



Universiteit
Leiden
The Netherlands

The role of soft law in times of crisis

Dam, J.C.A. van; Ghio, E.; Perlingeiro, R.

Citation

Dam, J. C. A. van. (2024). The role of soft law in times of crisis. In E. Ghio & R. Perlingeiro (Eds.), *Are legal systems converging or diverging?* (pp. 317-340). Cham: Springer.
doi:10.1007/978-3-031-38180-5_17

Version: Publisher's Version

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/3728425>

Note: To cite this publication please use the final published version (if applicable).

The Role of Soft Law in Times of Crises



J. C. A. van Dam

1 Introduction

In times of crisis, swift action is often needed to effectively respond to the (unprecedented) challenges and problems that present themselves. Characterised by features of informality, non-binding governance instruments are ‘fast, flexible and easy to issue.’¹ Therefore, at least at first sight, they constitute a perfect response to take the swift and urgent action that is needed in times of crisis.

The popularity of such instruments, often referred to as ‘soft law’ in the literature, came to the fore during the COVID-19 pandemic. In the European Union (EU), numerous soft law measures were issued to address and counteract the consequences of the health crisis.² ‘Soft governance’ played an important role during the pandemic not only at the EU supranational level, but also at the level of individual Member States.³ Yet, literature also reveals regulatory differences in the way governments responded to the crisis. Authors have found that in some countries—such as Denmark, Finland, Iceland and Norway—soft law played a pivotal role, with numerous soft law instruments being issued to tackle the crisis.⁴ In other countries, such as Greece and Germany, soft law has played a lesser, sometimes even insignificant, role as a regulatory tool during the crisis.⁵ Thus, the literature presents a varied picture

¹Ştefan (2020), p. 663.

²Ibid. See also Eliantonio et al. (2021a).

³Eliantonio et al. (2021b); Boschetti and Poli (2021).

⁴Eliantonio et al. (2021b), p. 3.

⁵Ibid.

J. C. A. van Dam (✉)

Dutch Council of State and Department of Constitutional and Administrative Law at Leiden University, Leiden, The Netherlands

e-mail: j.c.a.van.dam@law.leidenuniv.nl

and suggests that the role of ‘pandemic soft law’ is likely to be shaped by national legal culture and practice.⁶

Aiming to contribute to the research on the role that soft law plays during crises, and in particular during the COVID-19 crisis, this chapter predominantly explores the role of soft law in the Netherlands. As a decentralised unitary state, where soft law can play a role in coordinating and aligning different levels of government,⁷ and a country where one category of soft law has been given a legal basis (in the form of so-called *policy rules*),⁸ The Netherlands makes for an interesting case study, raising a series of questions: has there been room for soft, non-legally binding, instruments in the Dutch response to the COVID-19 pandemic? If so, what were the benefits of soft law in addressing the COVID-19 crisis? Were these potential benefits fulfilled, or did undesired side-effects or risks arise? And what lessons can be learned from the use of soft law for the future?

This chapter examines these questions and finds that soft instruments were used in The Netherlands to address the COVID-19 crisis. The informal rules and guidance took the form of *inter alia* ‘guidelines’, ‘policy rules’, ‘questions and answers’, ‘dialogues’ and ‘template regulations.’ These non-legally binding instruments have been issued with the intention of providing clarity and assistance to the municipalities in implementing the corona measures (discussed below), as well as to enable a more coordinated and coherent implementation of the legally binding corona measures. The analysis shows that, in practice, the provision of guidance and support allows for dialogue, (better) alignment, and convergence between municipalities and safety regions.⁹

However, the chapter also argues that the use of soft instruments risks de facto limiting the room for differentiation and tailored decision-making at the regional or local level—objectives that are central to the Dutch approach in addressing crises. What is more, the COVID-19 soft law measures also have (input) legitimacy drawbacks, with some measures mostly emanating from discussions with *private* parties.

The chapter is structured as follows. Section 2 outlines the ‘hard’ response to COVID-19, introducing the decentralised emergency regulations during the first phase of the crisis and the Temporary COVID-19 Act in the second phase of the crisis. Section 3 introduces the main ‘soft law categories’ in the Netherlands, followed by an overview of the COVID-19 soft laws that have been issued to address the pandemic in the Netherlands in Section 4. Section 5 reflects on the legal status of COVID-19 soft law, its converging effects, as well as the potential side-effects and legitimacy drawbacks. Section 6 provides the conclusion.

⁶Boschetti and Poli (2021), p. 51; Eliantonio et al. (2021b), p. 3.

⁷See Sect. 5.3.

⁸See Sect. 3.1.

⁹The safety regions are decentralised bodies that are committed to ensuring the safety of the inhabitants and that are responsible for facilitating regional cooperation in times of crisis and disasters.

2 A Hard Response to COVID-19: From Decentralised Emergency Regulations to the Temporary Corona Act

2.1 Decentralised Emergency Regulations

Initially, in March 2020, the Dutch response to address the pandemic consisted of the adoption of decentralised emergency regulations. These legally binding corona measures were issued at the level of the 25 ‘safety regions’—decentralised bodies that are committed to ensuring the safety of the inhabitants and responsible for facilitating regional cooperation in times of crisis and disasters.¹⁰ These emergency regulations provided the necessary, yet far-reaching measures, such as the prohibition of public gatherings, the closure of cafés and restaurants and a 1.5-metre social distancing rule.¹¹

This decentralised approach allowed, at least in principle, for a regional and differentiated approach that could take into account regional circumstances, while making decisions as close to the citizens impacted as possible.¹² Nonetheless, the room for regional differentiation remained limited, as the emergency regulations had to give effect to a legally binding instruction (*bindende aanwijzing*) from the Minister of Health directed at the Chairs of the safety regions.¹³ Subsequently, the Safety Council—an umbrella organisation which represents the 25 safety regions—issued so-called non-legally binding ‘model emergency regulations’, from which it was possible to deviate within the boundaries set by the Minister’s binding instructions. These model emergency regulations were, as discussed below,¹⁴ the first soft law measures that accompanied the legally binding corona measures.

This initial decentralised response to address the crisis with emergency regulations adopted by the safety regions has been heavily criticised for lacking a firm democratic basis, whilst also severely limiting fundamental rights.¹⁵ In this respect, it is pointed out that the emergency regulations were adopted by the Chairs of the safety regions¹⁶ without the (direct) involvement or control of a democratically elected body such as, for instance, the municipal councils.¹⁷ Instead, the legal competence of the Chairs of the safety regions to enact emergency regulations, laid down in the Public Health Act, is aimed at enabling swift action to address

¹⁰ Article 39 of the safety regions Act (*Wet Veiligheidsregio’s*).

¹¹ Broeksteeg (2020).

¹² Van Blommestein (2021), Sect. 2.

