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'Verba Volant, Quoque (Soft Law) Scripta?' An Analysis of the Legal Effects of National Soft Law Implementing EU Soft Law in France and the UK

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I. INTRODUCTION

EU SOFT LAW is not subject to transposition duties by the Member States.[1] Yet national authorities have increasingly adopted soft law acts to implement EU soft law in a variety of policy areas, such as competition and environment. As argued by Hartlapp, national implementation practices result in efficiency gains, while the implementation of EU soft law by the Member States demonstrates that EU soft law has legal effects.[2]

This chapter provides insights into the effects of selected soft law measures issued by the French and UK authorities to implement EU Commission soft law in competition and environmental policies. The contribution of this chapter to the existing literature and the European Network of Soft Law Research (SoLaR) project is twofold. First, the chapter conducts a textual analysis of the chosen

[1] While transposition is required to make EU directives applicable at the national level by way of adoption of national measures, implementation is concerned with non-conformity and incorrect application cases. For an overview of the difference between transposition and implementation, see www.europarl.europa.eu/RegData/etudes/BRIE/2018/608841/IPOL_BRI(2018)608841_EN.pdf. In certain instances, the implementation of EU soft law is required, see, eg, EIOPA guidelines on the implementation of the Solvency II Directive.

[2] M Hartlapp, 'Soft Law Implementation in the EU Multilevel System: Legitimacy and Governance Efficiency Revisited' in N Behnke, J Broschek and J Sonnicksen (eds), *Configurations, Dynamics and Mechanisms of Multilevel Governance* (New York, Springer International Publishing, 2019).

national implementing measures and closely assesses their wording. Second, it discusses the legal effects of national implementing soft law with regard to (a) the potential effect on third parties, (b) the influence on the discretion of the issuing authority and (c) the use made by national courts. This analysis reaches two main findings. First, the legal effects of national implementing soft law are unsettled and thus increase unpredictability and uncertainty associated with EU soft law. Second, there is a risk of fragmentation of legal effects between EU soft law and national implementing soft law, decreasing legal certainty and hindering good governance.

Ancient wisdom offers guidance to rationalise the role and effects of EU and national soft law and suggests a way forward. According to the Latin proverb,[3] spoken words (*verba*) 'fly away' (*volant*) and thus have no influence on individuals' behaviour, while written words (*scripta*) will 'remain' (*manent*) and influence legal conduct. How can we then ensure that the wording of EU soft law measures 'stays' and does not 'fly away'? This chapter argues that EU institutions, jointly with national authorities and courts, should strive to enhance the uniformity of the effects of soft law measures at the EU level and in Member States. In particular, EU and national authorities ought to ensure that soft law is treated as 'written words' (*scripta*), the meaning and effects of which 'remain' (*manent*) in the legal orders of the EU and its Member States.

The rest of the chapter proceeds as follows. First, an overview is given of the selected EU policy areas and the legal effects of EU soft law measures issued in these fields are described. Second, the national implementation of specific EU soft law measures in the areas of competition and environment law in France and the UK are discussed, along with the legal consequences of national implementing soft law. Some final remarks and suggestions on how to address the fragmentation of the legal effects of EU and national soft law are provided in the conclusion.

II. METHODOLOGY

This chapter analyses selected national soft law measures adopted in France and the UK to implement EU Commission soft law on competition (excluding State aid) and environmental matters. Both of these fields fall within the scope of the SoLaR project, have attracted attention in literature[4] and represent, respectively, exclusive and shared EU competences. Accordingly, they reflect different levels of

[3] The full version of the Latin proverb is 'Verba volant, scripta manent' ('Spoken words fly away, written words remain').

[4] See, among others, O Ştefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' (2008) 14 *European Law Journal* 753; E Korkea-aho, 'EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?' (2009) 16 *Maastricht Journal of European and Comparative Law* 271; T Devine and M Eliantonio, 'EU Soft Law in the Hands of National Authorities: The Case Study of the UK Competition and Markets Authority' (2018) 11 *Review of European Administrative Law* 49.

centralisation of EU policies and distinct types of EU soft law. EU and national competition authorities (NCAs) rely on a robust organisation with extensive powers, directed and overseen by the Commission. In contrast, the EU and Member State environmental authorities cooperate within less structured and more informal networks. As a result, soft law in these areas also serves different purposes. EU competition soft law is classified as decisional-interpretative, whilst soft law issued in the domain of environmental law and policy primarily intends to guide the implementation of relevant policies and offer interpretative guidance to (national) decision-makers.[5]

The legal orders of France and the UK[6] are taken as textbook examples of common and civil law systems. In the French system, the divide between hard law and soft law remains controversial in the academic literature and case law. Labelling acts that do not stem from the legislative process as 'law' is problematic, as it runs against the principle of parliamentary sovereignty, according to which the Parliament issues laws that are the expression of the will of the people.[7] In a common law system, such as the UK, a more encompassing notion of law exists[8] and the question of the legal effects or bindingness of an act issued by national authorities has not occupied English courts or scholars.

Interestingly – but understandably, given the lack of the duty to transpose – national authorities in the selected jurisdictions have not implemented the same EU soft law acts. Therefore, since a top-down selection (ie, choosing the EU soft law measure and researching the implementing measures in France and the UK) was not possible, a bottom-up approach was followed instead (ie, researching among national acts and selecting measures[9] that have implemented EU soft law).

This chapter focuses on French and UK soft law implementing measures that include references to EU soft law or provide details concerning the relationship between the national implementation instrument and the original EU soft law measure. This selection method ensures that the sample comprises national acts that are specifically intended to give effects to EU soft law. Among the plethora of existing national soft law measures, the author has selected and analysed acts that best illustrate the diversity of soft law implementation practices in France and the UK. The sample is neither systematic nor exhaustive, but is intended to

[5] See A Hofmann, ch 3 in this volume.

[6] The UK left the EU on 31 January 2020. The analysis included in the chapter pre-dates Brexit day.

[7] See N Rubio and O Ştefan, ch 8 in this volume. See also C Thibierge, 'Le droit souple, réflexion sur les textures du droit' (2003) 4 *Revue trimestrielle de droit civil* 599.

