



**Call for Papers "Geopolitics & Values: what is the real power of the EU?"**

**THE POWER OF EU SOFT LAW**

**EU's global leadership in promoting multilateralism through soft law**

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## **EXECUTIVE SUMMARY**

The increasing use of soft law tools by EU institutions has given rise to a number of legal issues, from their status within the EU legal order to their legal value. Soft law being a particularly attractive instrument to govern international relations, this paper will provide a legal analysis of soft law in EU external relations and illustrate its role in promoting multilateralism and solidarity during the COVID-19 crisis. A look at the CJEU case-law will show that, notwithstanding their lack of binding force, the adoption of EU soft law acts are not freed from the principles enshrined in the EU Treaties. Reforms in the decision-making process of such instruments appear therefore desirable in order to address the challenges linked to the mostly unregulated area of EU soft law.

### **Short bio**

Hava Yurttagül is a PhD candidate in law. After an LL.M. in European and International law, with a specialization in human rights law, and different work experiences in international organizations, including the European Parliament and the United Nations, she decided to pursue a doctoral degree in the field of European whistleblower protection, under the supervision of Prof. Dr. Giegerich. The defense of her PhD thesis will take place in January 2021.



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## LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
ECDC	European Centre for Disease Prevention and Control
EEAS	European External Action Service
EIB	European Investment Bank
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WBG	World Bank Group
WHO	World Health Organization

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## Introduction

2020 will certainly remain an *annus horribilis* in the collective memory. By thrusting the entire globe into a health crisis, the COVID-19 pandemic highlighted the vulnerability and weaknesses of our democratic systems and the need for rapid and fundamental changes to ensure that values taken for granted do not erode away. The pandemic has brought to light how local issues can become global concerns and how concerted efforts, cross-border cooperation and global solutions are indispensable to address the challenges arising in the interconnected world in which we live. However, with the US's global leadership on the decline, the EU has a responsibility to take up the torch and embrace a leading role in promoting international cooperation. Because dialogue, multilateralism and compromise are at the heart of the EU's DNA, the 2012 Nobel Peace Prize winner enjoys a particular legitimacy and credibility when engaging with partners worldwide in order to create new coalitions able to maintain the rule-based international system established after the Second World War. Diplomacy through EU soft law could be particularly attractive in this respect, with the use of soft instruments playing an important part in creating common ground and favourable conditions for international cooperation. With its flexible features, soft law is indeed an effective tool in the EU diplomatic apparatus to promote democratic principles and revitalize a multilateral dynamism brought to a near standstill in recent years. The purpose of this paper is to provide a legal analysis of soft law in EU external relations, taking into account the EU's global efforts during the COVID-19 crisis. To identify the strengths and weaknesses of soft law as a tool to govern EU's relations with the rest of the world, the first part of this paper is dedicated to the analysis of soft law in the EU legal order (A). A case-study of the EU's global response to the 2020 pandemic illustrates the practicability of such instruments on the international scene and the EU's role in promoting solidarity and international cooperation during the COVID-19 crisis (B). Finally, opportunities and existing challenges are examined to appreciate the future place of EU soft law in external relations (C). Concluding remarks provide concrete recommendations for improvement in using soft law to promote European unity so as to advance the EU's position as a central geopolitical actor.

### A. Soft Law in the EU Legal Order

#### I. Judicial review of EU soft law acts

In general terms, soft law could be defined as ‘a “normative consensus” of rules and principles shared by the Member States (and other jurisdictions) which provide a useful reference for the Court’,<sup>1</sup> thus having a certain persuasive force.<sup>2</sup> ‘(N)ot binding in the traditional sense’,<sup>3</sup> EU soft law can take a variety of forms, from atypical EU acts such as press releases, guidelines and communications,<sup>4</sup> the existence of which is not recognized by the TEU and TFEU,<sup>5</sup> to typical EU acts, recommendations or opinions, which are described in the EU Treaties as having ‘no binding

<sup>1</sup> Opinion of AG Tanchev to CJEU, Case C-619/18, *Commission v Poland*, delivered on 11 April 2019, ECLI:EU:C:2019:325, Footnote 51.

<sup>2</sup> Opinion of AG Tanchev to CJEU, Case C-507/19, *Deutschland v XT*, delivered on 1 October 2020, ECLI:EU:C:2020:768, para. 41.

<sup>3</sup> Opinion of AG Bobek to CJEU, Case C-16/16 P, *Belgium v Commission*, delivered on 12 December 2017, ECLI:EU:C:2017:959, para. 86.

<sup>4</sup> Opinion of AG Bobek to CJEU, Case C-16/16 P, *Belgium v Commission*, para. 55.

<sup>5</sup> Senden, L. (2013) Soft Post-Legislative Rulemaking: A Time for More Stringent Control. *European Law Journal*. 19(1), p. 59.



force'.<sup>6</sup> According to the Court of Justice of the European Union (hereafter referred to as 'CJEU' or 'Court'), these EU acts intend 'to confer on the institutions ... a power to exhort and to persuade, distinct from the power to adopt acts having binding force'.<sup>7</sup> *Soft law* yet not *legally* binding, this duality inevitably raises the question of the 'legality' of those acts and the consequences for the jurisdiction of the CJEU, especially considering the 'weak embedding of soft rule-making in the Union's institutional and legal structure'.<sup>8</sup> In this context, the CJEU has consistently held that Art. 267 TFEU 'confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception',<sup>9</sup> therefore including soft law instruments.<sup>10</sup> With regard to the power of judicial review, however, Art. 263 TFEU expressly excludes recommendations and opinions from the scope of the CJEU's jurisdiction, which is a rule extended by the CJEU to all EU acts not producing binding legal effects.<sup>11</sup> *A contrario*, the CJEU can thus review 'all measures adopted by the institutions ... which are intended to have legal effects'.<sup>12</sup> The Court follows a substantive approach in this respect, focussing on the wording, context, substance and intention of the author of an EU act<sup>13</sup> rather than on its form and nature<sup>14</sup> to determine whether it produces legal effects, a reasoning also known as the ERTA test. According to this rationale, and despite their explicit exclusion under Art. 263 TFEU, recommendations, opinions and by extension, all EU soft law instruments could therefore still be subject to judicial review if they do not constitute 'genuine' EU acts void of legal effects.<sup>15</sup> The distinction between the lack of binding legal force and the production of legal effects is therefore key to determine whether an EU soft law act falls within the jurisdiction of the CJEU. On the basis of the ERTA test, the CJEU assessed the legal effects, or lack thereof, of a number of EU soft law measures from guidelines and codes of conducts to letters.<sup>16</sup>

<sup>6</sup> Art. 288 TFEU.