¹³ Article 7 of the Public Health Act (*Wet publieke gezondheid*).

¹⁴ See Sect. 4.1.

¹⁵ Wierenga (2020); Wierenga et al. (2020), p. 1317.

¹⁶ Article 39 of the safety regions Act and Article 176 of the Municipalities Act (*Gemeentewet*).

¹⁷ Wierenga (2020), p. 239; Wierenga et al. (2020), p. 1317.

crises effectively.¹⁸ In the words of Julicher and Vetzo, the Dutch response to the COVID-19 pandemic was an ‘executive-led, decentralised response’.¹⁹

2.2 *The Temporary Corona Act*

In the summer of 2020, the Dutch Government presented a first draft of the Temporary Corona Act (TCA) to the House of Representatives. The first draft of the TCA was extensively debated in Parliament and significantly amended afterwards, with the final act only being adopted in December 2020. The explanatory memorandum to the legislative proposal explained that this act aimed to give the binding corona measures a more ‘solid foundation’, to enhance their democratic legitimacy, and to replace the emergency regulations.²⁰ At the same time, the aim of a strengthened democratic involvement had to be reconciled with the necessity to act effectively, as well as the need to leave room for flexibility and differentiation in addressing the crisis.

To this end, the TCA provided for the adoption of Ministerial Regulations that ‘may contain far-reaching corona measures.’²¹ The Ministerial Regulations needed to be approved by the House of Representatives (*de Tweede Kamer*).²² However, for these Ministerial Regulations to be adopted, no prior approval from the Senate (*de Eerste Kamer*) was needed. While the explanatory memorandum took a different view, stating that the TCA had struck an ‘optimal balance’ between democratic legitimacy and the need for swift action and flexibility,²³ concerns were nonetheless raised about the democratic credentials of the corona measures laid down in Ministerial Regulations.²⁴

The aim of the TCA was to strengthen the democratic credentials of the corona measures, while also bringing about a shift in the allocation of responsibilities. In the first phase of the crisis, the Chairs of the security regions were put in charge of tackling the crisis by means of decentralised emergency regulations.²⁵ The TCA, instead, strengthened the responsibilities and the role of the 355 Dutch municipalities and, in particular, of mayors, who became responsible for the implementation and enforcement of the corona measures laid down in the TCA and Ministerial regulations. They could grant licenses, designate places where specific corona measures were in place, give instructions or orders and take sanctioning measures

¹⁸See *Kamerstukken II* 2019/20, 35526, 3, p. 3. See also Van Blommestein (2021), Sect. 2.

¹⁹Julicher and Vetzo (2021).

²⁰*Kamerstukken II* 2019/20, 35526, 3, p. 2.

²¹*Ibid.*, p. 7.

²²Article 58c of the Public Health Act (*Wet publieke gezondheid*).

²³*Kamerstukken II* 2019/20, 35526, 3, p. 7.

²⁴See for instance Julicher and Vetzo (2021).

²⁵Safety Regions Act, Article 39.

if needed. With this decentralised implementation approach, the TCA aimed to leave room for differentiation as well as tailored decision-making at the local level.²⁶

The TCA was a temporary legislative act and while it was extended four times, it expired on 1 June 2022. Therefore, the restrictive corona measures are currently no longer in force. The Minister of Health has announced that a legislative proposal for permanently allowing for the adoption of pandemic measures will be presented in due time.

Nevertheless, it is relevant to explore what role soft law instruments have played in relation to the legislative framework that, until recently, has governed the corona measures, as this provides insights into the role that soft measures can play during times of crisis. Furthermore, future legislation might again be complemented with soft law measures. It is therefore apt to draw lessons from earlier regulatory experiences in how to address crises

3 Soft Law in The Netherlands

As in any other legal system, the phenomenon of pseudo-legislation, or ‘soft law’ is common in Dutch administrative law and practice. For a long time, administrative authorities in the Netherlands have issued administrative rules to exercise their administrative discretion granted by the legislator.²⁷ One type of administrative soft law, the so-called ‘policy rules’, has even been given a basis in the Dutch General Administrative Law Act (GALA). While most of the debate in Dutch scholarship and practice has concentrated on this peculiar legal construction, policy rules are certainly not the only type of soft law that can be found in the Dutch legal order. Other (more) informal instruments feature in the Dutch regulatory landscape as well. Hence, the concept of ‘soft law’ can be understood in a broad manner, namely as non-legally binding rules or guidance on how to use an administrative decision-making power.²⁸ This chapter uses the terms soft law and guidance (documents) interchangeably, referring to the same non-legally binding rules that fall under this umbrella definition.²⁹

This section discusses the three main categories of administrative soft law that feature in the Dutch legal order: (i) ‘policy rules’; (ii) ‘informal policy rules’ and; (iii) ‘guidelines’.³⁰ This overview will help to categorise and understand the peculiarities of the COVID-19 soft law measures that were issued during the crisis.

²⁶ *Kamerstukken II* 2019/20, 35526, 3, p. 8; Article 58e of the Public Health Act (*Wet publieke gezondheid*).

²⁷ Bröring (2019), p. 168.

²⁸ *Ibid.*, p. 175.

²⁹ Van Dam (2020), pp. 23–24.

³⁰ Bröring and Geertjes (2013), Sect. 2.1.

3.1 Policy Rules (*Beleidsregels*)

The first category of soft law instruments consists of ‘policy rules.’ Policy rules are decision-making rules issued by administrative authorities that indicate how they will exercise the discretionary powers conferred on them by the legislator. Article 1:3 GALA defines a policy rule as ‘an order, not being a generally binding regulation, which lays down a general rule for weighing interests, determining facts or interpreting legislative provisions in the exercise of a power of an administrative authority.’ GALA also provides the general legal basis for administrative authorities to issue policy rules when exercising an administrative competence conferred upon it by the legislator.³¹

An important characteristic of Dutch policy rules is that they are not legally binding, making them soft law and distinguishing them from ‘hard law’, or legally binding legislative acts. However, Dutch policy rules exert a ‘self-binding effect’ on the issuing authorities, which follows from Article 4:84 GALA, which states that the administrative authority shall act in accordance with the policy rule ‘unless, due to special circumstances, the consequences for one or more parties would be out of proportion to the purposes of a policy rule’.

GALA does not prescribe what form policy rules should take and thus, policy rules can take various forms and shapes such as ‘policy notes, circulars and even letters.’³² This follows from their adoption process, which remains highly informal. The only requirement set in GALA is that policy rules should be published; other than that, there are no specific procedural requirements that regulate the adoption of this type of soft law.

