article is structured as follows. First the phenomenon of European soft law is briefly discussed

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1 The broader term 'European soft law' covers preparatory and informative instruments published by the Commission, like Green Papers, White Papers and action programmes.

2 See L.A.J. Senden *Soft Law in European Community Law* (diss. Tilburg) (Oxford and Portland Oregon: Hart Publishing, 2004) p. 123 et seq.

3 L. Senden *Soft Post-Legislative Rulemaking: A Time for More Stringent Control* (2013) ELJ 19 , pp. 57-75, p. 57.

4 See fn. 3, p. 62.

5 H. C.H. Hofmann, G. C. Rowe, A. H. Türk *Administrative Law and Policy of the European Union* (Oxford: Oxford University Press, 2011) p. 571.

6 C. van Dam *EU Administrative Soft Law and the Separation of Powers* in: Hans-Martien ten Napel & Wim Voermans (ed.) *The Powers That Be. Rethinking the Separation of Powers, A Leiden Response to Möllers* (Leiden: Leiden University Press, 2015) pp. 191-213, p. 193.

7 See fn. 3, p. 62-63.

8 O. Ştefan *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union* (Alphen aan den Rijn: Kluwer Law International, 2012) p. 15-16.

9 See fn. 5, p. 571.

10 A variation on the definition given by Ştefan. See fn. 8, p. 15-16.

11 See also T. Hartley *The Foundations of European Union law: an introduction to the constitutional and administrative law of the European Union* (Oxford: OUP, 2010) p. 354.

12 F. Snyder *Interinstitutional Agreements: Forms and Constitutional Limitations* in: G. Winter (ed.), *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Baden-Baden: Nomos Verlagsgesellschaft, 1996) pp. 453-466, p. 463.

(section II). Second, section III reviews how, according to the ECJ, national authorities and courts should deal with soft law. Third, these findings are compared to Dutch implementation practice (section IV). Fourth, consideration is given to the pros and cons of soft law in the implementation of ESI Funds (section V). Finally, some conclusions are drawn (section VI). This article argues that soft law offers flexibility to the Commission and national authorities, but its disadvantages in relation to issues of legality and legal certainty should not be underestimated.

II. European Soft Law in the Field of ESI Funds

European soft law takes various forms: working documents,[13] communications,[14] guidance notes,[15] reference guides,[16] or guidelines.[17] Many authors have tried to categorise these documents.[18] For the purpose of this article, it is important to distinguish interpretative soft law from decisional soft law. Using interpretative instruments the Commission indicates how existing EU law provisions should be understood and applied.[19] Through compromises, EU law contains provisions open to various interpretations. Although in theory only the ECJ can hand down legally binding interpretations of EU law, in practice national authorities first and foremost apply EU law. National authorities interpreting provisions in different ways threaten an effective and uniform application of EU law. Laying down a certain interpretation in soft law, the Commission attempts to achieve the uniform interpretation of EU law in Member States.[20] In practice, Member States often ask the Commission to clarify European legal instruments; without soft law "they would be stumbling in the dark".[21] An example of an interpretative soft law instrument on ESI Funds is the Guidance for Member States on Article 41 Common Provision Regulation (CPR) – Requests for payment.[22] Here the Commission explains the introduction of phased applications for interim payments to prevent excessive upfront payment of European Investment Funds to financial instruments.

In decisional instruments, the Commission indicates how it will apply EU law in individual cases, where it has been given an implementing, discretionary power.[23] One example concerning ESI Funds are the guidelines for determining financial corrections to expenditure co-financed by the EU under the Structural Funds and European Fisheries Fund for non-compliance with the rules applicable to financial engineering instruments.[24] These apply to the Commission in its relationship with Member States where expenditure concerning financial instruments are deemed irregular and have not been corrected by the Member State. However, the guidelines recommend the competent national authorities to apply the same criteria and rates defined in the guidelines towards beneficiaries, unless they apply stricter standards. Thus, national authorities will follow the guidelines *vis-à-vis* beneficiaries and pass the financial corrections on to them.

Soft law on ESI Funds is usually discussed in an expert committee – the EGESIF,[25] successor to

13 See working document AGRI/60363/2005-REV1, On-the-spot checks of area according to articles 23-32 of Commission Regulation 765/2004, G:\AA\WD\60363 REV1-Final.

14 See the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, *OJ* 2012 C 8/4.

15 See the Revised Guidance Note on Financial Engineering Instruments under Article 44 of Council Regulation 1083/2006, CO-COF_10-0014-05-EN.

16 Financial instruments in ESIF programmes 2014-2020, A short reference guide for Managing Authorities, Ref. Ares(2014)2195942 - 02/07/2014.

17 Guidelines on financial corrections for expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement, Annex to the Commission Decision of 19.12.2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union, C(2013) 9527 final.

