Panel abstract **"New Perspectives on the Interplay between Hard Law and Soft Law in Europe and Beyond"**

Regional and global networks increasingly develop, promulgate and diffuse soft law in the form of non-binding rules, standards and guidelines. This trend is particularly strong - but not limited to - the EU, which is a multi-level polity wherein in some issue areas regulatory power is disaggregated into the hands of task-specific transnational networks. These pieces of soft legislation coexist along with hard domestic law in non-trivial ways. In some cases, soft law is actively supported by private actors to prevent the development of more binding legislation. However, soft law can also entail contractual provisions that make it enforceable once agreed upon. This is for instance the case of the "Safe Harbour" agreement on data protection between the EU and the US. Soft law can also pave the way for more stringent public regulation and be referred into hard law. Transnational (soft) law and domestic (hard) law are more and more intertwined in practice, as an effective regulatory regime ideally requires to make the most of the flexibility of the former and of the certainty of the latter. However, the varieties of soft and hard law configurations, their origin, consequences and the trade-offs associated with them are still poorly understood. This panel welcomes theoretical and empirical contributions addressing the complex relationships between soft and hard law with a special attention to the conditions explaining different soft and hard law configurations and their consequences for regulation and governance.

**Re-evaluating Soft Law in European Public and Private Governance**

Linda Senden, University of Utrecht, Europa Instituut/RENFORCE (<http://renforce.rebo.uu.nl>)

Colin Scott, University College Dublin

Very preliminary draft – not to be quoted !!

**1. Introduction**

An important governance focus in the disciplines of international relations and law over many years has been on the emergence, character and effects of instruments referred to in English as ‘soft law’. Though the category may be thought of as sufficiently well-established not to require the inverted commas, recent developments in public and private governance in the EU raise questions about the boundaries of the concept of soft law and how it is theorised in relation to hard law instruments. Conventionally we might think of soft law as emerging in the EU in the shadow of state hierarchy, as non-binding instruments which have normative effects because of public authority, but which are not properly catalogued within the EU Treaties. While such an approach may be formally correct it risks neglecting both the empirical effects of soft law instruments on the one hand, and the potential for understanding expanded instrument choices in policy design on the other.  A further dimension is added when we consider the effects of privately developed norms which are the subject matter of delegation or adoption, either implicitly or explicitly, by EU institutions. While such instruments might conventionally not be understood as soft law measures, lacking direct public authority, the different forms of complementarity which have emerged between public action and private instruments may be thought of as sufficiently supplying the public imprimatur which is a characteristic of soft law. Taken together such developments suggest a complex normative map comprising both actors and instruments of public and private character which requires a re-evaluation of the character, boundaries, legitimacy and effects of soft law as a mode of governance.

In this contribution we explore these two dimensions of the increasingly complex normative map. We wish to identify in particular the different types of complementarities between hard law and soft law that currently emerge within the context of the EU and that involve a multitude of actors, both public and private and operating at the EU, national and transnational levels. First, we focus on what we label as the *soft public law dimension*, referring to soft law originating from a public source but which finds itself in the shadow of the system of legal instruments and hierarchy of norms the Treaty of Lisbon put into place. This concerns not only soft law acts adopted by the European Commission, but also by Union agencies and intergovernmental networks. These include for instance the new financial agencies (eg. ESMA) but also older agencies like the European Aviation Safety Agency (EASA). Intergovernmental networks producing soft law can be found in the area of communications and competition**.** Examples include policy making by BEREC to implement the European Commission’s preference for a soft law approach in ‘Europe’s Policy Options for a Dynamic and Trustworthy Internet of Things’ (2013) and the quite formal activities of the European Competition Network working groups, addressing the effects of a measure of devolution to national competition authorities under Regulation 1/2003. Tellingly, the emergence of both these networks was driven by the European Commission. Even more than with the case of Commission soft law, the development of soft law in such networks tends to go underground within the broader legal system, as it has remained non-regulated in the Union Treaties. EU directives or regulations may thus in fact impose a certain obligation upon the Commission or an agency to adopt soft law acts, such as recommendations and guidelines, without the latter ever forming part of the formal set of the Union's legal instruments and without the Treaties stipulating tasks and powers of Union agencies. Given the silence of the Treaties, a full understanding of the soft regulatory role of the Commission, agencies and intergovernmental networks, the effects thereof and its relation to hard law requires further empirical investigations and analysis (section 2).

The second focus concerns what can be labelled as the *soft private regulation dimension,* referring to the different ways in which transnational – often perceived as soft - private regulation can find its way into the Union's legal framework. Such private regulation can be ‘loaned’ soft public authority but also hard public authority, depending on the different ways in which public regulators follow-up on such private regulation. Here we will draw on the insights gained in various case studies to illustrate the different complementarities that one sees emerging between soft private regulation and EU soft and hard law (section 3). In a synthesizing section, we will consider what consequences the identified soft and hard law configurations and complementarities may have for the development of the Union’s regulatory system and its legitimacy (section 4). Overall, this analysis enables us to address the tripartite questions to what extent soft law practices have grown through the developing roles assigned, explicitly or implicitly, to intergovernmental networks and private regulatory regimes, to what extent the growth in such normative instruments beyond the European Commission and other direct governmental actors tends towards masking their significance and effects, and, to what extent the move lending of governmental authority to soft law instruments progressively further from the core of government can be a legitimate and effective basis for policy implementation.

**2. The soft public law dimension**

2.1 The formal EU hierarchy of norms and delegation of powers system

At first glance, the Treaty of Lisbon put into place a rather clear set of legal instruments – or hierarchy of norms, as it is often referred to – in Articles 288 to 291 TFEU, certainly when compared to the pre-Lisbon version of the EC-Treaty. Article 289 of the old EC-Treaty merely distinguished between regulations, directives and decisions as binding Community acts, while recognizing recommendations and opinions as (the only) Community instruments having no binding force. So, the old Treaty did not distinguish between the legislative or administrative/executive nature of a Community instrument and one could only find out by actually having a closer look at the legal act at issue, whether it was of a legislative or executive nature by looking at the adopting institution (the adoption by the Council and European Parliament pointing towards a legislative act, and the adoption by the Commission pointing to an administrative/executive one, in rare cases the Council).

