



EU SOFT LAW INSTRUMENTS AS A TOOL TO TACKLE THE COVID-19 CRISIS: LOOKING AT THE “GUIDANCE” ON PUBLIC PROCUREMENT THROUGH THE PRISM OF SOLIDARITY

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ABSTRACT: The European Commission has used soft law instruments to tackle the COVID-19 crisis. In so doing, it not only tried to accommodate the emergency within the flexibilities inherent in EU law, but it also assumed, along with national authorities, its own share of responsibility to respond to economic and public health issues. By taking as a case study a Communication on public procurement, it is argued that in the EU the principle of solidarity goes beyond its natural intergovernmental dimension. There emerges from recent soft law instruments a normative value implying in particular the awareness of a common interest and destiny, of a mutual connection and interdependence of peoples, each of whom must be responsible to itself, to future generations and to other peoples.

KEYWORDS: COVID-19 and the EU – soft law – public procurement – principle of solidarity – holistic approach – common interest and destiny.

I. INTRODUCTION

Since inception of the current pandemic crisis the European Commission has often resorted to soft law instruments to address it. Their use is not an oddity for the EU legal system.¹ Enjoying no legislative power, not even in case of emergency, the Commission has adopted a number of atypical acts to accommodate the emergency within the flexi-

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¹ As regards soft law in the EU legal system, A. DI PASCALE, *Gli atti atipici nel sistema delle fonti del diritto dell’Unione europea*, Milano, Giuffrè, 2017, p. 51 *et seq.*; O. STEFAN, M. AVBELI, M. ELIANTONIO, M. HARTLAPP, E. KORKEA-AHO, N. RUBIO, *EU Soft Law in the EU Legal Order: A Literature Review*, 2019, papers.ssrn.com; M. ELIANTONIO, O. STEFAN, *Soft Law in the EU Legal Order: Reflections and Contemporary Trends*, in *Yearbook of European Law*, 2018, p. 457 *et seq.*



bilities inherent in EU law.² Interestingly, as it will be highlighted, in so doing the Commission has also loosened up its guardian of the Treaties task.

As is known, soft law is a flexible instrument to attain a variety of EU objectives. It may amount to a simple policy initiative to set institutions' work programs, such as for instance is the case for the White or Green Papers. Further, in line with *Grimaldi*, it is often and rightly remarked that a recommendation, although unempowered to bear binding effect on its addressees, brings about interpretative impacts on both domestic statutes and EU law provisions.³ More interestingly, based upon a complex institutional and judiciary practice, Recommendations, Communications, Guidelines, Codes of conduct and so forth, have formed a composite legal framework producing a set of practical effects, even beyond the *Grimaldi* ruling.⁴ Some of these aspects will be considered in this *Insight*, though this is not its main goal since it will focus on the solidarity principle. The aim of the Commission's soft law instruments adopted during the COVID-19 crisis has been not only to indicate that EU law is equipped to react to health crises rapidly, and to set a satisfactory tier of legal certainty in terms of EU law compliance, namely by public authorities. Its aim has also been to deliver its contribution in terms of solidarity, i.e. the quintessence normative value of the EU construction,⁵ to national authorities facing the health and economic crisis.

The *Insight* is divided in 5 Sections. First, a selected case study will be introduced (Section II) and the content of the Commission's suggestions will be described (Sections III and IV). The *Insight* will then focus on the use of a soft law instrument for shaping a mature principle of solidarity within the EU system (Section V). Finally, conclusions will be drawn suggesting a holistic approach to the concept of solidarity (Section VI).