<sup>7</sup> CJEU, Case C-16/16 P, *Belgium v Commission*, Judgment of 20 February 2018, ECLI:EU:C:2018:79, para. 26.

<sup>8</sup> Senden, L. & van den Brink, A. (T.) (2012) Checks and Balances of Soft EU Rule-Making. *Policy Department C: Citizens' Rights and Constitutional Affairs*, p. 16.

<sup>9</sup> CJEU, Case C-322/88, *Grimaldi v. Occupational Diseases Fund*, Judgment 13 December 1989, ECLI:EU:C:1989:646, para. 8; see also CJEU, Case C-16/16 P, *Belgium v. Commission*, 20 February 2018, para. 44.

<sup>10</sup> Opinion of AG Bobek to CJEU, Joined Cases C-83/19, C-127/19 and C-195/19, *Asociația 'Forumul Judecătorilor din România' v Inspecția Judiciară, and Asociația 'Forumul Judecătorilor din România', Asociația 'Mișcarea pentru Apărarea Statutului Procurorilor' v Consiliul Superior al Magistraturii, and PJ v QK*, Case C-291/19, *SO v TP and Others*, Case C-355/19, *Asociația 'Forumul Judecătorilor din România', Asociația 'Mișcarea pentru Apărarea Statutului Procurorilor', OL v Parchetul de pe lângă Înalta Curte de Casație și Justiție — Procurorul General al României (Request for a preliminary ruling from the Curtea de Apel Pitești (Court of Appeal, Pitești, Romania))*, delivered on 23 September 2020, ECLI:EU:C:2020:746, para. 126.

<sup>11</sup> CJEU, Case T-721/14, *Belgium v Commission*, Order of 27 October 2015, ECLI:EU:T:2015:829, para. 17; see also CJEU, Case C-131/03 P, *Reynolds Tobacco and Others v Commission*, Judgment of 12 September 2006, ECLI:EU:C:2006:541, para. 55.

<sup>12</sup> CJEU, Case 22/70, *Commission v Council* (hereinafter referred to as 'ERTA Judgment'), Judgment of 31 March 1971, ECLI:EU:C:1971:32, para. 42.

<sup>13</sup> CJEU, Case T-721/14, *Belgium v European Commission*, para. 18.

<sup>14</sup> CJEU, Case 22/70, *ERTA Judgment*, para. 42.

<sup>15</sup> CJEU, Case C-16/16 P, *Belgium v Commission*, para. 29.

<sup>16</sup> e.g. CJEU, Case C-366/88, *France v Commission*, Judgment of 9 October 1990, ECLI:EU:C:1990:348; CJEU, Case C-443/97, *Spain v Commission*, Judgment of 6 April 2000, ECLI:EU:C:2000:190; CJEU, Case C-303/90, *France v Commission*, Judgment of 13 November 1991, ECLI:EU:C:1991:424; CJEU, Case C-325/91, *France v Commission*, Judgment of 16 June 1993, ECLI:EU:C:1993:245; CJEU, Case C-57/95, *France v Commission*, Judgment of 20 March 1997, ECLI:EU:C:1997:164; CJEU, Case C-301/03, *Italy v Commission*, Judgment of 1 December 2005,



While the CJEU extended the application of the ERTA test to recommendations in its 2018 judgment *Belgium v Commission*,<sup>17</sup> it nonetheless underlined its exceptional nature in consideration of Art. 288 TFEU in conjunction with Art. 263 TFEU.<sup>18</sup> Accordingly, the CJEU held that ‘it is not ... sufficient that an institution adopts a recommendation which allegedly disregards certain principles or procedural rules’ for a judicial review to be permissible.<sup>19</sup> There thus seems to be a higher threshold for recommendations to be considered to produce legal effects and consequently be challenged under Art. 263 TFEU. The contrast between typical EU acts and other forms of EU soft law is particularly evident when compared to cases involving EU external action, since ‘the effects of an agreement (binding or otherwise) under international law are distinct from the effects, as a matter of EU law, of the act through which the (competent) Union institution expresses agreement with its content and authorises signature’.<sup>20</sup> Indeed, the principle of conferral of powers and institutional balance enshrined in Art. 13(2) TEU ‘requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions’.<sup>21</sup> Following the Court’s reasoning, it is therefore irrelevant whether or not the EU act is intended to produce legal effects; the mere lack of competence to issue said act creates legal effects and could render it challengeable under Art. 263 TFEU.<sup>22</sup> This distinction between binding legal force and legal effect and the subsequent consequences for the judicability of EU soft law acts is particularly relevant considering their increasing use,<sup>23</sup> including in the field of EU external relations,<sup>24</sup> with EU soft law representing more than 10% of EU law.<sup>25</sup>

## II. Soft law in EU external relations

Soft law as an alternative to ‘hard’ norms and binding agreements is indeed especially attractive in the field of international relations because it regulates international behaviours in a flexible way, providing a broad margin of action while laying the groundwork for international cooperation.<sup>26</sup>

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ECLI:EU:C:2005:727; CJEU, Case C-308/95, *Netherlands v Commission*, Judgment of 5 October 1999, ECLI:EU:C:1999:477.

<sup>17</sup> CJEU, Case C-16/16 P, *Belgium v Commission*, paras 31-37.

<sup>18</sup> CJEU, Case C-16/16 P, *Belgium v Commission*, paras 29-30.

<sup>19</sup> CJEU, Case C-16/16 P, *Belgium v Commission*, para. 28.

<sup>20</sup> Opinion of AG Sharpston to CJEU, Case C-660/13, *Council v Commission*, delivered on 26 November 2015, ECLI:EU:C:2015:787, para. 69.

<sup>21</sup> e.g. CJEU, Case C-409/13, *Council v Commission*, Judgment of 14 April 2015, ECLI:EU:C:2015:217, para. 64; CJEU, Case C-73/14, *Council v Commission*, Judgment of 6 October 2015, ECLI:EU:C:2015:663, para. 61.