18 See fn. 2.

19 See fn. 3, p. 60.

20 H. Adam *Die Mitteilungen der Kommission: Verwaltungsvorschriften des Europäischen Gemeinschaftsrechts? Eine Untersuchung zur rechtsdogmatischen Einordnung eines Instruments der Kommission zur Steuerung der Durchführung des Gemeinschaftsrechts* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) p. 71-72.

21 See fn. 5, p. 570.

22 EGESIF_15-0006-01, 08/06/2015.

23 See fn. 3, p. 60.

24 EGESIF_14-00015, 06/06/2014. See <http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/guidelines_financial_corrections.pdf>.

25 Group of Experts in Structural and Investment Funds (EGESIF). EGESIF deals with delegated acts, guidelines and other documents from the Commission. There is also a Coordination Committee for European Structural and Investment Funds where the Implementation acts are first dealt with (comitology).

COCOF[26] – which consists of representatives of the Member States. Usually the soft law is put to Member States and/or the Commission. After adoption, the soft law is communicated to the national authorities and published on the DG REGIO website. Soft law, however, is not always published in the EU Official Journal.[27,28] Sometimes – at least with agricultural subsidies – a soft law document is known only to the Commission and the national authorities.

III. The Significance of European Soft Law for National Authorities and Courts According to the ECJ

1. National Authorities

European soft law is not legally binding, so national authorities are not obliged to implement European subsidy schemes in accordance with such documents. Article 291 TFEU requires Member States to adopt all measures of national law necessary to implement *legally* binding Union acts.[29] In addition, the principle of loyal cooperation in Article 4(3) TEU – though formulated more broadly than Article 291 – does not oblige Member States to act in accordance with EU soft law.[30,31,32,33] Thus, no obligation exists for national authorities to implement European soft law.[34] They are however competent to implement soft law in their national legal orders.[35] In that case national authorities are bound to soft law by virtue of the national law.[36]

(Indirect) Legal Effects of European Soft Law

Under EU law soft law can actually have (indirect) legal effects on national authorities, even if new obligations are contained in soft law. An important preliminary condition is that soft law can only have legal effect when in line with EU hard law.[37,38,39,40,41] Furthermore, soft law cannot deviate from the ECJ's case law.[42]

One possibility is that an EU Treaty or regulation states that soft law is legally binding. This was at issue for instance in the *Generics* ruling where the annex to a directive stated that the Commission guidelines must be taken into account.[43]

Secondly, agreement can exist between the Commission and Member States or national authorities concerned the soft law.[44] The document itself does not have to state this. Soft law can arise from negotiations between the Commission and Member States, without making this explicitly clear.[45,46] For soft law to have any legal force, according to Senden, a legal basis in primary or secondary EU law must exist either specifically providing for the assumption of such 'agreed' acts,[47] or a special obligation to cooperate.[48] The *IJssel-Vliet* ruling dealt with how far

26 The Committee of the Coordination of Funds (COCOF).

27 T. Groß *Exekutive Vollzugsprogammierung durch tertiäres Gemeinschaftsrecht?* (Die Öffentliche Verwaltung, 2004) pp. 20-26, p. 21.

28 See fn. 20, p. 631.

29 J. Luijendijk, L.A.J. Senden *De gelaagde doorwerking van Europese administratieve soft law in de nationale rechtsorde* (2011) SEW, pp. 312-352, p. 329.

30 See fn. 3, p. 190.

31 A. Sanchez Graells *Soft Law and the Private Enforcement of the EU Competition Rules* (paper presented at the International Conference on the Private Enforcement of Competition Law, University of Valladodid, 14-15 October 2010 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1639851>) p. 9-10.

32 S. Thomas *Die Bindungswirkung von Mitteillungen, Bekanntmachungen und Leitlinien der EG-Kommission* (EuR, 2009) p. 423-443, p. 435;

33 See fn. 2, p. 443.

34 See fn. 2, p. 351 et seq. See Case 229/86, *Brother Industries*, [1987] ECR 3757.

35 Case T-113/89, *Nefarma*, [1990] ECR II-797. See also fn. 2, p. 348.

36 See fn. 32, p. 432-433.

37 See fn. 32, p. 428-429.

38 E. Korkea-Aho *EU soft law in domestic legal systems: flexibility and diversity guaranteed?* (MJ 2009) pp. 271-290, p. 279, footnote 27.

39 O.A. Ştefan *European Competition Soft Law in European Courts: A Matter of Hard Principles?* (EL) 2008) pp. 753-772, p. 764.

