

Soft law and its implications for institutional balance in the EC

Linda A.J. Senden*

1. Introduction¹

Over the last decade, the belief has gained ground that Community legislation is not always the best and only way to realize European integration and that a differentiated range of instruments is required besides the traditional legislative ones, namely regulations and directives. Increasingly, emphasis is placed on the use of alternative regulatory instruments, including self-regulation, co-regulation, open co-ordination, benchmarking, peer pressure, networks, standardization and soft law.² This development has been confirmed in the Commission's White Paper on European Governance and subsequently in the Inter-institutional Agreement 'Better Lawmaking'.³ In essence, the debate in the latter document centres on the extent to which the traditional – supranational and top-down – Community method is still the right way to proceed, and on what new forms of European governance – both intergovernmental and non-governmental – should be explored and promoted with a view to ensuring good governance. The Commission considers that 'legislation is often only part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework'.⁴ The issue of the proliferation and simplification of Community legal instruments has also been put on the agenda of the European Convention.

The tax law area provides a concrete illustration of this shift in legislative approach. In the Communication from the Commission to the Council, the EP and the ESC 'Tax Policy in the European Union – Priorities for the years ahead', the Commission thus considered that in view of the difficulty of reaching unanimous agreement on legislative proposals in this area, the Community has to consider the use of alternative instruments such as soft law as a basis for its initiatives in this area. In particular it considered that 'the use of non-legislative approaches or 'soft legislation' may be an additional means of making progress in the tax field'. The adoption of instruments such as communications, recommendations, guidelines and interpretative notices is deemed to contribute to providing guidance on the application of

* Professor of European Law, Tilburg University, Faculty of Law, Department of European and International Public Law, PO Box 90153, 5000 LE Tilburg, the Netherlands. Tel. +31 13 4662742. Correspondence may be sent to: L.A.J.Senden@uvt.nl

1 This paper has been written in the framework of the SARO-project 'The Emerging Constitution'. As such, it draws to a large extent on my doctoral thesis on the use of soft law in European Community law, L. Senden, *Soft law in European Community law*, 2004.

2 This development was set in motion in particular by the adoption of the Edinburgh European Council Conclusions, 1992 *Bull. EC*, no. 12, p. 15.

3 COM (2001) 428 and *OJ C* 321, 31.12.2003, p. 1 respectively.

4 White Paper on European Governance, COM (2001) 428, pp. 4 and 20-22 in particular.

the Treaty, helping to remove obstacles to the internal market, pointing to potential legal problems and possible solutions as to avoid legal conflicts or litigation, and to the development of new tax rules.⁵

The general assumption underlying this new Community legislative policy is that differentiation of the Community legal instruments contributes to the legitimacy, effectiveness and transparency of Community action⁶ and, as such, to good governance. The way in which the Commission conducts the debate in the White Paper provides proof of this assumption.⁷ Yet, for various reasons one may wonder to what extent it actually holds true. One of these reasons is that the use of soft law instead of legislation may upset the horizontal division of powers – between the Community institutions – which in its turn can be seen as affecting the legitimacy of the European Community. This will be the core question of this contribution: how does the use of soft law affect the horizontal division of powers and as such the institutional balance in the EC? Does its adoption by one institution entail an unacceptable bypassing of the competences of the other institutions in the decision-making process?

Thus far this particular question has drawn very little attention. On the one hand, the present discussion on horizontal power sharing focuses on institutional reform and the modalities of the decision-making process, such as decision-making procedures, the weighing of votes, and the composition and functioning of the institutions.⁸ On the other hand, the discussion of the Community's legal instruments focuses on those instruments having been attributed legally binding force, and in particular it aims at introducing a distinction between legislative and implementing acts and a hierarchy of norms. Without denying the relevance of these discussions, the question of how the use of soft law affects the institutional balance must also be addressed, as the increasing use of instruments not provided for in the Community legal system has a detrimental effect on the use of legislation. This means that more decisions are made outside the framework of the formal Community decision-making process, in which the institutions have been carefully assigned their proper role and power, to reflect a certain institutional balance.

In dealing with this question here, the notions of Community soft law and of legitimacy will first be explained somewhat further. Next, I will look at the meaning of horizontal power sharing and of institutional balance within the framework of the EC and the role that the principle of Community loyalty, established in Article 10 EC, plays in this respect. A number of possible and important implications will then be identified which the use of soft law raises in view of the institutional balance in the EC, entailing in particular a discussion of the competences of the Commission and the Council to adopt certain soft law instruments and the way in which these are being exercised, including the use of soft law as a means of parallel legislation. To conclude, I will consider the existing guarantees and the need for changes to overcome the negative implications that the use soft law may have for institutional balance.

5 COM (2001) 260 final, pp. 10 and 22-24. The Nice IGC failed as regards simplifying the decision-making process in the tax law area, which thus in a sense forces the Commission to have recourse to other tools.

6 I speak deliberately of 'Community' here and not 'Union', because this contribution will only deal with the implications of the use of soft law instruments within the framework of the first – supranational – pillar of the EU, i.e. the EC, and not within the – intergovernmental – second and third pillars of the EU. Community and EC are used as synonyms.

7 See the Commission work programme White Paper on European Governance 'Enhancing democracy in the European Union', SEC (2000) 1547/7 fin, p. 3; the Commission here clearly links transparency, accountability and effectiveness to the notion of good governance as preconditions.

8 Cf. B. Smulders, 'Conventie – Kritische kanttekeningen bij de gevolgen van het 'ontwerp-Verdrag tot vaststelling van een Grondwet voor Europa' voor het institutionele evenwicht', 2003 *Nederlands Tijdschrift voor Europees Recht*, no. 9, p. 246.

2. The concept and classification of Community soft law

An analysis of legal writing on soft law reveals three core elements of this phenomenon: 1. ‘rules of conduct’ or ‘commitments’ are concerned, which 2. are not devoid of all legal effect despite the fact that they have been laid down in instruments that have no legally binding force as such, and which 3. aim at or may lead to some practical effect or influence on behaviour.⁹ On this basis, the following definition can be given of soft law: rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects.¹⁰

As such, the concept of soft law can be considered to provide an umbrella concept for those instruments laying down rules of conduct whose legal status is unclear or uncertain. What is certain is that they have not been attributed legally binding force. Given the limited number of Community instruments provided for by the EC Treaty itself and the proliferation of instruments in daily practice, it is clear that many different instruments can possibly be brought within its scope. As a result, the phenomenon of soft law in EC law is actually of a very heterogeneous nature. Here I will concentrate on those soft law instruments adopted – unilaterally – by the European Commission and the Council of Ministers,¹¹ which still leaves us with a huge variety of instruments. This makes it quite impossible to make general comments on their nature, function, possible legal effect and other characteristics such as their addressees, legal basis, and adoption process and, in line with this, on how they affect the institutional balance. Since these instruments are not regulated in any way, much will therefore depend on the instrument at issue, its actual content and the intention of its drafters. Yet, to bring some order to the heterogeneity and proliferation of soft law instruments and to understand better the way in which the Commission and Council make use of them, a classification of these instruments is called for. On the basis of their function and objective, a distinction can thus be made between preparatory and informative instruments, interpretative and decisional instruments and steering instruments.

Within the first category of *preparatory and informative* instruments fall, in particular, Green Papers, White Papers, action programmes and informative communications. These instruments are adopted with a view to the preparation of Community law and policy and/or the provision of information on Community action. An early example is the White Paper on the Completion of the Internal Market, from 1985.¹² Since it has been alleged, notably by the European Parliament, that the instruments falling within this category are being used as alternatives to legislation¹³ – and could as such affect the institutional balance – they are taken into consideration here. Yet, one may wonder whether they actually constitute soft law at all, since they do not establish any rules of conduct in themselves but merely prepare for the elaboration and adoption of such rules

9 Cf. F. Snyder, ‘Soft Law and Institutional Practice in the European Community’, in S. Martin (ed.) *The Construction of Europe: essays in honour of Emile Noël*, 1994, p. 198; D. Thüerer, ‘The role of soft law in the actual process of European integration’, in O. Jacot-Guillarmod et al., *L’avenir du libre-échange en Europe: vers un Espace économique européen?*, 1990, p. 132; G. Borchardt et al., ‘Soft law in European Community law’, 1989 *European Law Review*, no. 5, p. 285; A. Morand, ‘Les recommandations, les résolutions et les avis du droit communautaire’, 1970 *Cahiers de Droit Européen*, no. 2, pp. 626-627.