II. THE CASE STUDY: *GUIDANCE ON THE SMART USE OF PUBLIC PROCUREMENT LAW DURING THE COVID-19 CRISIS*

The soft law choice to address public procurement in emergency situations provides an intriguing case study. Public procurement is a sensitive field in terms of the internal mar-

² O. STEFAN, *Voluminous, Effective, Legitimate? A Research Agenda*, in *European Papers – European From, Insight* of 3 June 2020, www.europeanpapers.eu, p. 1 *et seq.*

³ It is so when a domestic statute is passed for implementing a recommendation. If it enacts a non-binding act, the latter casts light on the correct interpretation of the former in the sense that the statute should be interpreted and applied accordingly. Likewise, a recommendation enjoys the same interpretative force when it is meant to supplement binding EU law provisions (Court of Justice, judgment of 13 December 1989, case C-322/88, *Grimaldi*, para. 18). O. STEFAN, M. AVBELI, M. ELIANTONIO, M. HARTLAPP, E. KORKEAHO, N. RUBIO, *EU Soft Law in the EU Legal Order*, cit., p. 24 *et seq.*

⁴ R. DWORKIN: *L'impero del diritto*, Milano: Il Saggiatore, 1989, p. 35 *et seq.*; R. DWORKIN, *Taking Rights Seriously*, Massachusetts: Harvard University Press, 1977, p. 22 *et seq.*; F. SNYDER, *Soft law and institutional practice in the European Community*, in *EUI Working Papers*, no. 5, 1993, p. 2.

⁵ Opinion of AG Bot delivered on 26 July 2017, joined cases C-643/15 and C-647/15, *Slovak Republic, Hungary v. Council*, para. 17.

ket's integrity. This is particularly so, when goods and services are swiftly needed to face the magnitude of a pandemic crisis as the one Europe is facing. Reliance on soft law by the Commission shows its desire to concretely support member states in the public purchasing of protective equipment, medical goods and services, at a time when supply chains experience serious disruption, as in fact they did at the very outset of the pandemic outburst. Basically, the Commission's intervention evolved along two different routes. First, it has stepped up efforts by launching joint procurement actions for various medical and similar goods. Since there are more than 250000 contracting authorities in the EU, the Commission has declared its will to mobilize all available resources to provide further advice and assistance to member states and public buyers. The Commission has since then coordinated national contact points through a dedicated WIKI online tool.

Second, in such harsh emergency situation, it was paramount to prevent unwanted delaying side-effects for national authorities engaged in ensuring vital objectives, while as much as possible abiding by EU Law. So, the Commission has adopted a *Guidance* on the smart use of public procurement law during the COVID-19 crisis.⁶ Being aware of the imperative need of swift solutions to deal with an abrupt increase of demand for protective and other medical goods and services, the Commission highlighted all the available options and flexibilities under the EU public procurement framework. Thus, it has reminded public authorities that they can substantially reduce the deadlines to accelerate open and restricted procedures (Section III), or even choose a negotiated procedure without publication – a solution that in fact entails a straight award, so as that a public authority is empowered to engage directly with the market (Section IV).

III. STATE OF URGENCY

It may be worth recalling that Directive 2014/24/EU⁷ sets out two situations, *i.e.* the state of "urgency" and that of "extreme urgency", each implying a different level of emergency. Overall, they differ in terms of their respective coherence with the structural principles underlying EU law framework on public contracts – the widest possible opening-up to competition, the internal market's integrity, and the most efficient use of public funds (because such use ensures wider access of companies to the business opportunities, and broader range of available supplies).⁸ In fact, unlike the "state of urgen-

⁶ Communication C/2020/2078 of 1 April 2020 from the Commission, *Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis*, hereafter, *Guidance*.

⁷ Directive 2014/24/EU of 26 February 2014 of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC.

⁸ See *inter alia* Court of Justice: judgment of 11 January 2005, case C-26/03, *Stadt Halle and RPL Lochau*, paras 44 and 47; judgment of 13 December 2007, case C-337/06, *Bayerischer Rundfunk and Others*, para. 39; judgment of 19 May 2009, case C-538/07, *Assitur*, para. 26; judgment of 23 December 2009, case C-305/08, *CoNISMa*, para. 22.

cy”, provisions governing the “state of extreme urgency” clash with such principles because they provide no competitive tendering. It follows that resorting to the “state of extreme urgency” procedure requires more severe conditions to be met.