[8] Judicial decisions constituting common law are classified among the UK legal sources. Among the sources of UK law, scholars also include constitutional conventions, which are not strictly speaking legal documents. See B Hilaire, *Understanding Public Law* (Abingdon, Taylor & Francis, 2009) 9. See also M Dobbs and O Ştefan, ch 15 in this volume, as well as N Xanthoulis and A Karatzia, ch 6 in this volume.

[9] The chapter analyses a total of eight implementing measures, four in the area of competition law (two in France and two in the UK) and four in the area of environmental policy (two in France and two in the UK).

highlight certain important aspects for both jurisdictions. The lack of soft law in France and the UK giving effects to the *same* EU soft law measure is a testament to the fragmented implementation of EU soft law in the Member States.

III. EU COMPETITION SOFT LAW

Competition law falls within the exclusive competences of the EU.[10] The expansion of this particular EU competence was proactively driven by the Commission Directorate-General for Competition (DG Comp), which has a central role in investigating potential violations in this field.[11] Article 5 of Regulation 1/2003 has devolved competence in handling competition cases to the NCAs,[12] which, jointly with the Commission, exercise oversight powers and enforce EU and national competition law. Cooperation also occurs at a horizontal level amongst Member State competition authorities. The European Competition Network (ECN), composed of the Commission and NCAs, operates as a coordination mechanism for the enforcement of EU competition law.

Over the years, the Commission has issued numerous soft law acts in the field of competition law[13] in the form of notices, recommendations, opinions or communications,[14] with the operation of the ECN itself regulated primarily through soft law.[15] Despite a wealth of soft law in this area, there is still uncertainty surrounding the effects of EU competition soft law. For instance, soft law measures may contain caveats mentioning that they do not bind the Commission.[16] Yet, EU courts have not been deterred from relying on those acts in their reasoning[17] or from establishing that soft law instruments bind the discretion of their author, and that national courts should consider EU soft law

[10] Article 3 TFEU. See also C Townley and AH Türk, 'The Constitutional Limits of EU Competition Law: United in Diversity' (2019) 64 *Antitrust Bulletin* 235.

[11] See DJ Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (Oxford, Oxford University Press, 2001).

[12] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[13] See I Maher, 'Competition Law Modernization: Evolutionary Tale?' in P Craig and G de Búrca (eds), *Evolution of EU Law* (Oxford, Oxford University Press, 2011). See also I Maher, ch 2 in this volume.

[14] Information gathered through EUR-Lex, https://bit.ly/35cGSog.

[15] See, eg, 'Notice on cooperation within the Network of Competition Authorities' [2004] OJ C101/43; European Commission, 'Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty' [2004] OJ C101/65.

[16] See, eg, European Commission, 'Commission Notice on Immunity from fines and reduction of fines in cartel cases' [2016] OJ C298/17. Its introduction specifies that the notice is a 'documentation tool and has no legal effects'. The effects of EU soft law in the field of EU state aid have been discussed in O Ştefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (Dordrecht, Kluwer Law International, 2013).

[17] See, eg, Case-19/77 *Miller International Schallplatten GmbH v EC Commission* [1978] EU:C:1978:19. Also, in Case T-79/12 *Cisco & Messaget Spa v Commission* [2013] EU:T:2013:635, the General Court (GC) relied on the guidelines of the Commission on horizontal mergers as an interpretative tool to apply Regulation 139/2004, jointly with the relevant case law.

when judging.[18] At the national level, Georgieva finds that EU competition soft law may gain effects as a vessel for general principles of EU law.[19] Despite these developments, the scope and nature of legal effects of EU competition soft law are not completely determined.

A. National Soft Law Measures Implementing EU Competition Soft Law in France

The Autorité de la concurrence (AdC) is the competent authority to assess anti-competitive practices occurring on French territory and to issue relevant sanctions. As noted above, French scholars and judges have expressed sceptical views on soft law, 'as it could be dangerous and affect the integrity of the legal order'.[20] These critical opinions have not prevented the AdC from implementing EU soft law measures through national (soft law) acts. But the ambiguity concerning the legal effects of EU competition soft law is interestingly reflected in the AdC's implementing measures. To illustrate this point, the following paragraphs discuss, in turn, the AdC's measures implementing the ECN leniency programme model and the Commission guidelines on non-horizontal and horizontal concentrations.

Leniency programmes[21] were first created at the EU level through a 1996 Commission communication.[22] These do not have 'legislative force' and do not bind Member States.[23] In 2001, leniency programmes were introduced under the French Commerce Code.[24] The EU regulatory framework of leniency programmes changed with the creation of the ECN in 2003, and the adoption of the ECN model leniency programme, which is, like earlier leniency programmes, non-binding and cannot create any legitimate expectations.[25] The absence of binding

[18] Case C-322/88 *Grimaldi* [1989] EU:C:1989:646. See also Case C-526/14 *Kotnik* [2016] EU:C:2016:570. See E Korkea-aho, 'National Courts and European Soft Law: Is *Grimaldi* Still Good Law?' (2018) 37 *Yearbook of European Law* 470.

[19] Z Georgieva, 'Soft Law in EU Competition Law and its Judicial Reception in Member States: A Theoretical Perspective' (2014) TILEC Discussion Paper.

[20] Translation from French; see PM Eisemann, 'Les Gentlemen's agreements comme source du droit international' (1979) *Journal du droit international* 326, cited in F Chatzistavrou, 'L'usage du soft law dans le système juridique international et ses implications sémantiques et pratiques sur la notion de règle de droit' (2005) 15 *Le Portique* 79.

[21] Leniency programmes allow for reductions of sanctions linked to competition infringements under certain conditions, such as the cooperation of companies with the national or European authorities in the identification of anti-competitive behaviour.

[22] European Commission, 'Communication de la Commission concernant la non-imposition d'amendes ou la réduction de leur montant dans les affaires portant sur des ententes' [1996] OJ C207/4.

[23] Case C-557/12 *Pfleiderer* [2011] EU:C:2011:389, para 21.