40 See fn. 2, p. 243 et seq.

41 See also Case C-464/09/P, *Holland Malt BV*, [2010] ECR I-12443.

42 See fn. 39, p. 764; see fn. 2, p. 373.

43 Case C-368/96, *Generics*, [1998] ECR I-7967.

44 See fn. 3, p. 272.

45 Apparent during interviews as part of my PhD research (J.E. van den Brink, *De uitvoering van Europese subsidieregelingen in Nederland. Juridische knelpunten en uitdagingen*, Deventer: Kluwer 2012) with representatives of the Commission, the European Court of Auditors and Dutch authorities charged with the granting of European subsidies.

46 See also J. Klabbers *Informal instruments before the European Court of Justice* (*CMLRev* 1994) pp. 997-1023, p. 1012.

47 See Case C-303/90, *France/Commission*, [1991] ECR I-5315; Case C-325/91, *France/Commission*, [1993] ECR I-3283, in which such a legal basis was not provided for. See also fn. 2, p. 272-273.

48 See fn. 5, p. 574 et seq.

Member States can be bound to soft law through a special obligation to cooperate.[49] It concerned the significance of guidelines drawn up by the Commission on how it will use its discretion within the framework of State aid law. The ECJ concludes that the Member State is obliged to apply Commission soft law, since in accordance with Article 93(1)EEC (now Article 107(1) TFEU) an cooperation obligation exists for the Commission and Member States and it is apparent that the Member State has accepted the soft law in question.[50] In the *Germany/Commission* ruling, the acceptance by the Member State exists since it had taken part in the procedure for the adoption of the guidelines and had approved them, which it did not dispute.[51] This has now been codified in Article 23(1) of Regulation No 2015/1588 of the Council.[52] So in State aid cases soft law is legally binding upon Member States following their agreement.[53]

To what extent can the case law in State aid cases be applied to the implementation of ESI Funds? The regulations of previous programme periods contained a principle of partnership requiring the cooperation of the Commission and Member States.[54] As a result, the requirement of a special cooperation obligation seemed to be complied with. The principle of partnership, however, has been rephrased in Regulation 1303/2013 (CPR) and is now limited to the relationship between the Member State and its competent regional and local authorities. Although the ECJ may deduce a special obligation to cooperate from the simple fact that ESI Funds are implemented under shared management[55] between the Commission and Member States, this is far from sure.

Moreover, it must be apparent that the Member State has accepted the soft law. Must there be express agreement, or is it sufficient if it appears that the Member State applies the soft law in practice? As already mentioned, within the framework of ESI Funds, through the EGESIF Member States take part in the procedure for the adoption of the soft law. Often, representatives of the Member States approve the soft law.[56] From the above examples, it might be derived that in European subsidy cases the ECJ will also rule that for a Member State to be bound to soft law, it must give explicit approval.[57] The mere application of soft law seems insufficient. After all, it is possible that in the EGESIF where the soft law was discussed the Member State had explicitly indicated its disagreement, but – with majority agreement – the soft law was eventually applied by the particular Member State anyway. But until now there has been no European case law on this issue.

In conclusion, it is doubtful therefore whether the case law concerning the significance of soft law for national authorities in State aid issues also applies to the implementation of ESI Funds.

2. National Courts

This section will consider how national courts should deal with European soft law based on the ECJ's case law. In *Grimaldi* the Court decided that recommendations can play an important role as an interpretation aid, and should be taken into account by national courts.[58] This raises a number of questions. Does *Grimaldi* imply that national courts are merely obliged to take recommendations into account if they can contribute to clarifying European law or national law to implement it?[59] Soft law must then merely be considered a mandatory interpretation aid. Or did the Court mean that national courts are obliged to interpret national law in conformity with recommendations?[60] With regard to soft law which establishes that national authorities are obliged to comply with it, the second view prevails.[61] For other soft law, the first view must be assumed.[62] After all, soft law has

49 Case C-311/94, *IJssel-Vliet*, [1996] ECR I-5023. See fn. 20, pp. 109-110.

50 See fn. 32, p. 433-434.

51 Case C-288/96, *Germany/Commission*, [2000] ECR I-8237.

52 *OJ* 2015, L 248/1.

53 Member States are not obliged to agree with soft law concerning State aid: joined cases T-132/96 and T-143/96, *Freistaat Sachsen and Volkswagen/Commission*, [1999] ECR II-3663, Case C-292/95, *Spain/Commission*, [1997] ECR I-1931.

54 Art. 11 of Reg. 1083/2006.

55 Art. 59 of Reg. 966/2014.

56 Apparent from aforementioned interviews; although these interviews took place in the COCOF-period I assume this has not changed. A soft law document arising through consultation with Member States, is apparent to ESI Funds if it concerns an EGESIF (or before 2014 a COCOF) document. Such documents do not show Member States approved the document.