While Article 288 TFEU still contains the same set of instruments, setting out their legal nature and effect,[[1]](#footnote-1) the Lisbon Treaty brought notable changes as to the purposes for which they can be used. The new Articles 289, 290 and 291 TFEU thus make a distinction between respectively legislative acts, delegated acts and implementing acts, Union directives, regulations and decisions taking either one of these forms. In itself, this distinction in itself is to be applauded for indeed making clear the different nature of Union acts and the way in which they relate to one another, especially since the words of ‘delegated’ and ‘implementing’ are added to the labels of the acts when adopted. Yet, while the underlying aim of this Treaty amendment was to bring more transparency and clarity to the Union’s legal instruments and their specific nature, it may be doubted whether this goal has actually been achieved. In particular, because the three binding Article 288 instruments can actually still be of either a legislative, delegated or implementing nature. The following graph illustrates this.

***Graph 1 – Formal hierarchy of norms, as contained in Articles 288-291 TFEU***

As a consequence, one will still have to take a look at a particular Union act as to identify this nature. In the hierarchy of norms as it was originally designed in the Constitutional Treaty for Europe and upon which the current provisions draw, this was not the case as a different terminology was being introduced for acts of a legislative and delegated nature (framework laws and laws). Yet, this terminology was abandoned in the Treaty of Lisbon because of its declared excessivley constitutional nature. Secondly, even if the TFEU seemed to have built a rather comprehensive hierarchy of norms or at least give the impression thereof, the many different soft law instruments the EU institutions use in practice do not reflect in any other way in the TFEU than it did already in the old EC-Treaty. So, the reference to recommendations and opinions in Article 288 has remained unchanged and only Article 292 was added, stipulating the power of the Council to adopt recommendations and the procedure to follow for this. This means that the Treaties in their current form do not reflect in any way the incremental development soft administrative rule-making has witnessed in the daily practice of the EU, also beyond the European Commission. Below we will highlight core features of this development.[[2]](#footnote-2)

2.2 The phenomenon of EU soft administrative rule-making

Analysing the Union’s administration in a triadic way, the distinction is made between direct administration, indirect administration and cooperative or shared administration.[[3]](#footnote-3) Direct administration occurs at the Union level, often equalised with administrative decision-making or single-case decision-making, such as the Commission’s individual decisions in the area of competition law. But this can also be taken to refer to administrative rule-making[[4]](#footnote-4) or the exercise of general implementing powers by EU entities. Indirect administration then refers to the implementation of EU law into national administrative systems. Shared administration is considered to occur where the two levels work together.[[5]](#footnote-5) Soft administrative rule-making as this occurs in the context of the EU must clearly be viewed from the perspective of shared administration. Practice shows that the Commission’s exercise of implementing powers does not only lead to the adoption of legally binding acts – in particular delegated and implementing acts – but also of administrative soft law acts. These are cast primarily in instruments like communications, notices, guidelines, codes and circulars. This forms an increasingly important category of soft law that fulfils a post-law function,[[6]](#footnote-6) by seeking to provide further rules and guidance to national authorities and interested parties on the interpretation, transposition, application and enforcement of EU law. This occurs with a view to enhancing the transparency, legal certainty, correct and uniform interpretation of EU law, its predictability and the equal treatment of those concerned. This type of soft law is thus always related to already existing – hard - Union law.

As such, soft administrative rule-making acts may be geared towards the level of direct administration, by explaining how the Commission will use its own decision-making powers in individual cases (*decisional acts*).[[7]](#footnote-7) An example is the Commission’s communication on the application of penalty payments and lump sum payments in the framework of the infringement procedure.[[8]](#footnote-8) Yet, such acts will clearly also bear effect on the organization of the implementation of EU law on the national level and thereby on the level of indirect administration. Interestingly, more recently we also witness the emergence of Commission decisional acts that are specifically geared towards the level of indirect administration, by seeking to guide the way in which Member States use their discretionary powers in implementing EU law. The Handbook on Implementation of the Services Directive provides an example of this. Another category of soft administrative acts indicates or summarizes the way in which – according to the Commission – Union law should be understood and applied *(interpretative acts)*. These may not only relate to indirect administration (giving guidance to national authorities), but may be relevant in the context of direct administration as well. The objective may then be to provide guidance to other EU institutions, bodies and agencies, as well as to provide transparency and legal certainty for stakeholders and citizens on how EU law will be interpreted and applied by the EU administration.

When it comes to soft administrative rule-making, not only the levels of direct and indirect administration are thus very much intertwined, but in fact also the levels of general rule- making and single-case decision-making. The underlying rationales of soft administrative rule-making and its increasing importance for legal practice underline this. Very importantly, it must also be observed that more recently certain EU-level committees (e.g. the Customs Committee),[[9]](#footnote-9) networks and agencies have been gaining soft rule- making powers as well with a view to securing the actual implementation and enforcement of EU law and policy. In itself, the use of soft EU administrative rule-making by such entities indicates a maturing European administrative bureaucracy, as this to a certain extent parallels developments at the national administrative level where we can find counterparts of interpretative and decisional rules, as well as of agencies.[[10]](#footnote-10)

Decisional actsare of particular importance when it comes to the Commission’s single-case decision-making, as they set out how the Commission intends to apply EU law to individual cases at hand. So, these acts are adopted in areas where the Commission enjoys (wide) discretionary implementing powers, such as in the fields of competition law and state aid. Direct administration by the Commission as expressed in its individual decision- making will thus very much depend on the existence and contents of such general rule- making acts, underlining that these two aspects of direct administration should be considered very much in conjunction. Interestingly, Union legislation may not only enable but even oblige the Commission

to adopt such a decisional act, while stipulating at the same time certain procedural requirements. A clear example is in Directive 2010/40,102 of which Article 9 states:

‘The Commission ***may adopt guidelines and other non-binding measures*** to facilitate Member States' cooperation relating to the priority areas in accordance with the **advisory procedure** referred to in Article 15(2).’ In a similar vein, Article 23(4) of Directive 2010/63 on the protection for animals used for scientific purposes provides that: ‘*Non-binding guidelines*at the level of the Union on the requirements laid down in paragraph 2 may be adopted in accordance with the advisory procedurereferred to in Article 56(2).’ The advisory procedure envisaged in both cases is that under Articles 3 and 7 of Decision 1999/468/EC (the old Comitology Decision), also having regard to its Article 8. This procedure allows for a certain involvement in and control of the Commission’s exercise of implementing powers by national representatives and the European Parliament. Certain directives may even provide for more stringent control of national representatives and the European Parliament, as Directive 2011/24/EC on the application of patient’s rights in cross-border healthcare illustrates. This Directive provides that the Commission ‘***shall adopt guidelines*** supporting the Member States in developing the interoperability of ePrescriptions’, according to the **regulatory procedure** as contained in the Comitology Decision.’ [our emphasis] It does not specify whether these guidelines are to be of a binding or non-binding nature.