[24] L 464-2 and R 464-5 of the French Commercial Code, introduced with the loi du 15 mai 2001 sur les nouvelles régulations économiques.

[25] 'ECN Model Leniency Programme Report on Assessment of the State of Convergence', https://ec.europa.eu/competition/ecn/model_leniency_programme.pdf; see paras 4 and 5.

effects is meant to keep leniency procedures as flexible as possible and to provide national authorities with discretion. Following the changes at the EU level, in 2006 the AdC issued a 'Communiqué de procédure' laying down the substantive and procedural requirements to initiate a leniency programme under French law.[26] The French communication gives guidance to market operators on how the AdC implements these programmes. The text of the communication remains silent as to its legal effects, but the relevant provisions of the Code of Commerce and the ECN model leniency programme are extensively mentioned. The communication also identifies the AdC's effort to 'homogenise' the enforcement of leniency programmes in the light of the ECN model.[27] In 2012, the AdC issued a brochure, addressed to the general public, explaining the functioning of leniency procedure. The brochure mentions explicitly that it is devoid of level value.[28]

By endorsing the ECN programme and implementing it via national soft law, the AdC has introduced a new tool of national governance modelled on the European example. The adoption of a soft law communication instead of legislation to lay down the procedural requirements of leniency programmes contributes to broadening the discretion of the AdC. The AdC's soft law also increases flexibility in setting leniency programmes.

Overall, the French implementation of the EU leniency programmes only partially resembles the initial EU measure. While both the Commission and the AdC primarily use soft law, the French legal order also regulates leniency programmes through hard law. Although there is presently no case law on the French leniency programmes, the presence of hard law in this field resolves the issue of the breadth of the AdC's discretion. The discretion of the AdC in enforcing leniency programme must respect the boundaries set by the Code de Commerce – a piece of hard law. This also means that any violation of hard law provisions by the AdC is amenable to judicial control. The co-existence of hard and soft law in this field nevertheless raises a concern: if national hard and soft law on leniency programmes are not applied harmoniously with the European leniency model, the efforts to 'homogenise' European and national leniency programmes are held back. If national implementing measures are enforced independently from the ECN model, problems in terms of uniform application of EU law may arise.[29] Furthermore, the policy objectives envisaged and set out in the ECN model leniency programme may be frustrated if national implementing measures diverge from EU measures.

Another example is the Lignes directrices de l'Autorité de la concurrence relatives au contrôle des concentrations (hereinafter 'AdC Lignes directices').[30] As explained in their preface, these guidelines complement the existing national

[26] The communication was revised in 2012 and in 2015.

[27] 'ECN Model Leniency Programme' (n 25) para 5.

[28] www.autoritedelaconcurrence.fr/doc/brochure_clemence_nov12.pdf.

[29] Interestingly, in the *avis* issued by the AdC concerning national leniency programmes, there is no mention of the European leniency programme model.

[30] www.autoritedelaconcurrence.fr/sites/default/files/ld_concentrations_juill13.pdf.

and EU legislation, and lay down the EU-inspired conditions to evaluate anticompetitive mergers. Through the guidelines, the AdC has also identified additional situations that are not regulated under the original Commission communications.[31] The AdC Lignes directrices mention the Commission guidelines on non-horizontal[32] and horizontal[33] concentrations to interpret legal concepts[34] and to set a minimum threshold for national policies.[35] A series of disclaimers included in the AdC Lignes directrices provide insights on their intended legal nature. Paragraph 13 specifies that this guidance is devoid of any 'normative purpose'[36] and merely provides companies with 'a pedagogical presentation on its scope, on the progress of the procedure before the Authority and the objectives, criteria and methods used for the analyses on the merits [of merger transactions]'. However, paragraph 14 indicates that the AdC Lignes directrices may be applied against individuals in the context of competition enforcement; indeed, they have been relied on by AdC when it has evaluated alleged anticompetitive behaviour, jointly with hard law provisions.[37]

It is unclear whether the AdC Lignes directrices can be invoked independently, without reference to hard law, against individuals before French courts. The issue of the effects of the AdC Lignes directrices becomes even more complex when we consider their impact on the discretion of the AdC. The AdC declares that it 'undertakes to apply the guidelines each time it examines a transaction, provided that no circumstances particular to this transaction or any consideration of general interest justify derogations therefrom'.[38] This statement raises more questions than answers.

Legal scholars and practitioners have argued that the wording of AdC Lignes directrices creates legal ambiguity as to their use by the AdC and national courts.[39] Moreover, due to many 'vague' concepts in the AdC Lignes directrices,

[31] See, eg, 'Communication consolidée sur la competénce de la Commission en vertu du règlement (CE) no 139/2004 du Conseil relatif au contrôle des opérations de concentration entre entreprises' [2009] OJ C43/10; European Commission, 'Communication de la Commission relative aux restrictions directement liées et nécessaires à la réalisation des opérations de concentration' [2005] OJ C56/24.

[32] 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings' [2008] OJ C265/6.

[33] 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' [2004] OJ C31/5.

[34] AdC Lignes directrices, paras 324 and 386 concerning the notion of horizontal merger and related issues.

[35] These Commission guidelines have been applied by the General Court in *Cisco Systems Inc* to assess whether the Commission respected the limits of its discretion. See *Cisco & Messaget Spa v Commission* (n 17).

[36] This notion seems to indicate that the guidelines do not wish to create obligations of legislative nature – thus, binding erga omnes.

[37] Décision n° 10-DCC-198 du 30 décembre 2010 relative à la création d'une entreprise commune par Veolia Environnement et la Caisse des Dépôts et Consignations.

[38] AdC Lignes directrices, para 14.