To begin with the “state of urgency”, it makes it possible to reduce the time limits for tendering applicable under normal circumstances to the “open procedure”, as well as to the ordinary “restricted procedure”. As a result, deadlines would be roughly halved;⁹ that explains the reason why the “restricted procedure” is usually labelled as the “accelerated restricted procedure”. However, in accordance with EU law, the urgency requirement can be invoked only if such a state is “duly substantiated” by the contracting authority, specifically in the sense that the compliance with normal deadline would be “impracticable”¹⁰. This *soft test* is founded on a specific *onus probandi*, requiring the national authority to prove that, should it abide by common standards, it would fail to achieve the need underlying the urgency situation – namely, in the pandemic crisis the health objective to promptly supply protective goods to hospitals and population. As it will be suggested *infra*, the *Guidance* practically takes this *soft test* for granted in advance.

IV. STATE OF EXTREME URGENCY

As said, a “state of extreme urgency” is far more disruptive as regards the promotion of competition within the internal market. For the “negotiated procedure without publication”, which is applicable in “extreme urgency” situations, implies that the tender notice is not actually made public in the Official Journal. In this case public buyers are authorized not to comply with the principles of equal treatment and transparency. However, a public authority may award public contract by a negotiated procedure without prior publication of a tender notice only if a cumulative set of conditions are fulfilled. Such *hard test* requires that, first, an extreme urgency circumstance is brought about by events that were unforeseeable by the contracting authorities; second, such a situation is incompatible with general deadlines required for the ordinary procedures; third, the circumstance underlying the situation of extreme urgency must in no case be attributable to the contracting authorities; finally, a causal link between the unforeseen event and the extreme urgency is established.¹¹

⁹ As regards the open procedure the minimal regular deadline is 35 days which may be cut until 15 days (Art. 27 of Directive 2014/24/EU). For the restricted procedure, the request for participation deadline goes from an ordinary minimal of 30 days (Art. 28 of Directive 2014/24/EU) to a minimal shortened period of 15 days (Art. 28, para. 6, of Directive 2014/24/EU), while the submission of the tender may be cut from a minimal of 30 days (Art. 28 of Directive 2014/24/EU) to a minimal period of 10 days (Art. 28, para. 6, of Directive 2014/24/EU).

¹⁰ Arts 27, para. 3, and 28, para. 6, Directive 2014/24.

¹¹ *Ex plurimis*, Court of Justice, judgment of 15 October 2009, case C-275/08, *Commission v. Germany*, para. 65.

As if that wasn't enough, the well-settled caselaw has also clarified in a stringent manner several other aspects of the procedure awarding public contracts without publication. According to the Court of Justice, this procedure is exceptional in nature and may be applied only in cases which are set out in the Directive exhaustive list.¹² Naturally, the burden of proving the actual existence of the exceptional circumstance lies on the national authority.¹³ Since the competitive tendering falls short, the relevant rules must be strictly interpreted because they imply serious derogations from the guarantees set forth in primary law principles.¹⁴

Despite such *hard test*, the *Guidance* recalls that in practice a procedure based on a public procurement without publication may also amount to a “*de facto* direct award”, so as that a public buyer is allowed to interact with potential suppliers. Moving from the assumption that the COVID-19 crisis fits the requirement of an extreme and unforeseeable urgency, the *Guidance* clarifies that any procedural steps may be legitimately circumvented insofar as three basic conditions are fulfilled: i) exceptional increase of the need for certain goods or services, ii) a significant disruption of the supply chain, and iii) procedures of public procurement cannot be carried out due to technical or physical impediments.¹⁵ Since the Commission cannot waive EU law through an atypical act, it is plausible that the contracting authorities remain in charge of drawing up a written report as to the circumstances that justify the use of this procedure.¹⁶

Overall the Commission considers this set of complex prerequisites as being met in the current crisis. A public buyer may negotiate directly with potential contractors. Interestingly, the *Guidance* reminds that under the COVID-19 circumstances ‘there are no publication requirements, no time limits, no minimum number of candidates to be consulted, or other procedural requirements. No procedural steps are regulated at EU level. In practice, this means that member states authorities can act as quickly as is technically/physically feasible – and the procedure may constitute a *de facto* direct award only subject to physical/technical constraints related to the actual availability and speed of delivery.’¹⁷ The *Guidance* goes on by recalling that public authorities may even resort to innovative digital tools and work more closely with innovation ecosystems or entrepreneurs’ networks; or may pursue a ‘multi-stage strategy’, given that, for their immediate and projected short-term needs, national buyers should fully exploit the flexibilities of the framework.¹⁸

¹² Court of Justice, judgment of 8 April 2008, case C-337/05, *Commission v. Italy*, para. 56.