3.2 Informal Decision-Making Rules

The second type of administrative soft law consists of ‘informal decision-making rules’ issued by an administrative authority to exercise its discretionary powers. One of the main characteristics of these decision-making rules is that they do *not* qualify as policy rules, for instance for the reason that the rules have not been published.³³ Informal decision-making rules can take the form of internal instructions laid down in, for example, internal instructions, protocols, handbooks, framework documents, technical guidance or even in algorithms. Furthermore, this broad category also

³¹ Article 4:81(1) GALA states: ‘An administrative authority may establish policy rules in respect of a power conferred to it, which is exercised under its responsibility or which has been delegated by it’.

³² *Kamerstukken II 1993/1994*, 23700, 3, p. 107.

³³ Bröring (2019), p. 170.

encompasses (unwritten or implicit) ‘lines of conduct’ that are derived from established decision-making practices.

Even when not taking the form of a policy rule, lines of conduct (based on informal decision-making documents or established practices) still generate a self-binding effect for the administrative authority. This self-binding effect is a ‘mediated binding effect’³⁴ as it arises through the application of general principles of law such as the principle of equal treatment and the principle of legitimate expectations. Nonetheless, this binding effect is considered less strong than the binding effect of policy rules provided for in Article 4:84 GALA.³⁵

3.3 Guidelines (*Richtsnoeren*)

The third type of soft law that features in the Dutch regulatory landscape are the so-called *richtsnoeren* or ‘guidelines’ that—contrary to Dutch policy rules—do not have a legal basis in the Dutch GALA.³⁶ *Richtsnoeren* are issued by a different authority or organisation than the authority that uses the guidelines to exercise its administrative discretionary power. In other words, Dutch policy rules are issued by the authority itself to exercise its administrative discretion, whereas *richtsnoeren* are ‘alien’, in the sense that they are issued by another authority than the competent authority. Guidelines are issued, for instance, by the Association of Dutch Municipalities (an umbrella organisation through which Dutch municipalities cooperate) with the aim of assisting municipal authorities in implementing and enforcing national legislation. Guidelines may also have a highly technical character when issued by expert organisations. Examples of such ‘expert guidelines’ (*deskundigenrichtlijnen*) are the guidelines issued by the National Institute for Health and the Environment (RIVM). Those guidelines that are issued by experts have a binding effect on their addressees, which derives from the principle of care as well as the duty to provide reasons for decisions. They can be described as a ‘comply or explain’ obligation. Deviation from expert guidelines is permitted, provided that the departure from the guidelines is adequately reasoned and well explained. Nonetheless, the binding effect of *policy* guidelines that address discretionary powers is considered to be weaker,³⁷ or even ‘legally non-existent.’³⁸

³⁴Compare Ștefan (2013), p. 182.

³⁵Bröring and Geertjes (2013), p. 6.

³⁶Bröring (1993).

³⁷Ibid, p. 489.

³⁸Bröring and Geertjes (2013), p. 6; Bröring (1993), p. 483.

4 Soft Law During the COVID-19 Crisis

As outlined in Sect. 2, the initial response to address the pandemic in the Netherlands consisted of the adoption of hard, binding measures that first took the shape of decentralised emergency regulations, subsequently codified in the Temporary Corona Act. Complementary to this legal framework, soft law measures were issued as well. In fact, informal instruments have mushroomed throughout the crisis, serving as a tool to assist, as well as to align and coordinate, the actions of the local authorities.

This section gives an overview of the soft law instruments that have been issued during the COVID-19 crisis. It addresses soft law measures during the first phase of the crisis when the corona measures were laid down in binding emergency regulations, and subsequently reflects on the second phase of the crisis, when soft law measures complemented the Temporary Corona Act. The aim is to give some general insights into how soft rules can play a role that is complementary to the ‘hard response’ to address crises. This section also briefly reflects on soft law instruments issued during another crisis, i.e. the refugee crisis, showing that the COVID-19 soft law instruments are not a unique phenomenon.

4.1 *Model Emergency Regulations Issued by the Safety Council*

During the first phase of the COVID-19 crisis, soft regulation played an important role in aligning the content of the legally binding emergency regulations issued by the Chairs of the safety regions. As already discussed in Sect. 2, within the boundaries of the binding instructions given by the Minister of Health, the Chairs of the safety regions were given broad discretion to decide on the content of these emergency regulations and hence, on the corona measures being taken.

As also noted in Sect. 2, in order to give guidance and support to the safety regions, the Safety Council enacted so-called ‘model emergency regulations.’ Remarkably, even though these model emergency regulations lack legally binding force, in practice the model emergency regulations have considerable harmonising effects. Research conducted by Boogaard et al. shows that the emergency regulations issued by the Chairs of the safety regions largely ‘copy’ the templates issued by the Safety Council.³⁹ Only exceptionally do the emergency regulations depart from the model regulations and *if* amendments are made, this is coordinated by the safety regions.⁴⁰ Hence, the non-legally binding model regulations play an important role in aligning the legally binding rules issued by the safety regions. What is more, an

³⁹Becker et al. (2020).

⁴⁰Ibid.

‘Interpretative Committee’, composed of public officials, was created to answer interpretative questions by the safety regions on the provisions in the template regulations.⁴¹

To conclude, in the first phase of the crisis, the non-legally binding regulatory templates and a mechanism of informal questions and answers exerted strong harmonising effects on the decentralised and legally binding emergency regulations issued by the 25 safety regions.

4.2 Guidance on the Implementation and Enforcement of the Temporary Corona Act

When the Temporary Corona Act entered into force in December 2020, Dutch municipalities faced a new situation. Indeed, with the entry into force of this Act, the municipalities became the central actors in implementing and enforcing the rules that were laid down in this act and the accompanying Ministerial Regulations. In this changed regulatory landscape, with corona measures laid down in legally binding rules, soft rules and (other) guidance documents came to the fore again. This time, guidance and assistance was provided mostly by the Dutch Association of Municipalities. As will be shown, the COVID-19 guidance documents issued in this second phase of the crisis are numerous and take various forms.⁴²

The main aim of COVID-19 guidance documents is twofold. First, the documents seek to provide assistance to the municipalities with respect to the implementation and enforcement of the Temporary Corona Act.⁴³ Second, the COVID-19 guidance documents aim to ensure a certain consistency and uniformity in the way in which Dutch municipalities implement the Temporary Corona Act. For instance, the policy framework for municipalities explains that ‘consistency with respect to the interpretation and use of measures to address the crisis and accordingly more clarity with regard to the administrative actions are needed.’⁴⁴ The document also states that ‘[t]he aim is to find a fine balance between the necessary regional coordination and the use of competences within the political-administrative context at the local level’.⁴⁵

The remaining part of this section gives a general overview of the various forms of COVID-19 guidance documents that aim to support effective and coordinated

⁴¹ Insights on (the existence of) this Interpretative Committee were shared during interviews with chairs of the safety regions that were conducted by prof. Geerten Boogaard and mr. Roel Becker (Department of Constitutional and Administrative Law, Leiden University). I would like to thank Geerten and Roel for sharing their insights and research findings with me.