These examples show firstly, that the legal set of instruments as contained in Articles 288-291 TFEU is not comprehensive and that the functioning of the Union system clearly also relies on other legal instruments operating in the shadow thereof. Secondly, the adoption of such instruments may clearly also be bound to comitology procedures that have been introduced for the control of the Commission’s exercise of implementing powers in Article 291 TFEU, in particular in its Paragraph 3. Apparently, the scope of comitology is not necessarily restricted to the Commission’s adoption of legally binding acts but can also be extended to its soft implementing acts. The new Comitology Regulation, replacing Decision 1999/468/EC allows for such a reading, given that it speaks in a general way of ‘implementing acts’ without distinguishing between binding and non-binding acts.

2.3 The agencies’ use of soft law

While being an increasingly important part of the Union’s institutional framework, a general provision in the Treaties stipulating the place and function of agencies in the Union system as well as rules regarding their establishment and powers is lacking. Consequently, they are generally established by secondary law acts (often regulations), on the basis of a specific Treaty provision, such as Articles 114 and 352 TFEU. These provisions confer powers on the EU to bring about certain (substantive) laws and policies, but have been interpreted by the EU legislator so as to include the power to establish Union organs to supervise or facilitate the implementation of the laws and policies at issue. While the ECJ has established that powers may be delegated to such organs, it made it clear that this must be confined to clearly defined executive powers and does not extend to powers involving a wide margin of discretion. This famous Meroni doctrinethus excludes the delegation of general regulatory powers to agencies.[[11]](#footnote-11) Yet, this doctrine is put under pressure by the currently developing institutional practice, as certain agencies have developed policy-making activity that comes close to full regulatory powers.[[12]](#footnote-12) While these general rule-making powers are soft by the label, they are often hard in practice and effects. One may actually say that soft EU administrative rule- making is booming business.

Chiti has distinguished agencies on the basis of how they are involved in the exercise of rule-making powers:[[13]](#footnote-13) (i) European agencies provided with genuinely final administrative decision-making powers; (ii) European agencies coordinating common systems providing an advisory or technical assistance to European and national institutions; (iii) European agencies coordinating common systems responsible for the production and dissemination of high-quality information in certain specific sectors of EU action. For the purposes of this paper, especially agencies falling within the first and second category are of interest as most of these engage in some form of regulation by soft law. The first category includes for instance the Office for Harmonization in the Internal Market (Trademarks and Designs - OHIM), the Community Plant Variety Office (CPVO), the European Chemicals Agency (ECHA) and, most recently, the three new European Supervisory Authorities (ESAs): the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA). European agencies within the second category include those that coordinate common systems providing advisory or technical assistance to European and national institutions, such as the European Network and Information Security Agency (ENISA), the Agency for Cooperation of Energy Regulators (ACER), the European Maritime Safety Agency (EMSA) and the European Railway Agency (ERA). The European Aviation Safety Agency (EASA) does not merely assist the Commission in exercising rule-making powers, but also adopts itself technical guidelines**.** The European Medicines Agency (EMEA) is an example of an agency that has *de facto* engaged in issuing technical, scientific and procedural guidance concerning the implementation of the EU pharmaceutical legislative framework. Here we will look briefly into two examples of soft rule-making by regulatory agencies and legal effects thereof; EASA and ESMA.

*EASA*

The European Aviation Safety Agency (EASA) was established in 2002 as an independent EU body with a specific responsibility for aviation safety strategy within the continent.[[14]](#footnote-14) The principal objective of EASA is to ‘establish and maintain a high uniform level of civil aviation safety in Europe’.[[15]](#footnote-15) It focuses especially on advising the EU safety standards, authorisation of non-EU operators, undertaking safety research and certifying types and parts as appropriate for use on aircraft operating in the EU. It is also engaged in establishing operational links with other regional and national organisations undertaking similar functions, with a view to harmonise standards and promote best practice in aviation safety. This is indicative already of the regulatory role of the EASA, which is confirmed by the functions the founding Regulation ascribes to it. Besides inspection, certification, coordination, data collection and analysis and authorisation activities, these include in particular also ‘the drafting of aviation safety legislation and provision of technical advice to the Commission’. According to the preamble of the Regulation, the EU must lay down essential requirements applicable to aeronautical products, parts and appliances, to persons and organisations involved in the operation of aircraft, and to persons and products involved in the training and medical examination of pilots. For this purpose, the European Commission is also empowered to develop the necessary Implementing Rules (IR).[[16]](#footnote-16) Even though the European Commission is responsible for regulatory tasks, many are in fact carried out by EASA.[[17]](#footnote-17) More particularly, EASA plays an important role in aviation legislation through the performance of three essential tasks: rulemaking, certification, and standardization.[[18]](#footnote-18) In terms of rulemaking, EASA has to support ‘the development of a high and uniform level of safety and of environmental standards in aviation’.[[19]](#footnote-19) This involves the drafting of aviation safety rules and adopting so-called 'soft rules' to assist in the consistent application of EU legislation across the European Union.[[20]](#footnote-20)

The ‘rules’ of EASA are cast in Opinions and Decisions.[[21]](#footnote-21) An Opinion is a draft of legislation (together with an explanatory memorandum), which is submitted to the European Commission.[[22]](#footnote-22) Opinions are issued in the case of amendments concerning the scope and content of the EASA Regulation and its Implementing Rules, or when new Implementing Rules are being established.[[23]](#footnote-23) They are further processed either by the European legislator (the Council of Ministers and the European Parliament) or the European Commission before the legislation can be enacted and published in the Official Journal of the EU. Where the opinions comprise technical rules, the Commission may not change their content without prior coordination with EASA.[[24]](#footnote-24)

