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EUROPEAN AND DOMESTIC SOFT LAW WITHIN SPANISH ADMINISTRATIVE LAW

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European and domestic soft law within Spanish administrative law

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I. Introduction(*)

One of EU soft law's defining roles is to enhance the effectiveness and homogeneity of EU law's indirect enforcement. Soft law measures provide common guidance to the various domestic authorities in charge of enforcing EU law, thereby reconciling the application of the relevant legally binding instruments throughout the Union.[1] However, there are various factors that can lessen soft law's homogenising effect,[2] one of them being that Member States can award soft law provisions a different nature, effects and scope. The purpose of this chapter is to describe how Spanish administrative and judicial authorities implement EU soft law, so that the final results can be compared to those of other Member States. The line of reasoning is structured as follows: first, there is an overview of the applied methodology and a quantitative analysis (II). The qualitative analysis then focuses on the position of EU and domestic soft law within the Spanish legal order (III). The next sections address its legal effects (IV), as well as its implications regarding certain general principles (V). Finally, there is an outline of the main conclusions (VI).

II. Methodology

The methodology includes a doctrinal analysis of the position of soft law within Spanish law, along with an empirical analysis of the application of EU soft law by administrative and judicial authorities. The first approach entails examining Spanish legal provisions as well as scholarly and case law doctrine on soft law measures. Note that the status of European soft law within the Spanish legal order has not been established exclusively by reference to EU law. Indeed, way before Spain joined the European Communities, administrative law in Spain already had non-binding administrative instruments or measures with the most diverse forms, *nomen iuris* and legal effects. The second methodological approach amounts to an empirical analysis including a case law review and a series of interviews with Spanish officials and judges.[3] The case law study seeks to assess the impact of previously selected EU soft law measures (from four sector-specific areas) on the case law of Spanish last instance courts.[4] The interviews seek additional information on how administrative bodies and courts of justice construe and apply soft

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[1] See the contribution by O Stefan in this volumen, section 5.

[2] L. Senden, T. van den Brink, *Checks and balances of EU soft law rule-making*, Study drafted for the European Parliament (European Parliament 2012) 17.

[3] See the contribution by M Hartlapp, E Korkea-aho in this volumen, section 2.

[4] The case law review has focused on Constitutional Court and Supreme Court judgments. The selected areas are environmental protection, social policy, competition law and financial regulation. Within each of them, for the sake of comparability, we have focused on a closed list of instruments.

law, regardless if these interpretations and applications are explicitly reflected in the case law.[5]

From a quantitative standpoint, the results of the case law review are somewhat divergent regarding the four sector-specific areas under analysis. The Spanish Supreme Court has considered that the EU Guidelines on Vertical Restraints[6] and the *de minimis* Notice[7] have an interpretative value. However, there is no mention of the soft law measures within the other three policy areas. We did find references to similar measures in some of those areas. In any case, Spanish courts often raise and apply the relevant hard law instruments and case law of the Court of Justice interpreting them. The interviews we conducted suggest that this divergence can be due to several overlapping circumstances. The first one could be how difficult it has become for certain cases to reach higher courts, since the latter are now entitled to pick and choose the cases they hear. The second circumstance relates to the potential incorporation of soft law content into binding domestic provisions that would subsequently be raised and applied by administrative and judicial authorities. Finally, some of these soft law instruments shape and embody the Court of Justice case law, so that this doctrine is directly pleaded and cited by parties and courts.[8]

III. Legal nature and judicial review

The position of soft law within Spanish law is similar to its status within the EU legal framework.[9] Its legal nature mostly stems from its non-binding character, as explained in sub-section (A) below. This defining feature of soft law also gives rise to some specificities regarding the judicial review thereof (B).

A. Legal nature

Soft law measures are decisions adopted by public authorities intended to drive the behaviour of their addressees, yet without laying down legally binding obligations or prohibitions.[10] This definition is rooted on three elements. First, soft law measures contain abstract criteria that will be used for future decision-making. They can be drafted as rules, if their application is binary or bivalent, or as principles, if they provide for optimization requirements or mandates subject to gradual fulfilment.[11] Those measures with a specific subject and individual scope fall outside the traditional understanding of soft law in Spain.