[39] Nathalie Pétrignet et al, 'Projet de révision des lignes directrices en matière de contrôle des concentrations', 25 March 2013, https://cms.law/fr/fra/publication/flash-info-concurrence-projet-de-revision-des-lignes-directrices-en-matiere-de-controle-des-concentrations.

market operators ultimately bear the risk of inconsistent interpretations.[40] The Conseil d'Etat case law has attempted to provide some degree of certainty and to remove risks for market operators, noting that the AdC Lignes directrices can be used to assess whether the authority has respected the limits of its discretion. This case law makes no reference to the original EU soft law measure.[41] Consequently, the fact that the national measures are of EU inspiration is immaterial in establishing its legal effects. In this respect, one may legitimately ask whether a divergent interpretation of the AdC Lignes directrices from the original EU soft law acts constitutes a breach of the EU principle of consistent interpretation. Being implementing measures of EU acts, it could be argued that the AdC Lignes directrices should be interpreted in the light of the original EU soft law measure under the *Von Colson* doctrine.[42]

B. National Soft Law Measures Implementing EU Competition Soft Law in the UK

UK competition law is populated by a plethora of hard and soft law acts. In addition to the provisions stemming from the EU Treaties, a primary legal source is the UK Competition Act 1998, establishing the competences of the Competition and Market Authority (CMA). Section 60 provides that national courts should ensure that there is no inconsistency between the EU and UK law when applying that Act. The basis for implementation practices of EU competition soft law in the UK is the Enterprises Act 2002. Section 106 provides that the CMA has powers to adopt soft law measures in the form of advice and guidance documents.[43] The adoption of soft law is thus authorised by a national legislative provision. On the basis of this authorisation, the CMA has adopted multiple soft law measures. When implementing EU soft law, CMA acts refer to the original EU soft law and regulate their interplay with EU measures. Several CMA acts also replicate the content of EU soft law.

The study of the implementation of EU competition soft law in the UK will focus on two measures: the 'Mergers: Guidance on the CMA's jurisdiction and procedure' and the 'Vertical Agreements: understanding competition law' guidance adopted by the Office of Fair Trading (OFT). These acts, which are discussed below, implement the Commission Consolidated Jurisdictional Notice and the Commission's 'Guidelines on Vertical Restraints', respectively.

[40] ibid.

[41] Conseil d'État, 3ème – 8ème chambres réunies, 25/05/2018, 404382.

[42] Case C-14/83 *Von Colson* [1984] EU:C:1984:153. See also *Grimaldi* and *Kotnik* (n 18).

[43] See, eg, s 31D(1) of the Competition Act 1998, which requires the CMA to prepare and publish guidance on the circumstances in which it may be appropriate to accept binding commitments.

The purpose of the 'Mergers: Guidance on the CMA's jurisdiction and procedure'[44] is to set rules on mergers involving companies active in the UK and covered by the provisions of the Enterprise Act. It briefly addresses mergers falling within the ambit of Commission competence under the EU Merger Regulation[45] and the relationship between domestic and European merger control systems. This national guidance cannot supersede any EU legislation or guidance,[46] and is to be applied flexibly, with the Authority able to depart from it if need be.[47] Furthermore, the guidance cannot be considered as a comprehensive document, 'nor can it be cited as a definitive interpretation of the law'.[48] The content of the CMA guidance effectively reproduces the content of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.[49]

In other national instruments, the connection with EU soft law has been acknowledged even more explicitly. An example is the 'Vertical Agreements guidance adopted by the OFT, the authority preceding the CMA.[50] This guideline explains how the authority would apply Article 101 of the Treaty on the Functioning of the European Union (TFEU) and the prohibition to vertical agreements, describing the application of the Commission's Block Exemption for Vertical Agreements and the treatment of vertical agreements. In this guidance document, the OFT has stated that it has taken into account the European Commission's Notice 'Guidelines on Vertical Restraints'[51] as a reference point.[52] As a result, the OFT Guidelines on Vertical Restraints should be read and applied together with the European Commission Notice on Guidelines on Vertical Restraints.[53] However, the CMA guidance also indicates that: 'Anyone in doubt about how they may be affected by the EC Treaty, the Competition Act 1998 or the Enterprise Act 2002 should seek legal advice.'[54]

Thus, the CMA's and OFT soft law measures are instruments addressed to companies in order to facilitate the interpretation of EU and national competition rules. The interaction between the EU and UK competition soft law is

[44] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2__Mergers__Guidance.pdf.

[45] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

[46] See n 44, para 1.5.

[47] ibid para 1.6.

[48] ibid para 1.5.

[49] European Commission, 'Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings' [2008] OJ C95/1.

[50] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284430/oft419.pdf.

[51] https://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf.

[52] See n 50, para 4.6. The same also applies for other guidance; see, eg, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284396/oft401.pdf.

[53] 'Guidelines on Vertical Restraints' [2010] OJ C130/1.

[54] See n 50, at 1.

clearly governed by the principle of consistent interpretation, reaffirmed at the national level under section 60 of the Competition Act and, more specifically, in the analysed national soft law acts.[55] Such principle ensures consistency between the EU and UK levels of governance.[56]

In order to assess and identify the legal effects of the CMA's soft law, attention should be paid to the competence of the CMA to adopt soft law measures under the Enterprise Act. Under this legislation, the authority is empowered to issue guidance concerning competition policies to the public. Therefore, such competence would be devoid of purpose if CMA soft law acts could not produce legal effects at least in the form of interpretative documents. As a consequence, CMA's soft law measures should be presumed to produce legal effects in the light of the CMA's competences. Another question is whether they can be invoked against individuals, as in France. First, it should be noted that the CMA relies on its guidance documents when issuing decisions against third parties.[57] Second, in case *Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority et al*,[58] the UK Supreme Court (UKSC) interpreted the 2014 CMA Merger guidelines discussed above. In the judgment, these guidelines were used to evaluate the effects of the cessation of business and determine the way in which the CMA assesses the relevant circumstances. The UKSC did not interpret the CMA guidelines in the light of the original EU soft law. However, the judgment confirms that CMA soft law acts produce legal effects on third parties, both as legal basis for CMA's decisions and as an interpretative document. In addition, the CMA soft law has a 'self-binding' effect on the authority's discretion.