57 J. Klabbers *The undesirability of soft law* (1998) Nordic Journal of International law, pp. 381-391, p. 389.

58 Case 322/88, *Grimaldi*, [1989] ECR 4407; joined cases C-317/08-C-320/08, *Alassini et al./SpA*, [2010] ECR 2213.

59 See fn. 2, p. 387; see fn. 32, p. 437-438;Case T-549/08, *Luxembourg/Commission*, [2010] ECR II-2477.

60 See fn. 2, p. 387.

61 See fn. 29, p. 335.

62 See fn. 3, p. 62; see fn. 2, p. 389 et seq.

no priority over national law, no direct effect in the national legal order or priority over primary and secondary EU law, since soft law cannot deviate from this.[63]

In other cases the ECJ chooses another approach route. In the *Kreussler* case for example the ECJ states that the national court *may* take account of that document.[64] Contrary to *Grimaldi* it leaves room for the national court to set aside the guidance.

Another question is whether *Grimaldi* requires national courts to consider recommendations *ex officio*. In *Grimaldi* it appears Grimaldi himself had relied on the recommendation. No clear obligation seems to exist for national courts to consider soft law *ex officio*, in view of the Court's opinion that national courts are not obliged to apply EU law *ex officio* without the power to do so according to national law.[65] A different view would mean that in every case pertaining to EU law, national courts must examine the extent to which soft law applies. This is almost impossible, since much soft law has not been published. The ECJ has not yet given an explicit ruling on an obligation for national courts to apply soft law *ex officio*. However, in *Mehiläinen Oy*, the Court considered *ex officio* an interpretative communication from the Commission in its assessment.[66] It remains to be seen whether this will have implications about obligations for national courts.

Next, to what extent does *Grimaldi* apply to other soft law instruments besides recommendations? After all, recommendations, contrary to communications or working documents, are explicitly mentioned in Article 288 TFEU and are usually published in the Official Journal. In *Baltlanta*, however, the ECJ applied the *Grimaldi* formula by analogy also to Commission guidelines.[67] The obligation to take soft law into account is thus not limited to just recommendations.

The final question is to what extent national courts, in deviating from an interpretation of European law endorsed by the Commission through soft law, are obliged to ask for a preliminary ruling? The ECJ's case law shows that if national courts doubt the *validity* of the soft law, they must ask for a preliminary ruling.[68] It is uncontested that national courts may ask for a preliminary ruling about the *interpretation* of soft law.[69] If national courts prefer a different interpretation than the Commission it usually indicates that the interpretation of the underlying EU hard law does not concern an *acte clair*.[70] In that case, the highest national court is obliged by virtue of the *Cilfit* ruling[71] to request a preliminary ruling, even if the Commission has adopted soft law. However, it is also possible that the soft law cuts no ice or is contradictory. If the national court considers the EU provision to be clear, there is no need to require a preliminary ruling on the interpretation of the soft law.[72] The same applies if the soft law is evidently contrary to the ECJ's case law. However, in case there are conflicting decisions from lower courts in various Member States concerning the interpretation of an EU provision, a court, against whose decisions there is no judicial remedy under national law, is obliged to request a preliminary ruling.[73] I assume this also applies where soft law exists on the interpretation of that provision.

On the basis of the ECJ's case law, it can be concluded that national courts must use European soft law as a mandatory interpretation aid. Furthermore, national courts may ask preliminary questions concerning the interpretation of soft law. If the underlying EU hard law is unclear, the highest national courts must refer a preliminary question to the ECJ.

IV. Implementation Practice in The Netherlands

In this section the approach of the Dutch authorities and courts to soft law on ESI Funds is discussed. Practice and case law relating to other European subsidies implemented under shared management will also be considered, such as the European Agricultural Guarantee Fund (EAGF). Finally, the consequences

63 See fn. 2, p. 390.

64 Case C-308/11, *Kreussler*, [2012] ECLI:EU:C:2012:548.

65 Joined Cases C-222-225/05, *Van der Weerd et al.*, [2007] ECR I-4233.

66 Case C-215/09, *Mehiläinen Oy*, [2010] ECR I-13749; joined cases C-145/08 and C-149/08 *Loutraki et al.*, [2010] ECR I-4165; Case C-196/08, *Acoset*, [2009] ECR I-9913.

67 Case C-410/13, *Baltlanta* [2014] ECLI:EU:C:2014:2134.

68 Case C-11/05, *Friesland Coberco Dairy Foods*, [2006] ECR I-4285; Case C-311/04, *Algemene Scheeps Agentuur Dordrecht BV*, [2006] ECR I-609. See also fn. 29, p. 324.

69 Case C-137/08, *VB Penzugyi Lizing Zrt*, [2010] ECR I-10847.

70 See fn. 32, p. 438.

71 Case 283/81 *(Cilfit)*, [1982], p. 3415.

72 See fn. 32, pp. 438-439.

73 Case C-160/14 (*Ferreira da Silva*), [2015] *not yet reported*.

of the approach of the Dutch authorities and courts for the beneficiaries will be discussed.