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[5] The interviewees have heterogeneous profiles: officials acting as high-level Government advisors (4), Supreme Court (3) and Constitutional Court law clerks (1) and Justices from the Judicial-Administrative Chamber of the Supreme Court (1).

[6] Guidelines on Vertical Restraints (2010/C 130/01). Judgment of the Supreme Court of June 2, 2015, cassation appeal no. 4502/2012, paras. 1 and 4.

[7] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*de minimis* Notice) (2014/C 291/01). Supreme Court Judgments of March 17, 2016, cassation appeal no. 446/2011, para. 2; of December 17, 2015, cassation appeal no. 108/2012, para. 2; of April 16, 2012, cassation appeal no. 436/2009, para. 2; and of February 15, 2012, cassation appeal no. 1560/2008, para. 7.

[8] See the contribution by M Hartlapp, E Korkea-aho in this volumen, section 5.

[9] R. Alonso García, 'El soft law comunitario,' 154 *Revista de Administración Pública* (2001) 63-94; L. Senden, *Soft Law in European Community Law* (Oxford: Hart, 2004); H. C. H. Hofmann, G. C. Rowe, A. H. Türk (2011), *Administrative Law and Policy of the European Union*, (Oxford: Oxford University Press, 2011) 536-586; O Stefan, *Soft Law in Court. Competition law, State Aid and the Court of Justice of the European Union* (Alphen aan den Rijn: Kluwer Law, 2012).

[10] D. Sarmiento, *El soft law administrativo* (Madrid: Civitas, 2008) 89-106.

[11] Sarmiento n (10) 102-105.

The second major element of soft law measures is their steering or directing purpose. There is also a tremendous diversity in this regard.[12] Administrative bodies sometimes impose guidelines for action on other bodies with whom they engage in hierarchical relationships. This has been the underlying rationale of the so-called "instructions" or "circular notices" under Spanish law ever since 1958 (*instrucciones* or *circulares* in Spanish).[13] Article 6(1) of the Act No 40/2015, on the Legal Regime of Public Authorities (*Ley de Régimen Jurídico del Sector Público*, LRJSP) provides that "higher bodies will generally be entitled to guide lower bodies' activities by means of instructions and circular notices." Some other times, they will jointly lay down action criteria and standards resulting from the cooperation between public authorities.[14] Soft law measures can also be aimed at guiding the future behaviour of the very authorities adopting them, or even at (indirectly) guiding private entities' or persons' conduct within a sector-specific area.[15] In sum, hierarchy, cooperation, self-guidance and regulation with external effects are the four grounds for adopting soft law measures.

The third defining element of soft law is its non-binding essence. As shown below, this does not entail that soft law measures have no legal effects. Rather, it simply means that they lack a legally binding nature.[16] Article 6(2) LRJSP accurately illustrates this defining aspect: "[f]ailure to comply with instructions (...) does not by itself affect the validity of acts issued by administrative bodies." Soft law measures cannot directly invalidate another act or provision, since they do not comprise autonomous validity requirements.[17] This standard is applied by Spanish courts to decide whether certain contested measures amount to soft law provisions or otherwise to administrative rules, both regarding unilateral measures[18], and agreements between various administrative authorities.[19]

A different issue altogether is how to apply this general standard. Concerning its contents, both a regulation and a soft law instrument provide guidelines addressed to the future decision-making body. However, they differ in their formal dimension; if the same content is incorporated into a formal instrument acknowledged as a source of law, it will have a binding effect. Otherwise, such content will have no binding force. The authority should assess the advantages and disadvantages of both approaches to guiding administrative action. As a matter of principle, judicial bodies should respect the scope of discretion awarded to the aothority to decide how to guide administrative action, therefore simply applying the relevant legal framework for hard or soft law. This is the stance of domestic authorities with regard to EU soft law. They are not entitled to correct the formal designation or the decision-making procedure of measures adopted by EU institutions. Nevertheless, as for measures stemming from domestic authorities, Spanish

