SOFT LAW GOVERNANCE IN TIMES OF CORONAVIRUS IN SPAIN

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During the first few months of the COVID-19 pandemic, between March and July 2020, Spanish national and regional authorities made extensive use of soft law mechanisms to fight the spread of the virus and to tackle the consequences of the crisis. Soft law was used either as an instrument in and of itself, or as a justification for hard law instruments, with more than 200 non-binding measures being enacted by the State and by the Autonomous Communities. Spanish courts also extensively used soft law as a tool to interpret existing hard law instruments, many of them related to the protection of the fundamental right to personal integrity. Such uses give rise to concerns as regards the transparency of administrative action and the principle of legal certainty. Moreover, the widespread use of soft law measures as criteria justifying the adoption of binding measures restricting fundamental rights may have consequences from the perspective of the democratic accountability and judicial control of executive action. Overall, this points to the need to reconsider the current system of constitutional and legal constraints attached to this form of regulation, for example by introducing some binding procedural rules relating to its adoption and its publication, as well as by clarifying its legal effects and the mechanism through which it can be enforced by courts.

I. Introduction

This article focuses on the use of non-binding soft law guidance to address the impact of COVID-19 in Spain, where many of the measures used to fight the spread of the pandemic have been adopted through circulars, instructions, guidance and other soft law norms, the legal status of which is not entirely clear. It specifically addresses Spanish soft law containing public health recommendations to prevent the transmission of the virus, or to provide assistance to COVID-19 patients, and therefore does not cover the rest of (rather ancillary) soft law measures adopted during the crisis to fight its effects in other areas, such as those relating to economic policy, consumer protection, or banking governance.

Under the decentralised Spanish system (Estado autonómico), the 17 regional Autonomous Communities have health competences transferred to them, with the State at the national level being responsible for certain strategic areas, as well as for the overall coordination of the National Health System. More specifically, the Spanish Ministry of Health has responsibility for national plans, regulation and laws, and the Departments of Health of the
Autonomous Communities are responsible for the regional implementation of national regulations and for the development of regional regulation and policies. Local authorities have relatively residual competences for the protection of public health in terms set out in national and regional legislation (Article 25(2) of Law 7/1985 of 2 April establishing the Bases of the Local Regime). All these levels of administration have employed a mix of binding and non-binding preventive measures to contain the spread of the virus.

An important element to keep in mind is that the pandemic led the Spanish Government to declare a state of alarm (estado de alarma) on 14 March 2020 for an initial period of 15 days,1 which was subsequently extended every fortnight until 21 June 2020 with the approval of the lower chamber of the Spanish Parliament (Congreso de los Diputados).2 According to Article 116 of the Spanish Constitution (Constitución Española, ‘CE’), the state of alarm is the least restrictive of the three states of emergency under Spanish law – state of alarm (estado de alarma), state of exception (estado de excepción), and martial law (estado de sitio). The state of alarm means there can be a temporary and partial (i) strengthening of executive powers to impose restrictive measures, and (ii) centralisation of competences for the executive branch of the Spanish government, though the extent of such centralisation is not predetermined and it is unclear whether there can be different degrees of temporary centralisation under a state of alarm. During the pandemic the Spanish Government was empowered, as part of the state of alarm of March-June 2020, to quarantine citizens nationwide and to adopt other restrictive measures based on public health concerns. However, any matter of regional competence that was not expressly exercised by the State remained under the regulatory competences of the Autonomous Communities.

Legal scholarship on COVID-19 in Spain to date has focused on the extraordinary hard law measures adopted by the State under the state of alarm, as well as on the implications thereof from the perspective of the constitutional principles of autonomy (Article 2 CE), democracy and rule of law (Article 1 CE), including the protection of fundamental rights.3

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1 Royal Decree 463/2020 of 14 March declaring the state of alarm.
2 The six extensions of the state of alarm were approved by the Royal Decree 476/2020 of 27 March, Royal Decree 487/2020 of 10 April, Royal Decree 492/2020 of 24 April, Royal Decree 514/2020 of 8 May, Royal Decree 537/2020 of 22 May, and Royal Decree 555/2020 of 5 June.
3 See in this regard the special issue on legal dimensions of the pandemic ‘Coronavirus y otros problemas’ (2020) 86-87 El Cronista del Estado Social y Democrático de Derecho, March–April 2020. See also Guillermo...
No study has been published so far on soft law measures as a mechanism to fight the pandemic in Spain.