By way of a preliminary conclusion, the effects of UK competition soft law seem clearer and more coherent than those of French competition soft law. Indeed, the CMA has not excluded the 'normative purpose' (ie, binding nature) of its soft law measures. Consequently, no contradiction has arisen between the wording of the CMA soft law and the way in which it has been applied by the CMA – a contradiction that we have observed in relation to some of the analysed French competition soft law.

Yet the concerns raised for the AdC's soft law also apply to the CMA measures. The CMA wields an extensive margin of discretion in the implementation and application of EU policies set in soft law acts.[59] If the national implementing

[55] *cf* 'Vertical Agreements', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284430/oft419.pdf.

[56] As required by the principle of supremacy, if a conflict between national soft law and EU hard and soft law arises, the latter must prevail. How the CMA guidances will be applied after Brexit remains to be seen.

[57] See, eg, https://assets.publishing.service.gov.uk/media/5a71fe2be5274a7f9c5862d4/provisional_findings_report.pdf.

[58] *Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority et al* [2015] UKSC 75.

[59] The same circumstances could also arise for other NCAs when implementing EU soft law and applying relevant national measures.

acts have binding effects not envisaged for the original EU measures, the former will 'overachieve' the policy results set at the EU level.[60] As a result, the application of the CMA soft law by the national authority without taking into account the legal effects of the original EU soft law will lead to the fragmentation of the effects between EU soft law and national implementing acts. The fragmentation of legal effects of EU soft law may also arise in the context of judicial interpretation of CMA soft law. If CMA's soft law is applied or interpreted by UK courts as having effects that are different from those of the EU original measures, the courts will also contribute to the fragmentation of the legal effects of soft law.

IV. EU ENVIRONMENTAL SOFT LAW

Both the EU and its Member States share legislative competences in environment. The EU environmental administrative structure is not centralised and relies on a number of EU and national entities, unlike the competition law model, where the Commission plays a *primus inter pares* role. EU soft law is also different in the context of environmental law and policy. EU environmental measures often take the form of framework legislation. Soft law may be used to complement these frameworks and detail the content of EU environmental policies. Overall, environmental soft law has an interpretative function aimed at fostering the implementation of complex pieces of EU environmental legislation.[61]

EU environmental soft law is abundant, amounting to more than 150 EU instruments in the form of recommendations, opinions and communications.[62] The wealth of EU environmental soft law is partly due to the substantial Commission's soft law-making powers stemming from EU hard law. For instance, Directive 2008/98 provides the Commission with the power to adopt guidance documents addressed to the Member States concerning the reduction of environmental impact and waste.[63] As discussed by Eliantonio, EU environmental soft law has rarely been interpreted by the ECJ and is mostly cited by Advocates General (AGs), who use it as an interpretative tool.[64] The case law on environmental guidance documents demonstrates that there is no uniform approach in relation to their effects. While the non-binding nature of these documents

[60] EU soft law measures implemented by the CMA may provide that they do not have binding effects. See, eg, the 'Commission's notice on Immunity from fines and reduction of fines in cartel cases', implemented in the UK through the 'CMA's guidance as to the appropriate amount of a penalty'. The Commission notice is explicitly deprived of binding effects on the Commission.

[61] M Eliantonio, 'Soft Law in Environmental Matters and the Role of the European Courts: Too Much or Too Little of it?' (2018) 37 *Yearbook of European Law* 496.

[62] Compiled by the author from https://eur-lex.europa.eu.

[63] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives [2008] OJ L312/3, arts 8 and 38.

[64] Eliantonio (n 61).

is accepted in some cases,[65] the existence of legal effects does not seem to be explicitly excluded.[66]

A. National Soft Law Measures Implementing EU Environmental Soft Law in France

The protection of the environment is at the core of numerous soft law acts issued by the Agence de l'Environnement et de la Maîtrise de l'Énergie (ADEME). This authority has a broad mandate to gather information, mobilise the public, advise in the adoption of policies and assist in their implementation.[67] The ADEME works under the supervision of the Ministry of Ecological and Solidarity Transition (METS).[68] Both the ADEME and the METS issue national guidance documents (*circulaires* and *lignes directrices nationales*), which deal with similar themes to Commission guidance documents on environmental policy.[69] Some of the ADEME and METS guidelines expressly refer to these Commission documents. For instance, the French guidelines concerning the Environmental Impact Assessment Directive cite relevant EU soft law and include weblinks to EU guidance documents.[70] Other soft law acts by the ADEME or the METS implement national hard law[71] or are preparatory documents for the adoption of local strategies[72] giving effects to EU policies.[73] Two examples of French environmental soft law will be discussed below: the ADEME measures implementing the EU circular economy plan and the METS 'Lignes directrices nationales sur la séquence éviter, réduire et compenser les impacts sur les milieux naturels' (hereinafter 'METS Lignes directrices').

[65] See, eg, Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland* [2014] EU:C:2014:2324, Opinion of AG Jääskinen.

[66] Eliantonio (n 61); J Scott, 'In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law' (2011) 48 *Common Market Law Review* 329.

[67] www.ademe.fr/en/about-ademe.

[68] Décret n° 2017-1071 du 24 mai 2017 relatif aux attributions du ministre d'Etat, ministre de la transition écologique et solidaire, JORF n°0123 du 25 mai 2017 texte n° 10 sets out the competences of this minister.

[69] G Lisi et al, 'National Report on France: The Use of EU Soft Law by National Courts and Administration in the Field of EU Environmental Law' in M Eliantonio and G Lisi (eds), 'EU Environmental Soft Law in the Member States: A Comparative Overview of Finland, France, Germany, Italy, the Netherlands, Slovenia and the UK' (2020) SoLaR Working Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656418.

[70] This is confirmed by Lisi et al (ibid).

[71] See ADEME 'Méthanisation' (November 2016), www.ademe.fr/sites/default/files/assets/documents/avis_ademe_methanisation_novembre_2016.pdf. The document specifies that the methanisation should be one of the initiatives to achieve the objectives of the law on the green transition.

[72] See, eg, ADEME, *Guide Méthodologique du Développement des Stratégies Régionales d'Économie Circulaire en France* (2014). This guide is mainly intended for elected officials and agents to mobilise support in view of the entry into force of the law on the green transition.