[12] J.A. Santamaría Pastor, *Principios de Derecho administrativo español*, vol. I (Madrid: Iustel, 2015) 263-265; M. Sánchez Morón, *Derecho administrativo. Parte general* (Madrid: Tecnos, 2016) 189-190.
[13] M. Moreno Rebato, 'Circulares, instrucciones y órdenes de servicio,' 147 *Revista de Administración Pública* (1998) 159-200; Sarmiento n (10) 108-111.
[14] J.M. Rodríguez de Santiago, *Los convenios entre Administraciones públicas* (Madrid: Marcial Pons, 1994) *passim*; Sarmiento n (10) 117-120.
[15] Sarmiento n (10) 120-133.
[16] See the contribution by N Xanthoulis in this volumen, section 2.3.
[17] Sarmiento n (10) 164-167. Notwithstanding the foregoing, non-compliance with a given soft law measure can trigger the application of other provisions with such invalidating effects or other legal consequences. See Sarmiento n (10) 212-213, and Section IV.B.
[18] Judgments of the Supreme Court of December 19, 2018 (cassation appeal no. 31/2018); and of November 26, 2015 (cassation appeal no. 31/2018).
[19] Supreme Court Judgment of December 2, 2013 (cassation appeal no. 4479/2010).

case law and scholars have regard to their contents, purpose and effects on the legal framework rather than to the procedure or the *nomen iuris*.[20] This approach resembles that of the Court of Justice regarding soft law measures adopted within the Union.[21]

As can be noted, Spanish scholarship and case law have traditionally approached soft law from the perspective of the system of sources of law. There has been an attempt to shed light on the legal regime of soft law instruments within the formal classification of acts and provisions of public law.[22] However, one of the authors of this paper has recently come up with an alternative proposal. In spite of their major differences, all soft law measures do have one thing in common: their main purpose is to lay down additional criteria to further complete and specify the undefined regulatory boundaries of administrative discretion.[23] Soft law measures allow to anticipate the exercise of administrative discretion by putting forward abstract provisions.[24]

B. Judicial review

Under the *Foto-Frost* doctrine, challenging soft law measures drafted by Union institutions, bodies and agencies before domestic courts is precluded in any event.[25] However, it is not precluded to challenge, before Spanish courts, an implementing act adopted by domestic administrative authorities on grounds of invalidity of the underlying EU soft law instrument. This has not been the case in neither the sector-specific areas selected in this research nor in any other. National courts would definitely be entitled to request a preliminary ruling on the interpretation of the relevant hard law provision, which would also allow them to question the Court of Justice about the soft law measure, and particularly about the compatibility thereof with legally binding EU law. Similarly, if a domestic court considers that the soft law measure is contrary to binding EU law, it may submit a preliminary ruling on validity to the Court of Justice.[26] Within the framework of Article 267 TFEU, it is not at stake whether the measure produces "legal effects *vis-à-vis* third parties,"[27] which is nonetheless the issue inherent to the action for annulment under Article 263.

Judicial review of domestic soft law measures differs between the Supreme Court and the Constitutional Court. As for the first, we have already seen how qualifying a given

[20] Santamaría Pastor (n 9) 264-265. As for unilateral measures, see Supreme Court Judgment of November 26, 2015 (cassation appeal no. 3405/2014) para. 1; and of December 19, 2018 (cassation appeal no. 31/2018) para. 4. With regard to the agreements, see Supreme Court Judgment of December 2, 2013 (cassation appeal no. 4479/2010) para. 4.
[21] Case C-16/16 P, *Belgium v. Commission* [2018] ECLI:EU:C:2018:79, para. 32; Conclusions of AG Bobek, para. 63.
[22] Sánchez Morón (n 12); Santamaría Pastor (n 12) 264-265; Sarmiento n (10).
[23] J.M. Rodríguez de Santiago, *Metodología del Derecho administrativo. Reglas de racionalidad para la adopción y el control de la decisión administrativa* (Madrid: Marcial Pons, 2016) 115.
[24] H-P Nehl, 'Judicial Review of Complex Socio-Economic, Technical, and Scientific Assessments in the European Union,' in J. Mendes (ed.), *EU Administrative Discretion and the Limits of Law* (Oxford: OUP, 2019) 157, 172.
[25] Case 314/85, *Foto-Frost* [1987] ECR I-4199, para. 17.
[26] Opinion of AG Bobek, in Case C-16/16 P, *Belgium v. Commission*, para. 108. M. Eliantonio, 'Soft Law in Environmental Matters and the Role of the European Courts: Too Much or Too Little of it?,' 37 *Yearbook of European Law* (2018) 507; E Korkea-aho, 'National Courts and European Soft Law: Is *Grimaldi* Still Good Law?,' 37 *Yearbook of European Law* (2018) 470–495.
[27] J. Scott, 'In legal limbo: Post-Legislative Guidance as a Challenge for European Administrative Law,' 48 Common Market Law Review (2011) 329-355; Eliantonio (n 26) 506-507.