<sup>22</sup> CJEU, Case C-660/13, *Council v Commission*, Judgment of 28 July 2016, ECLI:EU:C:2016:616, paras 30-48; see also Opinion of AG Sharpston to CJEU, Case C-660/13, *Council v Commission*, para. 62.

<sup>23</sup> Opinion of AG Bobek to CJEU, Case C-16/16 P, *Belgium v Commission*, paras 81 *et sequ.*; see also Senden, L. & van den Brink, A. (T.), Checks and Balances of Soft EU Rule-Making, (fn. 8), p. 64.

<sup>24</sup> García Andrade, P. (2016) The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments. *European Papers*. 1(1), p. 115.

<sup>25</sup> Stefan, O. et al. (2019) EU Soft Law in the EU Legal Order: A Literature Review. *King’s College London Law School Research Paper Forthcoming*, p. 3; Wessel, R. A. (2018) ‘Soft’ International Agreements in EU External Relations: Pragmatism over Principles?. *ECPR SGEU Conference*, Panel Hard and Soft Law in the European Union, Paris 13-15 June 2018, p. 2, available online at <https://ecpr.eu/Events/Event/PaperDetails/38907> [Accessed 15/11/2020].

<sup>26</sup> Thürer, D. (2009) Soft law. *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law, OUP, available online at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1469?prd=EPIL> [Accessed 15/11/2020]; Reinicke, W. H. & Jan Martin Witte, J. M. (2003) Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords. In: Shelton, D. (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*, OUP, pp. 75-100.





This is particularly relevant for the EU, which as a subject of international law is able to act on the international stage within the limits of its competence laid down in the EU Treaties. In doing so, the EU ‘shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world’.<sup>27</sup> While the EU has the ability to enter into legally binding agreements with third parties, the increasing use of soft law to regulate the external action of the EU reveals the particular attractiveness of more flexible arrangements to govern the EU’s relations with the world,<sup>28</sup> as a way to promote a coordinated or concerted European approach.<sup>29</sup> However, as seen above, the complexity linked to the increasing use of soft law in the field of EU external relations lies in its multi-layered effect. As such, it has an external effect on the international stage governed by international law and a double effect on the internal front between EU institutions and between the EU and its Member States governed by EU law. In contrast with the adoption of legally binding international agreements, which follows a strict procedure with a specific division of competences, the adoption of EU soft law instruments in the field of external actions are, in principle, freed from those constraints, thereby threatening the institutional and procedural balance carefully crafted in the EU Treaties to govern EU relations with external partners. However, it should be recalled that the non-binding character of acts concluded by the EU with third parties should be distinguished from the legal effects of those acts under EU law. The legal analysis should thus be twofold: first, one should determine whether the international agreement was intended to have binding force following a substantive approach, the formal designation being ‘not of decisive importance’.<sup>30</sup> In this sense, the Court focuses rather on the intention of the parties as ‘the decisive criterion’ to determine whether an act concluded by the EU with a third party is meant to be legally binding.<sup>31</sup>

If its non-binding character has been established, ‘the act intended to give effect to the international agreement’<sup>32</sup> should be examined through an EU legal lens. As a reminder, according to the ERTA test, the CJEU is able to review the legality of ‘all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects’.<sup>33</sup> Two considerations derive from this statement. First, the ‘genuine’ author of the act has to be identified to establish whether it is an act emanating from the EU or a measure adopted by national authorities, the latter case excluding judicial review under Art. 263 TFEU.<sup>34</sup> The CJEU follows a substantive approach in this context, stating that it is not sufficient for an act to ‘be described as a “decision of the Member States” for it to be excluded from review’.<sup>35</sup> Accordingly, it also does not suffice for an act to be

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<sup>27</sup> Art. 21(1) TEU.

<sup>28</sup> Slominski, P. & Trauner, F. (2021) Reforming me softly - how soft law has changed EU return policy since the migration crisis. *West European Politics*. 44(1), pp. 93-113; Wessel, R. A. (2021) Normative transformation in EU external relations: the phenomenon of ‘soft’ international agreements. *West European Politics*. 44(1), pp. 72-92.

<sup>29</sup> Senden, L. (2005) Soft Law, Self-Regulation and Co-regulation in European Law: Where Do They Meet?. *Electric Journal of Comparative Law*. 9(1), p. 25.

<sup>30</sup> CJEU, Opinion 1/75, *Arrangement OCDE - Norme pour les dépenses locales*, Opinion of 11 November 1975, ECLI:EU:C:1975:145, Section A, Second paragraph, p. 1359.

<sup>31</sup> CJEU, Case C-233/02, *France v Commission*, Judgment of 23 March 2004, ECLI:EU:C:2004:173, para. 42.

<sup>32</sup> CJEU, Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment of 3 September 2008, ECLI:EU:C:2008:461, para. 286.

<sup>33</sup> CJEU, Case 22/70, *ERTA Judgment*, para. 42.

<sup>34</sup> e.g. CJEU, Case C-97/91, *Oleificio Borelli SpA v Commission*, Judgment of 3 December 1992, ECLI:EU:C:1992:491, para. 9.

<sup>35</sup> CJEU, Joined cases C-181/91 and C-248/91, *Parliament v Council and Commission*, Judgment of 30 June 1993, para. 14.



described as a statement resulting from a meeting between ‘the Members of the European Council’ and a third country for it to fall within the jurisdiction of the CJEU.<sup>36</sup> To determine the ‘real’ author of an act, the CJEU thus takes into account ‘its content and all the circumstances in which it was adopted’.<sup>37</sup> Secondly, if the act can be attributed to an EU institution, the content must be analyzed, in order to determine, on the basis of a substantive approach, whether it produces legal effects in the EU legal order. Indeed, while the obligations arising from legally binding international agreements between the EU and third parties must comply with the principles laid down by the EU treaties,<sup>38</sup> the lack of binding force of an international agreement does not suffice to disregard the principle of conferral of power and institutional balance enshrined in Art. 13(2) TEU.<sup>39</sup> The area governed by the EU act is thus determinant to establish whether the distribution of competences has been respected between the EU and its Member States and between EU institutions. As seen above, an infringement of those principles could lead to the creation of legal effects with the measure thus becoming a challengeable act under Art. 263 TFEU. This rationale becomes all the more important in relation to non-binding international agreements to which the EU is not a party. Indeed, the Court takes into consideration whether the elements established in the agreements are ‘capable of decisively influencing the content’ of EU law<sup>40</sup> in order to determine whether it has legal effects in the EU legal order, thereby giving the EU external competence with respect to the said international agreement.<sup>41</sup> Nevertheless, the Court seems to have a more flexible approach with regard to the principle of conferral of power and institutional balance if it considers that the internal conflict of competence, on the EU level, could have a detrimental impact for the EU on the international stage.<sup>42</sup>

