

Soft Law, Justiciability, and the Rule of Law

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ABSTRACT

The justiciability of soft law is a demand of the rule of law, understood as “articulated governance” (WALDRON 2013): the normative impact of power must be channelled, exposed, and controlled by structuring its exercise through a sequence that encompasses, and differentiates, the phases in which that impact takes shape – norm-production, application, and scrutiny. Within this sequence, courts occupy a central position, serving as a crucial node of control over power’s normative impact in relation to particular cases. Soft law too, insofar as it has normative influence, must be “articulated” in these terms and, thus, subject to judicial scrutiny. The aim is not to convert soft law into hard law, but to render visible, and subject to public scrutiny, the normative force it exerts.

La giustiziabilità del soft law risponde ad una esigenza fondamentale dello stato di diritto, in termini di “articulated governance” (WALDRON 2013): occorre incanalare, esporre e controllare l’impatto normativo del potere articolando il suo esercizio in una sequenza che contempra, e differenzi, le fasi in cui esso prende forma – produzione normativa, applicazione, e scrutinio. In questa sequenza, la giurisdizione occupa una posizione centrale, costituendo il cruciale snodo di controllo sull’impatto normativo del potere in relazione a casi concreti. Anche il *soft law*, data la sua portata normativa, deve essere “articolato” in questi termini e, quindi, sottoposto a scrutinio giudiziale. Non si tratta di convertirlo in *hard law*, ma di rendere visibile, e soggetta a pubblico scrutinio, la forza normativa che esso dispiega.

KEYWORDS

Soft law, justiciability, rule of law, governance, judicial review, democracy

Soft law, giustiziabilità, stato di diritto, governance, controllo giurisdizionale, democrazia

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1. *Introduction*

Contemporary systems of governance increasingly rely on soft law, a heterogeneous set of normative instruments sharing a common feature: they are not hard law in the sense that they stand outside the system of legal sources and lack legal bindingness (SNYDER 1994; SENDEN 2004; WESTERMAN et al. 2018; PINO 2021)¹.

Yet soft-law instruments exert normative force and play a significant role in shaping the conduct of both institutional and non-institutional actors, also interacting with legal norms through relations of complementarity, supplementarity, or integration. These relations can also assume a conflictual character, when soft law produces effects that contradict binding legal norms (SHAFFER, POLLACK 2012; STEFAN 2024) or when it effectively imposes obligations that the legislature did not enact, displacing the normative choices embedded within hard law².

In this respect, the nature of soft law instruments is atypical and raises important questions at two levels. First, at the conceptual level, questions arise about the distinctive features of soft law, its relationship to the legal system and the sources of law, its function, and the mechanisms that characterize its production and application. Second, at the normative level, questions arise about the legitimacy of soft-law instruments, in light of the rule of law and the democratic principle. On both levels, these questions remain highly contested, as we are dealing with a new and continuously evolving phenomenon that still requires substantial clarification.

Against this background, a central and particularly controversial issue concerns the justiciability of soft law, that is, whether, and on what grounds, judicial bodies may rely on soft law in adjudication and how such judicial reliance fits the rule of law in a democratic system. I will attempt to illustrate this problematic dimension of soft law, suggesting that its justiciability is not only compatible with, but justified by, the rule of law. The argument is, in a nutshell, that soft law emerges from the exercise of powers that shape the normative environment within which citizens

* This article partially expands on the contents of VALENTINI 2025a, chapter 4. I wish to thank all participants in the CLEAR workshop “Rule of Law: in Books, in Minds” (Bologna, 7-8 July 2025) for their comments and observations on an earlier version of this work, which were extremely insightful and helpful.

¹ SNYDER 1994, 32 defines soft law as a set of «rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects». For a comprehensive overview and analysis of the heterogeneous and varied spectrum of sources of soft law, see ELIANTONIO et al. 2023, and DELGADO, NUNEZ VAQUERO 2025.

² This conflict potential is bound up with the sources of soft law's authority. Soft law gains its normative power from the quality of its reasoning and the expertise it reflects, as well as from the institutional position of its source. A guideline issued by a regulatory agency, a recommendation from a higher administrative body, or an indicator developed by an international organization carries weight both for what it says and for who issues it. For actors within institutional hierarchies or those dependent on ongoing relationships with these bodies, ignoring soft law involves risks, such as reputational costs, relational consequences, or the expectation of stricter enforcement, which make it practically binding regardless of its formal status. The result is a *de facto* obligation that functions outside the usual legal and democratic authority governing the creation of legal duties. When conflict arises, the hierarchy of legal sources requires that hard law prevails. However, without mechanisms to identify and resolve these conflicts, soft law can still operate, potentially displacing hard law, and the tension often remains unnoticed for legal review. This gap is what justiciability is meant to address.

and institutions operate. As such, it falls within the scope of the rule of law, understood as an ideal of “articulated governance” (WALDRON 2013): the exercise of power with normative impact must be channelled through a sequence of distinguishable stages – production, execution, scrutiny – that make it visible and subject to control, opposing its arbitrary use (WALDRON 2013; KING 2025). Courts play a central role within this sequence by examining how power normatively impacts on particular cases, thereby providing an indispensable stage of control: in these terms, the rule of law justifies the judicial scrutiny of soft law.