10 See in more detail, Senden 2004, *supra* note 1, p. 112.

11 Without denying their relevance, instruments or methods that depend to a large extent on the direct involvement of outside – either public or private – parties will thus not be dealt with here (cf. the methods of open coordination, benchmarking, networks and best practices, which involve the Member States). The same goes for co-regulatory and self-regulatory instruments such as European collective agreements and environmental agreements, which involve management and labour and industry respectively. See on their connection to soft law, L. Senden, ‘Soft law, self-regulation and co-regulation in European law: Where do they meet?’, 2005 *Electronic Journal of Comparative Law*, no. 1, <http://www.ejcl.org/91/art91-3.html>.

12 COM (1985) 310 final.

13 *Agence Europe*, 22-23 December 1997, no. 7127, p. 10 and *Agence Europe*, 21-22 December 1998, no. 7369, p. 13.

in the future. One could therefore also say that these instruments fulfil a *pre-law* function. This function can also be understood in a more substantive way, in the sense that soft law acts pave the way for the adoption of future legislation by providing or increasing the basis of its support. The second category of *interpretative and decisional* instruments aims at providing guidance for the interpretation and application of existing Community law.¹⁴ The decisional instruments indicate in what way a Community institution – usually the Commission – will apply Community law provisions in individual cases when it has implementing and discretionary powers. As such, they constitute the rules on the basis of which it will decide in a particular case. To this category belong, notably, the Commission’s communications and notices and also certain guidelines, codes and frameworks. They are adopted frequently in the area of competition law and state aid and just one example is the De Minimis Notice.¹⁵ As such, these instruments bear resemblance to the administrative or policy rules familiar to national legal systems. The Commission also frequently adopts interpretative notices and communications, indicating how, in the Commission’s opinion, Community law should be interpreted, while often summarizing the relevant case law of the CFI and the ECJ. The Commission Interpretative Communication concerning the free movement of services across frontiers is an illustration of this.¹⁶ Interpretative and decisional acts are often not intended to replace legislation, but rather to complement it. As such they can usually be said to fulfil a kind of *post-law* function, being adopted subsequent to existing Community law with a view to supplementing and supporting both primary and secondary EC law.

The third category of *steering* instruments covers instruments that aim at establishing or giving further effect to Community objectives and policy or related policy areas, sometimes in a rather political and declaratory way, but often also with a view to establishing closer cooperation or even harmonization between the Member States in a non-binding way. This category can be further subdivided into formal steering instruments, actually provided for by Article 249 EC (in particular the recommendation), and non-formal steering instruments that have arisen in Community practice. In this category one finds instruments resembling those found in the context of international law:¹⁷ conclusions, declarations, recommendations and resolutions. These are adopted notably by the Council, the Representatives of the Governments of the Member States meeting in Council or both, although the Commission also adopts steering instruments (recommendations and codes of conduct). To a certain extent at least, these are intended as alternatives to legislation and are presumed to realize harmonization of national law in a rather informal or indirect way. Recommendation 87/62/EC on monitoring and controlling large exposures of credit institutions can be mentioned as an example in this regard.¹⁸ In view of this, they can often be said to fulfil a *para-law* function. Yet, they may also merely perform the pre-law role.

Even if such a classification has its limitations,¹⁹ it enables an identification of the different roles that soft law plays in the Community legal order, particularly in relation to EC legislation. Furthermore, this classification also contributes to identifying the different – negative but also

14 Cf. also Melchior, ‘Les communications de la Commission. Contribution à l’étude des actes communautaires non prévus par les traités’, in Mélanges Fernand Dehousse, vol. 2, *La construction européenne*, 1979, p. 243; A. Mattera, *Le marché unique européen. Ses règles, son fonctionnement*, 1988, pp. 28-31 and M. Gardeões Santiago, ‘Las ‘comunicaciones interpretativas’ de la Comisión: Concepto y valor normativo’, 1992 *Revista de Instituciones Europeas*, no. 3, p. 933.

15 *OJ C* 372, 9.12.1997, p. 13. See also Senden 2004, *supra* note 1, pp. 148-155.

16 *OJ C* 334, 9.12.1993, p. 3.

17 However, the important fact remains that the precise significance and effect of interpretative, decisional and steering instruments can only be assessed against the specific background and peculiarities of the Community legal order.

18 *OJ L* 33, 04.02.1987, p. 10. See further on this Senden 2004, *supra* note 1, pp. 162-171.

19 E.g. the concrete contents of a soft law act may lead to the conclusion that it actually falls within two of the aforementioned categories and/or that it fulfils more than one of the described functions.

positive – implications the use of soft law may have for institutional balance. The evaluation of soft law in terms of its threat or contribution to legitimacy, and more specifically to institutional balance, can thus not be made in a general way, but will depend on the act in question and the category that it can be considered to belong to.

3. Enhancing the Community's legitimacy

What does it mean then for the Community to seek to enhance its legitimacy; what can this sometimes rather empty rhetoric be said to imply? It is beyond doubt that the Community legal system constitutes a legal order in its own right,²⁰ which is, however, based on the principle of democracy and the rule of law, like the national legal systems that are represented in it.²¹ This entails that not only the existence and division of Community power but also its exercise must be acceptable to the citizen. Citizens must have the belief that this – exercise of – power is fair,²² and not induced, for instance, by fear.

Democratic organization and the democratic exercise of power is usually considered to be the basis for this acceptability and hence for the legitimacy of the EC. So, to begin with, legitimacy is understood in the sense of democratic legitimacy or rather of the democratic legitimization of the Community decision-making process. Since the powers of the European Parliament in this process are still considered to be weak, enhancing legitimacy is primarily understood as an effort to increase the citizen's influence, control and participation in this process. Yet, although democratic organization of power certainly facilitates the acceptance of power and its exercise, such a narrow and formal conception of legitimacy, as it has been described by some,²³ is not sufficient. In the legal orders of the Member States, acceptability of state power and its exercise relies on the rule of law as well.²⁴ That the EC is a *Rechtsgemeinschaft* and committed to the rule of law is expressed in Article 220 EC, which makes it clear that the Court of Justice has to ensure that in the interpretation and application of the EC Treaty 'the law is observed'.

The essence of a state based on the rule of law is that its government action is bound by the law. This can be said to require, on the one hand, governing *sub lege* and, on the other, governing *per lege*.²⁵ Governing *sub lege* does not only mean governing on the basis of the law, i.e. that there is a competence conferring legal basis (principle of legality). It also means governing within the boundaries of the law, that is, in conformity with certain principles on which a constitutional state is based and which indicate the limits to the powers to be exercised, with a view to ensuring the freedom and liberty of citizens. Governing *per lege* means that power should be exercised through the adoption of laws with, *inter alia*, a view to ensuring legal certainty and equality. These requirements must be considered to apply not only to states, but to every entity that is vested with the exercise of government power. The Community legal system is no different in this respect. In fact, precisely because it is founded on the principle of conferred powers, this can be said to apply even more for the EC. The intention was expressly not to endow the Community

20 Case 26/62, *Van Gend en Loos*, [1963] ECR 3.

21 Cf. Art. 6 TEU. See also in this sense W. van Gerven, *The European Union. A Polity of States and Peoples*, 2005, pp. 2-3 and its Chapter 3.

22 P. Pescatore, 'Les exigences de la démocratie et la légitimité de la Communauté Européenne', 1974 *Cahiers de Droit Européen*, pp. 505-506.

23 *Ibid.*, p. 507; J. Weiler, 'Problems of Legitimacy in Post 1992 Europe', 1991 *Aussenwirtschaft*, nos. 3-4, p. 411; M. Fernández Esteban, *The rule of law in the European constitution*, 1999.

24 M. Burkens et al., *Beginselen van de democratische rechtsstaat: inleiding tot de grondslagen van het Nederlandse staats- en bestuursrecht*, 2001, p. 9.