[73] See, eg, 'Lignes directrices encadrant l'adoption de décisions d'autorisation de mise à disposition sur le marché de produits biocides', implementing Regulation (EU) No 528/2012.

In 2014, the Commission adopted the 'Communication setting out the action plan for a circular economy',[74] but at present its effects remain unclear. The circular economy policy was positively received in France, with the Law concerning the energetic transition for the green growth enacted in 2015.[75] The legislation provides the ADEME with powers to adopt recommendations and guidelines on the disposal of waste as implementing acts of the circular economy plans. The ADEME has exercised this competence by adopting guidelines[76] to guide the public in the achievement of circular economy objectives. The language used in the ADEME documents is informative and educative.[77] To a large extent, ADEME soft law on circular economy reproduces the educative-informative content included in similar EU soft law measures. As an example, the ADEME has published a *fiche tecnique*[78] on the EU system of ecolabelling. The document states that it seeks to diffuse information concerning the European Ecolabelling system in France, and contains links to the Commission website and the relevant guidance on the EU system on ecolabelling.[79] In addition, it sets out EU environmental legislation and the interaction of the EU policies with relevant national measures.

The METS Lignes directices date back to 2013.[80] They are based on EU directives,[81] but reference and take note of Commission guidance.[82] They address 'the concerned operators' such as state entities, companies and associations, and lay down principles and harmonised methods at the national level on the implementation of the 'avoid, reduce and compensate' sequence[83] under EU and national legislation.[84] The guidelines specify that their nature is methodological and they 'propose non-normative methods'.[85]

[74] 'Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions Towards a Circular Economy: A zero waste programme for Europe' COM(2014)398.

[75] Loi relative à transition énergétique pour la croissance verte. The connection between this legislation and the Commission initiative is further confirmed by the following document: www.ecologique-solidaire.gouv.fr/sites/default/files/9-1-17_PLAN_DECHET_2016-2025_pour_BAT.pdf.

[76] See ADEME 'L'économie Circulaire en 10 Questions' (2009), www.ademe.fr/leconomie-circulaire-10-questions and www.ademe.fr/faire-dechets-0.

[77] They employ expressions such as 'Utilisez le papier avec modération' and 'Respectez les doses recommandées'.

[78] www.ademe.fr/sites/default/files/assets/documents/fiche-technique-ecolabel-europeen-201901.pdf.

[79] ibid 1.

[80] www.side.developpement-durable.gouv.fr.

[81] see pages 11 and 21 of the METS Lignes directices.

[82] ibid 78, 122 and 139.

[83] Lignes directrices nationales sur la séquence éviter, réduire et compenser les impacts sur les milieux naturels. Service de l'économie, de l'évaluation et de l'intégration du développement durable (Paris, Ministère de l'écologie, 2013).

[84] see n 83, at 4 ('Les recommandations méthodologiques de chaque fiche proposent des modalités possibles de mise en œuvre des textes législatifs et réglementaires existants, y compris sur la base d'exemples').

[85] www.ecologique-solidaire.gouv.fr/eviter-reduire-et-compenser-impacts-sur-lenvironnement#: ~:text=Le%20minist%C3%A8re%20d%C3%A9finit%20la%20politique,par%20la%20diffusion%20d'%C3%A9l%C3%A9ments.

Both the ADEME and METS soft law is primarily addressed to citizens and businesses. The ADEME guidelines in particular attempt to influence individual behaviour by addressing the general public. The ADEME and METS acts are also among the instruments guiding the activities of the French authorities competent to enforce environmental law, that is, regional bodies and the so-called *préfets*.[86]

While it is not yet established whether this soft law could be applied as self-standing instruments against individuals, one could argue that the ADEME and METS acts may be invoked together with liability rules applicable in the field of environmental law concerning matters such as waste disposal.[87] In such a scenario, these soft law acts could be used as interpretative instruments to detail the content of obligations set out in EU and national legislation. If so, the need to obtain judicial protection in relation to these soft law acts is pronounced.[88] Then again, the 'self-binding' effect of French environmental soft law is limited. Due to their 'educative' nature, these soft law measures could in principle bind their author only if the authority had sanctioning powers, which is not currently the case. For instance, the ADEME is not directly involved in the enforcement of environmental law, since its role is mainly advisory and educative. It cannot adopt decisions or issue measures that are binding on third parties based on its own soft law. Accordingly, the ADEME does not exercise any discretion in its relationship with individuals, and thus the question of whether its discretion is bound by its soft law becomes void. The same discussion also applies to the METS, which does not possess enforcement powers either.

To date, French courts have not exhaustively addressed the question of the legal effects of environmental soft law produced by the ADEME and the METS. In 2014, the Court of Appeal of Nancy held that the METS Lignes directices analysed above do not have 'normative' value (ie, binding force).[89] The Court of Appeal did not consider the fact that these guidelines form part of the implementation measures of EU hard and soft law. Nor did it consider the presence of national hard law in interpreting the legal effects of the guidelines. However, this particular judgment was issued by a lower court, and a higher court might reach a different conclusion. A different interpretation of the legal effects of ADEME

[86] In France, the *préfets* are the main authorities in charge of enforcing environmental law. For an overview of the environmental administration in France, see https://uk.practicallaw.thomsonreuters.com/Document/I9e2e9fb2a29d11e79bef99c0ee06c731/View/FullText.html?originationContext=docHeader&contextData=(sc.Default)&transitionType=Document&needToInjectTerms=False&firstPage=true&bhcp=1.

[87] See art 1246 of the French Civil Code, regulating the action for liability for environmental damage.

[88] ADEME, 'Caractérisation de la Problématique des Déchets Sauvages' (February 2019), www.ademe.fr/sites/default/files/assets/documents/rapport-caracterisation-problematique-dechets-sauvages-2019.pdf.