Agency Decisions do not constitute mandatory requirements; they provide details in order to support implementation of the requirements entailed in the related regulations. A Decision can take the form of a *Certification Specification* (CS), an *Acceptable Means of Compliance* (AMC) to a rule, or *Guidance Material* (GM) to a rule. These acts aim to assist in the implementation of the law and they are frequently referred to as 'soft law'. However, with regard to CS,[[25]](#footnote-25) certificates shall be issued and maintained if they are complied with. Although the agency formally only ‘assists’ the Commission, its decisions apply to all owners of a specific type of plane and the withdrawal of a certificate can mean that all owners of that plane are affected. In that sense, its soft law can be quite hard in fact.[[26]](#footnote-26) Regarding AMC, these are non-binding standards in order to illustrate means to establish compliance with the EASA Regulation and its implementing rules and, at the same time, allow for flexibility in the way of compliance as alternative means of compliance can be proposed. GM are non-binding supportive documents to the rule texts.[[27]](#footnote-27) They help to clarify the meaning of a requirement or specification and are used to support the interpretation of the EASA Regulation, its implementing rules and AMC.[[28]](#footnote-28)

EASA’s Management Board has established procedures for issuing Opinions, CS, AMC and GM.[[29]](#footnote-29) In the case of Opinions, the Agency puts forward in fact the proposal for regulation by the Commission, but the decision-making process then continues outside of EASA’s remit, the ultimate responsibility lying with the Commission. The decision for adoption or further amendment of the rule will be taken under the comitology procedure. In practice, most EASA Opinions are handled through the comitology procedure.[[30]](#footnote-30)

Although EU law acts are strictly speaking only applicable within the European Union, the transnational nature of aviation and the fact that many (if not most) international aviation companies will operate within the European Union in some ways, gives these provisions a broader territorial application than might otherwise be the case. EASA, thus, has a regulatory impact both within and outside of the European Union inasmuch as non-EU organizations, operators and airlines may wish to engage in activity within the Union.

*ESMA*

The founding Regulation of ESMA provides that it has the power to develop draft regulatory technical standards in the specific cases referred to in the Regulation and issue guidelines and recommendations. This does not, however, imply a *carte blanche* for ESMA simply to adopt soft law measures in any situation.[[31]](#footnote-31) According to Article 16(1) the agency may decide to issue guidelines and recommendations for the consistent, efficient and effective supervisory practices as well as for common, uniform and consistent application of EU law. Furthermore, recital 26 of the Regulation provides that “in areas not covered by regulatory or implementing technical standards, the Authority should have the power to issue guidelines and recommendations on the application of Union law.” As Van Rijsbergen has stated: “On the one hand, this recital may imply that ESMA is indeed free to issue guidelines and recommendations on whatever issue in whichever area it deems it necessary and important. On the other hand, however, the recital may be interpreted as meaning that ESMA is not always free to use its powers to adopt soft law measures, because securities legislation may result in limiting ESMA’s power, namely by providing for the power to draft regulatory or implementing technical standards.” While these soft law measures are not legally binding by definition, there seems to be at least an intention of legally binding force deriving from the wording and terms used in ESMA guidelines and recommendation. The ‘comply or explain’ mechanism that goes along with them for national competent authorities and financial market participants is also considered an indicator for this.[[32]](#footnote-32)

Both regulatory and implementing technical standards are to be adopted by the Commission by means of Regulations or Decisions. The Commission may ‘rubberstamp’ these standards or reject them fully or in part and/or adopt amendments, but the latter two options only after consultation of the ESA in question. Experience has taught us, however, that the Commission, with regard to older agencies, tends to opt for the former alternative (‘rubberstamping’) which increases the *de facto* power of the agencies EU even more.[[33]](#footnote-33)

In section 2.4, we will consider the problematic aspects of the regulatory trend thus identified for legitimate regulation and governance in the EU. But first we will look into the rulemaking activities of networks.

2.4 The use of soft law in networks

Not only within the framework of agencies but also of networkswe increasingly witness the adoption of soft administrative and even regulatory rule-making. Networks have developed in many areas and sectors of EU law, including those of competition law (ECN), telecommunications (ERG) and the environment (IMPEL, EEA). In certain cases, such networks have culminated in the creation of agencies, for instance in the area of energy (ACER) and the financial markets (EBA, EIOPA, ESMA). Networks are predominantly geared towards the administration of legal rules and the effective enforcement of law.[[34]](#footnote-34) The network trend has been analysed in terms of infiltration into national policy areas in different stages, labelling them as Trojan horses.[[35]](#footnote-35) In the most far-reaching stage, they have important centralising effects on the EU-level and *de facto*, national supervisory authorities will work more as the extended arm of the Commission than for their own Member State.[[36]](#footnote-36) The institutional and procedural design and functioning of networks raises a number of issues from the perspective of input or procedural legitimacy and judicial protection (see the next section on this).

We confine ourselves here to briefly indicating these problems in relation to the European Competition Network(ECN), often seen as the mother of all networks.

The ECN’s main task is to ensure effective decision-making and consistent application and enforcement of EU competition rules at both EU and national level. The Network has a weak legal basis, as its establishment can only be traced back to two provisions which impose a duty of cooperation and of exchange of information,[[37]](#footnote-37) the creation of a network between the Commission and the national competition authorities (NCAs) merely being mentioned in recital 15 of the preamble of the Regulation. The Network was created by way of a Commission notice only, as a forum for discussion and cooperation, lacking the independent legal personality that European agencies do have.[[38]](#footnote-38) Yet, the ECN has developed into more than just such a forum, as it also has decision-making power. In particular, it may decide on the most appropriate forum to deal with a case (the best placed authority).[[39]](#footnote-39) The allocation of a case[[40]](#footnote-40) can have huge consequences for the complainant since it can be viewed as an implicit way of deciding that the European competition rules have not been violated and therefore the complaint will not be found admissible. However, these allocation decisions have a soft law status and are therefore not open to appeal. There is also the practice of ‘informal discussions’. While the exchange of information can have important consequences - for detection, private enforcement and leniency -, there is no right of access to records (if they exist) or right of appeal.[[41]](#footnote-41) The ECN also issues policy guidelines. Furthermore, although these qualify as soft law, national supervisory authorities in practice usually comply with them. Since these authorities are part of the Network and collaborate in the drawing up of the European guidelines, it is because of principles of good governance such as legitimate expectations, due care and equal treatment that they also have a duty to act in accordance with them.[[42]](#footnote-42) National courts also take these policy guidelines into account because they have been agreed on by the national authorities and because they may not possess the specialized expertise to pass judgments on these texts.[[43]](#footnote-43)

This brief account of soft administrative rule-making as it emerges in the Union’s daily practice confirms that the formal hierarchy of norms as contained in the TFEU only contains part of the picture. As the following graph illustrates, one can identify in particular a much hidden dimension to the implementing activity of EU law, taking place in the shadow of Article 291 TFEU. This occurs not only by the Commission itself, but also other public bodies both at the EU level and that of shared administration.