From this perspective, the article clarifies the conditions under which, and the standards by which, the judicial engagement with soft law is grounded in, and enhances, the rule of law. The analysis proceeds as follows. After outlining the concept of soft law and emphasizing its atypical nature and effects, it points out the normative challenges that soft law raises, particularly its contested relationship with the rule of law. The article then examines this relationship and highlights its relevance for the rule-of-law requirement that normative powers be subject to public scrutiny, especially by judicial means. From this perspective, the analysis proceeds by outlining the debate on the justiciability of soft law and responds to key objections, arguing that justiciability follows from the rule of law. Then, it draws on recent developments in the ECJ’s case law and in contemporary soft-law theory to propose a framework for assessing the legitimacy of soft law, pointing out that justiciability is crucial not only for reasons of legality but also for reasons of democratic accountability.

2. *What Is Soft Law?*

The concept of soft law captures a varied set of normative instruments, such as recommendations, guidelines, communications, codes of conduct, technical standards, that do not belong to the legal system and lack legally binding force (SNYDER 1993, 1994; THIBIERGE 2003; TERPAN 2023)³. Nonetheless, these instruments exert significant normative influence by shaping the expectations, and orienting the actions, of citizens and institutional and non-institutional bodies. In this sense, soft law provides a distinctive normative route – alternative or complementary to hard law, in preparatory or executive forms – offering an informal regulatory option free from the burdens of time, form, and procedural rigidity that hard law imposes. As such, soft law has become increasingly central to contemporary systems of governance and, today, it constitutes one of the most relevant elements of institutional practices across the EU, spanning both public and private law settings. The production of soft law has increased exponentially, involving a plurality of actors, from institutions to independent agencies, transnational networks, and standardisation bodies (ELIANTONIO et al. 2023; DI ROBILANT 2006; SNYDER 1993, 1994).

Despite its widespread use and practical relevance, however, soft law remains without clear conceptual boundaries. Explicit references to it in positive law are rare; rather, the concept has taken shape primarily within doctrinal discourse, first in international law (MCNAIR 1930), then with a progressively broader scope (TERPAN 2023). Originally the term referred to treaty instruments intended to generate extra-legal obligations between States. Over time, doctrine extended the concept to describe various regulatory techniques adopted at the supranational level especially to govern relations between the European Union and its Member States. Within domestic settings

³ The most minimalist definition describes soft law in residual terms: the set of regulatory instruments that do not fall within the category of hard law, such as recommendations, guidelines, codes of conduct, resolutions and opinions. These instruments have common characteristics – often in contrast to hard law – such as lack of precision, absence of binding force and lack of enforcement mechanisms. THIBIERGE 2003, depending on the combination of these characteristics, further distinguishes between “flou”, “doux” and “mou” law, respectively referring to law that is vague or imprecise in content (*flou*), that lacks binding force (*doux*), and that is devoid of enforcement mechanisms (*mou*).

as well, soft law encompasses norms that have no direct legal effect and yet guide the behaviour of their addressees. Domestic soft law often results from regulatory powers exercised by public authorities in sectors such as taxation, health, and public security, but in some cases is produced without a specific legislative mandate, also by private or hybrid actors⁴.

Understanding the nature and function of soft law, therefore, requires engaging with a multi-form, hybrid, and multi-level regulatory paradigm in which normativity goes beyond legality to encompass forms of “soft” practical guidance that are external to hard law. Although indirectly, this guidance remains legally relevant: the coordinates provided by soft law instruments interact with legal norms and, by virtue of this interaction, acquire significance for the operation of hard law, particularly through courts and administrative bodies (SCOTT 2011; ELIANTONIO 2018). Indeed, through various mechanisms, soft law enters legal circuits to guide administrative practice, inform judicial reasoning, contribute to the formation of “living law” (TERPAN 2015)⁵. As such, soft law stands as a normative belt connecting legally binding norms, and the legal system, to normative reasons that emerge from external rule-making and standard-setting spheres, which can be institutional, technical, civil (VALENTINI 2025a)⁶. This connecting function is particularly important in multi-level governance systems that require a flexible decision-making structure and the integration of diverse spheres of rule-making. Soft law is thus not merely “weak” law, but a set of autonomous, hybrid, and adaptive regulatory instruments that exert a distinctive normative force. This force derives primarily from its capacity to provide practical orientation through reasoning, persuasion, expertise, rather than through legal obligation.

2.1 Conceptual Challenges

Nonetheless, soft law is typically defined in negative terms, by contrast to hard law, rather than by its own distinctive properties. This negative definitional strategy highlights what soft law lacks, that is, legal bindingness and inclusion among the sources of law, but does not clarify its positive, distinctive, features. This is partly because soft law occupies an intermediate position between hard law and policy-making, inviting comparisons with both while resisting full assimilation to either. In this respect, positions in the literature vary considerably. Some accounts present soft law as a quasi-legal instrument, capable of being partially assimilated to hard law (REGENT 2003; SCOTT, TRUBEK 2002); others treat it as a complement to hard law (DE BÚRCA, SCOTT 2006); others reduce it to a mere rhetorical device, functional to the legitimisation of existing power relations under the guise of normative neutrality (KLABBERS 1998).