measure as a soft law provision or as a binding rule revolves around pragmatism and flexibility. However, once the Supreme Court finally defines a contested measure as soft law, it cannot be directly challenged. Thus, as opposed to what happens with EU law, flexibility is not achieved by allowing for direct appeals against soft law measures,[28] but rather dealing with its nature and awarding it binding force having regard to its content, scope and effects. However, precluding the measure from being directly challenged does not prevent courts from indirectly reviewing the criteria and standards laid down in soft law provisions, following an appeal against the implementing acts adopted which produce legal effects *vis-à-vis* their addressees.[29] Conversely, the Constitutional Court has granted leave to proceed to appeals for constitutional protection (*recursos de amparo*) directly challenging non-binding hierarchical instructions, in view of the fundamental right to an effective judicial protection (Article 24(1) of the Spanish Constitution or SC).[30]

IV. Legal effects

Although they lack direct invalidating effects, soft law measures have other legal effects, namely: interpretative effects (A); indirect invalidating effects (B); compensatory effects (C) and internal punitive effects (D).

A. Interpretative effects

Soft law can have varying effects on the interpretation of legal provisions. First, soft law instruments can provide arguments and lines of reasoning (teleological ones, for instance), when interpreting binding provisions to which they relate, in order to clarify vagueness, settle contradictions or fill gaps.[31] This feature of soft law provisions, that can be called ordinary interpretative effect, is clearly acknowledged both in EU law and in the Spanish legal order. According to the Court of Justice, non-binding EU acts can help to interpret binding Union law,[32] although they cannot modify its content or deprive it of its essence.[33] Likewise, most rulings handed down by Spanish courts applying the soft law examined herein (or similar soft law measures) award them this ordinary interpretative effect.[34]

Secondly, a different issue altogether is if the criteria laid down in soft law provisions somehow determine or restrict the interpretation of the relevant binding rules. In the *Grimaldi* case, the Court of Justice stated that national courts "are bound to take (...) into consideration" EU soft law measures.[35] Both administrative and judicial authorities in Spain are bound by this requirement. Nonetheless, where soft law arises from Spanish authorities, and thus the *Grimaldi* doctrine is not applicable, such general obligation fades away. It is worth differentiating between administrative and judicial application of soft

[28] Eliantonio (n 26) 504-508.
[29] Supreme Court Judgment of November 3, 2003 (cassation appeal no. 232/2001) para. 2; and of December 19, 2018 (cassation appeal no. 31/2018) para 4.
[30] Constitutional Court Judgment 47/1990, of March 20, para. 4. M. Bacigalupo, 'Sobre la impugnabilidad 'directa' de las instrucciones administrativas,' 26 *UNED. Boletín de la Facultad de Derecho* (2005) 565-571.
[31] Opinion of AG Bobek, in Case C-16/16 P, *Belgium v. Commission*, para. 91. Eliantonio (n 26) 508-511.
[32] Amongst many others, see Cases 281, 283-285 and 287/85, *Germany et al. v. Commission* [1987] ECR I-3203, paras. 13-18.
[33] Case 59/75, *Maghera et al.* [1976] ECR I-91, para. 21.
[34] Supreme Court Judgment of December 19, 2018 (cassation appeal no. 31/2018).
[35] Case C-322/88, *Grimaldi* [1989] ECR I-4407, para. 18.

law. In the first case, if the relevant administrative authority has abided by the criteria laid down in the relevant soft law instrument in the past (i.e., if the soft law provision has become an administrative precedent as a result of its consistent enforcement), the administrative authority should give due reasons in order to deviate therefrom (Article 35(1)(c) of the Act No 39/2015 on Administrative Procedure, *Ley de Procedimiento Administrativo* or LPAC).