¹³ Court of Justice: judgment of 3 May 1994, case C-328/92, *Commission v. Spain*, paras 15 and 16; *Commission v. Italy*, cit., paras 57 and 58.

¹⁴ Court of Justice: judgment of 17 November 1993, case C-71/92, *Commission v. Spain*, para. 36; judgment of 2 October 2008, case C-157/06, *Commission v. Italy*, para. 23.

¹⁵ *Guidance*, cit., p. 4 *et seq.*

¹⁶ Art. 84, para. 1, let. f), of Directive 2014/24/EU.

¹⁷ *Guidance*, cit., p. 2.

¹⁸ *Ibid.*

V. A SOFT LAW INSTRUMENT FOR SHAPING A MATURE PRINCIPLE OF SOLIDARITY WITHIN THE EU LEGAL SYSTEM

In normal times, resorting to a state of “urgency”, or *a fortiori* to that of “extreme urgency”, is not easy. The scope of the requirements relating to such tests cannot be determined unilaterally by each public authority, without any external control. For instance, the European Commission may exceptionally accept national authorities having recourse to “negotiated procedure without publication”, after having been duly informed. Yet, in the current pandemic crisis at a certain point in time it reacted by adopting a temporary soft law framework to open floodgates, recognizing that the pandemic constitutes an extraordinary event that can even be tackled with a “de facto direct award”.

The *Guidance* is a valuable tool to inform member states and practitioners as to the procedures for purchasing of goods and services during the COVID-19 crisis. It allows contracting authorities to a “line of reason” when applying EU law in situations of urgency or extreme urgency, for it clarifies how public buyers may launch and conclude a procedure within a matter of days, even hours, if necessary. After all, one might say, this matches public procurement Directives. They harmonize national laws, and often leave to member states the choice not to apply certain provisions at all, or to include them in their domestic implementing legislation with a degree of stringency that varies according, *inter alia*, to the domestic needs prevailing at a certain moment. On the same vein, one could add, member states have the power to implement the EU applicable rules in a more flexible or tighter way, provided that they remain within the regulatory framework designed by the optional rules and comply with the principle of proportionality, which (together with the principles of equal treatment and transparency) permeates public procurement procedures. In the end, one may argue, the *Guidance* confirms the idea that soft law contributes to recognizing diversity in member states and to securing national autonomy.¹⁹

Yet, the Commission intendment is not only to guide national authorities as to how to take advantage of the inherent flexibilities of EU public procurement law in emergency times. Throughout the *Guidance* the Commission has also assumed, along with national authorities, its own share of responsibility to respond properly to the serious public health issues related to the COVID-19 crisis. In this respect, the importance of the *Guidance* is material and deserves a short contextualization.

As discussed, this document plainly points out that the current pandemic is *per se* a sufficient ground for implying the existence of “a state of urgency”, the *soft test*. It also admits that reducing deadlines is legally feasible for buying goods and services in the short and medium term. Accordingly, this *ex ante* fact-finding accords public authorities a sort of *safe harbor* as to the existence of a state urgency. In other words, had such authorities decided to shorten an open procedure or to resort to the accelerated restrict-

¹⁹ E. KORKEA-AHO, *EU soft law in domestic legal systems: flexibility and diversity guaranteed?*, in *Maastricht Journal of European and Comparative Law*, 2009, p. 271 *et seq.*

ed one, it is granted that the Commission would not challenge their actions. It will in practice refrain from launching infringement procedures for violation of the urgency test as set forth in Arts 27, para. 3, and 28, para. 6, of Directive 2014/24. This is a consequence which is not immaterial for public buyers. For they have no procedural device to refer questions to the Court of Justice on matters of EU law, although, according to a well-settled caselaw, they have to apply domestic law consistently with EU directives, and, in case of a genuine clash, they have to ensure the primacy of EU provision having direct effect.²⁰ In a nutshell, an infringement procedure for failure to fulfill the *soft test*, appears implausible, since the “state of urgency” has been undoubtedly and *a priori* recognized by the Commission.

