Institutional and legal implications of the use of 'soft law' instruments

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The European Parliament adopted a resolution based on the own-initiative report drafted by Manuel **MEDINA ORTEGA** (PES, ES) and on the institutional and legal implications of the use of 'soft law' instruments. It considered that, in the context of the Community, soft law often constituted an ambiguous and ineffective instrument which was liable to have a detrimental effect on Community legislation and institutional balance. It should be **used with caution**, even where it was provided for in the Treaty. Soft law could not be a substitute for legal acts and instruments, which were available to ensure the continuity of the legislative process, especially in the field of culture and education. Parliament stressed that each EU institution, including the European Council, must consider both legislative and non-legislative options when deciding, on a case-by-case basis, what action, if any, to take.

Parliament further considered the open method of coordination to be legally dubious, as it operated without sufficient parliamentary participation and judicial review. It should be employed only in exceptional cases and Parliament should become involved in the procedure.

Parliament deplored the use of soft law by the Commission where it was a surrogate for EU legislation that was still necessary per se, or where it extrapolated the case-law of the Court of Justice into uncharted territory. It urged the Commission to make a particular effort to **guarantee transparency and public accountability** in the process of adopting non-binding Community acts, as well as to increase the use of impact assessment in the decision-making process. The institutions were asked to refrain from adopting soft-law instruments when draft legislative acts are under consideration. The Commission should give special consideration to the effect of soft law on consumers and their possible means of redress before proposing any measure involving soft-law instruments.

As regards **Commission communications**, green and white papers did not give rise to any direct legal obligations. However, the adoption of consultation papers and political declarations of intent should not be seen as implying any legal obligation to enact the corresponding regulations. Whilst the Commission interpretative communications serve the legitimate purpose of providing legal certainty, their role should not extend beyond that point. When they serve to impose new obligations, interpretative communications constitute an inadmissible extension of law-making by soft law. When a communication laid down detailed arrangements not directly provided for by the freedoms established under the Treaty, it was departing from its proper purpose and was thus null and void. Communications satisfying the criteria referred to above should consequently be issued only in those cases where Parliament and the Council, in other words the legislature, had instructed the Commission to draw up the necessary interpretative communications. Parliament considered that translating the Treaty into reality was the responsibility of the legislature and that its interpretation was the responsibility of the Court of Justice.

Standardisation and codes of conduct were important elements of self-regulation. However, standardisation must not lead to overregulation and constitute an additional burden for small and medium-sized enterprises in particular. The legal bases concerned should incorporate built-in safeguards against overregulation.

Parliament went on to point out that, whereas it was legitimate for the Commission to make use of pre-legislative instruments, the pre-legislative process should not be abused nor unduly protracted. In areas such as the **contract-law project**, a point must come where the Commission decided whether or not to use its right of initiative and on what legal basis.

Parliament, as the only democratically elected Community institution, was not currently consulted about the use of so-called soft-law instruments, such as Commission recommendations, based on Article 211 of the EC Treaty, and interpretative communications. Parliament called on the Commission to develop a modus operandi that guaranteed the participation of the democratically elected bodies including, possibly, by means of an interinstitutional agreement, and thus more effective monitoring of the need for the adoption of 'soft-law' instruments. Such an agreement should, in particular, aim to resolve the contradiction that has arisen as a result of the rules in Articles 211, 249(5) and 230 of the EC Treaty and in the case-law of the European Court of Justice, when the Court requires the national courts to take due account in current legal disputes of recommendations which are per se non-binding under the Treaty.

Lastly, Parliament stressed that the expression of soft law, as well as its invocation, should be avoided at all times in any official documents of the European institutions.