1. National Authorities

In practice, Dutch authorities that implement ESI subsidy schemes are not concerned whether European soft law is legally binding.[74] They have other reasons to comply with soft law.

Firstly, to avoid the risk of infraction proceedings.[75] After all, the Commission can take the position that soft law is merely a reminder of obligations under European hard law. Although non-compliance with the soft law can in itself not lead to the view that the Treaty has been violated, this can occur if the Commission and the ECJ consider that the result is that a hard European standard is not complied with.[76] Soft law then acts as an interpretation criterion.[77] The Commission can also take the position that on account of the special obligation to cooperate, discussed above, the Member State is bound to the soft law concerned.

More importantly, regarding ESI Funds, European subsidy paid by national authorities eventually must be claimed from the Commission.[78] Hence, the Commission has more sticks to wield. Officials of the Commission and the European Court of Auditors (ECA) take soft law as a starting point to monitor European subsidies spent in Member States. The 'comply, or explain principle' is applied: as soon as national authorities deviate from EC soft law, the authority in question must provide an explanation. If it has no answer, it may have to repay the subsidies to the EU,[79] so national authorities are not keen to deviate from soft law. If they comply with EC soft law, they have no fear of these risks.[80] Although in special cases the Commission may deviate from the soft law in favour of Member States, this requires tough negotiations.

National authorities also act in accordance with soft law because they have requested it themselves.[81] It may not be completely clear to them how European rules are to be interpreted so they are often quite happy for the Commission to clarify subsidy legislation.[82] With certainty concerning interpretation of subsidy regulations, Member States reduce the chance of the Commission finding that expenditure is irregular through incorrect interpretation.[83]

In addition, soft law often arises in consultation with Member States (i.e. in the aforementioned expert committee EGESIF) so it is not evident that national authorities would deviate in their interpretation of it.

Finally, European soft law mainly contains 'rules' very similar to the rules laid down in binding European instruments[84] and though these are non-binding instruments, they offer little flexibility. An example offers working document 'On-the-spot checks of area according to Articles 23-32 of Commission Regulation 796/2004', applicable to the single payment scheme financed by the EAGF. The payment entitlement for this scheme was based on the number of hectares of agricultural land. The working document contained a stricter definition of agricultural land than in the EU legislation: 'In accordance with Article 8(1) of Regulation 796/2004, (forage) areas of trees inside an agricultural parcel with density of more than 50 trees/ha should, as a general rule, be considered as ineligible. Exceptions may be envisaged for tree classes of mixed-cropping such as for orchards and for ecological/environmental reasons. Possible exceptions must be defined beforehand by the Member States.'[85] Although this implies that this rule already ensues from Article 8(1) of the Commission Regulation No 796/2004, it can be understood that for the application of area-related aid schemes a parcel with trees is considered an agricultural parcel pro-

74 See fn. 45, p. 288.

75 See fn. 2, p. 345.; J. Scott *In legal limbo: post-legislative guidance as a challenge for European Administrative Law* (CMLRev 2011), pp. 329-355, p. 344.

76 See fn. 29, p. 321.

77 See fn. 29, p. 321. Also Case T-258/06, *Germany/Commission*, [2010] ECR II-2027.

78 See fn. 45, p. 288.

79 See fn. 20, p. 31 and pp. 124-125.

80 Literature refers to a 'chilling effect'. See fn. 20, p. 125; J. Scherer *Das Rechnungsabschlußverfahren, Ein Instrument zur Durchsetzung Europäischen Verwaltungsrechts?*, (EuR 1986), pp. 52-74, p. 73.

81 See fn. 45, p. 289.

82 Confirmed in interviews with national authorities.

83 Apparent from interviews with national authorities. See also fn. 20, p. 31.

84 Soft law instruments often 'mimic the language and norms of formal legal instruments': see fn. 38, p. 281. See also K. Armstrong, C.Kilpatrick *Law, Governance, or New Governance? The Challenging Open Method of Coordination* (2007) Columbia Journal of European Law, pp. 649-677, p. 660.

85 Guidance for on-the-spot checks of area and area measurement, AGRI/60363/2005-REV1, p. 4. Note that the "50-trees rule" in the period 2014-2020 has been implemented in the European regulations. See Article 9(2) of the Commission Delegated Regulation 640/2014, *OJ* 2014 L 181/48.

vided it is possible to carry out agricultural activities. Nevertheless, the responsible Dutch minister applied this so-called "50-trees rule" in full to beneficiaries[86] and decided in 2009 to implement this rule in the Dutch implementing regulations.[87] The explanatory notes to these regulations indicate that the working document, although consistently applied by the Commission, is actually not legally binding. For reasons of clarity for farmers and the fact that the standard can easily be checked, it was decided to incorporate it in the Dutch Common Agriculture Policy (CAP) income support scheme 2006.[88] By doing so, the soft law became legally binding in the Netherlands.