⁴² See for an overview of the guidance documents issued by the Dutch Association of Municipalities: <https://vng.nl/artikelen/tijdelijke-wet-maatregelen-covid-19>.

⁴³ See for instance the Handreiking Tijdelijke wet maatregelen COVID-19 voor gemeenten. VNG, Pels Rijcken & Droogleeveer Fortuijn, June 2021, p. 6.

⁴⁴ Voorbeeld-beleidskader Twm voor burgemeesters. VNG, 20 November 2020, p. 1.

⁴⁵ Ibid, p. 1.

action with a view to implementing the corona measures laid down in legally binding rules.

4.2.1 The ‘COVID-19 Guide’ on the Implementation of the TCA for Mayors

The main guidance document that provided support to the municipalities in their task to implement and enforce the rules laid down in the TCA and Ministerial Regulations, is the *Handreiking Tijdelijke wet maatregelen COVID-19 voor gemeenten* (‘COVID-19 Guide’). The first thing to note is that the COVID-19 Guide was issued by the Dutch Association of Municipalities in collaboration with Pels Rijcken & Droogleever Fortuijn, a Dutch law firm and the State’s Advocate.⁴⁶ Not surprisingly, as further discussed below, this raises questions concerning the democratic credentials of this act.

With over a hundred pages, the COVID-19 Guide was a voluminous document. It gave an extensive overview of the rules and responsibilities of the Dutch municipalities under the ‘new’ legal framework. This overview had a highly explanatory character, summarising and explaining the legal framework and the methodology that it follows. Nonetheless, the guide also gave (interpretative) guidance on the elements to be taken into account when taking decisions on the granting of licenses (such as, for instance, the guidelines on the granting of licenses for events under Article 58i of the Public Health Act).⁴⁷ Finally, the *Handreiking* included ‘formats’ for administrative decisions, which gave practical advice on the points that should be addressed in decisions for granting licenses, decisions on administrative penalties or decisions imposing a burden under penalty.⁴⁸

4.2.2 A Model ‘Policy Framework’ for Mayors and Chairs of the Safety Regions

In addition to the *Handreiking* discussed above, the Dutch Association of Municipalities issued a guidance document outlining a so-called ‘model-policy framework’ (*voorbeeld-beleidskader*) for all 355 mayors.⁴⁹ The introduction to the policy framework stressed the importance of coordination and alignment between different municipalities, as this is expected to lead to more consistency and clarity as regards the measures that are taken during the crisis.⁵⁰ Hence, this policy framework

⁴⁶ See: <https://www.pelsrijcken.nl/en/about-us/state-advocate-nations-attorney>.

⁴⁷ *Handreiking Tijdelijke wet maatregelen COVID-19 voor gemeenten*. Pels Rijcken & Droogleever Fortuijn, June 2021, p. 22.

⁴⁸ *Ibid.*, pp. 81–94.

⁴⁹ *Voorbeeld-beleidskader Twm voor burgemeesters*. VNG, 20 November 2020.

⁵⁰ *Ibid.*, p. 1.

explained the competences that mayors have under the TCA, gave guidance as to the policy decisions that could or needed to be made, and outlined to what extent the regulations provided room for differentiation (*maatwerk*).

A ‘model-policy framework’ was drafted by the Safety Council, this time addressing the Chairs of the safety regions.⁵¹ The document explained that even though competences shifted to the municipalities, the Chairs of the Security Regions still played an important coordinating role in implementing the TCA.⁵² The policy framework gave an overview of the responsibilities the Chairs of the safety regions still have after the entry into force of the TCA. For instance, the Chairs of the safety regions remained responsible for providing information to the Minister of Health and communication concerning the pandemic to the public.⁵³ In general, the document stressed the importance of coordination between the different relevant actors, i.e. minister, safety regions and municipalities, and included a list of matters to be coordinated regionally.⁵⁴

4.2.3 A ‘Legal Helpdesk’, Questions and Answers and Dialogues

In addition to the guidance documents discussed above, the Association of Municipalities also provided guidance and support to the municipalities in other, even more informal ways. These initiatives involved a ‘legal helpdesk’, an overview of ‘questions and answers’ as well as ‘Dialogues in times of corona’.⁵⁵

First, the legal helpdesk is a support mechanism designed by the Dutch Association of Municipalities and the Ministry of the Interior. As part of this support mechanism, the Association of Municipalities, ministries, and other organisations share their knowledge and expertise with the aim of assisting the municipalities. Members of the Municipal Councils and municipal officials were invited to ask questions concerning the implementation of the TCA. Still today, even though the TCA has expired, municipal officials are invited to contact the helpdesk in order to ask their legal questions related to COVID-19.⁵⁶

⁵¹ Beleidskader Tijdelijke wet maatregelen COVID-19 voorzitters veiligheidsregio. Veiligheidsberaad, VNG, 2021.

⁵² This coordination takes place in the context of the regional policy team that continues to exist under the TCA on the basis of article 39 of the safety regions Act. See on the role of the safety regions after the TCA entered into force Van Blommestein (2021), Sect. 4.

⁵³ As follows from article 58s of the Public Health Act; see Beleidskader Tijdelijke wet maatregelen COVID-19 voorzitters veiligheidsregio. Veiligheidsberaad, VNG, 2021, p. 4.

⁵⁴ Beleidskader Tijdelijke wet maatregelen COVID-19 voorzitters veiligheidsregio. Veiligheidsberaad, VNG, 2021, p. 9, 10.

⁵⁵ See <https://vng.nl/artikelen/tijdelijke-wet-maatregelen-covid-19>.

⁵⁶ See <https://vng.nl/rubrieken/coronavirus-covid-19>.