*Graph 2 – Informal hierarchy of norms, as ensuing from administrative practice*

**2.4 Re-evaluating soft administrative rule-making in European public governance**

The next logical issue to consider is what this ‘hidden’ soft administrative rule-making practice means in terms of the legitimacy of EU regulation and governance, even if their practices or very existence are considered efficient devices of cooperation between the EU and the national levels. Here we confine ourselves to identifying the main problem areas.

As a startingpoint, the non-acknowledgement and non-regulation of the Commission’s use of soft law nor of agencies and networks in the Treaties betrays a strong desire to maintain as much flexibility in this use as possible. While this may add to its effectiveness, in itself the lack of a coherent regulation and more comprehensive typology of instrumentsleads to a certain level of confusion on soft rule-making, affecting *legal certainty*. This lack raises questions for instance as to how this rule-making relates to the other Union instruments and the applicability of concomitant procedures as well as their precise legal status and effects, also for national administrations and judiciaries. The Court’s ruling in the ESMA Case may actually have added to the legal confusion and uncertainty existing in this regard. In that case, the UK submitted that the delegation of powers to an EU agency as those provided for in Article 28 of the foundational Regulation of ESMA was incompatible with the Treaties, since Articles 290 and 291 TFEU circumscribed the circumstances in which certain powers could be given to the Commission. But the Court did not consider the delegation system as ensuing from those provisions (as by contrast AG Jaaskinen did), but simply stated that since the TFEU Treaty expressly permits EU bodies, offices and agencies to adopt acts of general application as appears from the judicial review provisions (especially art. 263), ESMA is also entitled to adopt such acts. Furthermore, it was also of the opinion that Article 28 did not involve a wide margin of discretion that would prevent such a delegation of powers.

Besides that, the complete silence of the Treaties on agencies’ and networks’ rule-making activities has quite some potentially significant drawbacks for their *accountability and checks and balances*, in particular when these concerns are also not adequately addressed at the specific Commission, agency or network levels. When it comes to agencies, the Commission has attempted to develop a common framework for their governance, leading in the past to the adoption of a Regulation on executive agencies.[[44]](#footnote-44) So far, the efforts to establish a common framework or inter-institutional agreement regarding regulatory agencies have failed. The procedural framing of soft rule-making thus gets its shape in a highly *ad hoc* manner, depending on the rules that are being put into place in the context of specific areas, sectors, agencies or networks. In legal doctrine, this has led to the observation that ‘[w]hile certain overall administrative norms, such as giving reasons and the duty of good administration may apply, a style of administrative law seems to be emerging in which each agency is subject to procedures peculiar to itself and provided by the legislation creating it plus those developed by its own practices over time plus any emerging from judicial review.’[[45]](#footnote-45) The landscape of applicable procedural rules and practices thus resembles a patchwork blanket, where some agencies may have put into place far more sophisticated good governance/administration rules and practices than others. While more recently we can see a correlation between the scope of rule-making powers allocated to agencies and the level of proceduralisation (cf. the ESAs), the reasons behind the differences in approach in this regard are not always evident. Therewith, a general issue emerging in this context is also how to ensure consistency.

Expanding on the remarks above, a key issue of concern related is *the (legal) position of individuals vis-à-vis such soft administrative rulemaking*. The Treaty of Lisbon has sought to enhance the protection of individuals regarding actions on the part of agencies, institutes and bodies of the EU, even if not regulating them in a general way in the Treaties. It has thus recognized the necessity of ensuring the openness and access to documents of these entities as well as of judicial protection against their actions. Yet, neither Article 11 TEU nor other Treaty rules on participation and consultation include these entities. Given the fact that there is no electoral connection in the networks’ and agencies’ general rule- making activity, the establishment of procedural rules under which such rule-making may come about and who is to be involved in this process appears imperative. While agencies’ statutes may (increasingly) provide for outside participation in their decision-making processes, there is a risk that this particularly involves those that have the technical and financial resources to do so and and also those having a particular interest.[[46]](#footnote-46) There is no legal guarantee of balanced participation and influence on this process and some actors may be privileged, under the guise that decision making is purely technical, even though it is widely acknowledged that most technical decision making significantly affects interests and thus has political components. Agencies are therefore often considered to provide at the most for some form of technical accountability rather than any democratic accountability: the typical agency executive board is constructed in such a way as to provide for some Member State control through the appointment of experts. It is argued that to the extent that this renders the staff of agencies accountable, it is less likely to be to the Member States and the citizenry as a whole than to the epistemic community to which board members and the staff belong.[[47]](#footnote-47) How to ensure inclusiveness, equal treatment and equal representation are therefore important issues emerging in this context.

Apart from that, the judicial review of soft administrative rule-making presents numerous hurdles, first of all because of its very soft lawnature. While it is settled case law that an action for annulment under Article 263 TFEU can be brought before the ECJ against ‘fake’ soft law provisions, some uncertainty remains as to what extent the Court effectively requires demonstration of ‘intent’ of legal effects in this regard and if this is not required, whether all types of legal effects allow for admissibility of a claim. Would for instance legal effects produced by way of judicial interpretation suffice in this regard? Clearly, Article 263 does not allow for judicial protection against soft law acts which entail only factual implications, even if such acts present a wrongful interpretation of EU law and may be misleading for those concerned and legal practitioners.[[48]](#footnote-48) The lack of judicial protection due to the impossibility of challenging acts not intending or producing legal effects, can be somewhat mitigated by the possibility to bring an action for annulment against an individual decision the Union may have taken on the basis of such an act.[[49]](#footnote-49) A second problem concerns the limited *locus standi*of natural and legal persons (including representative associations, NGOs) under Article 263 TFEU. It has been noted that the Treaty of Lisbon has taken an important step to loosen the strict requirement of ‘individual concern’ by now enabling claimants to start an action for annulment against ‘regulatory acts’ that are merely of direct concern to them. Yet, a ruling of the General Court has shown that while acts of general application are covered by that term, they have to be of a binding nature as well. A third problem concerns the bodies against which procedures can be started. The Treaty of Lisbon has marked an enhancement of the level of judicial protection by stipulating in the judicial procedures provisions, including Articles 263 and 267 TFEU, that actions can also be brought against acts of Union bodies, offices and agencies. Yet, networks do not have the formal status of a Union body and lack legal personality under EU law. Presumably, therefore, they do not fall within the scope of these provisions and hence no action for annulment can be started against such an entity.[[50]](#footnote-50) Yet, if the rule- making activity of a network can be considered attributable to the Commission and/or the national regulatory authority, one can start proceedings against the Commission and/or the national authority. If a claimant has been able to overcome these hurdles, yet another looms in the actual enforceability of certain good administration principles. While access to documents, under certain conditions, has evolved into a procedural right, this is certainly not the case so far for the principles of participation and consultation. So far the Union Courts have been very reluctant to understand them in terms of procedural rights.