Spanish courts are not bound to take into consideration soft law measures passed by national political and administrative authorities. The duty to give reasons (which falls within the scope of the fundamental right to an effective remedy under Article 24(1) SC) does require to fully address the parties' claims and pleadings. If the parties invoke a soft law measure as the basis to plead a given legal interpretation, the deciding court will be required to give reasons as to whether it upholds or rejects the interpretative criteria arising from such measure. However, this does not result from the nature and effects of soft law, but from the fact that its content has become part of the parties' pleadings. In the absence of such pleading, the relevant court will not be bound to take into account the soft law measures where the national administrative bodies have enshrined their own interpretative guidelines.

Thus, there is a major discrepancy or unbalance between i) those cases subject to binding secondary law and covered by EU soft law instruments (where domestic courts are required to take the latter instruments into consideration) and ii) those other cases wherein the courts are only bound to take into account national soft law if pleaded by the parties. The little presence of soft law instruments examined in this research within the case law doctrine of higher courts can also be due, at least partially, to the momentum of the second group of cases: Spanish courts tend to wrongly disregard the *Grimaldi* doctrine even in EU cases, since under Spanish law they are not required to take into consideration soft law provisions drafted by Spanish authorities unless expressly invoked by the parties to support their claims. The interviews conducted within this research allow to confirm the validity of this hypothesis: the main reason given to explain the lack of case law references to most soft law instruments is that it is not pleaded by the parties.

Finally, if Spanish courts are not required to take into consideration and examine the criteria laid down by national soft law, let alone they will be bound thereby. Judicial authorities are not even required to conform to soft law provisions drafted by Spanish authorities when interpreting domestic legislation.[36] Such a conforming interpretation requirement is not in line with soft law's non-binding nature, and it breaches the constitutional principle under which judges are independent and solely subject to the rule of law (Articles 24 and 117 SC). This must only be accepted regarding EU soft law, by virtue of the *Grimaldi* doctrine and the primacy principle.

B. Indirect invalidating effects

Given their non-binding nature, the breach of soft law measures does not entail the direct annulment of the breaching provision or act. Nevertheless, there are two cases where non-compliance with soft law can have indirect invalidating effects. They are "indirect" because the grounds for annulment are not the soft law infringements themselves, but rather breaches of other rules or principles. The first case relates to binding rules

[36] Against Sarmiento (n. 10) 167-177.

incorporating soft law content, so that any subsequent acts in breach thereof will be invalid.[37] This is aptly exemplified by provisions referring to soft law content in their articles or annexes or allowing to make a project's authorization dependent on the fulfilment of best practice requirements. In these cases, any invalidating effects are not directly triggered by the breach of this soft law instrument, but rather by the violation of the relevant rule or act which incorporated soft law content. This partly explains why there are no references to European soft law in the case law examined herein, for example, regarding water-related matters. There are rulings repealing river basin plans for breaching the relevant domestic law provisions whose content partially overlap with European Commission guidelines.[38]

Secondly, non-compliance with soft law can be one of the conditions triggering invalidating effects under a general principle of law. As noted above, failure to decide on the basis of standards laid down in soft law, if such standards had been consistently abided by in previous cases, requires the authority to give due reasons (Article 35(1)(c) LPAC). Non-compliance with this duty can entail a twofold violation: breaching the right to an equal application of the law both by courts and administrative bodies (Article 14 SC),[39] and breaching the right to a duly reasoned administrative decision, which is encompassed by the right to good administration (Article 41 CFREU).[40] Concerning EU soft law, there is an additional case: breaching the requirement to take into consideration provisions of Union soft law set forth by the *Grimaldi* doctrine. In all these situations, any subsequent acts will not be invalidated solely on grounds of soft law breaches; rather, the invalidating effects arise directly from the violation of those other rules requiring to make a duly reasoned decision or to take into consideration the relevant soft law provisions. The European or national origin of the relevant soft law measure should have no impact whatsoever, since those legal effects are triggered by the conduct of domestic authorities. However, within Spanish case law, there are no signs that such indirect invalidating effects have been found regarding EU soft law.