As a result, attempts to classify the many forms of soft law remain uncertain: instead of a clearly defined set of distinctive properties that might ground a coherent taxonomy, analyses of soft law tend to rely on loosely specified missing features. What soft law *is*, in positive terms, remains

⁴ An instructive example is offered by administrative circulars (*circolari amministrative*) in Italian law (see, *inter alia*, GIANNINI 1960, CATELANI 1984, BASSI 1989). Traditionally conceived as “internal” acts, binding only within the administration, these normative instruments have increasingly been used to produce also external effects, particularly in sectors such as taxation and public health. This ambiguous status and the controversial question of their justiciability illustrate the broader difficulties surrounding soft law.

⁵ According to TERPAN 2015, soft law can take various forms: on the one hand, non-binding but legally relevant rules; on the other hand, formally binding rules with weak content or no enforcement mechanisms. By combining these two levels, we have a classification based on two axes: the nature of the obligations (more or less binding) and the type of enforcement (more or less stringent). On the basis of these coordinates, we can distinguish between soft law acts that do not establish formal obligations but provide practical guidance from formally binding acts that are ineffective. In this perspective, Terpan proposes a systematic reflection on the regulatory functioning of the European Union, emphasising that it cannot be assimilated to either international or national law. Rather, the EU legal system is part of a regulatory continuum in which binding and non-binding instruments, “hard” and “soft” rules, with strict enforcement and with more flexible enforcement mechanisms, co-exist.

⁶ For a deeper analysis mechanisms of deliberative transmission and their importance, see VALENTINI 2025a.

only partially articulated, both with respect to its sources, forms and modes of production and with respect to its distinct type of normativity.

Further difficulties arise because the descriptive use of the category of soft law is often conflated with its normative use, which aims to justify the legal relevance of non-binding acts (KLABBERS 1998). When the distinction between these two perspectives collapses, soft law risks being analysed *as if* it were law, despite lacking the attributes of legal validity (KLABBERS 1998). Two specific dangers follow. One is the creation of a “regulatory illusion” (KLABBERS 1998), in which soft law is granted an unexamined normative status on the basis of excessive optimism about its impact, allowing political or technical agreements to be accepted as law even when they do not satisfy the criteria of legal validity. The other is conceptual instability: either soft law is assimilated to hard law, thereby losing the specific features that distinguish it, or it is excluded from legal discourse altogether (KLABBERS 1996). Some more articulated positions propose to overcome this dichotomy by considering law not only as a source of formal obligations, but also as a set of instruments that guide behaviour, structure expectations and contribute to the construction of shared meanings. In this perspective, soft law is part of a *continuum* in which normativity takes on gradual and hybrid forms (PASTORE 2003; GOLDMANN 2008; WESTERMANN et al. 2018).

These difficulties extend to the modes of production and application of soft law. Indeed, soft law instruments can be produced and used in different types of institutional settings, within administrations or legislative bodies, as well as in non-institutional – private or hybrid – settings, by entities exercising delegated or non-delegated regulatory powers. Across these various domains, different entities resort to soft law for various regulatory purposes as well as to interpret hard law or to anticipate or implement legal norms. Here too, analysis is often flattened onto the model of hard law, merely noting that soft-law instruments are produced and applied through procedures lacking the formal qualities of the procedures used for hard law, without further characterising this informality or differentiating among its many practical manifestations.

A neglected but crucial point, in this respect, concerns the different degrees of informality that can be observed. Some types of soft law, especially in institutional contexts, arise from procedures whose steps and timelines are defined with considerable precision⁷. This matters because it affects the degree of transparency and certainty we can associate with soft law, and therefore its compatibility with the rule of law.

It is also essential to distinguish between forms of soft-law production and application that rely on a delegated institutional competence and those that do not. This differentiation likewise bears on the legitimacy of soft law and the kind of authority, whether epistemic or practical, that can be associated with it, depending on the institutional credentials of the actors who produce or use it.

This is not the occasion to address all these aspects in detail, but it is important to emphasise that the lack of precise analysis affects the discussion on the justiciability of soft law. The different types of soft-law acts, and the processes governing their production and application, are highly relevant for assessing whether and how courts may rely on them, and with what implications. In this respect, as the case law of the ECJ highlights, the existence of an institutional link between soft law and hard law is particularly significant.

3. Normative Challenges

The conceptual uncertainties surrounding soft law are mirrored by uncertainties concerning its legitimacy. Much of the existing analysis evaluates soft law through criteria developed for hard law, both in terms of legality and democratic authorization. Unsurprisingly, soft law often fails

⁷ This applies to EU Commission regulatory acts, which are produced in accordance with rules of procedure providing for public consultation.

to satisfy these criteria, though its non-conformity varies significantly depending on the type of instrument under consideration. As noted above, one limitation of existing debates is that they rarely differentiate between soft law produced by public actors, private actors, or hybrid entities. These forms of soft law originate from normative activities of different kinds and involve actors whose authority and accountability differ significantly. Without distinguishing among them, we risk flattening important differences.