Second, the website of the Association of Municipalities provided a list with ‘questions and answers’ related to the implementation of the TCA as well as the Ministerial regulations.⁵⁷ Questions and answers addressed, for instance, the competences of the mayors and Chairs of the safety regions as well as the role played by the municipal councils. The website also included questions and answers related to the Ministerial Regulations that complement the TCA. These questions and answers related to the Ministerial Regulations have since been deleted from the website as the Ministerial Regulations have expired.⁵⁸

Third, the Association of Municipalities launched the so-called ‘dialogues in times of Corona’, which provide support to the municipalities in implementing and enforcing the TCA. The dialogues took place in the form of online conferences and workshops during which officials and experts provided information on the TCA, as well as on the responsibilities of the municipal authorities and safety regions under this Act. During the first edition of the corona dialogues, in November 2020, insights were shared by officials working for responsible ministries, the authors of the abovementioned COVID-19 Guide, as well as officials working for the Dutch Association of municipalities. Several other editions have followed, the most recent concentrating on ‘post-corona recovery plans.’⁵⁹

4.2.4 Action Frameworks Issued by Mayors

COVID-19 soft law not only took the form of guidance issued by the Association of Municipalities, but also assisted the mayors and municipalities in their implementing tasks. Mayors themselves issued the typical Dutch ‘policy rules’ in order to make clear how they intended to use their discretionary powers granted by the corona measures. Indeed, as explained above, in the Netherlands, mayors were largely responsible for the enforcement of the legally binding corona measures laid down in the TCA and the Ministerial Regulations. The competence to issue policy rules followed from the general legal basis laid down in Article 4:81 GALA.⁶⁰ Several mayors of Dutch municipalities issued policy rules, most of them titled ‘action framework’ (*handelingskader*).⁶¹

⁵⁷The questions and answers can still be found at the website of the Dutch Association of Municipalities. See <https://vng.nl/artikelen/vragen-en-antwoorden-tijdelijke-wet-maatregelen-covid-19> and <https://vng.nl/artikelen/vragen-en-antwoorden-uitvoering-tijdelijke-regeling-maatregelen-covid-19>.

⁵⁸See Sect. 2.2.

⁵⁹See <https://vng.nl/artikelen/vng-dialoog-in-coronatijd>.

⁶⁰See above Sect. 3.1. The possibility to issue policy rules also is explicitly referred to in the explanatory memorandum to the Temporary Corona Act See *Kamerstukken II* 2019/20, 35526, 3, p. 25.

⁶¹An overview can be found at the governmental website that provides an overview of ‘local legislation and regulations’, see <https://lokaleregelgeving.overheid.nl/>.

The *Handelingskader Tijdelijke wet maatregelen Covid-19* issued by Aboutaleb, the mayor of the city of Rotterdam, provided a good example. This *Handelingskader* outlined and explained how the mayor intends to use his competences to enforce the COVID-19 legislation laid down in the TCA and Ministerial Regulations.⁶² Remarkably, the introductory statement to this action framework largely resembled the introduction statement of the action frameworks issued by other municipalities near Rotterdam. Hence, it seemed some alignment occurred between the policy rules issued by those municipalities. Whether and to what extent the mayors (of other regions) aligned the content of the policy rules requires further (empirical) research.

4.3 Beyond COVID-19: Soft Law and the Refugee Crisis

The COVID-19 crisis is not the only crisis in the Netherlands where soft law measures have played a role. The refugee crisis is another recent example where soft law measures have been issued. In May 2022, the Dutch Association of Municipalities, responsible ministries, and other partners issued a guide for the reception of Ukrainian refugees by Dutch municipalities,⁶³ as well as a guide for individuals hosting Ukrainian refugees.⁶⁴ Together with the Central Agency for the Reception of Asylum Seekers, the Association of Municipalities also issued a guide for the reception of asylum refugees in general, again addressing the Dutch municipalities.⁶⁵

Similar to several of the COVID-19 instruments, the guides addressed to the Dutch municipalities which concern the reception of refugees fall in the category of ‘guidelines’ (*richtsnoeren*), revealing that in this field as well, soft law documents play a role between different levels of governance. In this context, it is relevant to note that the reception of refugees is expected to become more and more decentralised. A legislative proposal is being prepared rendering the municipalities responsible for hosting refugees and introducing the possibility of giving binding instructions to the municipalities to receive (a certain number of) refugees.⁶⁶ What role (if any) soft law will play under this new allocation of responsibilities remains to be seen.

⁶² *Handelingskader Tijdelijke wet maatregelen COVID-19*, Rotterdam, 23 February 2022.

⁶³ *Handreiking Gemeentelijke Opvang Oekraïners*, version 3.0. Rijksoverheid, 20 May 2022.

⁶⁴ *Handreiking Particuliere Opvang Oekraïners (POO)*, version 3.0. Rijksoverheid, 24 June 2022.

⁶⁵ *Handreiking Proces tot realisatie opvanglocatie asielzoekers*. VNG, 2021.

⁶⁶ *Wetsvoorstel dwang asielzoekers vóór de zomer af*. Binnenlands Bestuur, 15 April 2022, <https://www.binnenlandsbestuur.nl/sociaal/wet-gedwongen-asielopvang-dichterbij>.

5 Analysis

The previous sections revealed that in the Netherlands, non-binding instruments featured alongside ‘hard’, legally binding measures to address the pandemic. ‘Model emergency regulations’ and informal Q&A mechanisms guided the content of the emergency regulations adopted by the Chairs of the safety regions during the first phase of the crisis. At a later stage, when the corona measures were given a legal basis in the TCA, guidance documents in various forms were issued to provide assistance to the municipalities and safety Regions. Dutch mayors issued policy rules that explained how they intended to use their discretionary powers.

The first observation that can be made based on the above overview is the large variety of the soft law instruments that were issued. The instruments are labelled under various names such as ‘guides’, ‘model-regulations’, ‘policy frameworks’, ‘action frameworks’, ‘questions and answer’ and ‘dialogues.’ This calls into question the legal status and effects of these documents. Do these documents have a binding effect on their addressees and/or on the issuing authorities? And what can be said about the legitimacy of those documents?

A second observation is that the aim of the guidelines (*richtsnoeren*) issued during the crisis was twofold.⁶⁷ First, they sought to provide guidance and assistance to the Chairs of the safety regions (in particular during the first phase of the crisis) and to the municipalities and mayors (during the second phase of the crisis) as to the implementation and enforcement of the legally binding corona instructions and measures. Second, the COVID-19 soft law instruments also sought to align, and harmonise, the design and implementation of the corona measures—first at the level of the safety regions, and later at the level of the municipalities. Here, the question arises whether these instruments have fulfilled these objectives in practice, and/or what this means for their role and function in the regulatory landscape governing the corona crisis.

This final section analyses the COVID-19 soft law instruments against these questions. It first looks at the legal status of the COVID-19 soft law documents, addresses legitimacy questions, and subsequently investigates whether the instruments have had a harmonising effect, and if so, to what extent, on the way in which the pandemic has been addressed.

5.1 The Legal Status of COVID-19 Soft Law

5.1.1 Mostly ‘Guidelines’ (Richtsnoeren)

The overview of the various non-legally binding documents that were issued during the pandemic shows that most of them were issued by another organisation than the authority that was competent to adopt or to implement the binding corona measures.

⁶⁷ As also mentioned in the introduction of Sect. 2.

