

Marloes van Rijsbergen, *Legitimacy and Effectiveness of ESMA's Soft Law*. Cheltenham: Edward Elgar, 2021. xxxvi + 330 pages. ISBN: 9781839109706. GBP 111.

Although old as (at least) the Roman Empire, soft law is nowadays one of the most used (and controversial) tools of EU governance. EU agencies are particularly keen on using it, since its formally non-binding nature enables these bodies to fulfil their regulatory function despite the limits (allegedly?) imposed by primary law and by the case law of the Court of Justice on their empowerment.

This book has the merit of tackling both the issues raised by the shaky institutional position of EU agencies and those raised by the unavoidably ambiguous nature of soft law. Despite what is stated in the book's introduction (p. 1), these two topics have already been studied together. In any case, the reader will soon forgive the inaccuracy of this claim, given the great added value that the book brings to the debates on these issues, which are of a crucial relevance for understanding the current challenges of the EU regulatory machinery.

Moreover, the book tackles these topics from a pragmatic and contemporary perspective. The theoretical debates on the notion of soft law, its boundaries, its implications, and its legitimacy, which have already been discussed in depth by academics, are left behind. Rigorously standing on previous literature, van Rijsbergen looks to the future and tackles ESMA's soft law simply as it is, namely, one of the techniques used to regulate EU financial markets, sketching ambitious "rules of the game" (p. 297) to enhance the overall legitimacy and effectiveness of this mode of governance.

In particular, after having provided some basic knowledge on ESMA, EU agencies, and soft law in general (Chapter 1), the book clearly presents and discusses its aim, i.e. to improve the legitimacy and effectiveness of ESMA's soft law in particular, as well as that of EU agencies in general. To this end, it develops a framework to assess soft law-making by EU agencies, identifying eight stages of the policy cycle in which legitimacy and effectiveness concerns may arise (Chapter 2). To each of these eight stages (definition of the legal basis, initiation of the soft law-making, soft law decision making, protection of the principle of transparency, transposition of the soft acts, compliance, enforcement vis-à-vis national authorities, judicial review), a specific chapter is dedicated, highlighting ESMA's experience in that regard and discussing the legal challenges which arise in that field. The recommendations that can be drawn from the analysis to improve both ESMA's soft law and that of EU agencies in general are debated by way of conclusion (Chapter 11).

The idea of using ESMA as a case study is certainly noteworthy, since this agency is one of the most interesting and advanced laboratories of EU soft law. However, the proposed classification of policy cycles is not fully convincing when applied to other agencies, both because of some overlaps (for instance, between the definition of the legal basis and the initiation of the procedure; between compliance and enforcement; between the definition of the decision making procedures and those that enhance transparency) and of a certain degree of "ESMAcentricity" (the relation between ESMA and its national counterparts is quite peculiar, as well as its powers in the regulation of financial markets: the application to other agencies of the safeguards identified through the ESMA's experience sometimes sound redundant and would deserve a more in depth evaluation). In any case, the identification of the different stages of soft law-making has the merit of enabling a very easy-to-read and smooth discussion throughout the whole book of the several legal challenges that arise from the adoption of soft law by EU agencies. Therefore, the limits from a theoretic perspective are well balanced by clear benefits in the articulation of legal reasoning.

The research methodology mixes classic desk research (literature and case law research) with a more innovative approach to the field, given by what the author defines as "semi-structured interviews with ESMA's officials" and by her professional profile (van Rijsbergen is currently Senior Supervisor at the Dutch Authority for the Financial Markets, with experience in one of ESMA's Standing Committees). This innovative methodology certainly has to be welcomed, since even those readers more interested in the most theoretical discussions on soft law cannot but appreciate the new light that the practical knowledge sheds on these debates.

Particularly intriguing is, by way of example, the use of ESMA's internal documents (see, for instance, the verbatim account of the meeting of the Boards of Supervisors reported at pp. 67–68, which gives an invaluable perspective for understanding how ESMA concretely deals with the issues related to the legal basis of its action). Given this approach, however, the room left for interviews could have been far greater and, above all, the lack of a concrete assessment (through market behavioural analysis, interviews, and national case law research) of the capability of ESMA's soft law to create legal and practical obligations on private parties (both financial institutions and investors), judges, and national authorities seems a missed opportunity. For the sake of clarity: Chapter 8 evaluates the capability of the several pieces of ESMA's soft law to create legally binding effects, yet relying on the classic (and, in this field, always more and more sterile) analysis of their wording, context, substance, and intention of the author.

Pragmatism, after all, is the pleasure and pain of this book. Its implicit yet obvious goal is to “institutionalise” soft law, i.e. to add a set of precise procedural and institutional amendments to enhance its legitimacy and effectiveness. The reader will find them in Chapter 11: adding in each agencies' establishing regulation a provision stating whether soft law can be adopted at all by the agency and to what extent, while also specifying the legal nature of these soft acts and the compliance duties for national authorities and third parties; enhancing participation through the creation (or further empowerment) of stakeholder groups, access to documents, and duty of motivation; specifying how each soft act should be transposed by national authorities (and here the “ESMAcentricity” of the proposals reaches its apex, given that many agencies do not adopt similar “comply or explain” guidelines addressed to national authorities).

This approach has the clear merit of presenting concrete and feasible proposals for the EU legislature. It is not by chance that the *Zeitgeist*, both at institutional and academic level, is clearly hinting to that direction: soft law is here to stay; the institutional limits to EU agencies' powers will be addressed (circumvented?) case-by-case, without engaging in Treaty revision; all one can hope for is to adjust certain elements of soft regulation to enhance its output. Yet, other paths can also be undertaken. In other fields of EU law (for instance, State aid), soft instruments have been transposed into purely hard pieces of legislation, since the creation of some hybrid forms of neither-fully-soft-nor-hard sources of regulation could also be dangerous. Indeed, a certain degree of flexibility and informality is always needed in any regulatory process: recent research shows that if one tightens the rule of soft law-making, softer forms of regulation will arise in any case, frustrating the original purpose of enhancing the overall legitimacy and effectiveness of regulation. Thus, it might be more efficient to keep the dichotomy between soft and hard law, and “upgrade” the former to the latter as soon as possible. Applying this paradigm to EU agencies clearly requires questioning the very foundations of soft law, discussing to what extent EU agencies should keep relying on this mode of governance according to their current institutional limits, and analysing the implications of soft law proliferation both at the judicial and normative levels – something that would clearly produce far more theoretic and less likely-to-be-adopted proposals.

Those who are interested in this latter approach will not find what they are looking for, since the monograph tackles these latter topics only incidentally. Yet, this reviewer's suggestion is to take this book into due consideration, regardless of your affiliation to the pragmatic or revolutionary side of the debate: in both cases, a deep understanding of the functioning of the most advanced laboratory of soft regulation, and its points of strength and weaknesses is needed. And that's exactly what this book is made for.

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