25 H. Gribnau, 'Legaliteit en legitimiteit: fiscale rechtsvorming in de democratische rechtsstaat', 2001 *Nederlands Tijdschrift voor Bestuursrecht*, no. 1, p. 16.

with a general competence to act, and consequently the Treaty provisions indicate when the Community may act, by what institution, in what form and according to what procedures. This principle is thus of major importance as regards the governing of the EC *sub lege*, as it functions as the Community principle of legality. As such, it reflects the classical, rather formal and procedural, conception of the rule of law, emphasizing the limitation and control of state power. In this conception, the legitimacy of government action is put on a par with its legality. Yet, in the national legal contexts, there has been a shift from the classical (liberal) conception of the rule of law to a more democratic and social conception, in which the (active) realization and protection of general principles of law and fundamental rights have increasingly gained attention. As such, general principles of law can to some extent be seen as a bridge to or legal counterpart of the norms and values of society.²⁶ Clearly, this shift has also had repercussions for the European legal context and in this respect various authors have spoken of ensuring social legitimacy,²⁷ of legitimacy granted by the rule of law²⁸ and substantive legitimacy.²⁹ Thus, Pescatore asserts that true legitimacy, that is substantive legitimacy, ensues from an adequate performance of the functions of government; legitimate power is understood to be the power that responds best to the expectations and needs of the public and that is capable of resolving the problems affecting it; in short, that is best for the general interest. I also understand legitimacy in this broad way, which can in particular be said to imply the duty to ensure good governance, demanding compliance with principles such as legal certainty, equality and legitimate expectations. The adoption of the Charter of Fundamental Rights of the European Union³⁰ and its insertion in the Constitutional Treaty for Europe, thereby intending to give it legally binding status, also reflects this shift to a more democratic and social conception of the rule of law.

4. Sharing of powers, institutional balance and loyal co-operation

The requirement to govern *sub lege* – meaning that the government has to act within the boundaries of the law – entails respecting the horizontal division of powers, which can be said to form an essential part of the rule of law upon which the EC is founded. In this regard, the principle of conferred powers is of crucial importance, as it determines when the EC and its institutions are competent to act. Although this principle is often merely understood in its function as a principle of legality, as expressed in Article 5(1) EC,³¹ the Treaty also gives expression to its function in respect of the horizontal division of powers.³² It does this in Article 7(1) by listing the different institutions that have to carry out the tasks entrusted to the Community and stating that ‘*Each institution shall act within the limits of the powers conferred upon it by this Treaty*’ (emphasis added). This provision thus underlines more the inter-institutional relations and in particular the existence of and the duty to respect the powers of the other institutions.

More generally, it can thus be said that, like the national legal systems represented in the EC, the Community legal system is also based on the idea of the separation of powers with a view to

26 *Ibid.*, pp. 15-16.

27 Weiler, *supra* note 23, pp. 415-416.

28 Fernandez Esteban, *supra* note 23, pp. 180-181.

29 Pescatore, *supra* note 22, p. 507.

30 *OJ C* 364, 18.12.2000, p. 1.

31 ‘The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.’

32 Apart from these functions, this principle can also be said to fulfil the functions of vertical division of powers, of legal protection and of democracy. See in this respect H.-P. Krausser, *Das Prinzip begrenzter Ermächtigung im Gemeinschaftsrecht als Strukturprinzip des EWG-Vertrages*, 1991 and D. Triantafyllou, *Des compétences d’attribution au domaine de la loi. Etude sur les fondements juridiques de l’action administrative en droit communautaire*, 1997, pp. 40-58.

preventing too great a concentration of power in the hands of one institution. Yet, the legislative, executive and judicial powers are divided in a different way than in the national legal systems and the dividing lines between, for instance, the legislature and the executive are not very clear-cut. As such, the Community structure has been characterized as quadripartite,³³ meaning that the three powers are in fact divided over four institutions: the Council of Ministers, the European Parliament, the European Commission and the Community Courts (ECJ and CFI). This structure can be explained by the fact that although the EC can to a large extent be characterized as a supranational organization, it still has intergovernmental features. The Council of Ministers thus principally represents the interests of the Member States, whereas the European Commission has to act independently of the Member States and in the general interest of the EC.³⁴ As a result, one can better speak of a sharing of the powers on which the Community legal order rests, rather than of a strict separation or division thereof. This is also confirmed by the fact that the Court prefers to refer in this regard to the maintenance of the institutional balance.

According to the Court's case-law, the notion of institutional balance refers to the system of the distribution of powers between the Community institutions as this has been set up by the Treaty, assigning to each institution its own power and role in the institutional structure of the Community and for the accomplishment of the tasks entrusted to it. Since this is already implied in Article 7(1) EC, 'institutional balance' can be considered a guiding principle for interpretation rather than a self-standing principle as has been argued in legal writing.³⁵ Observance of the institutional balance implies that each institution exercises its powers with due regard for the powers of the other institutions and that breaches of this rule can be penalized.³⁶

In the EC Treaty, a certain balance has thus been struck between the tasks and competencies of the institutions. In the decision-making process the Commission has been given the right of initiating legislation and also delegating decision-making powers; the EP has the power of consultation, co-operation or co-decision, depending on the applicable decision-making procedure; the Council has been attributed the power of decision; and obviously the Community courts perform the role of judiciary and as such monitor the lawfulness of the decisions taken. Although each Community institution has its own, defined competences in the decision-making process, which have to be respected by the other institutions, this does not mean that these competences are invariable. Institutional balance is a dynamic notion that may change over time, to be decided upon by Treaty amendment. For instance, as a result of the introduction of the co-decision procedure by the TEU, the position of the EP has been reinforced to the detriment of the Commission's right of legislative initiative.³⁷

Clearly, the role of the EP in the decision-making process is not a fixed one, but depends on the decision-making procedure declared applicable in the legal basis upon which the Commission puts forward a proposal. The legal basis and procedure also determine whether the Council decides by unanimity or qualified majority, and under what conditions deviation from the Commission's proposal is possible. This means that the Commission's position is also affected

33 R. Barents et al., *Grondlijnen van Europees Recht*, 2001, p. 110.

34 See Arts. 203 and 213(2) EC respectively.

35 S. Prechal, 'Institutional Balance: A Fragile Principle with Uncertain Contents', in T. Heukels et al. (eds.), *The European Union after Amsterdam: a legal analysis*, 1998, pp. 275-278. Cf. also B. de Witte 2000, 'Institutionele beginselen van gemeenschapsrecht', in H. Cousy et al. (eds.), *Liber Amicorum Walter van Gerven*, 2000, p. 34, who has considered more in general that in most cases the institutional principles have been attributed (only) an interpretative or supplementary role.

36 See in particular Case C-70/88, *Parliament v. Council*, [1990] ECR I-2041 (*Chernobyl*), Paras. 21-25.

37 Since under that procedure deviation from the Commission's proposal is quite easy in the case of agreement of the Council and the EP, as the Council then decides by qualified majority.

by the choice of legal basis. In short, the legal basis determines the actual role of the different EC institutions in the Community legislative process. This also means that the principle of conferred powers in its horizontal division of powers – presupposing (a certain) institutional balance – has been concretized in the separate Treaty provisions. The requirement to indicate the legal basis in directives, regulations and decisions makes it possible to control whether this division and the appropriate exercise of powers have been complied with.³⁸

The notion of institutional balance can also be linked to the principle of Community loyalty or *Gemeinschaftstreue* enunciated in Article 10 EC. This principle has witnessed a very interesting evolution in the case-law of the Court, as a result of which both its substantive and personal scope has become very broad. Not only does the principle apply to all state functions and every level of government (legislative, executive and judicial), but it now also entails a mutual duty of loyal cooperation between the Member States and the Community institutions, between the Member States and their institutions, and – of particular relevance here – between the Community institutions *inter se*.³⁹ It has thus become clear that cooperation between the Community institutions and inter-institutional dialogue, as contained, *inter alia*, in the consultation procedure,⁴⁰ are subject to the same mutual duties of sincere cooperation as are relations between the Member States and the Community institutions. The Declaration re Article 10 EC, attached to the Nice Treaty, explicitly confirms that the duty of sincere cooperation ‘also governs relations between the Community institutions themselves’. As Van Gerven has observed, the application of this duty does not alter the institutional balance, but, on the contrary, entails that all EU actors must exercise their powers by taking into account the legal powers and legitimate interests of the other, Community and national, actors.⁴¹ With respect to the decision-making process, this duty of sincere cooperation has also been confirmed by the Inter-institutional Agreement ‘Better Lawmaking’.