Those COVID-19 documents issued by the Dutch Association of Municipalities and the Safety Council fall under the category of what are called ‘guidelines’ or *richtsnoeren*—the third category of Dutch administrative soft law. Indeed, a key characteristic of ‘guidelines’ is that they are issued by another authority or organisation than the authority to whom the guidelines are addressed. As explained above, ‘guidelines’ lack legally binding force, yet judicial practice and scholarship has recognised that they might exert binding effects through the principles of care and the duty to provide reasons for decisions. These binding effects vary according to the type of guidelines. Binding effects of guidelines that concern the use of ‘discretionary’ competences or policy choices are generally considered to be ‘weak’, or ‘legally non-existent’. In contrast, strong ‘comply or explain’-like binding effects arise in the case of expert guidelines.⁶⁸

The guidelines issued during the pandemic sought to steer the policy and discretionary decisions of the safety regions and municipalities, and therefore fall under this latter subcategory of guidelines having a weak binding effect on their addressees. The ‘model emergency regulations’⁶⁹ issued by the Safety Council in the first phase of the crisis provided policy guidance on how the safety regions could use their discretionary rulemaking powers to issue emergency regulations. During the second phase of the crisis, when the TCA entered into force, the model policy framework⁷⁰ issued by the Association of municipalities gave general policy guidance to the municipalities. The COVID-19 Guide⁷¹ (*Handreiking*) addressed the discretionary powers of the municipalities to enforce the legally binding COVID-19 legislation. In this second phase of the crisis, the Safety Council also issued policy guidance⁷² (‘model-policy framework’) addressing the Chairs of the safety regions.

Hence, at least from a legal perspective, the COVID-19 guidelines issued during the pandemic did not exert a strong legal binding effect vis-à-vis the municipalities and safety regions. Nevertheless, ensuring consistency and convergence has been a ‘power of argument’⁷³ which may have led the municipalities and safety regions to follow the policy framework and guidance in practice.⁷⁴

5.1.2 What About More Informal Support Mechanisms?

In addition to the policy framework (*beleidskader*) and the COVID-19 Guide (*Handreiking*), the Association of Municipalities also issued (even) more informal COVID-19 guidance documents. Indeed, ‘questions and answers’, a legal helpdesk,

⁶⁸See Sect. 2.

⁶⁹See Sect. 4.1.

⁷⁰See Sect. 4.2.2

⁷¹See Sect. 4.2.1

⁷²See Sect. 4.2.2.

⁷³Bröring (1993), pp. 483; 489.

⁷⁴See Sects. 5.3 and 5.4.

online dialogues and workshops were created in order to support the municipalities and mayors in their task to implement and enforce the legally binding corona measures. Even though these support mechanisms addressed the municipalities, they cannot automatically be considered to fall under the categories of ‘guidelines’. Indeed, a key characteristic of *richtsnoeren* is that they seek to structure or ‘influence’ the way in which the competent authority uses its administrative competences.⁷⁵ Insofar as these informal mechanisms only provide information on the applicable corona measures or on the allocation of responsibilities under the TCA, the documents do not meet this requirement.

Another COVID-19 support mechanism was the provision of advice in the form of individual answers to the questions raised by Dutch officials (in the context of the ‘legal helpdesk’ for instance). Neither these questions, nor the answers to these questions, have been published online (as far as the author knows) and therefore, they cannot be considered to be ‘general rules’ which, however, is central to the definition of *richtsnoeren*.⁷⁶ Thus, it seems that under Dutch administrative law, these informal mechanisms do not fall under the scope of ‘guidelines’ either. Consequently, these guidelines are not likely to have a binding legal effect on Dutch municipalities.

5.1.3 Policy Rules

The most ‘formalised’ forms of COVID-19 soft law are the policy rules issued by mayors, spelling out how they intended to use the (discretionary) administrative powers to implement and enforce the corona measures laid down in the Temporary Corona Act and Ministerial Regulations. Policy rules are regulated by the legal framework that governs the issuance and use of policy rules in the Dutch GALA. This means that the COVID-19 policy rules have a self-binding effect on the mayors and that deviation is possible only if this is required in light of special circumstances.

5.2 *COVID-19 Soft Law: Low Levels of Democratic Legitimacy?*

The COVID-19 soft law instruments show a differentiated picture. Not only did they take different forms and shapes; they were also issued by different actors. COVID-19 soft law instruments have been issued by the Safety Council and by the Dutch Association of Municipalities, while the principal COVID-19 guide has been drafted in collaboration with a Dutch Law firm. Policy rules have been issued by Dutch mayors. The issuing of these non-binding documents does not follow a standardised

⁷⁵ Bröring (1993), pp. 92; 483.

⁷⁶ Ibid, pp. 94; 483.

process. Instead, as is often the case for soft law documents, the issuing process is largely unregulated and hence characterised by informality.⁷⁷ What does this imply for the democratic (input) legitimacy of these documents?⁷⁸ To what extent have democratically elected institutions been involved in the issuing of such documents; And/or was the general public (citizens) consulted about draft versions of the documents?

Let us start with the ‘model emergency regulations’ issued by the Safety Council in the early stages of the crisis. The Safety Council represents, as said above, the 25 safety regions and is composed of the 25 ‘Chairs’ of the safety regions.⁷⁹ The Chair is generally the mayor of one of the largest municipalities of the safety Region.⁸⁰ The Safety Council is considered to be a form of ‘extended’ local governance (*verlengd lokaal bestuur*).⁸¹ However, this does not mean that the non-legally binding model emergency regulations issued by the Safety Council were enacted following a democratically legitimised procedure. In contrast, democratic involvement prior to the adoption of these regulations is limited; while the content of the model emergency regulations was coordinated by the responsible Minister,⁸² there was no direct involvement of a democratically elected institution (such as the municipal councils) or of citizens of the safety regions. This only adds to the already weak democratic legitimacy of the legally binding ‘emergency regulations’ adopted by the safety regions. Indeed, as discussed, the model emergency regulations (that largely copied non-binding model emergency regulations) have been criticised for their lack of democratic legitimacy.⁸³

What about the guidance issued by the Dutch Association of Municipalities to assist the mayors and municipalities in implementing the TCA? The board of the Association of Municipalities is composed of mayors, aldermen and councillors, and is supported by several committees. However, there are no signs (as far as the author has found) that the municipal councils (the democratically elected bodies of Dutch Municipalities) were directly involved in the adoption of the COVID-19 guidance instruments issued by the Association of Municipalities.⁸⁴ Hence, the issuing process of guidance given to the municipalities during the COVID-19 pandemic is not characterised by high levels of democratic legitimacy. In this respect, most remarkable is the COVID-19 Guide that was drafted in collaboration with the private law

⁷⁷ See on the ‘features of informality’ of EU guidance documents Van Dam (2020), pp. 33–41.

⁷⁸ See on the concept of input legitimacy, Scharpf (1999), p. 7.

⁷⁹ See Sect. 2.1.