## **B. Case Study: The EU’s Global Response to the COVID-19 Pandemic**

### ***I. The ‘Team Europe’ approach***

If EU soft law is ordinarily an attractive tool to govern international relations, it is especially true in periods of turmoil. In times of crisis, ‘Europe does indeed what it does best: governing through soft law’.<sup>43</sup> As the spread of COVID-19 plunged the world into an ongoing health and economic crisis, with over 53 million cases and more than one million deaths globally by mid-November 2020,<sup>44</sup> the use of soft law became particularly relevant in defining the EU’s global response to the pandemic. At the beginning of April 2020, two months after the World Health Organization (WHO) Director-General declared the outbreak of COVID-19 a ‘Public Health Emergency of

<sup>36</sup> CJEU, Case T-192/16, *NF v European Council*, Order of 28 February 2017, ECLI:EU:T:2017:128, para. 69.

<sup>37</sup> CJEU, Joined cases C-181/91 and C-248/91, *Parliament v Council and Commission*, para. 14.

<sup>38</sup> CJEU, Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council*, para. 285.

<sup>39</sup> CJEU, Case C-233/02, *France v Commission*, para. 40.

<sup>40</sup> CJEU, Case C-399/12, *Germany v Council*, Judgment of 7 October 2014, ECLI:EU:C:2014:2258, para. 63

<sup>41</sup> CJEU, Case C-399/12, *Germany v Council*, Judgment of 7 October 2014, ECLI:EU:C:2014:2258, para. 64, see also paras 51-55.

<sup>42</sup> CJEU, Case 22/70, *ERTA Judgment*, para. 86; CJEU, Opinion 1/75, *Arrangement OCDE*, Section A, ninth paragraph, pp. 1360-1361.

<sup>43</sup> Stefan, O. (2020) COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda. *European Papers*. 5(1), p. 663.

<sup>44</sup> Since 31 December 2019 and as of the 14th of November 2020, the ECDC recorded 53 515 055 cases of COVID-19, with 1 304 871 deaths, see ECDC, COVID-19 situation update worldwide, *Daily situation update worldwide*, available online at <https://www.ecdc.europa.eu/en/geographical-distribution-2019-ncov-cases> [Accessed 15/11/2020].



International Concern'<sup>45</sup> and less than a month after the WHO categorized the spread of the virus as a pandemic,<sup>46</sup> the European Commission announced the launch of 'Team Europe'. With a package of approximately €15 billion, this EU external action framework is intended to support partner countries in the fight against the COVID-19 pandemic and its consequences<sup>47</sup> in accordance with the approach promoted in the G20 Joint Action Plan.<sup>48</sup> In their joint communication,<sup>49</sup> the European Commission together with the High Representative of the Union for Foreign Affairs and Security Policy, emphasized that the Team Europe's priorities would be focused on 'addressing the immediate health crisis and resulting humanitarian needs, strengthening partner countries' health, water and sanitation systems and their research and preparedness capacities to deal with the pandemic, as well as mitigating the socioeconomic impact',<sup>50</sup> on the basis of which specific financial packages would be allocated to the different countries in need.<sup>51</sup> According to the same joint communication, the EU's financial contribution to support partner countries in their fight against COVID-19 was said to be part of existing external action resources<sup>52</sup> and was planned to be divided as follows:

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<sup>45</sup> WHO, Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV). *Statement*. 30 January 2020, available online at [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) [Accessed 15/11/2020].

<sup>46</sup> WHO, WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020. *Statement*. 11 March 2020, accessible online at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [Accessed 15/11/2020].

<sup>47</sup> EEAS, Coronavirus: European Union launches « Team Europe » package to support partner countries with more and €20 billion. *Press Release*. 8 April 2020, accessible online at [https://eeas.europa.eu/headquarters/headquarters-homepage/77326/coronavirus-european-union-launches-“team-europe”-package-support-partner-countries-more-€20\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/77326/coronavirus-european-union-launches-“team-europe”-package-support-partner-countries-more-€20_en) [Accessed 15/11/2020].

<sup>48</sup> G20, Extraordinary G20 Leaders' Summit: Statement on COVID-19. *Statement*. 26 March 2020, available online at <http://www.g20.utoronto.ca/2020/2020-g20-statement-0326.html> [Accessed 15/11/2020]; G20, Press Release: G20 Finance Ministers and Central Bank Governors. *Press release*. 30 March 2020, available online at <http://www.g20.utoronto.ca/2020/2020-g20-finance-0331.html> [Accessed 15/11/2020]; G20, Communiqué - Virtual meeting of the G20 finance ministers and central bank governors. *Communiqué*. 18 July 2020, available online at <http://www.g20.utoronto.ca/2020/2020-g20-finance-0718.html> [Accessed 15/11/2020].

<sup>49</sup> European Commission, Communication on the Global EU Response to COVID-19, JOIN(2020) 11 final. *Joined communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*. 8 April 2020, available online at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020JC0011> [Accessed 15/11/2020].

<sup>50</sup> European Commission, Coronavirus: EU global response to fight the pandemic. *Press release*. 8 April 2020, available online at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_604](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_604) [Accessed 15/11/2020]; See also European Commission, Communication on the Global EU Response to COVID-19, JOIN(2020) 11 final, p. 2.

<sup>51</sup> Second pillar of the « Team Europe » approach, see European Commission, Communication on the Global EU Response to COVID-19, JOIN(2020) 11 final, p. 2.

<sup>52</sup> European Commission, Communication on the Global EU Response to COVID-19, JOIN(2020) 11 final, p. 2.