To sum up, therefore, there is constitutional recognition in the EC Treaty of – the respect of – horizontal power sharing or institutional balance: generally in Article 7(1) and specifically in separate Treaty provisions. The latter form of recognition can be said to reflect a deliberate shaping of the institutional balance. The principle of Community loyalty reinforces the duty to maintain this institutional balance.

5. Ways in which the use of soft law may affect the institutional balance

The prerequisite imposed by the rule of law to govern *per lege*, i.e. by way of ‘laws’, clearly reflects the guarantee function that legislation fulfils; the exercise of decision-making powers through the adoption of legislation ensures the respect of certain democratic and rule of law requirements, including institutional balance. Yet, at the same time it follows from Article 5(2) and (3) EC that in performing their role in the decision-making process the Community institutions must not only comply with the legal basis requirement (possibly prescribing the instrument), but also take account of the principles of subsidiarity and proportionality. This entails that the

38 See for a most recent and illuminating example of this, Case C 176/03, *Commission v. EP and Council*, judgment of 13 September 2005 (not yet reported).

39 Cf. Case C-65/93, *EP v. Council*, [1995] ECR I-643, Para. 23.

40 Cf. also Case C-392/95, *EP v. Council*, [1997] ECR I-3213, Para. 14, in which the Court made clear that effective participation of the EP in the legislative process in accordance with the procedures laid down by the Treaty ‘represents an essential factor in the institutional balance intended by the Treaty’.

41 W. van Gerven, ‘The full dimension of Article 10 EC Treaty’, contribution to the *XIX F.I.D.E. Congress*, Helsinki 2000, available on: <http://www.fidelaw.org/ql/community.htm> 2000.

choice of the form and intensity of Community action must be proportionate to the intended goal, leading in turn to an increased use of soft law in two different respects: the Commission, in carrying out its assessment as to the necessity and desirability of Community action before putting forward a proposal for legislation, makes increasing use of preparatory and informative instruments and, by its very nature, the proportionality principle pulls in the direction of the least interfering means of regulation.⁴² The consultation process that has taken place on the basis of preparatory instruments such as Green and White Papers may contribute to the finding that the adoption of soft law instruments is to be preferred over legislation.⁴³

Consequently, the use of soft law implies to a certain extent the rejection or non-adoption of legislation, in particular in the case of ‘steering’ soft law instruments that fulfil the para-law function. This leads to more rule making without following the formal decision-making procedures prescribed by the Treaty. So, when turning now to the question of how the use of soft law may affect horizontal power sharing, it is principally the respective powers of the Community institutions in the decision-making process that are at stake.⁴⁴ It follows from the discussion in Section 4 that the limit imposed by institutional balance in this regard is that the use of soft law may not amount to an abuse of powers.

One can then distinguish two main ways in which the use of soft law touches upon institutional balance. First, this results from the choice of an instrument of soft law as such, as there is not only a lack of clarity concerning the competences of the institutions to make use of soft law instruments – also in relation to the competences of other institutions -, but also as regards the adoption procedure to be followed and the role of the other institutions therein. Secondly, this may occur as a result of soft law instruments being used as a means of parallel legislation. In the following two sections these issues will be discussed in more detail. This discussion will reveal in particular that it is not so much the establishment of competence to adopt soft law that is problematic, but rather the way in which competences are being exercised.

6. The competence to adopt soft law

6.1. Relevance of the competence question

There are different arguments that make the question of competence to adopt soft law a relevant one. To start with, given the principle of conferred powers upon which the EC is based, it is difficult to imagine that no foundation of competence at all would be required for the adoption of soft law, and that its use would not also be limited in some way, by the law itself, as a result of general principles of law or because of concerns such as institutional balance. Furthermore, Article 249 EC lists the instruments that may be adopted, and separate Treaty provisions indicate some others (e.g. (action) programmes). Any change in the practice – of adopting instruments other than those mentioned in the Treaty, but whose contents fall within its scope – may have an unforeseen influence on the institutional balance as this has been concretized in the Treaty itself. In fact, the ECJ has recognized this in its judgment in Case C-233/02, *France v. Commission*, concerning an action for annulment of the act by which the Commission had concluded an agreement with the United States on guidelines intended *inter alia* to improve regulatory competition. The Court confirmed the Commission’s view that these guidelines were not intended

⁴² The Protocol on the application of the principles of subsidiarity and proportionality thus stipulates that ‘The form of Community action shall be as simple as possible’ and that ‘The Community shall legislate only to the extent necessary’.

⁴³ So, in that sense, the above observation of the EP might be right.

⁴⁴ But see Section 7 for soft law instruments interfering with the judicial powers of the ECJ/CFI.

to be binding, but rejected its view to the extent ‘[t]hat the fact that a measure such as the Guidelines is not binding is sufficient to confer on that institution the competence to adopt it.’ It held in particular that ‘Determining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty in the field of the common commercial policy be duly taken into account (...).’⁴⁵

Secondly, the idea that the principle of conferred powers is not applicable to soft law seems difficult to reconcile with the fact that Article 211, second indent, EC provides in a general way for the possibility of the Commission to adopt recommendations and opinions. Furthermore, several Treaty provisions explicitly provide for their adoption. The question then is how this should be explained; does it mean that a specific competence is sometimes required, or do such explicit provisions indicate not merely a competence to adopt such acts, but possibly even an obligation to do so? And how does this relate to the fact that some Treaty provisions provide for the adoption of Council recommendations; does this interfere with the Commission’s use of recommendations? The importance of this question is reinforced by the fact that some Treaty provisions also indicate a certain decision-making procedure in the case of the adoption of a recommendation.⁴⁶

Practice also shows a somewhat blurred picture when it comes to the perceived need for and identification of a legal basis in soft law acts. On the one hand, it is clear that the lack of a legal basis for legislation may precisely underlie the choice of using soft law, and consequently a (specific) legal basis is not mentioned. On the other hand, it appears that certain soft law acts, in particular Council recommendations (as opposed to Commission recommendations), do, as a general rule, mention a (specific) legal basis and are adopted in conformity with the procedure prescribed therein, such as consultation of the EP. This is illustrated by the numerous Council recommendations adopted on the basis of (ex) Article 235.⁴⁷ The question is then whether this is a requirement actually imposed by the notion of institutional balance or whether institutions may do so at their discretion.

So, in order to be able to assess whether the use of soft law amounts to an abuse of powers, the first question that needs to be addressed is whether or not a competence to adopt soft law instruments is required from the perspective of horizontal power sharing and institutional balance. The following shows that this must indeed be considered the case.

6.2. Explicit powers

There is only one provision in the EC Treaty that can be said to confer in a general way explicit powers on an institution to adopt certain soft law instruments. Most Commission recommendations thus start by referring to Article 211, which provides in its second indent that the Commission shall, in order to ensure the proper functioning and development of the common market, ‘formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary’. It can be concluded from the Court’s judgment in Case C-303/90, *France v. Commission*, that this provision does indeed confer upon the Commission a general competence to adopt ‘true’ recommendations and opinions, not imposing any obligations in addition to existing Community legislation, as the

45 Case C-233/02, *France v. Commission*, [2004] ECR I-2759, Para. 42. See on this judgment also the Annual Report 2004 of the ECJ, p. 14, available at <http://www.curia.eu.int>

46 See for instance Arts. 99 and 149(4) EC.

47 E.g. Recommendation 86/379/EEC on the employment of disabled people in the Community, *OJL* 225, 12.08.1986, p. 43 and Recommendation 96/694/EC on the balanced participation of women and men in the decision-making process, *OJL* 319, 10.12.1996, p. 11.