⁸⁰ They are elected by the general board of the safety regions which is composed of all mayors from the municipalities that belong to that safety region.

⁸¹ As states the website of the safety regions: <https://www.veiligheidsberaad.nl/over-het-veiligheidsberaad/#:~:text=De%20veiligheidsregio's%20zijn%20verantwoordelijk%20voor,zijn%20verantwoordelijk%20voor%20hun%20veiligheidsregio.>

⁸² As follows from: [https://www.veiligheidsberaad.nl/2020/03/17/landelijke-model-noodverordening-voor-de-veiligheidsregios/.](https://www.veiligheidsberaad.nl/2020/03/17/landelijke-model-noodverordening-voor-de-veiligheidsregios/)

⁸³ See Sect. 2.1.

⁸⁴ Compare Bröring (1993), p. 487.

firm Pels Rijcken. While the COVID-19 Guide is perhaps the most important guidance document advising mayors on how to use their enforcement powers and how to implement the TCA, the law firm does not have any democratic credentials. This low democratic legitimacy needs to be stressed and questioned.

The policy rules issued by the Dutch mayors (the more formalised form of COVID-19 soft law) find their origins in the discretionary powers granted by legislation, in this case the TCA. As said above, the competence to issue policy rules was given a legal basis in the Dutch GALA.⁸⁵ Nonetheless, the issuing process of policy rules does not require the involvement of electoral bodies (such as the municipal council) or citizens. A quick look at the COVID-19 policy rules issued by the mayors also does not reveal traces of such involvement or consultation. Thus, the issuing of COVID-19 soft law rules is not directly subject to democratic scrutiny. So saying, the legislation granting discretionary powers (in this case the TCA and Ministerial Regulations) that form the basis for the adoption of the policy rules was adopted following a legislative process – which in any case does to a certain extent endow these rules with democratic legitimacy.⁸⁶

From the above, it follows that the COVID-19 soft law rules score rather poorly when it comes to democratic (input) legitimacy. In this respect, the COVID-19 soft law issued during the pandemic in The Netherlands is neither unique nor exceptional. Low levels of democratic legitimacy are often pointed out when it comes to the issuing of soft law rules—not only at the national level, but also at the EU and international level. For instance, the various EU soft law measures that were issued to tackle the COVID-19 crisis have been firmly criticised for their low democratic credentials. Eliantonio and Ştefan show that these EU soft law documents were issued without involvement of the European Parliament and ‘with minimal and unsystematic consultation with stakeholders, national authorities and scientific bodies.’⁸⁷ The authors argue for stakeholder consultation and involvement of the European Parliament within short deadlines so as to improve the democratic credentials of EU soft law issued in times of crises.⁸⁸

Would a similar solution work for the COVID-19 soft law instruments that were issued in the Netherlands? Would it be desirable that electoral bodies such as municipal councils and the public or stakeholders be consulted prior to the issuing process of the COVID-19 guidelines? From a democratic legitimacy perspective only, the answer to these questions is ‘yes’. Yet, the answers to these questions require further thought and study. Indeed, such procedural requirements, even if short deadlines are applied, might lead to a longer and more cumbersome issuing

⁸⁵ See Sect. 3.1.

⁸⁶ Yet the democratic legitimacy of the TCA and Ministerial Regulations is also subject to criticism and discussion, as has been briefly pointed out in Sect. 2.2.

⁸⁷ Eliantonio and Ştefan (2021), p. 173.

⁸⁸ Ibid.

process, detracting from their flexible character, needed for a swift response to changing circumstances and developments requiring urgent action.⁸⁹

In this respect, it should also be kept in mind that the most important function of soft COVID-19 measures is related to their output legitimacy.⁹⁰ Soft law documents largely derive their legitimacy from their ‘problem solving’ character and efficiency gains, which are particularly useful in times of crisis.⁹¹

5.3 Coordination and Harmonisation: The Promises of COVID-19 Soft Law

The main rationale behind the issuing of the COVID-19 soft law instruments was to facilitate a more consistent, harmonised, and coherent implementation of the legally binding corona measures between the Dutch safety regions and the Dutch municipalities. The fulfilment of these objectives are important for these documents to be effective and legitimate ‘governance instruments’ (and related to the output legitimacy referred to above in Sect. 4.2).

Current research indicates that the soft law instruments issued during the COVID-19 crisis might certainly shape the way in which municipalities implement and enforce the legally binding corona measures. The study conducted by Boogaard et al. shows that the ‘model regulations’ issued by the Safety Council served as a basis for the emergency regulations issued by the Chairs of the safety regions.⁹² Deviations from the Model Regulations are found to be exceptional and often coordinated between the Chairs of the safety regions.⁹³ A possible reason for the alignment of the safety regions’ regulatory practices is the potential ‘waterbed effect’ that arises when differences exist between municipalities in the way activities are being enforced or licensed.⁹⁴ Activities then concentrate in the municipalities or places that are most ‘lenient’ when it comes to licensing and/or enforcing corona measures. Van den Berg and Mireau note, for instance, that when ‘Brabant went into a kind of voluntary lockdown in March [2020], bars in Nijmegen were filled with Brabant residents’.⁹⁵ These differences then give incentives for further alignment and coordination.

Whether the guidelines issued by the Dutch Association of Municipalities (during the second phase of the crisis) have had a similar steering effect on practices of the

⁸⁹ See on this ‘regulatory conundrum’ Van Dam (2020), pp. 7; 8; Eliantonio and Ștefan (2021), pp. 173–175.

⁹⁰ Scharpf (1999), pp. 10–11.

⁹¹ Compare Boschetti and Poli (2021), p. 24.

⁹² Becker et al. (2020).

⁹³ Ibid.

⁹⁴ Van den Berg et al. (2021), p. 4.

⁹⁵ Van den Berg and Mierau (2020).

municipalities requires further (empirical) research. There is, nonetheless, good reason to believe that the municipalities also aligned their implementing and enforcement policies in light of the COVID-19 guidelines. Not only was following these guidelines giving practical and policy advice to the municipalities the ‘easiest thing to do’, it also prevented the potential ‘waterbed effect’ in the event differences arise.

From the above, it follows that ‘soft rules’ and informal mechanisms play an important role in harmonising and aligning the decentralised implementation of the legally binding corona rules. Furthermore, these informal mechanisms facilitate a dialogue and coordination between the responsible authorities: the municipalities, the Chairs of safety regions, and the responsible minister. A pivotal role in promoting informal coordination and alignment is played by the Dutch Association of Municipalities. This umbrella organisation has not been granted an official function in implementing the TCA, yet in practice, plays an important coordinating role by issuing guidelines on how the municipalities could use *their* competences to implement and enforce the binding rules.