Against this background, questions of legitimacy arise in two dimensions. One concerns the compatibility of soft law with the rule of law and the requirements associated with legality, such as publicity, clarity, certainty, congruence, and access to justice. The other concerns the democratic legitimacy of soft law, given that it is produced through normative activities that are not directly subject to democratic authorization and control and unfold outside the channels of administrative or judicial processes (ELIANTONIO, ȘTEFAN 2021; SENDEN 2004; KORKEA-AHO 2015; VALENTINI 2025a).

Let me point out that these two dimensions, in democratic constitutional systems, are interdependent: democracy and legality form an integrated normative framework – a system – in which each supports, and enriches, the other (MORESO 2020; VALENTINI 2022, 2023, 2025a, 2025b). Assessing the democratic legitimacy of soft law, therefore, requires consideration of its legality, just as an evaluation of legality involves attention to the democratic dimensions of soft law. The analysis that follows concentrates on the relationship between soft law and the rule of law but will conclude by pointing out that the justiciability of soft law serves not only the demands of legality but also the deliberative quality of democratic systems of governance.

4. *Soft Law and the Rule of Law*

The relationship between soft law and the rule of law is highly contested, particularly in the present context of widespread concerns about regression in legality (SCHEPPELE 2013; PECH, SCHEPPELE 2017; SAJÓ 2024). As soft law becomes an increasingly ordinary tool of governance, it is crucial to assess whether its use reinforces or undermines the expectations associated with the rule of law. Indeed, the informality of soft law is in tension with the core requirements of legality – generality, publicity, prospectivity, intelligibility, consistency, practicability, stability, and congruence (FULLER 1969, 33-94). When soft law is produced through procedures that lack the guarantees attached to the adoption of hard law, these requirements may be strained; and when soft law is applied through variable or opaque practices, the same requirements are strained even more.

It should be emphasized, however, that this tension is also due to a theoretical insistence on deriving the rule of law from the “essence” of legality, at the expense of its significance as a political ideal opposing arbitrary power (KING 2025). Recognizing this significance allows us to move beyond the traditional debate between thin and thick conceptions – centred on the moral depth of the rule of law – and to reconsider its scope, also in relation to soft law (KING 2025; RAZ 2009; WALDRON 2008). Indeed, what soft law challenges us to appreciate is not (only) the formal or substantive dimensions of the rule of law, but also its function: structuring power to prevent its arbitrary use. From this perspective, the essential requirements of legality serve to anchor power within a framework of public justification (DICEY 1885; FULLER 1969; DYZENHAUS 2014). Although traditionally applied to hard law and governmental authority, these requirements aim more broadly to channel the normative impact of power on citizens, making its junctures exposed, differentiated, and subject to public scrutiny⁸. The scope of the rule of law, understood in

⁸ WALDRON 2013, 458 points out that «each of those elements embodies concerns about liberty, dignity, and respect that the rule of law represents. They offer multiple points of access, participation, and internalization. Each and all of them represent the step-wise incorporation of new norms into the lives, agency, and freedom of those who are to be subject to the norms».

these terms, extends beyond the exercise of governmental powers to also include other forms of normative power that operate in private or hybrid contexts and depart from ordinary law-making and institutional rule-making more in general. Therefore, not only hard law, but all measures that shape expectations, guide conduct, or influence the practical environment in which individuals act, should be produced through a sequence of recognisable stages, each with its own justificatory role (WALDRON 2013, 458).

This understanding draws on the idea of “articulated governance”: the requirement that power be exercised through a sequence of distinct institutional phases – legislation, adjudication, administration – rather than in an undifferentiated or compressed manner (WALDRON 2013, 459). The point is not simply to limit power but to channel it and “open up the decision making for access [...] at various points” (WALDRON 2013, 457)⁹. Each phase offers opportunities for scrutiny and contestation; and a serious failure of the rule of law occurs when these steps are “omitted” or “blurred” (WALDRON 2013, 458-459).

It is here that the rule of law intersects with the principle of separation of powers (WALDRON 2013, 458; VILE 1998). Both ideals converge on the requirement that the exercise of normative authority unfolds through distinct and identifiable phases, each subject to its own justificatory demands (LOCKE 1690; MONTESQUIEU 1748). Crucially, articulation and separation do not imply that the different stages of governance should remain isolated from one another. On the contrary, they must be connected through mechanisms of control that allow the outputs of one stage to be examined, challenged, and evaluated at subsequent stages (WALDRON 2013, 466). It is this connection, not mere division, that ensures the coherence of the overall structure set up by the rule of law and prevents normative influence from escaping accountability. Soft law-making powers must be brought within this framework: precisely because it shapes conduct and expectations without formal bindingness, soft law must be situated within the framework of “articulated governance”, which exposes its normative contribution and renders it susceptible to scrutiny, even though in different ways and to a different extent than hard law. In this sense, the justiciability of soft law, and the modes of adjudication, become crucially relevant.