Moreover, as noted, the *Guidance* has also suggested an extra simplified approach for public procurement in times of pandemic crises, by accepting beforehand that national authorities may even award public contracts through a procurement procedure without prior publication, which amounts to a *de facto* direct award. Indeed, the Commission has accepted that COVID-19 embraces the standards of “state of extreme urgency”, i.e. the *hard test*. Arguably, the *Guidance* becomes justiciable in the sense that the Commission may not depart from its own intendment without infringing general principles such as those of equal treatment and the protection of legitimate expectations.²¹ Despite concerning a different field of EU law, the *Kotnik* ruling shows that the Commission is also expected to react coherently to its own assumptions whenever exceptional circumstances envisaged in an atypical act are fulfilled.²²

Therefore, the *Guidance* explains how to apply the Directive 2014/24 and how the Commission intends to exercise its powers in a field where it enjoys a sphere of discretion. In practice, infringement procedures against a member state will not take place even in cases of direct awards. It seems however worth emphasizing that the *Guidance* offers no water proof solution to public authorities due to the inability of soft law to create genuine rights for its addressees.²³ It reflects the Commission’s view, and the relevant caselaw. It cannot, in any event, impinge negatively on the role of the Court of Justice as the ultimate interpreter of the *acquis* (Art. 19 TEU), should it be called to judge over preliminary requests referred by a domestic judge in a litigation, brought, for instance, by an unsuccessful undertaking having participated to a procedure issued in a

²⁰ Court of Justice: judgment of 13 February 1985, case 5/84, *Direct Cosmetics Ltd*, para. 37; judgment of 22 June 1989, case 103/88, *Fratelli Costanzo*, para. 33; judgment of 29 April 1999, case C-224/97, *Ciola*, paras 21 *et seq.*; judgment of 9 September 2003, case C-198/01, *Consorzio Industrie Fiammiferi*, paras 49 and 58; judgment of 12 January 2010, case C-341/08, *Petersen*, para. 80; judgment of 14 October 2010, case C-243/09, *Fuß*, para. 61; judgment of 4 December 2018, case C-378/17, *Minister for Justice and Equality*, para. 41 *et seq.*

²¹ Court of Justice, judgment of 13 December 2012, case C-226/11, *Expedia*, para. 28. O. STEFAN, M. AVBELI, M. ELIANTONIO, M. HARTLAPP, E. KORKEA-AHO, N. RUBIO, *EU Soft Law in the EU Legal Order*, cit., p. 26.

²² See by analogy Court of Justice, judgment of 19 July 2016, case C-526/14, *Kotnik*, para. 43.

²³ Court of Justice, judgment of 14 June 2011, case C-360/09, *Pfleiderer*, para. 21.

state of extreme urgency. Yet, before the Court of Justice and national courts a member state might actually rely upon the *Guidance*. Moreover, as it usually does in preliminary ruling procedures, the Commission is expected to intervene to support the lawfulness of the public buyers' conduct, carried out in a situation of urgency. Should that happen, there is room for the Court of Justice to adjust its *hard test* caselaw so as to take account of a scenario in which public health is put under severe strain.

In the end, while using its own discretion in order to give *ex ante* assurances to public buyers, the Commission has made a step forward, while showing proximity and solidarity to national authorities. It is suggested that this approach flows from the recognized existence of a common interest of member states and European peoples to face the pandemic crisis appropriately. This reflects the very foundation of the EU project.