Hence, a soft regulatory network has been set up that operates alongside, or in the shadows of, the legally binding rules, and which echoes so-called forms of ‘network based governance’.⁹⁶ In the literature, it has been argued that a network-based approach is needed for a successful and effective response to the crisis.⁹⁷ It seems that the issuing of COVID-19 guidance is key to such an approach where within the formal allocation of responsibilities, guidance and dialogue enable coordination and alignment.

5.4 Differentiation and Tailored Decision-Making at Risk?

COVID-19 soft law promoting coordination and harmonisation also has some disadvantages. Indeed, striving for uniformity in implementing and enforcement practices could mean that local authorities are less inclined to make tailored decisions that take into account the local circumstances. The room for differentiation that is provided for in the TCA and the Ministerial Regulations might not be utilised by the municipalities in practice. This is at odds with the ‘decentralised implementation approach’ that lies at the heart of the TCA. Indeed, by empowering municipalities (and mayors in particular) to enforce and implement the TCA, the room for differentiation and tailored decision-making is one of the key objectives of the TCA. This is also made clear in the explanatory memorandum to this Act.⁹⁸ The effect of too much uniformity and harmonisation between the municipal practices is also at odds with the concept of decentralised autonomy, a (constitutional) principle⁹⁹ that is

⁹⁶See e.g. Van Blommestein (2021).

⁹⁷Ibid.

⁹⁸*Kamerstukken II* 2019/20, 35526, 3, p. 8.

⁹⁹See on this principle for instance Esser and Boogaard (2020).

foundational to the Dutch legal order as a decentralised unity state. Hence, the various COVID-19 soft law measures that assist municipalities and safety regions on how to implement the corona measures, might lead to a less diversified approach in addressing the crisis, *de facto* leaving less room for municipal autonomy.

This leads to the (preliminary) conclusion that in the Netherlands, COVID-19 soft law has had an important function in promoting a coordinated and aligned implementation of the legally binding COVID-19 measures. At the same time, striving for harmonisation needs to be balanced against the objectives of tailored decision-making and differentiation, as well as the (constitutional) principle of decentralised autonomy. Otherwise, the room for tailored decision-making and differentiation provided by the TCA and Ministerial Regulations risk becoming an illusion in practice.

Thus, when soft law measures are issued to address future crises in the Netherlands, the challenge lies in drawing a fine line between harmonisation and differentiation, leaving sufficient room for municipal autonomy in implementing and enforcing the legally binding measures.

6 Conclusion

Aiming to contribute to research on the role of soft law in times of crisis, this chapter studied the role of soft law during the COVID-19 pandemic in the Netherlands. It finds that COVID-19 soft law indeed played an important role complementary to legally binding COVID-19 regulations. During the first phase of the crisis, non-legally binding model emergency regulations were used as templates for the (binding) regulations issued by the Dutch safety regions. During the second phase of the crisis (from December 2020 onwards), the COVID-19 guidance documents—in various forms—assisted municipalities in implementing the Temporary Corona Act, an act Parliament.

The analysis of the COVID-19 soft law rules shows that the role of these documents needs to be seen against the Dutch regulatory and constitutional context. The role of COVID-19 soft law is shaped by the fact that the Netherlands is a decentralised unitary state while in the legal context, typical forms of soft law—such as the guidelines (*richtsnoeren*) and policy rules (*beleidsregels*)—are part of the Dutch regulatory landscape. The analysis shows that the COVID-19 soft law rules' main objective was to assist the safety regions and municipalities in taking the required (implementing and regulatory) measures, in order to promote consistency and coherence in the way the crisis was being addressed. However, striving for consistency and harmonisation might come at the detriment of the room for differentiation and tailored decision-making that is provided for in the TCA, and which is central to the decentralised implementation approach.

This potential side-effect is not the only drawback of the issuing of COVID-19 rules. The legal status and binding effects of the so-called 'guidelines' (*richtsnoeren*) on their addressees might not always be crystal clear, potentially leading to (legal)

uncertainty for their addresses (the mayors) and the public. The issuing of COVID-19 soft law rules also has low democratic credentials. This is especially so for the COVID-19 Guide that was issued by the Dutch Association of Municipalities in collaboration with a law firm. The stronger the regulatory effects of these soft law documents become in practice, the more this low democratic legitimacy becomes problematic. At the same time, it should be kept in mind that the major advantage of soft rules is that they can be swiftly issued and revised, without the need for cumbersome issuing processes.

What future lessons can be drawn from this ‘Dutch case’ of COVID-19 soft law? Studying COVID-19 soft law in The Netherlands has shown that, complementary to hard law rules, soft law can be an effective instrument to bring about a more effective, consistent and harmonised response to the crisis, especially when regional and local authorities are involved. However, soft law is not flawless; it comes with some disadvantages or undesired side effects. In light of the absence of clear regulatory principles or rules governing the issuing and use of those instruments—and in particular of Dutch ‘guidelines’ (*richtsnoeren*)—it is all the more important that the actors that issue these documents are aware of the downsides of soft regulation and do their best to limit these downsides as much as possible. For instance, municipal councils could be consulted on draft versions of guidelines issued by the Association of Municipalities (elevating democratic credentials) and the documents (and hence drafters) should stress the importance of making use of the room for differentiation provided by regulations. Perhaps, in the future, a more principled approach towards the issuing and use of soft law, especially the highly unregulated soft law category of ‘guidelines’, could further improve these forms of soft governance.¹⁰⁰ Such meta-regulation of (Dutch) soft law, and *richtsnoeren* in particular, requires further study and research.

References

- Becker R et al (2020) Mate van juridische differentiatie door veiligheidsregio’s. Corona Papers, 21 December 2020, <https://coronapapers.nl/nieuws-1/nieuws/mate-van-juridische-differentiatie-door-veiligheidsregio-s>
- Beleidskader Tijdelijke wet maatregelen COVID-19 voorzitters veiligheidsregio. Veiligheidsberaad, VNG, 2021., <https://vng.nl/sites/default/files/2020-11/voorbeeldbeleidskader-tijdelijke-wet-maatregelen-covid-19-voorzitters-veiligheidsregio.pdf>
- Boschetti B, Poli MD (2021) A comparative study on soft law: lessons from the COVID-19 Pandemic. *Cambridge Yearb Eur Legal Stud* 23:20–53
- Broeksteeg H (2020) Voorschriften met gebreken. In: Heringa AW, Schinkelshoek J (eds) *Coronacratie. Rechtsstaat en democratie in tijden van crisis een eerste balans*. Montesquieu Instituut, The Hague, pp 41–50
- Bröring HE (1993) *Richtlijnen. Over de juridische betekenis van circulaire, leidraden, aanbevelingen, brochures, plannen*. Kluwer, Deventer

¹⁰⁰ Van Dam (2020), pp. 277–282; Van Dam (2021).