<b>II.1</b>	<b>Common priority lines of action</b>	<b>EU contribution to Team Europe package (EUR million)</b>
II.1.1	Support the urgent, short-term emergency response to humanitarian needs	502
II.1.2	Support to strengthen health systems	2,858
II.1.3	Economic and social consequences	12,281
<b>TOTAL</b>		<b>15,641</b>

**Table 1:** *European Commission*, EU Budget contribution to Team Europe package<sup>53</sup>

As part of the EU's collective action, Team Europe also encompassed a cooperation and multilateralism strategy by which it would aim to leverage the EU's position as a global actor to promote a coordinated response to the crisis.<sup>54</sup> In parallel, a virtual pledging event intended 'to help mobilise the necessary funding and support the World Health Organisation to assist the most vulnerable countries'<sup>55</sup> was also initiated and began on the 4th of May 2020.<sup>56</sup> With the support of partners,<sup>57</sup> this pledging initiative led by the European Commission raised a little less than €16 billion for 'universal access to tests, treatments and vaccines against coronavirus and for global recovery'.<sup>58</sup> From this sum, the European Commission and the European Investment Bank are said to have committed €4.9 billion 'in loans and guarantees to support the world's most fragile economies in recovering from coronavirus and achieving the Sustainable Development Goals',<sup>59</sup> with the total of Team Europe pledges accounting for approximately €6.5 billion of the €15.9 billion raised during the campaign.<sup>60</sup>

<sup>53</sup> European Commission, Communication on the Global EU Response to COVID-19, JOIN(2020) 11 final, p. 10.

<sup>54</sup> Fourth pillar of the « Team Europe » approach, see European Commission, Communication on the Global EU Response to COVID-19, JOIN(2020) 11 final, p. 3.

<sup>55</sup> European Commission, Coronavirus: EU global response to fight the pandemic. *Press release*. 8 April 2020.

<sup>56</sup> European Commission, Coronavirus Global Response Pledging Conference, 4 May 2020, available online at [https://ec.europa.eu/international-partnerships/events/coronavirus-global-reponse-pledging-conference\\_en](https://ec.europa.eu/international-partnerships/events/coronavirus-global-reponse-pledging-conference_en) [Accessed 15/11/2020]; see also European Commission, Closing remarks by President von der Leyen at the Coronavirus Global Response international pledging event, 4 May 2020, available online [https://ec.europa.eu/commission/presscorner/detail/en/statement\\_20\\_806](https://ec.europa.eu/commission/presscorner/detail/en/statement_20_806) [Accessed 15/11/2020].

<sup>57</sup> European Commission, Coronavirus Global Response: kick off of new campaign with support of Global Citizen. *Press release*. 28 May 2020, available online at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_952](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_952) [Accessed 15/11/2020]; European Commission, Coronavirus Global Response: world leaders summit and concert line-up announced for 27 June. *Press release*. 22 June 2020, available online at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1129](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1129) [Accessed 15/11/2020].

<sup>58</sup> EU, Coronavirus Global Response website, available online at [https://global-response.europa.eu/index\\_en](https://global-response.europa.eu/index_en) [Accessed 15/11/2020].

<sup>59</sup> European Commission, Coronavirus Global Response: Breakdown of the pledges made today in the 'Global Goal' Summit. *Questions and answers*. 27 June 2020, available online at [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_20\\_1216](https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1216) [Accessed 15/11/2020].

<sup>60</sup> EU, Coronavirus Global Response, Funds raised. *Pledge*. Available online at [https://global-response.europa.eu/pledge\\_en](https://global-response.europa.eu/pledge_en) [Accessed 15/11/2020]; see also EIB, Coronavirus outbreak: EIB Group's response. *Response outside the EU*. Available online at <https://www.eib.org/en/about/initiatives/covid-19-response/index.htm> [Accessed 15/11/2020].



## *II. A united call for a global strategy*

The European Commission was not alone in calling for international solidarity and cooperation during COVID-19 crisis. While it did not expressly refer to the Team Europe initiative, the European Parliament promoted a similar EU global strategy in its resolution on EU coordinated action to combat the COVID-19 pandemic and its consequences,<sup>61</sup> emphasizing ‘that the pandemic knows no borders or ideologies and that it requires the cooperation and solidarity of the entire international community’.<sup>62</sup> For its part, the Council of the European Union (Council) expressed its support for the Team Europe approach, stating that it ‘welcomes the announcement to re-direct almost 36 billion euros through the Team Europe packages to address the shattering effects of COVID-19 crisis in partner countries and regions’<sup>63</sup> and stressing that ‘(t)he momentum created by the EU-led pledging initiative started on 4 May 2020 ... needs to be sustained’.<sup>64</sup> In the same vein, the Council, together with the representatives of the Governments of the Member States, also confirmed that they are ‘committed to ensuring that the EU and its Member States, based on their commitment to multilateralism, continue to take a leading role in global health, and are determined to ensuring a coordinating, proactive and leading role in an inclusive process aimed at strengthening global health security and the WHO’.<sup>65</sup>

In coherence with these global objectives, the European Commission announced its willingness to participate in the COVAX Facility with an investment of €400 million,<sup>66</sup> an intent confirmed in a press release, with President of the European Commission Ursula von der Leyen stating, ‘We must make sure that citizens around the world have access to it. ... No one is safe until everyone is safe’.<sup>67</sup> Co-led by the Vaccine Alliance (Gavi), the Coalition for Epidemic Preparedness Innovations (CEPI) and the WHO, COVAX is the vaccines pillar of the Access to COVID-19 Tools (ACT) Accelerator, which is a global coalition to accelerate the development and production of and equitable access to COVID-19 tests, treatments, and vaccines through a global procurement mechanism (COVAX Facility) and financing instrument (COVAX AMC).<sup>68</sup> In contrast with the

<sup>61</sup> European Parliament, Resolution on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)). *P9\_TA(2020)0054*. 17 April 2020, available online at [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.html) [Accessed 15/11/2020].

<sup>62</sup> European Parliament, Resolution on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)). *P9\_TA(2020)0054*. 17 April 2020, para. 60, available online at [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.html) [Accessed 15/11/2020].

<sup>63</sup> Council of the EU, Council conclusions on Team Europe Global Response to COVID-19. *Press release*. 8 June 2020, para. 6, available online at <https://www.consilium.europa.eu/media/44347/team-europe-ccs-200608.pdf> [Accessed 15/11/2020].