C. Compensatory effects

Breaching a soft law provision can give rise to compensation claims. There are significant differences depending on the origins of the breached provision. Concerning EU soft law, compensation can be sought regardless if the breach stems from the activity of national administrative or judicial authorities. Conversely, as for domestic soft law, only administrative action will trigger compensatory effects, since there are very few cases of miscarriage of justice (or judicial fault) in Spanish law actually giving rise to damages. A violation of a soft law measure by an administrative body (or by a judicial authority in case of EU soft law) can give rise to compensation claims in two groups of cases.

The first one relates to cases involving the aforesaid indirect invalidating effects. The unlawfulness indirectly resulting from the soft law violation does not always give rise to compensation for the injured parties. This discrepancy between unlawfulness and compensation occurs regarding both EU and national soft law. EU law only requires Member States to pay compensation to individuals if the breach is "sufficiently serious".[41]

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[37] Sarmiento (n 10) 142-150.
[38] Amongst many others, see Supreme Court Judgment of April 11, 2019 (cassation appeal no. 4351/2016).
[39] S. Díez Sastre, *El precedente administrativo* (Madrid: Marcial Pons, 2008) 298-304; Nehl (n 20) 173.
[40] P. Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2019) 369-374.
[41] Cases C-46/93 and C-48/93, *Brasserie du Pêcheur* (1996) ECR *I-01029,* paras. 51 and 55.

Non-contractual liability will thus arise in case of manifest and particularly serious infringements, not of EU soft law (which has a non-binding nature) but of the relevant hard law norms that have been indirectly breached. There are two rules in Spanish administrative law leading to a similar outcome: public authorities will not be held liable for their unlawful acts if the body concerned has not unreasonably disregarded the limits on its discretion,[42] or, in case of purely non-discretionary acts, if they arise from an incorrect yet not unreasonable interpretation of law.[43] Ultimately, disregarding soft law will only give rise to compensation if it results in a seriously and manifestly unlawful decision.[44]

The second group of cases involves a breach of legitimate expectations.[45] In Spanish law, the latter constitutes grounds for liability that give rise to compensation (in particular for the so-called "negative interest"),[46] and that only apply by default (i.e., in the absence of another ground of illegality).[47] If the wrongful act is unlawful by virtue of another rule or principle, compensation would be paid on the grounds of such unlawfulness, not because of the breach of legitimate expectations. Furthermore, certain requirements must be met in order for public authorities to be held liable for damages under the principle of legitimate expectations. One is that the soft law measure should have given rise to the reasonable expectation that a benefit would be obtained in the future, and such expectation should rest on objective criteria. Another one is that a subsequent administrative act should have denied such advantage thereby thwarting the legitimate expectation.[48]

The application of these requirements to soft law infringements leads to three meaningful conclusions. Firstly, soft law instruments allow to justify the first of the said requirements, particularly if the measure was published. Secondly, the ability of soft law measures to create expectations worthy of protection depends on their content: the more specific and accurate the content of soft law, the easier it will be to expect a given behaviour relying thereon. On the contrary, the broader the wording of soft law provisions, the more difficult it will become to claim that a party's legitimate expectations have been breached. Thus, some argue that soft law's compensatory effects should be limited to rules and excluded for principles.[49] Thirdly, liability for breaches of legitimate expectations is only triggered where public authorities infringing soft law have approved, or been involved in the approval, of the soft law instrument they now deviate from. Administrative bodies cannot be bound to legitimate expectations created by a soft law instrument if they have not been involved in its production.[50] In these cases, administrative activity may cause damage, and the authority might even have to compensate it, but it will be on other grounds, such as the principle of legality. Accordingly, Spanish courts have not awarded

[42] Supreme Court Judgment of February 5, 1996 (cassation appeal no. 2034/1993), para. 3.
[43] Supreme Court Judgment of February 16, 2009 (cassation appeal no. 1887/2007), para. 5.
[44] L. Medina Alcoz, *La responsabilidad patrimonial por acto administrativo* (Madrid: Civitas, 2005).
[45] Opinion of AG Bobek, in Case C-16/16 P, *Belgium v. Commission*, para. 90. See the contribution by N Xanthoulis in this volumen, section 4.2.2.
[46] R. von Jehring, 'Culpa in contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen' (1861) 4 *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts* 1–11. On how Spanish scholars have embraced it, generally, see L. Medina Alcoz, 'Confianza legítima y responsabilidad patrimonial,' 130 *Revista Española de Derecho Administrativo* (2006) 290-292. Regarding soft law, see Sarmiento (n 10) 207-209.
[47] Díez Sastre (n 39) 371.
[48] Díez Sastre (n 39) 383.
[49] Sarmiento (n 10) 202-204.
[50] For an opposing stance, see Sarmiento (n 10) 206-207.

compensations for breaches of legitimate expectations in cases of EU soft law infringements by domestic authorities.