Court held that ‘(...) it should be noted that [ex] Article 155 of the Treaty gives the Commission the right to formulate recommendations or deliver opinions which, according to Article 189 of the Treaty, are not binding’.⁴⁸

Apparently, the Court considers it necessary, albeit rather implicitly, to establish the competence of the Commission to adopt recommendations and opinions and thus deems the principle of conferred powers to apply.⁴⁹ This does not detract from the fact that this involves a quite general empowerment, almost to the extent of giving the Commission a *carte blanche*,⁵⁰ as it may adopt such acts not only where expressly provided for by the Treaty but also whenever it considers it necessary. This applicability can be viewed in the light of securing the powers and tasks assigned to the Commission; the *carte blanche* can be regarded against the background of the more general role assigned to the Commission in the institutional system, which it is to act as the motor of European integration. Not only is its task in the decision-making process – the right of initiative – an expression of this, but so too is this right of adopting non-binding acts which may pave the way for future Community legislation.

6.3. Implied powers

The case law of the Court also makes clear that the competence to adopt a number of other soft law instruments – appearing only in daily practice and not provided for in the EC Treaty – can be established by having recourse to the doctrine of implied powers, thus accepting this doctrine in relation to institutional Community powers as well. In recent years, the ECJ and the CFI have had to address the question of competence to adopt decisional instruments, such as certain notices and guidelines, described in Section 2 as instruments that aim at providing guidance for the application of existing Community law. The Community courts have established that their use must be considered in the framework of the exercise of the Commission’s implementing powers. In the beginning, the ECJ recognized this only in staff cases, such as *Samara v. Commission* in which it held that there is in principle nothing to prevent the Commission from adopting internal decisions governing the exercise of the discretion conferred on the Commission by the Staff regulations.⁵¹ Later, a similar reasoning was followed in other types of cases, concerning, notably, state aid and involving the exercise of discretionary power. In *IJssel-Vliet*,⁵² the Court thus held in response to the question of whether the Commission was competent to establish guidelines, ‘(...) that the Commission, *in exercising its powers under Articles 92 and 93 of the Treaty, could adopt guidelines* requiring compliance, not only with criteria pertaining exclusively to competition policy, but also with those applicable in relation to the common fisheries policy, *even if the Council had not expressly authorized it to do so*’. (Para. 34 – emphasis added).

Thereby, the Court recognized the possibility of adopting not only individual decisions in the framework of the enforcement of these Treaty provisions, but also acts of a general nature. This was confirmed in later case law.⁵³ As such, the Court has not only established unequivocally the

48 Case C-303/90, *France v. Commission*, [1991] ECR I-5315, Para. 30.

49 Cf. also Case T-113/89, *Nefarma v. Commission*, [1990] ECR II-797, Para. 79, in which the CFI held that (ex) Art. 189 implies the ‘express conferral of the power to adopt acts with no binding force’.

50 Cf. Triantafyllou, *supra* note 32, pp. 368-376, who speaks of a ‘habilitation globale’.

51 Case 266/83, *Samara v. Commission*, [1985] ECR 189, Para. 15, Case 146/84, *De Santis v. Court of Auditors*, [1985] ECR 1723, Para. 11, Case T-2/90, *Ferreira de Freitas*, [1991] ECR II-103, Para. 61.

52 Case C-311/94, *IJsselvliet*, [1996] ECR I-5023.

53 Cf. Case C-443/97, *Spain v. Commission*, [2000] ECR I-2415, Case C-75/97, *Belgium v. Commission*, [1999] ECR I-3671, Para. 56 and Case C-382/99, *the Netherlands v. Commission*, [2002] ECR I-5163, Para. 4. More recently, the ECJ has confirmed this competence in respect of the Commission guidelines on the method of setting fines in Case C-189/02P, *Dansk Rørindustri v. Commission*, judgment of 28 June 2005 (not yet reported), in particular Paras. 207-214 and 238-252.

competence of the Commission to adopt such guidelines, by considering it implied in the implementing powers specifically attributed to it,⁵⁴ but it seems even to applaud the exercise of this competence. At least, it is clearly convinced of the beneficial effects of decisional instruments for outside parties – and hence of their usefulness and desirability – in the sense that they contribute to ensuring equal treatment and a transparent application of the law in individual cases. Green and White Papers do not usually indicate by virtue of what competence or on what legal basis they have been adopted, but their adoption with a view to the elaboration and preparation of future Community action can be said to fit in with the role assigned to the Commission in the legislative process, i.e. its exclusive right of initiative, following, *inter alia*, from Article 211, third indent.⁵⁵ Impliedly, it appears that the Court (again) deems the establishment of a competence to be required also in the case of preparatory action taken by the Commission in the performance of its tasks. Yet, it also appears that a specific legal basis is not required for the adoption of preparatory acts that are carried out in order to establish the merits of further (legislative) action; the establishment of an implied power suffices. In this respect, it is clear that the Court is willing to interpret this notion widely. That is to say, this power may be implied in the existence not only of a given power, but also of a given task or a Community objective.⁵⁶ This leads to the conclusion that whenever the performance of the task formulated in Article 211, third indent, is at issue and in particular whenever the Commission wishes to make use of its right of initiative, it can take the preparatory measures deemed necessary for a proper exercise thereof. It is clear that here the principle of conferred powers does not apply in its function as a principle of legality, but foremost in its function of ensuring that the Commission acts within the boundaries of the powers and tasks assigned to it.

In the Protocol on subsidiarity and proportionality, attached to the Treaty of Amsterdam, the Treaty drafters have in fact gone beyond the recognition of the mere competence of the Commission to adopt instruments such as Green and White Papers, in so far as directed towards consulting and involving those interested on the possible contents of Community legislation and policy. In its point 9, it has thus been established that ‘Without prejudice to its right of initiative, the Commission should: – except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents’. This stipulation can be seen as a confirmation of the view that the use of these instruments in itself contributes to good inter-institutional relations and to maintaining the institutional balance, even though the European Parliament sometimes considers that with the use of these instruments ‘*un droit au statut incertain*’ is being created. In particular, the consultation process that is conducted on the basis of the Green and White Papers creates more opportunity for direct participation of those concerned in the process of developing legislation and policy and thus also of the other EC institutions at a very early stage. In my opinion, when the Commission does not take due account of the EP’s and/or the Council’s view that there is indeed a need or desire for legislation, it infringes the institutional balance if it confines itself to adopting soft law subsequent to this

54 For confirmation of this standpoint by the CFI, see Case T-149/95, *Ducros v. Commission*, [1997] ECR II-2031, Para. 61 and point 6 of the summary, Case T-214/95, *Vlaams Gewest v. Commission*, [1998] ECR II-717, Para. 89, Case T-16/96, *Cityflyer Express v. Commission*, [1998] ECR II-757, Para. 57, Case T-380/94, *AUIFASS*, [1996] ECR II-2169, Para. 57, Joined Cases T-132/96 and T-143/96, *Freistaat Sachsen and Volkswagen v. Commission*, [1999] ECR II-3663, Para. 209.

55 See more generally also Arts. 250-252 EC and numerous separate Treaty provisions, indicating that the Council and the EP act upon a proposal of the Commission.

56 See Case C-106/96, *UK v. Commission*, [1998] ECR I-2729, as I have discussed elsewhere: Senden 2004, *supra* note 1, pp. 308-309. See in the same sense T. Hartley, *The foundations of European Community law: an introduction to the constitutional and administrative law of the European Community law*, 1998, p. 103.

consultation process, without giving a satisfactory statement of reasons for this choice of instrument.

By analogy, one can apply the doctrine of implied powers also to other soft law instruments, in respect of which the Treaty and the Community courts have not as yet established the power to adopt. The Council's competence to adopt recommendations and non-formal steering instruments can thus be considered implied in its power to take decisions, laid down in Article 202(2) EC. As regards interpretative acts, the competence of the Commission to adopt these can be traced back to Article 211, first indent, which imposes on the Commission the role of 'guardian of the Treaty'. With a view to the proper fulfilment of this role, it can be argued that the Commission should be empowered not only to take re-active measures – i.e. to start an infringement procedure on the basis of Article 226 EC – but also pro-active ones, aimed at the prevention of infringements of Community law. Moreover, besides performing a function of control that is related to individual cases only, it should also be able to ensure in a more general way the correct and uniform application of Community law and thus be considered to be empowered to take measures of a general, preventive nature.