<sup>64</sup> Council of the EU, Council conclusions on Team Europe Global Response to COVID-19. *Press release*. 8 June 2020, para. 13, available online at <https://www.consilium.europa.eu/media/44347/team-europe-ccs-200608.pdf> [Accessed 15/11/2020].

<sup>65</sup> Council of the EU, Draft Conclusions of the Council and the Representatives of the Governments of the Member States on the role of the EU in strengthening the World Health Organization. *No. 12276/20*. 27 October 2020, para. 11, available online at <https://data.consilium.europa.eu/doc/document/ST-12276-2020-INIT/en/pdf> [Accessed 15/11/2020].

<sup>66</sup> European Commission, Coronavirus Global Response: Commission joins the COVID-19 Vaccine Global Access Facility (COVAX). *Press release*. 31 August 2020, available online at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1540](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1540) [Accessed 15/11/2020].

<sup>67</sup> European Commission, Coronavirus Global Response: the Commission’s contribution to the COVID-19 Vaccine Global Access Facility (COVAX). *Press release*. 18 September 2020, available online at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1694](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1694) [Accessed 15/11/2020].

<sup>68</sup> Gavi, COVAX Website, available online at <https://www.gavi.org/covax-facility#what> [Accessed 15/11/2020].



EU, other global powers such as Russia, China and the US, chose not to participate in the international initiative,<sup>69</sup> though China eventually reversed its decision, eventually joining the global efforts for equitable access to COVID-19 vaccines at the beginning of October 2020.<sup>70</sup> While the US currently remains an outsider to the international project for equitable access to vaccines,<sup>71</sup> approximately 156 economies representing nearly two thirds of the global population are now involved in the COVAX initiative.<sup>72</sup>

## C. New Opportunities and Existing Challenges

### I. EU global leadership

The vision promoted by the EU in its global response to the COVID-19 crisis is a clear recognition of a reality where ‘the successful approach will be based on comprehending our shared humanity’.<sup>73</sup> Indeed, through the Team Europe initiative, the organization of the Global Goals pledging summit and its participation in the COVAX initiative, the EU has demonstrated a willingness to act as a catalyst in the promotion of greater cooperation and international solidarity during and after the pandemic,<sup>74</sup> a position praised by personalities such as Melinda Gates, who has expressed the hope that the EU will take the global leadership role left vacant by the US.<sup>75</sup> These efforts are also coherent with the overall mandate of the Union ‘in its relation with the wider world’, according to which it ‘shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights’,<sup>76</sup> with the primary objective of the EU’s development cooperation policy being ‘the reduction, and in the long term, the eradication of poverty’.<sup>77</sup> The EU fulfilling this mission by embracing a leading position in promoting solidarity and international

<sup>69</sup> *Courrier international*. (23/09/2020) *Pandémie. Les Etats-Unis et la Chine, grands absents de Covax, l’initiative mondiale d’accès aux vaccins*. Available online at <https://www.courrierinternational.com/article/pandemie-les-etats-unis-et-la-chine-grands-absents-de-covax-linitiative-mondiale-dacces-aux> [Accessed 15/11/2020]; Euronews with AP. (22/09/2020) *Coronavirus vaccines: US, China and Russia absent from WHO’s equal access COVAX coalition*. Available online at <https://www.euronews.com/2020/09/22/coronavirus-vaccines-us-china-france-and-germany-absent-from-who-s-equal-access-covax-coal> [Accessed 15/11/2020].

<sup>70</sup> Caixin Wang. (09/10/2020) *中国加入“新冠肺炎疫苗实施计划”，外交部：促进疫苗公平分配*. Available online at <http://www.caixin.com/2020-10-09/101612780.html> [Accessed 15/11/2020].

<sup>71</sup> Based on information dated 15 November 2020.

<sup>72</sup> WHO, *Boost for global response to COVID-19 as economies worldwide formally sign up to COVAX facility*. *News release*. 21 September 2020, available online at <https://www.who.int/news/item/21-09-2020-boost-for-global-response-to-covid-19-as-economies-worldwide-formally-sign-up-to-covax-facility> [Accessed 15/11/2020]; see also Gavi, *COVAX commitments and participation. List of participating economies, updated 14 October 2020*. Available online at [https://www.gavi.org/sites/default/files/covid/pr/COVAX\\_CA\\_COIP\\_List\\_COVAX\\_PR\\_14-10.pdf](https://www.gavi.org/sites/default/files/covid/pr/COVAX_CA_COIP_List_COVAX_PR_14-10.pdf) [Accessed 15/11/2020].

<sup>73</sup> Rubik, E. (21/10/2020) *I invented the Rubik’s Cube. It can teach us about facing problems like covid*. *The Washington Post*. Available online at [https://www.washingtonpost.com/outlook/coronavirus-pandemic-rubiks-cube/2020/10/20/4611c38e-0f28-11eb-8074-0e943a91bf08\\_story.html](https://www.washingtonpost.com/outlook/coronavirus-pandemic-rubiks-cube/2020/10/20/4611c38e-0f28-11eb-8074-0e943a91bf08_story.html) [Accessed 15/11/2020].

<sup>74</sup> Castellarin, E (2020) *The European Union’s Financial Contribution to the Response to the Covid-19 Crisis: An Overview of Existing Mechanisms, Proposals under Discussion and Open Issues*. *European Papers*, p. 10.

<sup>75</sup> Deutsch, J. & Herszenhorn, D. M. (01/05/2020) *Melinda Gates: European leaders ‘understand need for global cooperation’*. *Politico*. Available online at <https://www.politico.eu/article/melinda-gates-european-leaders-understand-need-for-global-cooperation-coronavirus-covid19/> [Accessed 15/11/2020]; see also Herswenhorn, D. M. & Paun, C. (04/05/2020) *EU leads (an almost) global effort to fight coronavirus*. *Politico*. Available online at <https://www.politico.eu/article/world-leaders-pledge-to-fight-coronavirus/> [Accessed 15/11/2020].

<sup>76</sup> Art. 3 (5) TEU.