**3. The soft private regulation dimension**

An exploration of the hard and soft norms of the core and peripheral public governance institutions of the EU might be thought to complete the set of those involved in law making. The concept of soft law highlights the capacity and tendency of public authorities to make rules which are intended to have effects but which are not binding. However, recent research on private regulation emphasizes the extent to which non-state bodies have become involved in both making and implementing norms. One response to the recognition of such private rule making is to suggest that this is undertaken chiefly through consensual contractual mechanisms, as would be true of both bilateral contracts and associational self-regulatory regimes over long periods of time and thus to argue that the consideration of such mechanisms does not belong in an analysis of public law or soft law. However it is increasingly impossible to see such private regimes in isolation from public governance and public authority as they frequently involve implicit or explicit recognition by governmental bodies, sometimes through forms of delegation and sometimes through some form of adoption in the public sphere.

What kind of norms are we talking about? Much of the private law making occurs through contractual mechanisms which have the effect of making the norms legally binding and thus outwith the scope of an article on soft law. However, notwithstanding the importance of such private contractual governance, there are other important instances where norms which are made are soft in character, because they do not legally bind anyone, though their intended effects on behavior may be very widespread. We suggest in this article that such soft norms may take on characteristics of soft law where they are in some sense supported by public authority for their effectiveness. In such instances a public body may be thought of as loaning its public authority, enabling private actors to undertake legislative tasks which would otherwise be undertaken by governmental bodies.

The idea that public bodies may loan their authority is not novel. Frank Partnoy’s concept of regulatory licensing is suggestive of public bodies loaning their authority to private organisations such as credit rating agencies by making compliance with the private norms an aspect of public regulatory scrutiny.[[51]](#footnote-51) In some instances the effect may be to turn the private rules into public law, because compliance with the norms is said to be a mandatory requirement. But just as commonly, it appears to us, the loaning of public authority underpins the authority of private norms without making them binding, thus generating a form of soft law emanating from private bodies.

As noted, many examples of transnational private regulation involve the deployment of hard law in the form of contracts. Thus purchasers who claim adherence to regimes relating to sustainable forestery, such as that of the Forest Stewardship Council, specify compliance with and accreditation of the standards right down the supply chain. In the case of private food standards, such as those devised by GlobalGap, similarly contracts are deployed to give effect. There is limited engagement of public authorities and no strong sense that public authority, beyond the enforceability of contracts, underpins the normative force of the regime. In other cases, however, regulatory instruments have been developed by transnational private regulators which are soft in character, in the sense that they are not binding. A key example is provided by the case of the development of Best Practice Recommendations by the European Advertising Standards Alliance (EASA).[[52]](#footnote-52) EASA is the network of national self-regulatory bodies in the EU and beyond which address advertising content. Its membership includes both the national self-regulatory bodies and industry representation. Whilst we may think of EASA’s emergence as a market driven measure designed to create reassurance for the public and confidence in the national self-regulatory bodies of the advertising industry, over time its activities in setting down norms have been observed by governmental bodies at national and EU level. Nationally, the UK communications regulator, OFCOM, observing the credibility of the national regime for self-regulation of print advertising, administered by the Advertising Standards Authority (ASA), decided in 2006 to delegate regulation of the content of broadcast advertising to the ASA also. Thus the UK Code of Broadcast Advertising, developed by the ASA, is

‘…designed to inform advertisers and broadcasters of the standards expected in the content and scheduling of broadcast advertisements…’[[53]](#footnote-53)

Given the complaint-driven enforcement provisions of the ASA code, which includes the power to require any licensed broadcaster to pull an advertisement, and further back up sanctions held by OFCOM itself, using its statutory powers, we might think that the ASA Code is not particularly soft, though it does provide a clear example of public authority being loaned. At the European level, with EASA, the European Commission has become increasingly interested in how it may lend authority to self-regulatory schemes generally and EASA in particular.[[54]](#footnote-54) Thus when the European Commission became concerned about the need to regulate Online Behavioral Advertising, it did not feel able to encourage pure self-regulation by the IT industry, but did provide encouragement to EASA to broker a set of Best Practice Recommendations at the EU level, which are then diffused through take up by national self-regulatory bodies and industry actors.[[55]](#footnote-55) There can be no doubt that the force and effectiveness of this soft law instrument, while partially deriving from EASA’s authority, is amplified significantly by the engagement of the European Commission. Thus, EASA Best Practice Recommendations, if they are a form of soft law, in the sense they are backed by loaned public authority, though made through the processes of a private organization, raise significant issues about both the character and oversight of law making.

A further form of linkage between private norms and public authority occurs when governmental actors adopt private norms *after* they have been promulgated. Often this will take the form of hardening the norms by making their take up mandatory. However, some EU instruments offer compliance with privately made norms as one mechanism for demonstrating compliance with a mandatory general principle, leaving the norm as soft in character, but backed by public authority in respect of its effectiveness.[[56]](#footnote-56) Does the private norm, such as a technical standard, which is mandatory for no one, and thus soft, become soft *law*, when it remains non-mandatory, but compliance satisfies requirements with mandatory public requirements?

Thinking more generally about public-private relationships in regulatory regimes there is a variety of forms of complementarity between public and private action. The *public-private axis* can be said to refer in particular to cases where complementarity comes about by way of public regulators actively involving private actors in public regulatory processes (co-regulation or conditioned self-regulation, delegation) or by public endorsement of private regulation in some form or another (ex-post administrative approval/policy alignment/legislative endorsement, incorporation otherwise in public standards).The *private->public axis* refers to cases where complementarity comes about as a result of the private regulator actively involving public actors in the private regulatory process by taking into account public standards in the private standard-setting (incorporation, reference, source of inspiration) or where private standards give effect to public standards (implementation). It may also be considered to refer to cases where the development of a private standard has been incited by the absence of public standards, serving thus the purpose of gap filling. More generally, one can label these various forms of complementarity as regulatory complementarity. Such complementarity may not only concern the rulemaking level, but also the levels of implementation, monitoring and enforcement.