7. Limits and conditions in exercising the institutions' competences

The Commission's and Council's power to make use of the various soft law instruments is thus directly attributed to them or can be considered implied in the powers and tasks conferred upon them. As such, their use can even be considered necessary for a proper fulfilment of the tasks assigned to them and a full use of their powers. Yet, it may also be asked what limits and conditions are imposed by the respect of institutional balance when it comes to exercising the powers to adopt soft law. In particular, how must the use of soft law be balanced against the powers of the other institutions? The following three issues will be discussed with a view to answering this question: the problem of concurring powers, the use of soft law as a means of parallel legislation and the influence of other institutions in the adoption of soft law acts.

7.1. The problem of concurrent powers

From the point of view of institutional balance, the use of soft law may become problematic particularly in the case of concurrent powers of the institutions. A first situation of such concurring powers presents itself in respect of the Council's legislative and the Commission's implementing powers in the area of state aid. As seen above, in exercising its implementing powers in this area of law, the Commission is now also considered empowered to adopt general, internal guidelines – be it in the form of communications, guidelines, frameworks, etc. – for the application of (now) Articles 87 and 88 EC. Yet, in the past this competence has been repeatedly questioned in legal writing.⁵⁷ Melchior has thus argued that although the Treaty acknowledges the usefulness of such acts of a general scope,⁵⁸ it leaves their adoption to the Council and not to the Commission and therefore the use of these instruments would amount to a misuse of powers. In its judgment in Joined Cases *Freistaat Sachsen and Volkswagen v. Commission*, the CFI clearly set aside the argument of the misuse of powers. It considered that the competence of the Council to adopt all regulations for the application of Articles 92 and 93 (now 87 and 88) EC as

⁵⁷ See Melchior, *supra* note 14, pp. 243 et seq. and G. Della Cananea, 'Administration by Guidelines: the Policy Guidelines of the Commission in the Field of State Aids', in I. Harden (ed.), *State Aid: Community Law and Policy*, 1993, p. 73.

⁵⁸ See the present Art. 89 EC.

this flows from Article 94 (now 89) EC is not affected when the Commission applies operational criteria, established beforehand, in the framework of the exercise of its broad discretionary power.⁵⁹ In doing so, it has rejected the argument of infringement of the institutional balance and concluded that the Commission and Council do have, to some extent at least, concurrent powers in this respect.

In this situation the establishment of the existence of concurrent powers therefore in fact leads the Court to conclude that there is no problem regarding the Commission's use of soft law in this area. Yet, in view of this it is difficult to see why not so long ago, a number of the Commission's internal acts were replaced by both Council and Commission regulations. According to the preambles of these regulations and the explanatory memoranda attached to them, this transposition of soft law into hard law occurred on the basis of considerations such as effectiveness, the correct and uniform application of Community law, legal certainty, transparency and equal treatment. Institutional balance is not mentioned in so many words, but the Commission has acknowledged the doubts that have been expressed as regards the Commission's power to adopt decisional acts.⁶⁰ More generally, one could say that the dividing line between the powers of the Commission and the Council in this respect are not very clear-cut, which has certainly contributed to the transposition of soft law into hard law.

A second situation of concurrent powers relates to the Commission's general power to adopt recommendations and opinions and to the Council's specific power to adopt these on a specific legal basis provided for by a number of Treaty provisions. In particular, might the existence of such a specific legal basis for the adoption of a Council recommendation preclude the Commission from making use of its general competence under Article 211(2) EC? I take the position that this question should be answered in the affirmative. The indication of a specific legal instrument in a Treaty or secondary law provision would indeed be superfluous if there were no regulation of (the exercise of) competence to accompany this.⁶¹ More particularly, it implies that the drafters of the provision at issue have already made the choice of instrument, possibly as an alternative to legislation. Moreover, such a provision may provide for certain guarantees as to who is to adopt the instrument at issue and according to what procedure, and/or provide for specific (legal) consequences. Respect for institutional balance may thus favour the identification of a specific legal basis and the adoption of the recommendation in conformity therewith, in particular with its procedural requirements.

Article 151(5) EC, second indent, provides support for this position, by stipulating that only recommendations may be adopted, and this only by the Council on the proposal of the Commission. As a consequence, I submit that the Commission must be considered to be precluded from adopting recommendations in the area of culture under its general power of Article 211(2), as this may be counter to the *effet utile* of Article 151(5) EC, second indent, and the democratic and, in particular, institutional guarantees for which it provides.⁶² Clearly, the Commission should limit itself to the role assigned to it, in this case putting forward only a proposal for a Council recom-

59 Case T-143/96, *Freistaat Sachsen and Volkswagen v. Commission*, [1999] ECR II-3663, Para. 241. Cf. also the above quotation of the judgment of the ECJ in *IJsselVliet*.

60 See the Explanatory Memorandum of the Commission Regulation on the application of Arts. 87 and 88 of the EC Treaty to *de minimis* aid and the preamble of Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Art. 93 of the EC Treaty, OJL 83, 27.03.1999, p. 1, discussed in more detail in Senden 2004, *supra* note 1, pp. 332-334.

61 See in this sense already M. Zuleeg, 'Die Kompetenzen der Europäischen Gemeinschaften gegenüber den Mitgliedstaaten', in G. Leibholz (ed.), *JöR neue Folge*, Band 20, 1971.

62 See in this sense also R. van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie*, 1999, pp. 278-279. EC provisions similar to the one mentioned are Art. 149(4), second indent, concerning education, professional training and youth and Art. 152(4) concerning public health.

mentation. So, where the Treaty provides a specific legal basis for the adoption of Council recommendations, I submit that the Commission is precluded from using its general power under Article 211(2) EC. The Treaty provisions in themselves must then be considered as an expression of institutional balance. In my opinion, it would be quite easy to clarify this in the Treaty, by adding to the text of Article 211(2) that the Commission shall ‘formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary, *in so far as the Treaty does not reserve the adoption thereof to the Council*’ or some similar terms.

A third situation of concurrent powers, arising outside the area of decision making, concerns the Commission’s power to adopt interpretative instruments and how this relates to the Court’s power to interpret Community law. Article 220 EC can be said to attribute to the Community courts the monopoly of power over the interpretation of Community law. They will, at least, have the final say in this respect. This is also generally acknowledged in the interpretative acts of the Commission, by stipulating that they are without prejudice to the interpretation that the Court may give to Community law. What is problematic, however, is that in these acts the Commission may not always stick merely to representing the interpretation to be given to Community law on the basis of the Court’s case law, but may add its own – subjective – views on how particular case law or a Treaty or secondary law provision should be understood.⁶³ In doing so, it exceeds the limits of its powers, which brings me to the next issue.

7.2. Using soft law as a means of parallel legislation

The above discussion concerns the adoption of ‘true’ soft law. Yet, it also appears that institutions may exercise their powers to adopt soft law in such a way that it actually amounts to the adoption of hard law, adding new legal obligations to those contained in existing Community law. Not surprisingly, the danger of abuse of powers presents itself most clearly when soft law is being used as a means of parallel legislation, which may occur, in particular, in the case of ‘steering’ soft law instruments that fulfil the para-law function.⁶⁴ So, what if a soft law act can be characterized as a hard law act in disguise, adopted by one institution in isolation? In the case of such (suspected) bypassing of the powers of other institutions, what can the latter do in order to protect their prerogatives in the decision-making process?

As observed above, the principles of subsidiarity and proportionality may lead the Commission to justify the choice of soft law over hard law, thus failing to put forward a proposal for legislation, particularly where the Treaty leaves open the choice of instrument. As such, these principles may also actually provide a cover for other reasons underlying the choice for soft law, such as a desire to impose rules which the Community legislator could not agree upon. It may thus be argued that there is no need for legislation because the adoption of soft law suffices, whereas in reality this represents an attempt to impose obligations by the backdoor. Sometimes this occurs when the Council (and possibly the EP) could not reach agreement on the Commission’s proposal. Sometimes it also happens that the Commission does not put forward a proposal at all.

An interesting illustration of the first possibility is provided by the adoption of the Commission Recommendation of 17 January 2001 on the maximum permitted blood alcohol content (BAC) for drivers of

63 See for a clear example the communication which the Commission issued after the *Kalanke* judgment, in which it held that the Court had allowed positive action regarding the under-represented sex, whereas the Court’s judgment only related to positive action in favour of women, COM (96) 88 final.