4.1 *From the Articulation of Governance to Justiciability*

Courts occupy a distinctive position within an articulated structure of governance. They serve both as the sites where power’s normative impact on particular cases is examined, and as forums through which affected persons can challenge the reasons offered at different stages of its exercise (DICEY 1885; WALDRON 2013, 457-459). Moreover, when soft law influences the meaning or application of binding legal norms, judicial engagement becomes essential to preserving this structured character of governance. Without it, the stages through which normative power takes effect remain opaque, and the opportunities for contestation that the rule of law demands are foreclosed. Justiciability thus serves not to transform soft law into hard law but to ensure that its place within the sequence of governance is exposed, differentiated, and subject to the public reasoning that courts are uniquely positioned to provide.

From this perspective, the interaction between soft law and hard law at the normative level reinforces the need for interaction at the applicative level. When soft law interprets, anticipates, supplements, or otherwise shapes the meaning and effects of binding law, the application of the latter requires courts to take soft law into account. Scrutiny of hard law cannot be considered adequate from the perspective of the rule of law unless the ancillary instruments that influence its application are also susceptible to judicial examination. Only by recognising the justiciability of soft law can courts disaggregate and scrutinise the various stages through which normative

⁹ «The legislature, the judiciary, and the executive – each must have its separate say before power impacts on the individual».

powers interact to influence citizens¹⁰, ensuring that reasons offered at each stage are publicly expressed and evaluated.

From this perspective, the rule of law requires that soft law be brought within the sphere of judicial scrutiny. The aim is not to confer upon soft law a binding force it does not possess, but to ensure that its normative influence is exercised consistently with the demands of transparency and reviewability.

Nonetheless, at present, the role of courts with respect to soft law remains uncertain. It is not clear under what conditions soft law is justiciable, nor which techniques courts should employ when taking soft law into account. It is also unclear to what extent soft law may guide the interpretation of hard law or be invoked in adjudicating cases. The European Court of Justice requires national courts to take soft law into account when relevant, but the precise manner in which they should do so remains contested and underdeveloped.

5. *The Debate on Soft Law Justiciability*

Among the various aspects of the relationship between soft law and the rule of law, justiciability is particularly relevant (HUBKOVÁ 2023, EICK 2025) not only because public scrutiny by judicial means is central to the disarticulation of, and control over, the exercise of normative powers, but also because the penetration of soft law into contemporary systems of governance has become so extensive that the absence of clear criteria for judicial scrutiny is increasingly problematic. A structured and principled approach to justiciability has become essential given the diffusion and practical relevance of soft law.

Despite this need, much of the debate approaches soft law with hesitation or resistance. Concerns arise not only about the desirability of judicial scrutiny but also its institutional feasibility. Opponents of justiciability argue that non-binding instruments lack the formal credentials required for judicial enforcement, and courts should not compensate for this weakness by granting informal instruments a status they do not possess. The fear underlying this position is that judicial engagement might blur the boundary between legally binding and non-binding norms, undermining legal certainty and distorting the separation of powers. If courts were to give legal weight to instruments that the legislature deliberately left non-binding, they might appear to be transforming political guidance into legal obligation, thereby reshaping the regulatory landscape without democratic authorization.

These objections are reinforced by the conceptual vagueness that surrounds the definition of soft law. Because the category lacks clear boundaries, very different types of instruments are often grouped together, obscuring the specific difficulties that particular forms of soft law pose for adjudication. At the same time, the debate frequently proceeds by analogy with hard law: it applies to soft law the criteria and expectations appropriate to binding norms, concluding that it fails to meet them. The result is that soft law is non-justiciable because it lacks the characteristics of hard law. At the same time, its normative influence is acknowledged without adequate mechanisms for scrutiny.

Some recurrent concerns shape this perspective. Some argue that judicial scrutiny would erode the distinction between binding and non-binding norms, placing legal certainty at risk. Others maintain that soft law lacks the procedural legitimacy that could make judicial oversight appropriate. A related view holds that judicial involvement would threaten the separation of powers by inviting courts to validate instruments that the legislature or administration did not intend to produce legal effects (ELIANTONIO, KORKEA-AHO 2018; KLABBERS 1996). Still others warn that

¹⁰ For a comprehensive analysis and defense of the distinction between the stages of production and application of norms, see SANDRO 2022.

judicial scrutiny may rigidify soft law, depriving it of the flexibility that constitutes one of its primary regulatory advantages. Taken together, these concerns rest on the belief that justiciability presupposes assimilation to hard law, and that such assimilation is undesirable because it either misrepresents the nature of soft law or distorts the constitutional allocation of powers.

These criticisms, however, highlight the difficulty of framing the justiciability of soft law and putting it into practice, not its illegitimacy, and do not undermine the central point: from the perspective of the rule of law, some degree of judicial scrutiny is not only legitimate but required (SCOTT 2011; ELIANTONIO 2018; VALENTINI 2025a). Although the atypical features of soft law complicate the assessment of its justiciability, the normative influence it exerts confirms rather than negates the need for judicial review. Soft law derives from the exercise of normative powers affecting the conduct and expectations of its addressees. When such effects remain insulated from public scrutiny, the rule of law is weakened. In a constitutional democracy, the exercise of power, formal or informal, with normative impact on citizens, must be capable of justification and such justification must be open to challenge before impartial institutions.