<sup>77</sup> Art. 208 (1) TFEU.



cooperation appears all the more important in view of the latest findings of the World Bank Poverty and Shared Prosperity 2020 report, which found that global extreme poverty is expected to rise for the first time in over 20 years, COVID-19, conflict, and climate change reversing ‘the gains in poverty eradication for the first time in a generation’.<sup>78</sup> It is therefore crucial that the EU honours its commitments made in the midst of the COVID-19 crisis and continues to support vulnerable countries in their fight against the pandemic and its socio-economic consequences.<sup>79</sup> In this respect, the EU Institutions Team Europe Monitoring system found that 36% of the sums committed were invested by July 2020, with the detailed analysis of sums spent by regions being as follows:

**EU Institutions Team Europe Monitoring (up until July 2020)**

EU Institutions - monitoring mechanism							
Region <sup>1</sup>	Total Team Europe commitments	Team Europe Priorities (committed versus spent) <sup>2</sup>					
		Emergency response to humanitarian need		Strengthening health, water and sanitation		Social & economic consequences	
		committed	spent	committed	spent	committed	spent
<b>TOTAL EUR Millions</b>	<b>20759</b>	<b>629</b>	<b>306</b>	<b>4587</b>	<b>1962</b>	<b>15543</b>	<b>5332</b>
Global	439	50	50	208	44	181	18
Guarantees <sup>3</sup>	1565	0	0	145	0	1420	441
Western Balkans and Turkey	3672	96	3	637	286	2939	878
Neighbourhood	8017	190	37	1914	988	5914	1938
Sub-Saharan Africa	3694	65	60	960	574	2669	1334
Latin America and the Caribbean	1309	35	25	108	24	1165	438
Asia and the Pacific	1589	145	131	419	46	1025	276
ACP, regional	327	47	0	166	0	114	8
OCTs	147	0	0	30	0	118	1

**Table 2:** European Commission, EU Institutions Team Europe Monitoring (up to 22/09/2020)<sup>80</sup>

## II. The need for an ex-ante control mechanism

While the monitoring system established and the website dedicated to Team Europe provide a certain level of transparency regarding the follow-ups to the EU’s international commitments made in the midst of the pandemic, recurrent challenges linked to the proliferation of EU soft-law arise. As illustrated above, the external measures the EU adopted during the pandemic were primarily initiated by its executive branch through soft law instruments such as press releases, communications and pledges. This can be explained by the role of the European Commission, which ‘shall promote the general interest of the Union and take appropriate initiatives to that end’.<sup>81</sup> Though there is an alignment between the approach promoted by the European Commission, the Council and the European Parliament to address the international impact of the pandemic, the lack of clarity as to the decision-making process and the consultations conducted

<sup>78</sup> WBG, Poverty and Shared Prosperity 2020: Reversal of Fortunes. *Report*. 7 October 2020, p. 5, available online at <https://openknowledge.worldbank.org/bitstream/handle/10986/34496/9781464816024.pdf> [Accessed 15/11/2020].

<sup>79</sup> Bilal, S. (2020) Towards an EU global COVID-19 response 2.0: Boosting Smarter Finance. *ECDPM, Discussion Paper No. 273*, pp. 5 *et sequ.*, available online at <https://ecdpm.org/wp-content/uploads/Towards-EU-Global-COVID-19-Response-2.0-Boosting-Smarter-Finance-ECDPM-Discussion-Paper-273-June-2020.pdf> [Accessed 15/11/2020].

<sup>80</sup> European Commission, EU Institutions external response to COVID-19 (up to 22/09/2020), *Tables*, p. 3, available online at [https://ec.europa.eu/international-partnerships/system/files/202000922-eu-institutions-response-to-covid\\_en.pdf](https://ec.europa.eu/international-partnerships/system/files/202000922-eu-institutions-response-to-covid_en.pdf) [Accessed 15/11/2020].

<sup>81</sup> 17(1) TEU.



raises some transparency issues and questions regarding the legitimacy of these measures, which are problematic often raised in relation to EU soft law.<sup>82</sup> The European Parliament expressed similar concerns as early as 2007 in its resolution on institutional and legal implications of the use of “soft law” instruments, in which it called on the European Commission ‘to develop, in cooperation with Parliament, a *modus operandi* that guarantees the participation of the democratically elected bodies including, possibly, by means of an interinstitutional agreement, and thus more effective monitoring of the need for the adoption of “soft law” instruments’,<sup>83</sup> the establishment of more stringent requirements for the adoption of EU soft law aiming to ensure predictability, consistency and coherence as an *ex-ante* control mechanism<sup>84</sup> complementary to the current *ex-post* judicial control developed by the CJEU.

An interesting starting point to establish such mechanism could be the 2016 Interinstitutional Agreement on Better Rule-Making, in which the European Commission, the Council and the European Parliament agreed ‘to promote simplicity, clarity and consistency in the drafting of Union legislation and to promote the utmost transparency of the legislative process’,<sup>85</sup> objectives reflecting the principles enshrined in articles 11 and 13 TEU as well as articles 7 and 15 TFEU. Notwithstanding its focus on improving the EU legislative process, this institutional agreement which can be considered as having binding force *inter partes*<sup>86</sup> could be expanded to include EU soft law acts, an addition coherent with the spirit of simplicity and clarity promoted therein. The fact that EU soft law has now become an inherent part of the EU’s pre- and post-legislative powers<sup>87</sup> legitimizes this inclusion, though it would require a specific addendum accounting for the hybrid nature of EU soft law acts. In doing so, the right balance has to be achieved, between, on the one hand, the need to preserve the characteristics which render soft law attractive, namely its flexibility, swift adoption process and reactive approach, while at the same time, introducing guiding principles with regard to the adoption of such EU acts in order to provide more clarity and certainty as to their potential legal effects. The advantages will be particularly relevant in the field of EU external action. Indeed, on the basis of the findings developed in this paper, one must admit that the legal value of EU soft law greatly depends on a wide range of variables linked to the context, wording and exact circumstances of each case. While this substantive approach is key to avoid that EU institutions and bodies choose to adopt atypical acts in order to escape judicial review,<sup>88</sup> it is insufficient to address the challenges described in this paper. Indeed, because an EU

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<sup>82</sup> Stefan, O., COVID-19 Soft law, Voluminous, Effective, Legitimate?, (fn. 43), p. 665 (concerning the COVID-19 measures adopted by the EU in general); Stefan, O. et al., EU Soft Law in the EU legal order, (fn. 25), pp. 33 *et sequ.* (on EU soft law in general); Senden, L., Soft Post-Legislative Rulemaking, (fn. 5), pp. 64 *et sequ.*; Wessel, R. A., Normative transformation in EU external relations, (fn. 28); On the lack of clarity regarding EU pledges, see Castellarin, E., The European Union’s Financial Contribution to the Response to the Covid-19 Crisis, (fn. 74), pp. 3-4; Senden, L. & van den Brink, A. (T.), Checks and Balances of Soft EU Rule-Making, (fn. 8).