[89] Cour Administrative d'Appel de Nancy, 1ère chambre – formation à 3, 12/06/2014, 13NC00244, Inédit au recueil Lebon. The judgment refers to the concept of 'normative value', which seems to correspond to the EU notion of 'legally binding' effects.

acts is nevertheless likely in the light of the jurisprudential trends in France. In recent years, French courts have been increasingly open towards acknowledging the legal effects of soft law acts.[90] Be that as it may, in this case too, we observe the risk of fragmentation of legal effects of EU soft law and national implementing measures, since the effects of national soft law are interpreted without taking those of the EU original measures into account.

B. National Soft Law Measures Implementing EU Environmental Soft Law in the UK

From an organisational perspective, UK environmental governance is more fragmented than the French system. The UK Environment Agency (UKEA) is the main body responsible for enforcing and issuing environmental permits. In addition, other authorities oversee the implementation of environmental policies in the different regions of the UK.[91] The UKEA has issued several soft law measures, which in most cases are adopted to implement EU soft or hard law. The following analysis focuses on two UKEA soft law acts: the 'Guidance on the legal definition of waste and its application' and 'European Union Emissions Trading System (EU ETS) Phase III – Guidance for installations', implementing the Commission's Guidance document on the Waste Framework Directive and the Commission's Monitoring and Reporting Regulation (MRR) Guidance document, respectively.

The 2012 'Guidance on the legal definition of waste and its application'[92] is part of measures adopted by the UK to transpose[93] the Waste Framework Directive.[94] It also implements EU soft law instruments concerning the circular economy. It states the following: 'This guidance is published alongside the Commission guidance interpreting the key provisions of the Directive … and takes account of the Directive's definitions and provisions.'[95] The final part of the guidance seeks to make the principles established in the EU and national case law on the definition of waste more accessible to the public. The guidance specifies that they do not change the legal definition of waste, and they do not take precedence over the case law on the definition's interpretation. They only provide clarifications on that case law according to the competent authorities'

[90] E Honorat, 'Innover et tenir bon' in *La scène juridique: harmonies en mouvement. Mélanges en l'honneur de Bernard Stirn* (Paris, Éditions Dalloz, 2019) 327.

[91] For example, the Natural Resources Wales and the Scottish Environment Protection Agency.

[92] UK Environmental Agency, 'Guidance on the Legal Definition of Waste and its Application, 8, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69590/pb13813-waste-legal-def-guide.pdf.

[93] ibid.

[94] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives [2008] OJ L312/3.

[95] UK Environmental Agency (n 92) 8.

knowledge at the time of publication of the guidance. They also include details on how operators should use them. First, businesses and other organisations remain responsible for ensuring compliance with the law on waste, and the courts are in charge of interpreting it. Second, in the event of a disagreement between a competent authority and a third party as to whether a particular substance is waste, legal advice should be sought.[96] This guidance serves as an interpretative tool for waste operators that must comply with it.[97] It is not clear whether the guidance binds the discretion of the UKEA.[98]

A second example of UK environmental soft law implementing EU soft law is the 'European Union Emissions Trading System (EU ETS) Phase III – Guidance for installations', which was adopted by the UKEA in 2018.[99] The original EU guidance clearly specifies that it lacks legally binding effects.[100] The UKEA document serves various objectives. First, it describes the main provisions of the greenhouse emissions regulations. Second, it sets out the understanding of the views of the UK Department for Business, Energy and Industrial Strategy (BEIS) on how the regulations should be applied and how particular provisions should be interpreted. Third, it sets out the regulators' understanding of BEIS's views on how particular provisions in relevant European legislation should be read. The guidance also explains the conditions under which to obtain a permit under the UK regulations. In addition, it gives directions on how to make applications (including permit applications) and how to comply with the permit terms. It uses prescriptive language addressed to relevant operators on how to obtain the permits and the applicable requirements.[101] In particular, it clarifies that the use of the word 'must' indicate a legal requirement.[102] The guidance aims at complementing existing EU legislation, as it lists the obligations under the UK regulations and applicable European legislation.

Two features of the UKEA EU ETS soft law suggest that this document produces legal effects towards third parties: the prescriptive wording, aimed at influencing the behaviour of third parties, and the clear link[103] with national hard law and EU legislation. The presence of legal effects is confirmed by the

[96] ibid 13.

[97] ibid.

[98] UK regulators have to comply with the Regulators' Code, which sets out the power to adopt guidance and advice to the public, and the general principles of UK administrative law, including legality and proportionality. See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf.

[99] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714272/EU-ETS-Phase-III-Guidance_for_installations.pdf.

[100] European Commission, 'Guidance Document – The Monitoring and Reporting Regulation – General guidance for installations', MRR Guidance document No 1, updated version of 27 November 2017, 1.

[101] See n 99, arts 16 ff.

[102] ibid p 3.

[103] The relevant EU and national legislation is extensively mentioned in the considered UK environmental soft law instruments.

fact that the UKEA has robust sanctioning powers and can punish violations of its soft law measures. However, if the UKEA EU ETS guidance is seen as enforceable, a twofold risk will arise. First, to the extent that the EU original measure has no binding effects, the legal effects of EU soft law and those of national implementing soft law will differ. Second, the enforceable nature of the UKEA EU ETS soft law may overachieve the objectives set in the original EU soft law.

Whether or not this guidance document binds the UKEA is uncertain. No guidance from the UK courts' case law exists concerning the legal effects of any UKEA soft law.

V. AN ANALYSIS

The picture that emerges from the analysis of implementation practices of EU soft law in France and the UK is complex.

In France, EU competition and environmental soft law has been implemented through a combination of soft and hard law. In terms of legal effects, French authorities' soft law measures implementing EU soft law reproduce to a large extent the uncertainties surrounding the original EU soft law. A textual analysis of the implementing soft law reveals incoherencies in the practice of the French competition authority. The greatest problem is that the wording of soft law measures does not correspond to the way in which these acts are used in practice. For example, the AdC has included caveats excluding the 'normative' purpose of its soft law documents, but has itself invoked them against individuals. Indeed, the AdC has relied on its 'non-binding' guidelines when issuing merger decisions. Similarly, French courts have interpreted the AdC's soft law measures as binding on their author, but have not settled whether they may be invoked against third parties before national courts.