2. National Courts

Rulings by Dutch courts confronted with disputes on European subsidies differ on the meaning of soft law.[89] The Council of State seems to consider it legally binding on national authorities and national courts.[90] The Trade and Industry Appeals Tribunal deems it possible that Dutch authorities use European soft law for Dutch policy. Considering a working document containing guidelines on when the submission of an agricultural subsidy application contains obvious errors,[91] the Tribunal held that, although the document is not binding, the Minister of Agriculture, Nature and Food Quality may establish a permanent policy line within the scope of European regulations on the basis of this and past working documents.[92]

However, a ruling by the Trade and Industry Appeals Tribunal of 27 October 2010,[93] considered it problematic that the Minister uses the aforementioned "50-trees-rule" in a working document of the Commission as a mandatory provision when assessing a subsidy application. The Tribunal observes that this document is not legally binding. The working document cannot restrict the obligation to assess individually whether a parcel must qualify as agricultural, as is laid down in the EU Regulation. However, the Tribunal does not consider whether and to what extent the working document is binding upon the Dutch Minister. Not a single ground is devoted to the extent the Tribunal itself is obliged to use the working document of the Commission as a mandatory interpretation aid. The judgment of 21 September 2011 shows that the implementation of the "50-trees-rule" in Dutch implementing regulations did not cause the Tribunal to change its mind. The EU Regulation still required an individual assessment of a parcel. It seems that the Tribunal considers the "50-trees-rule" contrary to EU hard law. If so, why did the court not ask the ECJ for a preliminary ruling?

3. Consequences for Beneficiaries

Dutch authorities normally follow the interpretation of the Commission in European soft law, primarily due to the 'comply, or explain' principle, which also has consequences for subsidy applicants and beneficiaries. The application by Dutch authorities of the Guidelines on financial corrections in expenditure financed by the Union under shared management for non-compliance with the rules on public procurement is an example of this. Although this concerns the discretionary power granted to the Commission to recover European subsidies from Member States (decisional soft law), national authorities are recommended to apply similar criteria and rates when correcting irregularities committed by beneficiaries. Beneficiaries of ESI Funds are then confronted with financial corrections using criteria and rates based on soft law. In my view, this is not contrary to the principle of legal certainty, although it is preferable that beneficiaries realise that Dutch authorities apply Commission guidelines when correcting irregularities.

Interpretative administrative soft law addressed to the Member State can impact on beneficiaries, even without explicit obligations being included. It

86 Apparent from ruling of the Dutch Trade and Industry Appeals Tribunal of 27 October 2010, ECLI:NL:CBB:2010:BO2425 and 21 September 2011, ECLI:NL:CBB:2011:BU1249.

87 In Art. 21a (2) CAP income support scheme 2006.

88 Dutch Official Gazette (Staatscourant) 2009, no. 62.

89 See on how Dutch administrative courts deal with European soft law J.E. van den Brink & J.C.A. van Dam *Nederlandse bestuursrechters en Unierechtelijke 'beleidsregels* (2014) JBplus, pp. 3-27.

90 Council of State 17 September 2014, ECLI:NL:RVS:2014:3408.

91 The case law of the Trade and Industry Appeals Tribunal concerns various successive working documents, such as working document AGR 49533/2002 of the Commission concerning obvious errors within the meaning of Art. 12 of Regulation 2419/2001.

92 Trade and Industry Appeals Tribunal 12 March 2003, ECLI:NL:CBB:AF6804.

93 Trade and Industry Appeals Tribunal 27 October 2010, ECLI:NL:CBB:2010:BO2425 and 21 September 2011, ECLI:NL:CBB:2011:BU1249.

is possible that national authorities are bound to the interpretation in the soft law, or consider themselves bound to it. For example, agricultural land included by beneficiaries may not be deemed eligible for subsidy by national authorities on the basis of soft law. This can entail that national authorities decide that a European subsidy was wrongly paid. Beneficiaries may not be aware of the relevant soft law since it has not been officially published. If this merely concerns interpreting an existing rule, the question is whether they can rely on ignorance. After all, the rules applicable to the subsidy relationship between national authorities and beneficiaries often have to be interpreted. There is no reason national authorities cannot use the interpretation endorsed by the Commission as appears from unpublished soft law.

The "50-trees rule" judgments of the Trade and Industry Appeals Tribunal show that it is willing to protect beneficiaries from soft law going beyond European hard law. Beneficiaries welcome the conclusion of the Tribunal. After all, the result is that European soft law cannot be directly invoked against beneficiaries, preventing them from being faced with an unknown interpretation of European law. However, problems with the Commission may ensue, as the Commission may hold the Netherlands to the "50-trees rule" in the working document. If the Dutch Minister continues to grant subsidies for such lands, this subsidy will possibly not be reimbursed by Europe.