<sup>83</sup> European Parliament, Resolution on institutional and legal implications of the use of « soft law » instruments (2007/2028(INI). P6\_TA(2007)0366. 4 September 2007, para. 16, available online at <https://www.europarl.europa.eu/sides/getDoc.do?reference=P6-TA-2007-0366&type=TA&language=EN&redirect> [Accessed 15/11/2020].

<sup>84</sup> Senden, L., Soft Post-Legislative Rulemaking, (fn. 5); see also Wessel, R. A., ‘Soft’ International Agreements in EU External Relations, (fn. 25), p. 23-24.

<sup>85</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.05.2016, pp. 1-14, para. 2.

<sup>86</sup> Art. 295 TFEU. See Senden, L., Soft Law, Self-Regulation and Co-regulation in European Law, (fn. 29), p. 22.

<sup>87</sup> Senden, L., Soft Post-Legislative Rulemaking, (fn. 5), p. 61.

<sup>88</sup> CJEU, Case T-496/11, *United Kingdom v ECB*, Judgment of 4 March 2015, ECLI:EU:T:2015:133, para. 30.





soft law act should be presumed valid unless and until annulled by the Court, the absence of an *ex-ante* control mechanism would allow an EU soft law act adopted in breach of the EU Treaties to produce legal effects prior to its annulment.<sup>89</sup> It therefore creates a level of uncertainty as to the potential legal effects of EU soft law instruments used to govern the EU's relationships with external partners, the lack of clarity as to the legality of such acts undermining the trust and legitimacy of EU external action. In those circumstances, the interplay between an *ex-ante* control mechanism establishing procedural safeguards and the judicial review by the CJEU could help elucidate the legal ambiguities with regard to the legality of EU soft law, promoting thereby legal certainty and predictability as to the production of legal effects.

### Concluding remarks and recommendations

In an ever-changing world, it is of utmost importance for the EU to affirm its unity so as to assert its sovereignty and become a leading force in the promotion of a diversified multilateralism, without which it would risk to 'be side-lined by global dynamics'.<sup>90</sup> According to Joseph Nye, who introduced the concept of soft power in the late 1980s, this unity would also be key to strengthen the EU's soft influence on the international stage.<sup>91</sup> This is particularly important taken that 'over time the soft power of attraction builds the trust needed for cooperative solutions that transnational problems like COVID-19 (or climate change) require'.<sup>92</sup> However, considering the current challenges hindering the EU to become a moral compass for the wider world,<sup>93</sup> the use of soft instruments could alleviate existing conflicts and help provide the EU with the means to fulfill its ambitious world-wide mission. Nonetheless, EU soft law will be effective only insofar as it complies with the principles enshrined in the EU Treaties. In view of the growing CJEU case-law with regard to EU soft law, EU institutions and bodies cannot afford to ignore the need for reforms, at the risk of undercutting the very benefits of soft law in governing the EU's external relations. For the EU 'to become a stronger global actor',<sup>94</sup> these reforms seem therefore inevitable in the long term.

#### *A call for an ex-ante control mechanism*

The development of guiding principles on the adoption of EU soft law, through an addendum to the Interinstitutional Agreement on Better Rule-Making, could be an effective solution to remedy the current shortcomings highlighted in this paper while preserving the practical advantages of soft law. Indeed, on the basis of the CJEU's case-law analyzed above, it has become evident that the adoption of EU soft law acts are not freed from the legal safeguards enshrined in the EU Treaties.

<sup>89</sup> Senden, L., *Soft Post-Legislative Rulemaking*, (fn. 5), p. 66.

<sup>90</sup> Council of the EU, The Rome Declaration, Declaration of the leaders of 27 member states and of the European Council, the European Parliament and the European Commission. *Statements and Remarks*. No. 149/17, 25 March 2017, available online at <https://www.consilium.europa.eu/en/press/press-releases/2017/03/25/rome-declaration/pdf> [Accessed 15/11/2020].

<sup>91</sup> European Albach Forum 2020. Joseph Nye on a World After the Liberal International Order. *Interview*, Moderator: Matt Karnitschnig, Speaker: Joseph S. Nye, 28 August 2020.

<sup>92</sup> Farrel, H. (24/04/2020) So do morals matter in U.S. foreign policy? I asked the expert. *The Washington Post*. Available online at <https://www.washingtonpost.com/politics/2020/04/24/so-do-morals-matter-us-foreign-policy-i-asked-expert/> [Accessed 15/11/2020].

<sup>93</sup> Giegerich, T. (2017) What kind of Global Actor Will the Member States Permit the EU to be Be?. *ZEUS Zeitschrift für Europarechtliche Studien*. 20(4), pp. 397-420.

<sup>94</sup> European Commission, President Jean-Claude Juncker's State of the Union Address 2017. *Speech*. 13 September 2017, available online at [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_17\\_3165](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165) [Accessed 15/11/2020].



The substantive approach applied by the CJEU to appreciate the legality of EU acts and the resulting extension of its jurisdiction to soft law therefore requires EU institutions and bodies to take additional precautions when adopting such acts in order to ensure compliance with the principles laid down in the EU Treaties. Such addendum should thus encompass both internal conditions and external requirements. On the internal front, those guiding principles should establish procedural safeguards for the adoption of EU soft law taking into account the CJEU's criteria presented in this paper. Externally, placing interinstitutional dialogue on a systematic footing would be essential to promote the principles of sincere cooperation and institutional balance enshrined in Article 13 TEU. These procedural precautions would help minimize conflicts of competences, thereby strengthening the legitimacy of EU external action while simultaneously ensuring the characteristic features of EU soft law. Lastly, the future-proof character of such addendum should ensure sufficient flexibility to allow for possible adjustments in order to reflect the evolving nature of the CJEU's jurisprudence with regard to EU soft law.



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