64 See Section 2 on this terminology.

motorised vehicles.⁶⁵ The Council failed to adopt the Commission's proposal on this, which had been in the pipeline since 1988, and in 2001 the Commission decided to adopt it as a recommendation in a virtually unmodified form. The area of free movement of capital and the right of establishment provides a good example of the second situation. The EP asked the Commission to replace its 1997 Communication on Golden Share with a directive proposal, but the Commission does not deem this to be necessary. The EP considers that the matter at issue (internal EU investments) is too important to be unilaterally decided by the Commission.⁶⁶ In its Resolution relating to the Commission Communication on certain legal aspects concerning intra-EU investment (Golden Share), the EP has furthermore observed that '(...) the content of the above-mentioned communication cannot be seen as binding, since the Commission clearly overstretched its powers by not discussing this important item of 'soft law' with the Council and the European Parliament'.⁶⁷

As these examples demonstrate, it is not fanciful to suggest that questionable motives might actually underlie the choice of soft law and that there truly is a danger of soft law acts aiming at the imposition of new legal obligations, for which no competence exists for the institution adopting them.

Furthermore, Commission recommendations contain many features which can be considered as indications of their intended legally binding force. Thus, the way in which the Commission drafts recommendations makes them difficult to distinguish from legislative provisions, as regards both their form⁶⁸ and often their imperative wording. It may also on the one hand be stipulated that they have no binding force, but on the other be expected that they are implemented and complied with and that their application is controlled. It seems that in most cases one could even speak of information and notification obligations being imposed in respect of the implementation measures that have been taken. The Commission may also threaten to propose or adopt legislation, as a 'sanction' on non-compliance with the soft law act.

The Commission Recommendation of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder constitutes a very illustrative example in this respect. The final point of its preamble reads that 'the Commission will monitor the implementation of this Recommendation and, if it finds the implementation unsatisfactory, it intends to propose the appropriate binding legislation covering the issues dealt with in this recommendation'. Furthermore, Article 11 of the Recommendation itself invited the Member States to take the measures necessary to ensure that the issuers of electronic payment instruments conduct their activities in accordance with the recommendation by not later than 31 December 1998. Both Eurocommissioner Monti and Bonino underlined the existence and relevance of compliance with this deadline in the implementation of the minimum standards set out in the recommendation.⁶⁹ Clearly, the Commission may want to achieve quite far-reaching, and in fact legislative, goals with the adoption of such a recommendation.

Other kinds of Commission acts, such as interpretative notices, may also provide evidence of such an intention of legally binding force. Logically, using soft law in such a way as to – in fact unlawfully – circumvent the influence of the other institutions in the decision-making process affects or even upsets the rule of law requirement of institutional balance. Fortunately, the Court

65 *OJL* 43, 14.02.2001, p. 31.

66 *Agence Europe*, 6 April 2001, no. 7940, p. 10.

67 European Parliament resolution on the updating of certain legal aspects concerning intra-EU investment, minutes of 5 April 2001-Provisional Edition.

68 Starting with 'Having regard to (...)' and a number of preliminary considerations ('Whereas (...)'), together constituting the preamble, followed by a number of separate provisions (Article 1, etc.).

69 <http://europa.eu.int/comm/dg15/en/finances/banks/626.htm>.

punishes such use of soft law, of which Case C-57/95 *France v. Commission* provides the clearest example.

This case concerned the Commission's Interpretative Communication on an Internal Market for Pension Funds, which was published only days after the Commission had withdrawn the proposal for a directive. The Court concluded that this Communication intended to have legally binding force, pointing, *inter alia*, to the fact that it contained measures which constituted the subject-matter of the proposal for a directive which the Commission withdrew 'because of a deadlock in the negotiations with Member States in the Council'.⁷⁰ Illustrative is also the observation of Advocate-General Tesouro that there was question of an 'operation of camouflaging the proposal for a directive as a communication' that had 'not – deliberately or through carelessness – been completely successful'.⁷¹ The Court further concluded that the Commission had no competence to impose the obligations contained in the Communication, and that in any event only the Council is empowered to adopt directives in respect of the relevant Treaty provisions. On these grounds, the Court declared the action for annulment both admissible and well founded.⁷²

The substantive approach which the Court has thus taken to this kind of act, considering the actual content and not the form decisive for the assessment of whether it has legal effect, allows for its annulment. It has thereby in my view offered an adequate remedy to counter this misuse of soft law instruments and the ensuing threat to the institutional balance, but institutions will have to be watchful and start annulment proceedings on the basis of Article 230 EC if they suspect such a situation has arisen.⁷³

7.3. Involvement of other institutions in the adoption of soft law acts

Finally, looking at the involvement of other institutions in the adoption process of soft law acts of the Council and Commission, the issues of institutional balance and democratic legitimization of the decision-making process are in fact very closely related. As the above example relating to the Commission's Golden Share Communication illustrates, it happens that the European Parliament complains about its non-involvement in this respect. It appears that, as a general rule, other institutions are only involved in the adoption process in the case of Council recommendations. The recommendations specify the decision-making procedure that was followed and they are adopted in conformity with the requirements imposed by their legal basis. In most instances, therefore, it is clear that the Council has acted on the basis of a proposal or draft recommendation of the Commission, generally followed by the opinion of the European Parliament and often also that of the Economic and Social Committee and occasionally of the Committee of the Regions. This boils down to an application of the consultation procedure. In some recommendations, such as Recommendation 98/561/EC on European cooperation in quality assurance in higher education,⁷⁴ even the cooperation procedure of (now) Article 252 EC has been declared applicable and followed.

70 Case C-57/95, *France v. Commission*, [1997] ECR I-1640, Para. 21.

71 *Ibid.* point 17 of the Opinion.

72 See Case C-366/88, *France v. Commission*, [1990] ECR I-3571 for another case in which the Court did not accept the imposition of new legal obligations by the Commission in a soft law act, for which it had no competence. The Court held in this case that 'As regards the power of the Commission to adopt provisions adding to the text of Article 9 of Regulation no. 729/70, it must be stressed that no such power is provided for by that regulation and that, in any event, only the Council is empowered, under Article 9(3), to adopt general rules for the application of that Article.'

73 As Case C-233/04, *France v. Commission*, *supra* note 45 shows, Member States can also start such proceedings. In that case, however, the Court did not agree with the French argument that the guidelines at issue should have been concluded by the Council, since they were not intended to have binding force and therefore not concerned by Article 300 EC. See its Paras. 38-46.

74 OJ L 270, 07.10.1998, p. 56.

A possible explanation for this is that the Council lacks a general competence to adopt recommendations; as seen in Section 6, it has been attributed only specific powers to adopt them in separate Treaty provisions and it acts in compliance with these provisions. As such, Council recommendations can be said to provide more guarantees as regards the maintenance of the institutional balance than do Commission recommendations. The latter are not adopted according to any particular decision-making procedure, which is probably connected with the fact that they are adopted on the basis of the rather general power provided for by Article 211, second indent, which does not prescribe any involvement of the Parliament. This may only be different in the case of delegated decision-making, when a recommendation is adopted on the basis of a directive or regulation which prescribes a certain procedure to be followed by the Commission.

Non-formal steering instruments including, in particular, Council conclusions, declarations, resolutions and codes of conduct, generally contain very few indications of their legal basis and the adoption process that has been followed. Interpretative acts are adopted very much on the Commission's own initiative, with no specific outside involvement. As regards decisional acts, the practice is increasingly that the Commission first adopts and publishes a draft version. These drafts are drawn up on the basis of developments that have taken place in legislation, case law, and policy (re)views, and interested parties are invited to comment on these draft versions. Both the draft versions and the outcome of the consultation process are regularly published. However, it remains unclear whether such a consultation process is obligatory, whether the period for reaction is sufficient and what account the Commission actually takes of the observations made by interested parties, including the Parliament. As a result, the question thus also remains whether this consultation is sufficient, in particular whether it provides – informal – democratic guarantees equal to those resulting from the formal decision-making process, in which the involvement of the EP is ensured.

