

Habemus Legitimacy? The European Commission Opens Public Consultation for a Guidance Document

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I. INTRODUCTION

In early April 2021, the European Commission published a consultation on the Have Your Say platform. While an open public consultation (OPC), *per se*, would not typically spark any particular interest, this OPC process was opened for a Guidance Document meant to update the Commission's understanding of the Habitats Directive. So far, (public) contributions to the making of Commission soft law have remained rare and largely opaque and occur behind closed doors. Will this development breathe new life into the legitimacy of soft law at the Union level?

Soft law, in general, plays a central role in the European legal order. The flexible nature of soft law instruments has established them as a sort of legal passe-partout, used to aid with the application, interpretation and transposition of EU law. The fast-paced and scientifically complex field of environmental policy is no stranger to the use of soft law, especially guidance documents.¹ In fact, one can identify hundreds of soft law instruments just within the context of the major areas of environmental regulation. Nevertheless, the adoption process for soft law measures has remained opaque. In simple terms, we know very little about how soft law is made or who has a say in the soft law-making process. This creates a considerable blind spot in the study of European Union (EU) soft law, as the foundational principles of transparency and participation are undermined.

II. WHO HAS A SAY IN HABITATS GUIDANCES?

That being said, in April 2021, the European Commission published a public consultation on the Have Your Say platform that called for input for a Guidance Document. The

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¹ See, for instance, the contributions on environmental protection in M Eliantonio, E Korkea-aho and O Stefan (eds), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (Oxford, Hart 2021).

Guidance in question will be adopted under the Habitats Directive,² and it will update the Commission's understanding of the provisions of the Directive on the strict protection of species of wild fauna and flora. The Guidance, planned for the second quarter of 2021, will replace the existing Commission Guidance from 2007,³ and it will include further clarifications in line with the current legal interpretations provided by the Court.

Thus far, the Commission has adopted a total of seventeen guidances under the Habitats Directive, covering a wide variety of issues (eg management of terrestrial wilderness or the development of wind energy). A quick look on the Commission's website reveals that, throughout the years, guidance documents have been a steady presence in EU biodiversity policy. Nevertheless, only a slim fraction of those provide any information on who had a say in the articulation process. In fact, in the vast majority of the cases there is no reference to participation in the adoption process of the guidance.

Even where participation is mentioned, references to participants (eg national authorities, scientific institutes or (*ad hoc*) working groups; Figure 1) remain rather vague. Nevertheless, to date, there have been no consultation processes opened for guidances under the Habitats Directive.

While OPCs have been opened in the past in different areas of Union policy (eg in the fields of competition or telecoms⁴) to develop soft law (albeit to a very limited degree), this tool has not yet been utilised in the environmental field.

At this stage, it is impossible to say with certainty why the Commission decided to initiate this process now. Nevertheless, there are two factors that may have played a role. First, recent empirical evidence has shown that Habitats guidances are widely cited by EU and national courts,⁵ which arguably makes a case for the relevance of strengthening the legitimacy of its adoption procedures. Second, the revision of the Better Regulation Guidelines,⁶ published in April 2021, which places greater emphasis on facilitating participation for stakeholders and the general public, may have been a motivator for reviewing participation practices for Commission soft law.

² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

³ Commission, "Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC" (2007) <https://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance_en.pdf> (last accessed 23 June 2021).

⁴ Commission, "EU competition rules – revision of the Vertical Guidelines" (*European Commission Have Your Say* n.d.) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12751-EU-competition-rules-revision-of-the-Vertical-Guidelines_en> (last accessed 23 June 2021); Commission, "Guidance on an EU methodology for the determination of Weighted Average Cost of Capital (WACC) in telecoms regulation" (*European Commission Have Your Say* n.d.) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1500-Guidance-on-an-EU-methodology-for-the-determination-of-Weighted-Average-Cost-of-Capital-WACC-in-telecoms-regulation_en> (last accessed 23 June 2021).

⁵ See, for instance, the contributions on environmental soft law in Eliantonio et al, *supra*, note 1; and M Eliantonio and G Lisi, "EU environmental soft law in the Member States: a comparative overview of Finland, France, Germany, Italy, the Netherlands, Slovenia and the UK" (2020) SoLaR Working Papers <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656418> (last accessed 23 June 2021).

⁶ Commission, "Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions: Better Regulation: Joining forces to make better laws" (2021) <https://ec.europa.eu/info/sites/default/files/better_regulation_joining_forces_to_make_better_laws_en_0.pdf> (last accessed 23 June 2021).

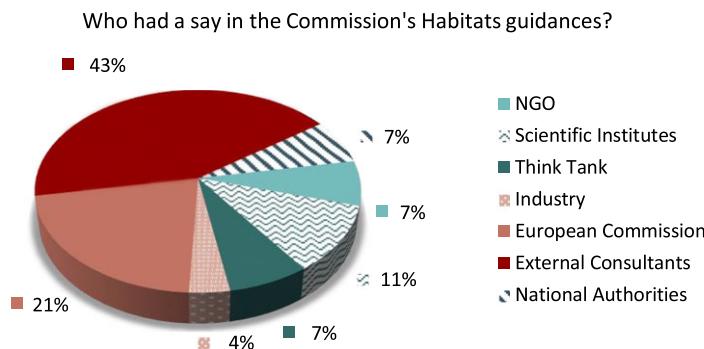


Figure 1: Actors involved in the process of developing Commission guidances under the Habitats Directive.
NGO = non-governmental organisation.