The *mixed public-private axis* can be said to concern in particular those cases where there is rather question of joint public-private initiatives/standard-setting or of cooperation that is demonstrative of vertical complementarity in a more institutional way; initiatives geared towards enhancing consistent and integrated approaches, reducing overlap and duplication of efforts. This exemplifies institutional more than regulatory complementarity, but possibly describes the case of the EASA Best Practice Recommendations noted above.

**4. Provisional Concluding remarks**

What legitimacy problems ensue from the soft-hard law configurations and complementarities we have identified in the paper? Do we see already possibilities for dealing with such problems or remedies thereto?

Clearly the move of soft law, beyond instruments promulgated by the European Commission, to take in instruments from European agencies, European networks, and private regulators, further accentuates the constitutional difficulties of legal instruments, though they may be soft in character, which have considerable impact extending well beyond the parties which negotiate them (and thus represent forms of government rather than contract). In the administrative sphere, the difficulties of such soft law instruments include their virtual immunity from measures such as those developed under the rubric of better regulation or smart regulation as to monitor and minimise regulatory burdens or ensure that the demands of regulation are proportionate to the objectives being sought.

One way to address these difficulties, not requiring amendment to the Treaties, is to expand the inter-institutional agreement on better law making. [[57]](#footnote-57) In his letter to the European Parliament of 12 November 2014, setting out his priorities for 2015, Commission President, Jean-Claude Juncker indicated that a new agreement on better law making was very much a priority, to be overseen by Vice President Frans Timmermans. A new agreement could offer not only a mechanism through which expanded soft law could be better observed and overseen, but also a means to legitimate self- and co-regulation and identify conditions under which delegation to private actors could be more routinely undertaken.