Problems thus remain in that, overall, there is no general involvement of the EP and the approach to consultation is not uniform or consistent, or at least unclear as regards its modalities. As a result, there is no clarity concerning when consultations take place, what account is taken of their outcome and whether all the interests involved and views expressed are equally balanced, including those of other Community institutions. This does not, however, in my view lead to the conclusion that it is desirable to formalize the adoption process, to the extent of providing for the involvement of the EP in the adoption of all these soft law instruments. Such formalization of the adoption process would cause friction between, on the one hand, the interest of ensuring protection of the role of the EP and thereby of some democratic input and legitimization in the decision-making process, and on the other hand the interest of flexibility of decision making, which may be the very reason underlying the choice of such instruments in the first place. With a view to resolving this friction, a proper intermediate solution would, in my opinion, be that consultation of the EP is provided for as regards Commission recommendations, as it is in the case of Council recommendations. In my view, such consultation is justified because the recommendation is a formal Community instrument, which has been found in most cases to fulfil the para-law function and occasionally to go beyond a merely recommendatory nature. In the case of non-formal soft law instruments, the interest of flexibility may be given priority.⁷⁵

75 This view also seems to be implied in the final report of the Working Group on simplification. See CONV 424/02, p. 6.

8. Existing guarantees and the need for changes

Finally, following on from the discussion in the preceding sections one must now consider how the implications which the use of soft law entails for institutional balance should be dealt with. In particular, is it necessary to establish in the EC Treaty the use of certain soft law instruments and/or to clarify the competences to adopt soft law? This question is most pressing in the case of concurrent powers of the institutions – in respect of Commission and Council recommendations and the use of interpretative and decisional acts -, but also arises as regards the preparatory instruments. In line with this, does the use of the principles of subsidiarity and proportionality require some adaptation in this context?

In fact, the drafters of the EC Treaty have foreseen the threat that the application of the principles of subsidiarity and proportionality can entail for institutional balance. In point 2 of the Protocol on the application of the principles of subsidiarity and proportionality, attached to the Treaty of Amsterdam, the concern has thus explicitly been expressed that this application should not endanger the institutional balance. Although it is not explained in the Protocol how this could actually occur, it must be taken to refer also to the dangers implicit in the preference for soft law and its increasing usage. Carrying out this preference does not necessarily go so far as to endanger the institutional balance. However, where this use does lead to a distortion of the institutional balance, legislation should be adopted. From this viewpoint too, it is only logical that, pursuant to point 9 of the Protocol, the Commission must consult widely before exercising its right of initiative and involve all the institutions that play a role in the decision-making process at the earliest possible stage. It must also take effective account of their views on the forms and instruments in which Community law and policy are to be cast. Moreover, inter-institutional cooperation has become more of a necessity during the last decade, particularly in view of the increased role of the European Parliament in the decision-making process and the interpretation given to Article 10 EC. The Inter-institutional Agreement ‘Better Lawmaking’ reflects this necessity.

Aside from that, the Treaty contains several safeguards of which the institutions can avail themselves in order to protect their role in the decision-making process. First, as described above in Section 7, the institutions may start an action for annulment on the basis of Article 230 EC, if they suspect that a soft law act aims in fact at imposing new legal obligations for which the adopting institution has no competence. Article 192 EC further provides a possibility for the European Parliament to request that the Commission put forward proposals for legislation and thus to express its possible disagreement with the way in which the Commission and the Council apply the subsidiarity and proportionality principles. Similarly, on the basis of Article 208 EC, the Council can request that the Commission put forward such a proposal. Obviously, in the case of the Council adopting soft law, the Commission can always decide to submit a proposal for legislation whenever it deems this necessary. Besides that, it is not excluded that an Article 232 action for failure to act (i.e. to adopt legislation) be brought by an institution that deems it has been bypassed in the decision-making process, as a result of the Commission or the Council adopting soft law instead of legislation. Although Treaty or secondary law provisions may not prescribe in explicit terms that legislative measures have to be taken in a certain area, the objective underlying such provisions may actually impose their adoption. Clearly, certain objectives, such as the establishment of a common policy with a view to the establishment and

functioning of the internal market, cannot be realized with the adoption of mere soft law.⁷⁶ Such an action can thus also function as a control mechanism in the sense that when an institution possibly neglects its task in the decision-making process, whether or not deliberately and whether or not for reasons of subsidiarity and proportionality, the other institutions can call it to account before the European Court of Justice.

Although a number of adequate legal means are thus available to prevent the institutions from unacceptably bypassing one another's competences in the decision-making process, one may wonder whether these are still sufficient when increasing recourse is had to instruments other than legislation. So, it could on the one hand be argued that the European Parliament should make more use of these means to secure its position in the decision-making process and in particular of the possibilities to bring an action for annulment or for failure to act. Yet, on the other hand, bringing such actions can also be said to be a rather complex and drastic means by which to protect this position, and moreover, rather difficult to reconcile with the spirit of inter-institutional cooperation. This situation could be taken as an argument for the introduction of a (limited) right of initiative of the European Parliament, providing a stronger means to secure the Parliament's power in the decision-making process than a mere request addressed to the Commission, and a less harsh means than initiating legal proceedings.

The foregoing also points to the necessity of carrying through amendments regarding the – modalities of the – consultation process, taking place on the basis of preparatory instruments, and the requirement of giving reasons. In particular, the consultation process as contained in the Protocol on the application of the subsidiarity and proportionality principles should be amended so as to express more clearly that there is a legal rather than a moral obligation⁷⁷ to adopt and publish preparatory, consultation instruments, and that this adoption fits in with the Commission's power in the decision-making process, in particular with the proper exercise of its right of initiative. This would contribute to a more consistent approach in the adoption of consultation documents, which at present is still too dependent on the act and area at issue. I also consider it more appropriate to establish this in the Treaty itself rather than in a protocol. This could be placed not only in the framework of the application of the subsidiarity and proportionality principles as established in Article 5 EC, but possibly or maybe even preferably in Article 211 EC, relating to the Commission's tasks and powers, and/or Article 249 EC. An intermediate solution could be to reinforce the wording of the now rather noncommittal provision on consultation (no. 26) contained in the Inter-institutional Agreement 'Better Lawmaking'.

In line with this, the requirement of giving reasons should also be extended, so as to include at least a limited right of participation. That is to say, this requirement should also be understood to impose an obligation on the Commission to account for the follow-up given to the outcome of the consultation process, and in particular why it has not complied with calls for legislation that may have been made by the EP and/or the Council.⁷⁸ In my view, the recognition of such a requirement – in its dialogue dimension – is a logical consequence of holding the consultation process; if the Commission were not to account for the choices made, the consultation process would be a futile exercise that could hardly be considered to contribute to increasing the legitimacy of Community action. In particular, when the Commission has not taken note of the

76 It follows in particular from Case 13/83, *Parliament v. Council*, (*Common Transport Policy Case*) [1985] ECR 1513, that the form and legal nature of the Community action to be taken – binding or non-binding – can possibly be derived from the objective or substance of the Treaty or secondary law provision at issue. See in more detail Senden 2004, *supra* note 1, pp. 329-330.

77 Given the 'should' in the wording of point 9. See also *supra* Section 6.

78 Such a requirement does not seem implied in – point 4 of – the proposed Protocol on the application of the principles of subsidiarity and proportionality, attached to the final version of the draft Treaty, CONV 850/03, 18 July 2003.

need for legislation expressed by the European Parliament, without sufficiently giving reasons for this, I consider that Parliament should be able to submit a proposal for legislation itself. The recognition of such a right could also then be seen as a concretization of the duty of inter-institutional cooperation now covered by the Article 10 EC obligation, in particular as a kind of sanction for non-compliance with this obligation. As such, I also deem it advisable to reformulate Article 10 EC, so as to express explicitly what is already provided for in the case law and the (non-binding) declaration re Article 10.⁷⁹ Unfortunately, the European Convention has not proposed any such changes in the draft for a Constitutional Treaty for Europe, but the possibility created in Article III-397 for the European Parliament, the Council and the Commission to conclude binding inter-institutional agreements can be regarded as a step in the right direction.

⁷⁹ To some extent, the Commission can be said to give some account of its way of proceeding by publishing inter-institutional communications and purely informative communications, concerning specifically the follow-up of Green Papers and White Papers.