In this sense, the opacity and normative uncertainty surrounding soft law provide the strongest reasons for judicial intervention. Without scrutiny, influential regulatory instruments escape control, undermining legal certainty and allowing regulatory authority to operate without accountability. In this sense, judicial engagement can contribute to anchoring the use of soft law to standards of public justification. Courts can test whether administrative or regulatory actors rely on soft law in ways that are coherent, reasonable, and compatible with rule of law requirements. They can also prevent authorities from treating recommendations and other soft law instruments as binding without providing adequate justification.

This understanding of judicial scrutiny allows a response to concerns about judicial overreach. Justiciability can take the form of an inquiry into the reasons governing the production and use of soft law. Courts may, for instance, review whether authorities have relied on a soft-law instrument without allowing meaningful contestation, or whether a recommendation has been treated as a *de facto* obligation without an adequate basis. Such review does not require converting soft law into hard law but serves to prevent arbitrary uses of informal norms.

Refusing justiciability on the ground that soft law lacks procedural legitimacy produces a paradox. Instruments with the weakest democratic and legal credentials thereby escape all forms of control, even when their normative impact is substantial.

5.1 *Assessing the Rule of Law Legitimacy of Soft Law*

If soft law is to operate within the constraints of the rule of law, there must be criteria capable of guiding its adoption and application. These criteria cannot be conceived as rigid thresholds imported from hard-law doctrines, for soft law does not share the same formal attributes or institutional pedigree. Instead, they must be understood as standards of justification that reflect the “channeling” purpose the rule of law and can be applied contextually. An instructive approach is offered by accounts that unpack the rule of law requirements applicable to soft law into a series of normative elements (DALY 2021; DALY 2020) that, rather than functioning as absolute requirements, serve as standards for testing the “degree” to which soft law is compatible with the demands of articulated governance (DALY 2021)¹¹.

¹¹ DALY (2021, 10), understands the requirements of the rule of law, in relation to soft law, as “benchmarks” forming a complex “normative framework” and argues that «it is important to recognise that these are ideals» and «compliance with them accordingly is not a binary matter, but rather a question of degree» and involves «trade-offs» among the different requirements, drawing on TASIIOULAS 2020, 121 (according to whom «it is important also to recognize that the Rule of Law necessitates trade-offs, both trade-offs among its eight desiderata when they conflict, such as between stability and possibility of compliance, and also trade-offs of those desiderata against other considerations, such as

The first of these elements is “correctness”: soft law should illuminate the consequences of its addressees’ conduct and allow them to orient their behaviour accordingly. Closely associated with this is the expectation that soft law be formulated with sufficient “clarity” to render its practical implications intelligible, even if some flexibility is inherent in its non-binding nature. “Accessibility” forms a further element: those subject to soft law should be able to know its content and understand the context in which institutional actors rely upon it. These demands are supplemented by the requirement of scrutiny, which concerns the possibility of subjecting soft law to public and institutional verification, and by the requirement of “reliability”, which entails that soft law be used in a manner that is coherent and predictable rather than arbitrary or shifting (DALY 2021, 2020).

Taken together, these elements delineate a scheme for assessing the legitimacy of soft law in a principled yet contextual manner, reflecting a conception of the rule of law as a justificatory ideal rather than a purely formal threshold. Gradual compliance with these elements contributes to a form of normative transparency that compensates for the absence of binding force and allows soft law to operate within channels of accountability consistent with constitutional democracy. When soft law does not fully conform to these standards, the resulting gap calls for justification. Judicial review here plays an indispensable role: courts are uniquely positioned to scrutinize the reasons that account for how these standards apply in a given context and to determine whether deviations from them are consistent with the demands of the rule of law. This judicial function allows an important distinction to emerge between legitimate and illegitimate uses of soft law. Soft law may strengthen the legal system when it is produced and invoked by actors who are institutionally recognised and accountable. Such actors need not be elected, but their authority must be grounded in public criteria and exercised through practices of reason-giving that enable their decisions to be traced, assessed, and, where appropriate, contested. Soft law is especially valuable when it forms part of a transparent and structured process subject to institutional oversight. Examples include instruments adopted by European institutions – such as the EU Commission recommendations or the reports issued by the Council of Europe – which are integrated into deliberative processes that allow for public scrutiny and public discussion. In these circumstances, soft law serves as an adaptive technique that enhances the capacity of the legal system to incorporate complex information and to respond to regulatory demands in a reasoned and accountable manner.

Soft law becomes more problematic, however, when it is produced without transparent procedures, without opportunities for public scrutiny, and without clear lines of authority or justification. When courts or administrations invoke such instruments without allowing their origins, rationale, or consistency with general principles to be examined, they become factors of opacity and normative distortion. In these cases, soft law weakens institutional accountability by permitting influential regulatory guidance to circulate without the safeguards associated with formal legality. In this sense, the shift from hard to soft law, entails a shift from mediated to unmediated accountability (SANDRO 2025): rather than being accountable to an external authority capable of enforcement, addressees are left to hold each other accountable through informal, interpersonal dynamics, a structure that exposes the weakest members of society to regulatory gaps. It is precisely to avoid such distortions that a framework of legitimacy is necessary, and that judicial scrutiny plays a central role. The evolving case law of the European Court of Justice illustrates the potential of such scrutiny, demonstrating that courts can engage with soft law in ways that preserve flexibility while ensuring accountability.

democracy or justice») making reference to FULLER 1969. This gradual account is also discussed by PINO 2019 and KRISTAN 2024 reading CELANO 2019. In broader terms, a gradual approach to constitutionalist standards of legitimacy is analysed, and defended, as part of a systemic view of constitutional democratic orders in VALENTINI 2020, 2022, 2025a, 2025b.