D. Internal punitive effects

We are not referring here to the application of soft law measures when imposing penalties on individuals or undertakings under a hard law provision. Rather, we are now dealing with the possibility of imposing an administrative disciplinary santion on national public officials who make decisions disregarding soft law standards issued under the principle of hierarchy. This is provided by Article 6(2) LRJSP regarding "instructions" or "circular notices" (*instrucciones* or *circulares* in Spanish). Failure to comply with these instructions or circular notices "does not affect, by itself, the validity of acts issued by administrative bodies, without prejudice to any potential disciplinary liability." Indeed, Article 95(2) of the Legislative Decree No 5/2014, Public Employees Act (*Estatuto Básico del Empleado Público*) states that "openly disregarding a hierarchically superior body's or official's orders or instructions" qualifies as a very serious infringement. In any event, this legal consequence or effect is limited to the relationships between administrative authorities subject to the principle of hierarchy, so that it does not apply where a national authority disregards EU soft law.

V. Constitutional dimension

The impact of soft law on the constitutional principles of administrative law, both European and Spanish, is manifold. Below we list some of these effects related to the rule of law (A), effectiveness (B), democracy (C) and federalism (D).

A. Rule of law

Soft law instruments certainly underpin some elements of the rule of law (articles 2 TEU and 1(1) SC). Anticipating and disclosing how public bodies will exercise their discretionary powers and construe the rules to which they are bound increases legal certainty (Article 9(3) SC). As public authorities discipline their future actions, they reduce the risk of breaching the principles of equality (Articles 2 TEU and 1(1) and 14 SC), and impartiality (Articles 41 CFREU and 103(1) SC). Finally, increasing the density of administrative action's regulation (even if it is performed through a soft law provision) allows to indirectly increase the effectiveness of judicial review (Articles 47 CFREU and 24(1) SC). Nonetheless, resorting to soft law instruments can also conceal the true drafter's intention to bypass the limits (mostly procedural ones) applicable to rule making powers.[51] Similarly, restrictions on the right to challenge soft law measures may lessen the effectiveness of judicial review. A comparative law analysis[52] shows how tempting it is to disguise as internal soft law what actually constitutes a regulation with external effects.

B. Effectiveness

Soft law can also increase the effectiveness of administrative action, which is a principle of the domestic Constitution (Article 103(1) SC) as well as of EU administrative law.[53]

[51] Senden, van den Brink (n 1) 16-17.
[52] K. Werhan, *Principles of Administrative Law* (Saint Paul: West Academic Publishing, 2014) 276-287.
[53] Craig n (41) 275-276.

From this perspective, it might be advisable for public authorities to enshrine in soft law instruments the standards they will apply when assessing facts or the impact of their decisions. This increases the effectiveness of administrative action thereby making it more legitimate.[54] Examples of this are technical standards regarding complex economic assessments to be performed by competition authorities policies,[55] or the establishment of technical environmental standards.[56]

C. Democracy

Soft law can also support the democratic principle (Articles 2 TEU and 1(1) and 1(2) SC). However, from this perspective, the consideration of these non-binding instruments can be as diverse and heterogeneous as the types of soft law measures in place, or the actual mechanisms through which public bodies gain democratic legitimacy. On the one hand, democratic legitimacy of administrative action within continental European public law rests, among other aspects, on its ties to government and, where appropriate, on the latter's connection with parliament.[57] By allowing top-down driving impulses throughout the administrative structure, thereby facilitating political guidance and control over administrative action, internal (and unilateral) soft law measures (such as the instructions set forth in Article 61(i) LRJSP) can improve the public administration's democratic legitimacy. In turn, unpublished domestic soft law measures may reduce the transparency of administrative action, thereby making it less likely for citizens to held it accountable. On the other hand, creating fora and spheres for stakeholders and parties concerned by administrative action to engage and participate within the context of administrative organization and procedures, as well as the drafting of soft law instruments enshrining the results of such participation mechanisms, may boost democratic legitimacy (Articles 10(3) TEU and 23 SC).[58]