A degree of uncertainty arises in the environmental field too. For example, the ADEME guidance documents implementing the Commission communications on the circular economy utilise a prescriptive language aimed at motivating citizens. Yet it is not clear whether they can be enforced against individuals. This option is not entirely ruled out, because the ADEME acts are capable of guiding the enforcement of environmental law by the French competent authorities. The same observation with regard to individuals applies to METS soft law. Then again, self-binding effects for the issuing authority seem unlikely, because neither the ADEME nor the METS has enforcement powers of its own. With respect to case law, a French lower court has excluded the 'normative nature' of national environmental soft law.[104]

[104] See Cour Administrative d'Appel de Nancy (n 89).

Overall, French courts have not taken a clear stance on the effects of national soft law measures implementing EU soft law and have not interpreted the national acts in light of the original EU measures.

In the UK, the question of the binding nature of soft law has occupied neither regulators nor judges. In the area of competition law, UK legislation and soft law guidance include clauses requiring courts and sector operators to solve potential conflicts between EU acts (including soft law) and national implementing measures in favour of the former (eg, section 60 of the Competition Act). Such clauses play a crucial role in ensuring coherence between the EU and the UK legal orders. The wording of the UK soft law does not rule out legal effects towards individuals. For this reason, there are no contradictions between the language used in those acts and the way in which these measures are applied or interpreted. The national legislative framework (eg, the competence of the CMA to issue soft law acts) and the enforcement powers of UK national authorities (eg, the UKEA sanctioning powers) suggest that UK soft law – both competition and environmental – is binding towards third parties. Whether or not UK soft law acts self-bind their authors is open to debate. However, such effects cannot be excluded in the absence of clear indications to the contrary.

Overall, UK courts have interpreted the effects of national soft law on a case-by-case basis and have relied on soft law acts, mainly in the competition field, as interpretative tools. No UK court has interpreted UKEA environmental soft law acts so far.

In a comparative analysis, the French implementing soft law is by and large faithful to the original EU soft law, and the terminology of the French soft law reflects, to a large extent, that of the original EU measure and rules out the existence of legal effects. UK soft law seems instead to be written to have legally binding effects, unlike the original EU soft law that UK soft law implements. Consequently, UK soft law may run the risk of overachieving what EU soft law, deprived of legal effects, requires. Such a risk exists, for instance, in relation to the UKEA EU ETS Guidance, the wording of which is prescriptive and implies binding effects, while the EU original document is deprived of legally binding effects.

Yet, for both UK and French soft law implementing EU soft law, the same concern arises: these national acts may be *interpreted or applied* as producing legal effects different from those of the EU original measure.

Even where EU soft law is considered as lacking legal effects, national implementing measures can be interpreted and applied by courts and regulators in a binding manner. An example is provided by the AdC Lignes directrices, the wording of which creates significant unpredictability for market operators. The document rules out its 'normative purpose'. Yet the Lignes directrices have been relied on by AdC when the authority has evaluated alleged anti-competitive behaviour. Similarly, UK soft law acts implementing EU environmental soft law may be considered as having binding effects, while the original EU soft law is not binding. This fragmentation of legal effects of EU and national soft law

is problematic for two reasons. First, when the legal effects of national measures diverge from those intended by the original EU measure, national soft law implementing acts could interfere with the expected policy goals established at the EU level. Second, the fragmentation of legal effects across different policy levels adversely affects legal certainty, the principle of uniform application and legitimate expectations, as well as the sincere cooperation between EU and national authorities provided under Article 4(3) of the Treaty on European Union (TEU).[105]

There are no easy fixes. In order to 'harmonise' the effects deriving from EU soft law measures across the Member States, one possible solution would be to apply national implementing (soft or hard) law consistently with EU soft law. But the principle of consistent interpretation can only partially address the fragmentation of the legal effects of EU soft law and national implementing measures. Namely, the unclear wording of EU soft law instruments and their inconsistent use by EU institutions may lead national authorities to implement EU soft law in a manner that does not correspond to the letter and spirit of the original soft law measure, but reflects a national understanding of soft law. Consequently, divergent national implementing measures generate effects that are different from those envisaged by European institutions – a situation that cannot be remedied by the principle of consistent interpretation.[106]

The following question arises: how can we then ensure that the wording (*scripta*) of soft law measures 'stays' (*manent*) and does not 'fly away' (*volant*)? Some suggestions are offered in the concluding remarks.

VI. CONCLUDING REMARKS

This chapter has analysed the effects of selected EU soft law measures by authorities in France and the UK to implement EU competition and environmental soft law. Implementation practices in France and the UK are different; furthermore, the effects of national soft law implementing EU soft law may diverge from those of the original EU soft law. The diversity of implementation practices and the (resulting) fragmentation of legal effects between EU soft law and national implementing measures are problematic for a number of reasons. They hinder legal certainty and the principle of legitimate expectations, as well as the sincere cooperation between EU and national authorities, guaranteed under Article 4(3) TEU. Ensuring a consistent interpretation of national implementing measures in the light of EU soft law is not a perfect solution to the problem. When the wording of the original EU soft law measure is unclear or

[105] The uniform application of EU law is a well-established principle in the ECJ case law. See, eg, Case C-510/10 *TV2 Danmark A/S v NCB* [2012] EU:C:2012:244.

[106] A similar view has been expressed in Korkea-aho (n 18).

its use by EU institutions is inconsistent, national authorities are often at a loss as to how to implement EU soft law. Consequently, the principle of consistent interpretation is not workable.

European and national authorities should instead strive to enhance the uniformity of the effects of soft law measures. But they should not embark on this effort in a non-coordinated fashion; rather, they should cooperate. Possible ways to do so include, among other things, institutional meetings involving EU and national authorities to determine the effects of EU soft law instruments and relevant implementing measures. A further option is the alignment of the wording of national soft law instruments with that used in the original EU soft law act, coupled with the duty of both EU and national authorities to apply soft law in line with the chosen wording. In particular, both EU and national entities should ensure that EU soft law is considered as 'written words' (*scripta*), whose meaning and effects are to 'remain' (*manent*) in the legal orders of the Member States.