Source: Author's own calculations (April 2021).

III. WHY SHOULD WE CARE ABOUT THE OPEN CONSULTATION PROCESS?

EU soft law has frequently been at the centre of criticism due to its tendency to circumvent legitimacy guarantees and escape most forms of accountability by not being subject to review. After all, soft law instruments are – by design – intended to provide quick and flexible policy solutions that, therefore, do not entail elaborate adoption procedures.

Nevertheless, the significant practical and legal effects of soft law have often been highlighted in the literature,⁷ to such an extent that they are difficult to ignore in discussions of legitimacy and participation in EU governance. In a few words: just because the adoption of soft law instruments is supposed to be speedy, this does not mean that it has to be hasty. Yet this is what we observe in the context of the Habitats Directive and its existing guidances.

In most cases, guidances are prepared by the Commission behind closed doors – sometimes with the contribution of consultants or national stakeholders – but with minimal input from the general public. Of course, this state of affairs undermines the Commission's commitment to transparent and participatory governance and further obscures the already “blurry” legitimacy of soft law.

In this way, the decision of the Commission to open an OPC process on the Habitats Guidance is an overall welcome development on this front and has the potential to breathe new life into the overarching legitimacy of Union soft law. This is especially the case as such instruments are used more and more, such as in the context of the COVID-19 crisis.⁸

IV. IS THIS SIMPLY WINDOW-DRESSING?

Nevertheless, we have to address the elephant in the room. Will the Commission utilise the input gathered through the OPC or is this move simply window-dressing? That remains to be seen.

⁷ For instance, as discussed in O Stefan, M Avbelj, M Eliantonio, M Hartlapp, E Korkea-aho and N Rubio, “EU soft law in the EU legal order: a literature review” (2019) SoLaR Working Papers <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346629> (last accessed 23 June 2021).

⁸ O Stefan, “COVID-19 soft law: voluminous, effective, legitimate? A research agenda” (2020) 5 European Papers 1.

While the OPC on the Habitats Guidance is a good first step, there is still little to no guarantee that this decision by the European Commission is actually going to improve the legitimacy of soft law-making in the long run. Ultimately, we will have to wait and see whether this approach will be implemented beyond this single Guidance and become a part of the Commission's toolkit for the development of soft law. If so, the input deficit of soft law would be lessened – albeit not eliminated. If not, the deficit will persist.

V. CONCLUSIONS: A WAY FORWARD FOR EU SOFT LAW?

It is rather clear that soft law is here to stay. Particularly in the context of EU environmental policy, with the European Green Deal on the horizon that will cut across policy domains and transcend levels of competence, soft law is expected to play a key role in the Union's strategy for tackling climate change and environmental degradation. This critical role of soft law only highlights the need for its legitimization even further. Nevertheless, the opacity of the soft law-making process is not a new or unknown phenomenon. Will this development bring a wind of change?

This development comes at a timely point, particularly considering the recent Opinion of AG Bobek in Case C-911/19⁹ on the reviewability of EU soft law in annulment actions under Article 263 TEU and preliminary questions regarding validity under Article 267 TFEU (also in the context of the Court's case law in *Grimaldi and Foto-Frost*),¹⁰ highlighting the limitations of the Court's approach towards the admissibility requirements for soft law measures. Nevertheless, the Court has retained its position not to admit direction against EU soft law measures (eg in *Belgium v Commission*).¹¹ This stance further emphasises the legitimacy blind-spots that are present in soft law through and through – from its adoption to its review (or, rather, the lack thereof).

Certainly, an open consultation process is not a cure-all for soft law. It is, nonetheless, a step in the right direction. While in no way guaranteed, such a relatively small change could have substantial consequences for the overall legitimacy of soft law at the EU level, especially since it responds to the long-lasting narrative regarding the lack of input in the soft law-making process, both by academics and by the European Parliament.¹² Nevertheless, there are significant obstacles that hinder the guaranteeing of the legitimacy of soft law.

⁹ Case C-911/19, *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR)* [2021] ECLI:EU:C:2021:294, Opinion of AG Bobek.

¹⁰ Case C-322/88, *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECLI:EU:C:1989:646; Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECLI:EU:C:1987:452.

¹¹ Case C-16/16, *Kingdom of Belgium v European Commission* [2018] ECLI:EU:C:2018:79.

¹² M Eliantonio and O Stefan, "The elusive legitimacy of EU soft law: an analysis of consultation and participation in the process of adopting COVID-19 soft law in the EU" (2021) 12 European Journal of Risk Regulation 159; D Petropoulou Ionescu and M Eliantonio, "Democratic legitimacy and soft law in the EU legal order: a theoretical perspective" (2021) 17 Journal of Contemporary European Research 43; S Vaughan, "Differentiation and dysfunction: an exploration of post-legislative guidance practices in 14 EU agencies" (2015) 17 Cambridge Yearbook of European Legal Studies 66; European Parliament, "European Parliament resolution P6_TA(2007)0366 on institutional and legal implications of the use of 'soft law'" (Resolution) (2007) OJ C187 E/75.

That being said, while, overall, the Commission's decision to open the soft law-making process to the general public is a promising and positive development, time will tell as to whether we can announce "Habemus Legitimacy" from the allegorical Berlaymont *loggia*. Nevertheless, many questions regarding the legitimacy of the soft law-making process, as well as its credentials in terms of participation and transparency, remain unanswered, calling for a new angle to the study of the EU soft law phenomenon.