D. Federalism

Finally, soft law can also help to fulfil the constitutional principles governing the relationships and interactions between the various territorial levels of governent, such as sincere cooperation (Articles 4(3) TEU and 2 and 103(1) SC). On the one hand, in areas of shared legislative powers, soft law measures agreed amongst the various competent levels can lead to a harmonious or uniform regulation of the relevant matter.[59] On the other, experience shows that the EU can resort to soft law instruments precisely within those areas where the powers and competences allocated thereto wane.[60] Under Spanish law, this can be hardly applied to the relationship between the State and the Autonomous

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[54] P. Craig, 'Legitimacy in Administrative Law: European Union,' in *Legitimacy in European Administrative Law: Reform and Reconstruction*, M. Ruffert (ed.) (Groningen: Europa Law Publishing, 2011) 197-216; F. Velasco, 'The Legitimacy of the Administration in Spain,' in *Legitimacy in European Administrative Law: Reform and Reconstruction*, M. Ruffert (ed.) (Groningen: Europa Law Publishing, 2011) 102-106.

[55] Stefan n (9); Z. Georgieva, 'Soft Law in EU Competition Law and its Judicial Reception in Member States: A Theoretical Perspective,' 16-2 *German Law Journal* (2015) 223-260.

[56] Eliantonio n (26) 496-497.

[57] H-H. Trute, 'Das demokratische Legitimation der Verwaltungs,' in W. Hoffmann-Riem, E. Schmidt-Assmann, A. Vosskuhle (Hrsg.), *Grundlagen des Verwaltungsrechts*, vol. I (Munich: C.H. Beck, 2006) 334-336; Velasco n (57) 101-102.

[58] Sarmiento n (10) 160-162.

[59] Sarmiento n (10) 50-55, 153-157.

[60] Case C-322/88, *Grimaldi* [1989] ECR I-4407, para. 143. Opinion of AG Bobek, in Case C-16/16 P, *Belgium v. Commission*, paras. 92-93.

Regions. The general rule is that the latter's autonomy (Article 2 SC) precludes the former from directing their action through soft law, where there is no room for State hard law.

VI. Conclusions

We should now outline the most meaningful conclusions. First, from an empirical point of view, we found a significant inconsistency in Spanish case law between the presence of soft law measures within competition law and the other policy areas.[61] This is due to various factors related to certain specificities of Spanish administrative and procedural law, as well as to the fact that Spanish courts have paid little attention to the *Grimaldi* doctrine.

Second, from a theoretical standpoint, we have not found procedural gaps in soft law's judicial review. However, Spanish courts' reluctance to openly discuss EU soft law measures hinders the requests for preliminary rulings on interpretation and validity, thereby reducing the actual completeness of the system of legal remedies provided for by EU law.[62]

Third, although it lacks binding force and thus direct invalidating effects, EU soft law can have various legal effects under the Spanish administrative law. Domestic courts have awarded interpretative effects to it. Since they do not stem from national bodies, EU soft law measures cannot provide the basis for internal disciplinary sanctions nor they can give rise to compensation for breaches of legitimate expectations by national administrative authorities. Although it would be at least theoretically possible, Spanish courts do not award indirect invalidating effects to European soft law, nor compensation for subsequent unlawful acts by domestic authorities. This leads to an excessive discrepancy between the legal effects conferred by national courts to European and internal soft law, which can also be seen in other Member States.[63]

Lastly, soft law's impact on the constitutional principles of administrative law is manifold and it does not allow for an unambiguous conclusion. On the one hand, those principles can lay down opposing or conflicting requirements so that the impact thereon of this form of public action can be inconsistent or contradictory. On the other, the various soft law measures are heterogeneous, and therefore they can lead to varying consequences from the perspective of the same constitutional principle.

[61] This finding is in line with other Member States. See the contribution by G Gentile in this volume, section 5.
[62] Case 294/83, *Parti écologiste "Les Verts" v European Parliament*[1986] ECR I-01339, para. 23.
[63] See the contribution of G Gentile to this volume, section 5.

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