1. It must be noted that while the description of the regulation and directive have remained unchanged, this has not been the case for the instrument of the decision; under the new formula, this instrument can in fact also be used as a generally applicable act and not just for individualized situations. [↑](#footnote-ref-1)
2. In doing so, this paper draws very much on a study that was performed for the European Parliament, on Checks and Balances of Soft EU-Rulemaking, by A. van den Brink and L.A.J. Senden, 2012, which can be found at http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2042480 [↑](#footnote-ref-2)
3. C. Harlow, Three Phases in the Evolution of EU Administrative Law, in: P. Craig and G. De Burca, *The Evolution of EU Law*, OUP, 2011, at p. 443. Cf. also W.T. Eijsbouts, J.H. Jans, A. Prechal and L.A.J. Senden, *Europees recht. Algemeen deel*, Europa Law Publishing, 2010, third revised edition, p. 28. Cf. also Hofmann and Türk, *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, Edward Elgar, 2009. [↑](#footnote-ref-3)
4. Cf. also J. Ziller, Alternatives in Drafting an EU Administrative Procedure Law, *PE* 462.417, p. 11 [↑](#footnote-ref-4)
5. Harlow 2011, *op. cit*. [↑](#footnote-ref-5)
6. Senden 2004, *op. cit* [↑](#footnote-ref-6)
7. For the use of this terminology, see Senden 2004, *op. cit* [↑](#footnote-ref-7)
8. Commission communication on the Implementation of Article 260(3) TFEU, *COM* 2010 1371 fin [↑](#footnote-ref-8)
9. It is not clear from the outset whether the rules established by such a committee are to be attributed to the Commission or not. See for example the Conclusions of the Customs Committee in Case C-311/04, *Algemene Scheeps Agentuur Dordrecht*, [2006] ECR I-609. [↑](#footnote-ref-9)
10. See e.g. G. Winter, *Sources and categories of European Union law: a comparative and reform perspective*, 1. Auflage, Nomos, Baden-Baden, 1996, concerning the British, Danish, Dutch, French, Spanish, Italian and German legal systems. Cf. also J.H. van Kreveld, *Beleidsregels in het recht*, Kluwer, 1983; H. Bröring, ‘Administrative Rules in British Law’, *MJEL* 1(1994), p.273; R. Baldwin and K. Houghton, ‘Circular arguments: the status and legitimacy of administrative rules’, *Public Law*, 1986, p. 239; A. Bok, ‘Policy Rules in German Law’, *MJEL* 1(1994), p. 255; B. Roozendaal, ‘Self-Restraint of Discretionary Authority in French Administrative Law’, *MJEL* 1(1994), p. 285. [↑](#footnote-ref-10)
11. Case 9/56, *Meroni,* [1958] ECR 133, 152. [↑](#footnote-ref-11)
12. In this sense, M. Shapiro, ‘Independent agencies’, in: P. Craig and G. De Burca, *The Evolution of EU Law*, OUP, 2011, pp. 112-115. [↑](#footnote-ref-12)
13. E. Chiti, Features, problems and perspectives of European agencies, *CMLRev*. 2009, p. 1395 et seq. [↑](#footnote-ref-13)
14. Under Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, now replaced by Regulation (EC) 216/2008. The authors are grateful to Marloes van Rijsbergen for her research assistance on this part. [↑](#footnote-ref-14)
15. Article 2(1) of Regulation (EC) 216/2008. [↑](#footnote-ref-15)
16. Its clause 4 and 38 and Art. 19(2), Regulation (EC) 216/2008. [↑](#footnote-ref-16)
17. Schout, ‘Assessing the Added Value of an EU Agency for Aviation Safety’ (2011), *Journal of Public Policy*, Volume 31, No. 3, p. 379. [↑](#footnote-ref-17)
18. Groenleer, Kaeding & Versluis, ‘Regulatory governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation’ (2010), *Journal of European Public Policy*, Volume 17, No. 8, p. 1221. [↑](#footnote-ref-18)
19. Schout 2011, op.cit., p. 378. [↑](#footnote-ref-19)
20. Article 18 and 19 of Regulation (EC) 216/2008. [↑](#footnote-ref-20)
21. Art. 2 www.easa.europa.eu/management-board/docs/management-board-meetings/2012/01/EASA%20MB%20Decision%2001-2012%20Revised%20MB%20Decision%20RM%20Process%20.pdf [↑](#footnote-ref-21)
22. Article 19(1) of Regulation (EC) 216/2008. [↑](#footnote-ref-22)
23. www.easa.europa.eu/rulemaking/rulemaking-directorate.php [↑](#footnote-ref-23)
24. Article 17(2)(b) of Regulation (EC) 216/2008. See also: Hofmann, Rowe & Türk (2011), *Administrative Law and Policy of the European Union,* Oxford University Press,p. 294. [↑](#footnote-ref-24)
25. Certification Specifications are technical standards indicating means to show compliance with the EASA Regulation and its implementing rules, which can be used by organisations for the purpose of certification. [↑](#footnote-ref-25)
26. Cf. Schout 2011, op.cit., p. 378. [↑](#footnote-ref-26)
27. www.easa.europa.eu/rulemaking/rulemaking-directorate.php [↑](#footnote-ref-27)
28. Art. 2 www.easa.europa.eu/management-board/docs/management-board-meetings/2012/01/EASA%20MB%20Decision%2001-2012%20Revised%20MB%20Decision%20RM%20Process%20.pdf [↑](#footnote-ref-28)
29. Article 52 of Regulation (EC) 216/2008. See also art. 1 of Management Board Decision 1/2012. This Decision describes the rulemaking procedure. [www.easa.europa.eu/rulemaking/rulemaking-directorate.php](http://www.easa.europa.eu/rulemaking/rulemaking-directorate.php). See also: www.easa.europa.eu/management-board/docs/management-board-meetings/2012/01/EASA%20MB%20Decision%2001-2012%20Revised%20MB%20Decision%20RM%20Process%20.pdf [↑](#footnote-ref-29)
30. www.easa.europa.eu/rulemaking/rulemaking-directorate.php [↑](#footnote-ref-30)
31. See M. van Rijsbergen, On the enforceability of EU soft law measures at the national level. The case of the European Securities and Markets Authority, *Utrecht Law Review*, Dec. 2014. [↑](#footnote-ref-31)
32. Ibidem. [↑](#footnote-ref-32)
33. R. Dehousse, ‘EU Law and the Transformation of European Governance’ in: C. Joerges and R. Dehousse, *Good Governance in Europe’s Integrated Market*, Oxford: Oxford University Press 2002, p. 223. [↑](#footnote-ref-33)
34. M. de Visser, *Network-based governance in EC law. The example of EC competition law and EC communications law*, Hart Legal Publishers, 2009, p. 207. [↑](#footnote-ref-34)
35. A. De Moor-van Vugt, Netwerken en de europeanisering van het toezicht, *SEW* nr. 3, maart 2011, pp. 94-102. [↑](#footnote-ref-35)
36. *Ibidem*. [↑](#footnote-ref-36)
37. Arts. 11 to 16 of Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* 2003, L1/1. [↑](#footnote-ref-37)
38. Commission Notice on cooperation within the Network of Competition Authorities, *OJ* 2004, C101/03. [↑](#footnote-ref-38)
39. Article 11 (2) and (3) oblige the national supervisory authorities and the Commission to inform each other of cases which will be dealt with in accordance with the procedures of the ECN. [↑](#footnote-ref-39)
40. Art. 11 Reg. 1/2003. [↑](#footnote-ref-40)
41. Art. 12 Reg. 1/2003. [↑](#footnote-ref-41)
42. See also S. Lavrijssen-Heijmans and L. Hancher, European Regulators in the Network Sectors: Revolution or Evolution? *TILEC Discussion Paper*, 2008-024, pp. 10-11. Accessible on: http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1162164. [↑](#footnote-ref-42)
43. De Visser 2009, *op.cit.* [↑](#footnote-ref-43)
44. \*\*\* [↑](#footnote-ref-44)
45. Shapiro 2011, *op. cit.*, second edition, p. 112. [↑](#footnote-ref-45)
46. Cf. Shapiro 2011, *op. cit.*, p. 116. [↑](#footnote-ref-46)
47. Shapiro 2011, *op.cit.*, p. 117. [↑](#footnote-ref-47)
48. H. Luijendijk and L. Senden, ‘De gelaagde doorwerking van Europese administratieve soft law in de nationale rechtsorde’, *Sociaal Economische Wetgeving (SEW),* 59(7-8). [↑](#footnote-ref-48)
49. Cf. the ECJ in Case C-443/97 *Kingdom of Spain v Commission* [2000] ECR I-02415, Paragraph 33: ‘The internal guidelines thus indicate the general lines along which, pursuant to Article 24 of the coordination regulation, the Commission envisages subsequently adopting individual decisions whose legality may be challenged before the Court by the Member State concerned in accordance with the procedure laid down by Article 173 of the Treaty.’ [↑](#footnote-ref-49)
50. For a more elaborate discussion of the problem of judicial protection in the context of networks, see De Visser 2009, *op.cit.* and M. Eliantonio, Effectieve rechtsbescherming en netwerken: een problematische verhouding, *SEW* 2011, nr. 3, pp. 116-122. [↑](#footnote-ref-50)
51. F Partnoy,'How and Why Credit Ratings Agencies are not like other Gatekeepers' (University of San Diego Law School, San Diego 2006) [↑](#footnote-ref-51)
52. P Verbruggen, 'Gorillas in the Closet: Public and Private Actors in the Enforcement of Transnational Private Regulation' (2013) 7 Regulation & Governance 512 [↑](#footnote-ref-52)
53. Advertising Standards Authority,'UK Code of Broadcast Advertising' (Advertising Standards Authority, London no date). [↑](#footnote-ref-53)
54. European Commission,'Self-Regulation in the EU Advertising Sector: A Report of Some Discussion Among Interested Parties' (European Commission, Brussels 2006) [↑](#footnote-ref-54)
55. European Advertising Standards Alliance,'EASA Best Practice Recommendation for a European Industry-wide Self-Regulatory Standard and Compliance Mechanism for Consumer Controls in Online Behavioural Advertising' (EASA, Brussels 2011) [↑](#footnote-ref-55)
56. See, for example, the EU General Product Safety Directive 2001/95/EC Art 3(2). [↑](#footnote-ref-56)
57. European Parliament, European Council and European Commission,'Inter-Institutional Agreement on Better Law-Making' (Brussels 2003) [↑](#footnote-ref-57)