It is a matter of course that the principle of solidarity has an intergovernmental dimension within the EU system.²⁴ So it is, for instance, in emergency situations related to the area of asylum and migration, whereby frontline member states receiving high numbers of refugees and applicants for international protection, are entitled to get measures of solidarity by other members.²⁵ This is not a novelty because since the 1950's Treaties the general rule of 'mutual respect' implied an embryonic form of solidarity concerning relations between member states.²⁶

Yet, solidarity and its inherent element of co-responsibility in situations of crisis, have an institutional dimension too. Although not included among the values on which the Union is founded, listed in the first sentence of Art. 2 TEU, "solidarity" is mentioned in the second sentence of the same provision as one of the normative values common to the member states" to which they are expected to conform.²⁷ Solidarity is also mentioned in the Preamble to the Charter of Fundamental Rights of the European Union as forming part of the "indivisible, universal values" on which the Union is founded. If the EU is meant to promote "solidarity between generations",²⁸ it would be hardly possible to deepen solidarity, or to envisage an ever-closer union between the peoples of Europe, as set out in the Preamble to the TEU, without the European institutions being ac-

²⁴ See in general C. BOUTAYEB (ed.), *La solidarité dans l'Union européenne*, Paris: Dalloz, 2011; R. BIEBER, F. MAIANI, *Sans solidarité point d'Union européenne. Regards croisés sur les crises de l'Union économique et monétaire et du Système européen commun d'asile*, in *Revue trimestrielle de droit européen*, 2012, p. 295 *et seq.*

²⁵ Art. 80 TFEU, concerning in particular the implementation of the EU common policy on asylum. See to this effect Court of Justice: judgment of 6 September 2017, joined cases C-643/15 and C-647/15, *Slovakia and Hungary v. Council* [GC], paras 291 and 292; judgment of 2 April 2020, joined cases C-715/17, C-718/17 and C-719/17, *Commission v. Poland, Hungary and Czech Republic* [GC], paras 70, 80, 180 and 181.

²⁶ Art. 4, para. 3, first sentence, TEU.

²⁷ R. BARATTA, *European Integration between Fundamental Rights and Common Values*, in P. AZZARO, M.A. GLENDON (eds) *Fundamental Rights and Conflict among Rights*, Baltimore: Franciscan University Press, 2020, p. 267 *et seq.*

²⁸ And "solidarity among Member States": Art. 3, para. 3, TEU.

tively involved in emergency situations undermining, as it is presently the case, public health and national economies.

VI. CONCLUSIONS

Soft law has been resorted to as a tool to advance the EU's normative value of solidarity. Undoubtedly, the Commission's response to the to the pandemic crisis has been so slow, and likely to undermine citizens' confidence in the Union, that a reform of the Treaties is desirable.²⁹ Nevertheless, at a certain point in time, the Commission changed attitude, and decided to stick to the general principle of solidarity that is a feature of the European integration construct.³⁰

European institutions are expected to take over their share of responsibility while assisting member states and public authorities. In this perspective, solidarity may be construed and conceptualized as legal doctrine based on 'common destiny' linking the Union and its peoples, particularly when it comes to the protection of public health and the well-being of citizens, which is after all one of the core objectives of the EU legal system. Treaty rules and the related institutional practice are forging a multidimensional and holistic principle of solidarity. Reading between the lines of the *Guidance*, while taking account of other soft law measures and legislative initiatives adopted during the pandemic crisis, there emerges a principle that is taking on deeper and newer connotations grounded on the awareness of a common interest and destiny, of a mutual connection and interdependence of peoples, each of whom must be responsible to himself, to future generations and to other peoples.

²⁹ C. BEAUCILLON, *International and European Emergency Assistance to EU Member States in the COVID-19 Crisis: Why European Solidarity Is Not Dead and What We Need to Make It both Happen and Last*, in *European Papers – European Forum, Insight* of 25 April 2020, www.europeanpapers.eu, p. 1 *et seq.*

³⁰ See in particular the emphasis put on solidarity by the European Commission: Communication COM(2020) 112 final of 13 March 2020 from the Commission, *Coordinated economic response to the Covid-19 outbreak*. As regards state aids, the Commission has put in place all necessary procedural facilitations to enable a swift Commission approval process under both Arts 107, para. 3, let. c), and 107, para. 2, let. b), TFEU (as to the Commission practice in this respect see A. ROSANÒ, *Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law*, in *European Papers – European Forum, Insight* of 7 May 2020, www.europeanpapers.eu, p. 1 *et seq.*).