V. Advantages and Disadvantages

It is apparent that in the implementation of European subsidy schemes, the role of European soft law in the Dutch legal order is not clear. While national authorities are inclined to follow soft law and even implement it into national law, to the Dutch Trade and Industry Appeals Tribunal European soft law cannot be automatically invoked against beneficiaries. Beneficiaries are confronted with decisions based on soft law without them being aware of this as it has often not been (officially) published. From the viewpoint of legal certainty and transparency, it is justifiable to ask to what extent the use of soft law is desirable.

1. The Advantages: Flexibility, Uniformity and Legal Certainty for National Authorities

Firstly, in both literature and during the interviews at the Commission and the ECA, it is often said that soft law offers flexibility to the Commission since there are no formal requirements on adopting soft law.[94] These are non-binding instruments and no formal procedure must be followed for its adoption; it can easily be created and modified. Especially after Lisbon, amending EU legal instruments has become very complicated.

Secondly, soft law is an important aid for national authorities to interpret standards that are unclear or open to interpretation in European subsidy legislation. There is general agreement between Member States about the text, but not always about the meaning and scope of European rules[95] so no 'explanatory memorandum' is drafted. It is also the case that the ECJ – though by virtue of Article 19 EU Treaty its rulings are the only authoritative source of interpretation of EU law – can only give a retrospective interpretation of European law, often after long judicial proceedings.[96] National authorities cannot ask the ECJ to interpret European law.[97] Hence, the interpretative authority of the Court does not satisfy the needs of national authorities and courts.[98] Soft law can play an important role in overcoming this problem.

Thirdly, if Member States act in accordance with soft law, they can be certain the Commission will not start infraction proceedings so it has an important preventive effect.[99] This can only be welcomed, if soft law is in line with prevalent EU law and does not impose new standards on Member States (and indirectly on beneficiaries) by means of soft law. The

94 D. Trubek, P. Cottrel, M. Nance *"Soft Law", "Hard Law" and EU Integration* in: G. de Búrca, J. Scott *Law en New Governance in the EU and the US* (Oxford and Portland, Oregon: Hart Publishing, 2006) pp. 65-94, p. 67 and p. 74; G. d. Cananea *Administration by Guidelines: The Policy Guidelines of the Commission in the Field of State Aids* in: I. Harden (ed.) *State Aid: Community Law and Policy* (Köln: Bundesanzeiger, 1993) pp. 61-75, p. 67.

95 See fn. 2, p. 226.

96 See fn. 29, p. 317-318; H. Adam, G. Winter *Commission guidance addressed to member state agencies* in: G. Winter (red.), *Sources and Categories of European Union Law, a Comparative and Reform Perspective* (Baden-Baden: Nomos Verlagsgesellschaft, 1996) pp. 629-644, p. 630.

97 See fn. 29, p. 318.

98 Ibid.

99 See fn. 2, p. 226.

principles of legality and legal certainty entail that new obligations should be based on European hard law.

Fourthly, the contribution of soft law to uniformity regarding the transposition, application and enforcement of EU law increases the useful effect of European law.[100] Decisional soft law also enables Member States and beneficiaries to anticipate how the Commission will apply subsidy legislation in a specific case.[101] This contributes to transparency and legal certainty and also to the predictability of the Commission's actions[102], guaranteeing equal treatment and transparency of individual decision-making.[103]

However, if beneficiaries are not aware that decisions of national authorities are partly based on soft law, the increasing legal certainty and transparency will not apply to them. Thus, we arrive at the disadvantages of using soft law.

2. The Disadvantages: Conflict with Legal Certainty for Beneficiaries and Legality

As beneficiaries are usually unaware of soft law, its use by national authorities implies an infringement of legal certainty particularly to the extent that it concerns new obligations. This is trickier if it concerns the interpreting of existing legislation. If a rule is open to several interpretations, it will not be concluded that the interpretation of national authorities based on unpublished soft law is unreasonable. But beneficiaries have been unable to anticipate this interpretation.