6. *The Approach of the ECJ*

The jurisprudence of the European Court of Justice offers an increasingly important point of reference for understanding how soft law can be subject to judicial scrutiny without becoming binding law. Within the European Union, where multi-level governance generates complex interactions among institutional actors and regulatory instruments, soft law plays a crucial role. The Court's case law reflects this complexity and demonstrates the gradual emergence of a more articulated approach to the justiciability of soft law.

Although soft law lacks legal bindingness, the Court has recognised its practical and interpretative relevance and has developed procedural mechanisms through which it may be subject to judicial monitoring. According to the Court's case law, acts that are not binding, such as recommendations, opinions or guidelines, cannot be the subject of direct appeal. The Court has repeatedly confirmed a restrictive interpretation, holding that only acts capable of producing binding legal effects can be directly challenged. Documents such as codes of conduct or interpretative notes, unless they impose new obligations not provided for by binding legal sources, therefore remain inadmissible.

The only potentially accessible instrument remains the preliminary ruling under Article 267 TFEU, through which a national court may raise doubts about the validity of a soft law act. However, this channel has structural limitations: it is subject to the initiative of the national court, is not open to European institutions or Member States, and presupposes the existence of a dispute in a judicial context in which soft law is actually relevant (*Belgium v. Commission*, C-16/16 P).

A foundational step in this direction has been taken by the Court in the *Grimaldi* (C-322/88) decision, where it held that recommendations, though not binding, must be taken into consideration by national courts to the extent they are relevant to the interpretation of EU or domestic law. This principle acknowledges that soft law may play a meaningful role in legal reasoning without attributing it binding effect. Subsequent case law has refined the *Grimaldi* rationale, emphasising that the obligation to consider soft law is conditional on its relevance to the specific case, with a broad margin of assessment (*KORKEA-AHO* 2018, 470-473). In doing so, the Court has linked the judicial relevance of soft law to its capacity to serve as a reasoned and accessible interpretative resource connected to, and grounded in, the legal order.

In recent years, the Court has extended this understanding of soft law through the preliminary reference mechanism. Even when a soft-law instrument cannot be directly challenged, it may be examined indirectly when questions arise concerning its compatibility with primary or secondary law. This mechanism allows the Court to review the legality of soft law in the course of adjudicating disputes involving binding norms. It thereby prevents soft law from escaping all judicial oversight simply because it is non-binding and ensures that the reasons embedded in non-binding instruments can enter the legal circuit and be subjected to public justification.

The decision in *FBF* (C-911/19) illustrates both the potential and the limits of this approach. The case concerned soft law issued by the European Banking Authority, whose guidelines exerted substantial influence on market actors and administrative authorities. The Court reaffirmed that such instruments lack binding force but examined their practical effects in detail¹². While ultimately finding no justiciable legal effects in this instance, the Court's willingness to analyse the instrument's indirect consequences revealed an awareness of the normative role of soft law. The judgment also exposed a tension in the Court's jurisprudence: although it recognises the significant practical impact of soft law, it maintains a restrictive stance on direct justiciability. This cre-

¹² The Court has emphasised that such acts exert a power of exhortation and persuasion over competent authorities, who must justify any decision not to comply. The Court has also noted that these acts may prompt the adoption of national legislation and has recalled that national courts are required to take EBA guidelines into consideration when resolving disputes before them.

ates a potential accountability gap whenever instruments with considerable normative influence fall outside the scope of direct judicial review.

At the same time, the Court has taken steps to mitigate this gap by integrating soft law into its broader legality framework. Through the preliminary reference mechanism, courts can assess whether soft law is consistent with higher norms, procedurally sound, and in conformity with general principles. This indirect review ensures that soft law remains subject to legal scrutiny and that standards of public justification frame its use. National courts, for their part, are expected to explain how and why they take soft law into account, thereby embedding the interpretative use of soft law within a practice of reasoned adjudication. This practice enhances transparency and safeguards access to justice within the Union.

The ECJ's evolving practice¹³ reveals an effort to balance the flexibility that makes soft law attractive with the accountability that the rule of law requires. By requiring national courts to consider soft law when relevant, while declining to treat it as binding, the Court promotes a model of judicial engagement that is sensitive to context and proportional to the instrument's practical effects. The insistence that courts take soft law into account when interpreting binding law reflects the Court's concern for coherence within the legal system, while the refusal to grant direct binding effect preserves the institutional balance established by the Treaties. This twofold approach allows the Court to maintain the distinction between binding and non-binding norms while ensuring that the normative influence of soft law does not remain unchecked.

Although the Court restricts the availability of direct actions against soft law, it recognises that the non-binding character cannot serve as a barrier to judicial protection in every case. When soft law affects the application of binding law or produces relevant practical consequences, it should be subjected to judicial examination. This principle reflects the Court's commitment to preserving access to justice even when regulatory techniques diverge from traditional legal forms. The result is an increasingly nuanced jurisprudence that situates soft law within a system of articulated governance without depriving it of its regulatory flexibility.

7. *Justiciability and Democratic Legitimacy*

The analysis has focused primarily on the justiciability of soft law as a requirement of the rule of law. Yet in a constitutional democracy, the significance of judicial scrutiny extends beyond legality. Justiciability also has a democratic dimension, for courts are not external to the democratic system but constitute an integral part of its deliberative structure (VALENTINI 2022, 2023, 2025a). They participate in a broader practice of public reasoning through which normative considerations circulate among different institutional spheres, from technical and administrative bodies to legislative and judicial arenas. In this broader sense, the judicial engagement with soft law is deeply connected to the deliberative quality of democratic governance (VALENTINI 2022, 2025a).

Soft law itself performs a deliberative function that is often overlooked. Many soft-law instruments emerge from processes of discussion and exchange among experts, civil society actors, and public authorities. In this respect, they embody the outcomes of deliberative practices that occur outside formal legislative mechanisms but nonetheless contribute to shaping public norms. At the same time, soft law enables deliberation by allowing the transmission of normative reasons across different spheres of governance. For example, a recommendation issued by an independent authority may articulate expert-based reasons that become relevant in administrative or judicial contexts, thereby linking the technical domain to broader institutional decision-making. Soft law thus can serve as a transmission belt within a deliberative system, enabling the circulation of arguments and concerns that might otherwise remain confined to specialised or informal settings (VALENTINI 2025a).

¹³ See also the recent decision on the *Jemerak* case (C-109/23) and the comment by LASHIN 2024.

This transmission function is particularly significant in complex governance systems such as the European Union, where decision-making and rule-making are distributed among multiple institutions, levels, and actors. Soft law helps maintain a connection between different spheres of such systems, by providing channels through which reasons and deliberative inputs can be integrated into more formal legal processes.

In this way, courts can play a pivotal role within a democratic deliberative practice (KORKEA-AHO 2015). Through judicial reasoning, they can select, interpret, and formalise the normative content of soft law, enabling it to enter the legal sphere in a manner consistent with principles of justification and accountability. When courts engage with soft law, whether by taking it into account for interpretative purposes, scrutinising its compatibility with legal norms, or addressing the underlying reasons, they do more than apply rules (HAGE 2018). They participate in a process of democratic reasoning that links different components of a broader, more complex deliberative system: their decisions help ensure that the normative reasons embedded in soft law are articulated publicly, tested for coherence, and made accountable within the legal framework.

From this perspective, however, the democratic legitimacy of soft law depends on certain conditions. Its production should be open to meaningful forms of participation; its adoption should be transparent; and its content should be susceptible to contestation and review. Although these conditions differ from the more stringent conditions that apply to legislation, they reflect the need for soft law to operate within a framework of public justification (PETROPOULOU IONESCU, ELIANTONIO 2021). Judicial review is essential to this framework. By subjecting soft law to scrutiny, courts ensure that its normative influence is exercised in accordance with democratic values. They make it possible to challenge unjustified reliance on soft law, to expose its underlying reasons, and to situate its use within a broader practice of democratic deliberation. For these reasons, justiciability is significant not only for legality but also for democracy.

8. Conclusion

This article has argued that the justiciability of soft law is not only compatible with, but required by, the rule of law. The argument rests on a re-conception of the rule of law as an ideal that does not merely constrain power but channels its exercise through a sequence of distinct institutional phases: “articulated governance”. Each phase must be identifiable and subject to scrutiny, and the phases must be connected through mechanisms of control that allow the outputs of one stage to be examined and evaluated at subsequent stages. Courts occupy a distinctive position within this structure: they are the institutional sites in which the articulated character of governance is preserved and through which affected persons can challenge the reasons offered at prior stages.

Soft law, precisely because it shapes conduct and expectations without formal bindingness, must be situated within this articulated structure. Its normative influence often operates at preparatory, interpretative, or supplementary stages of governance, shaping the meaning and application of the resulting binding norms. When soft law-stages remain opaque or escape scrutiny, the rule of law is weakened. Judicial review is therefore essential to ensure that the role of soft law in the sequence of governance is exposed, differentiated, and subject to public monitoring. The evolving jurisprudence of the European Court of Justice demonstrates how courts can engage with soft law in this manner, integrating it into the legal framework and preserving its flexibility and, also, accountability.

Justiciability also has democratic significance. Soft law contributes to the circulation of normative reasons across diverse institutional and non-institutional spheres, and courts function as a conduit through which those reasons are articulated and embedded in the deliberative structure of a constitutional democracy (VALENTINI 2022, 2023, 2025a, 2025b). In this light, the justiciability of soft law should not be viewed as an anomaly but as a requirement of a legal and democratic order committed to ensuring that all forms of normative influence are subject to public justification.

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