Secondly, soft law lacks democratic legitimacy.[104] The European Parliament – concerning the soft law of the Commission within the framework of the implementation of subsidy legislation – is not fully involved in the adoption.[105] Member States are also formally not involved in the adoption of soft law; it is usually only discussed in expert committees. It is however a small improvement that a representative of the European Parliament has now been allowed to attend EGESIF meetings.[106]

A third disadvantage of soft law is that the Commission often uses it to formulate new obligations for Member States, that do not arise from underlying European law or ECJ's case law.[107] This can result in illegally imposed obligations and is problematic considering institutional balance, national sovereignty, democratic legitimacy and individual legal protection and it is at odds with the legality principle.[108]

Fourthly, soft law too is often unclear so the contribution to transparency and legal certainty is not always guaranteed.[109]

Fifthly, the ECJ can always decide that the interpretation or application laid down in soft law is incorrect. The fact that national authorities comply with soft law is certainly no guarantee that their actions will be deemed in line with EU law.[110]

Ultimately, soft law does not ensure the uniform application of EU law since it is not legally binding and it is also unclear what its effect is in the national legal order.[111] Although national authorities feel obliged to follow soft law, national judges can overrule this.

VI. Conclusion: How to Proceed?

Although soft law is not legally binding for national authorities, the implementation practice on ESI Funds shows that the Commission assumes that they are in principle obliged to comply with soft law. The Commission applies the 'comply, or explain' principle. If national authorities cannot explain deviations from soft law, they risk having to repay money to Brussels. So they are inclined to comply with soft law when exercising discretionary powers and interpreting subsidy legislation.

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100 See fn. 2, p. 226.

101 See fn. 29, p. 318.

102 Case C-3/06, *Groupe Danone/Commission*, [2007] ECR I-1331.

103 Case C-443/97, *Spain/Commission*, [2000] ECR I-2415.

104 See fn. 29, p. 318.

105 In two resolutions the European Parliament heavily criticised the use of soft law by the Commission. See fn. 29, p. 319. See also the Resolution of the European Parliament of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments (A6-0259/2007) and Resolution of 9 February 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next legislative term (P7-TA (2010)0009).

106 Minutes of the 1st meeting of EGESIF, 27 March 2014. See Rule 13 of the Communication from the President to the Commission, Framework for Commission Expert Groups Horizontal Rules and Public Register, C(2010) 7649 final.

107 See fn. 29, p. 318; see fn. 2, p. 228.

108 See fn. 29, p. 319.

109 See fn. 2, p. 227.

110 Ibid.

111 See fn. 29, p. 319.

As a result beneficiaries of ESI subsidies are confronted with soft law. From the viewpoint of legal certainty, this is problematic if beneficiaries are unaware of this since they will have been unable to anticipate it. It is doubtful whether national courts can offer sufficient legal protection. The *Grimaldi* ruling demonstrates that national courts are obliged to use soft law as a mandatory interpretation aid.

To overcome the disadvantages of soft law, it is recommended that national authorities critically examine soft law proposed by the Commission and do not automatically approve or apply it, in particular if the soft law includes rules supplementing existing EU law. This concerns new rules that belong in the ESI regulations. By withholding approval of soft law, Member States will then retain more room for negotiation at the final settlement stage with the Commission and will have a stronger position in proceedings following a financial correction.

If national authorities consider themselves bound to soft law, it is preferable that the Commission adopts a flexible attitude to well-reasoned deviations to this. The 'comply or explain' principle should be applied so that national authorities have flexibility which is desirable considering the subsidiarity principle. If a provision from ESI regulations can be interpreted and applied in several ways, there should be freedom of choice. A Commission which makes it extremely difficult or impossible to deviate from soft law in practice strengthens the notion that it should have been laid down in legally binding rules. Furthermore, the transparency of soft law for beneficiaries should be increased. Although soft law is published on the website of DG REGIO, it is far from clear how national authorities will deal with it. So preferably soft law is translated into the national subsidy relationship, though it is incompatible with its nature that it is implemented into national laws and regulations. After all, the consequence of this will be that European soft law becomes law; precisely not the intention upon its adoption.[112]

It is recommended that if national authorities want to take account of soft law, they convert it into policy rules that are only binding on administrative bodies, cannot entail obligations for citizens and can be deviated from in special circumstances. A policy rule does the most justice to the nature of soft law. The increase in the density of rules through the implementation of soft law into policy rules is justified by the importance of the legal certainty for beneficiaries. If the rules laid down in soft law are nevertheless applied to them, it is preferable that such rules are laid down in instruments that they are aware of. Establishing soft law in policy rules also entails that national authorities can comply better with obligations *vis-à-vis* the Commission. Since soft law will be published, it is clear that national authorities will be able to use their interpretation towards beneficiaries.

The aforementioned recommendations try to remove the legal uncertainty inherent in the current use of soft laws, for both national authorities and beneficiaries. Nevertheless, it should be considered how the adoption of soft law can be considered less necessary. This might be achieved by adopting clearer European subsidy legislation in combination with the publication of explanatory notes, clarifying its interpretation and objectives. Regrettably, this is not expected in the near future. Questions on the impact of European administrative soft law in the national legal order and the associated issues concerning flexibility on the one hand and legal certainty, transparency and legality on the other hand remain relevant.

112 See fn. 29, p. 339.