It is important to note that, before the COVID-19 pandemic, Spanish authorities had used soft law in general – i.e., beyond the area of public health – mainly as a mechanism to guide the conduct of subordinated administrative bodies and units (so-called “internal” administrative soft law, which usually takes the form of circulars, instructions, or service orders) or to steer the conduct of other public administrations, mainly of those at the local level (so-called “inter-administrative” soft law). The historic use of non-binding rules as instruments addressed to subjects outside the administration was rather restricted and sector-based, in the form of codes of conduct or good governance standards in some specific areas, such as banking or consumer law. No relevant practice of using soft law as a mechanism addressed to the public in general existed before the COVID-19 pandemic, which is pioneering in this regard.

This article is based on the research and analysis of (i) the non-binding public health measures adopted by the State and the 17 Autonomous Communities over a five-month period from 11 March 2020 to 31 July 2020, and (ii) the decisions adopted by the Spanish courts over the same period in cases where COVID-19 recommendations were invoked by the parties in the proceedings. The selected reference period makes it possible to assess how Spanish administrations and judges used soft law immediately prior to the declaration of the state of alarm, in the midst of it, and once it was lifted (reverting to the usual decentralised distribution of competences between State and the Autonomous Communities).

The article is structured as follows. Section II provides an overview of the number, main features and purpose of soft law instruments adopted by Spanish administrations to fight the spread of COVID-19. Section III explores the relationship of these measures with fundamental rights and other constitutional and legal limits to soft law. Section IV then

Villar Crespo, ‘Repensando el derecho de excepción. La crisis del coronavirus y los tres aprendizajes sobre el derecho de necesidad en el ordenamiento jurídico español’ (2020) 54 Revista General de Derecho Administrativo.

4 For a comprehensive study on internal administrative soft law, see Mar Moreno Rebato, ‘Circulares, instrucciones y órdenes de servicio: naturaleza y régimen jurídico’ (1998) 147 Revista de Administración Pública 159.

5 On this, see Juan Carlos Covilla, ‘El soft law como instrumento para dirigir al gobierno local’ (2019) 12 Revista de Estudios de la Administración Local y Autonómica 97.

6 Daniel Sarmiento, El soft law administrativo (Thomson-Civitas, Madrid, 2008) 120-121.
moves on to the issue of effectiveness of public health recommendations in Spain in the context of the voluntary compliance of the public and enforcement by the courts. The main results of the research are summarised in Section V.

II. “Pandemic” Soft Law

1. Use of soft law to fight the pandemic

In Spain, both the central government and the regional and local authorities have extensively used non-binding soft law guidance, in addition to binding rules, to stop or to slow down the spread of the virus.

In all these levels of government, soft law measures have been adopted in a rather informal way, in the sense that many of them have not been subject to official publication, but only published on the websites of the administrations that have created them. This practice, especially prevalent at the State level, is striking because it is contrary to the only formal requirement imposed by Spanish law on administrative non-binding measures, namely their publication in the corresponding official journal. Such publication is necessary whenever so stipulated by a specific provision or “when appropriate by reason of the recipients or the effects which may result therefrom” (Article 6(2) of Law 40/2015 on the Legal Regime of Public Authorities, concerning internal administrative instructions and guidelines). In addition, COVID-19 soft law instruments are not accessible through a unified access point at the State level (i.e. a dedicated web page), whereas that access is made possible by some Autonomous Communities for their own soft law. Moreover, many of these measures are no longer available online after a certain period of time. This makes it difficult to accurately identify and quantify these non-binding instruments. That is all the more challenging when considering the diversity of formulae in which they and their frequent updates have been presented to date (from posters and audio-visual elements to detailed written guides).

More than 50 different nationwide non-binding public health guidelines and protocols were identified in a non-exhaustive search covering the reference period from 11 March to 31 July 2020. Most of them concern measures to prevent the transmission of the virus, as well as measures for the treatment and pharmacological care of COVID-19 patients. Among the most prominent ones are the Protocol for occupational risk prevention services against
exposure to SARS-CoV-2;7 Guidance on good practices at the workplace;8 Technical Recommendations for penitentiary facilities concerning the COVID-19 outbreak;9 a Guide on good practices for commercial establishments;10 Recommendations to Universities to adapt the academic year 2020-2021 for flexible attendance;11 a Technical document on COVID-19 management in primary and home care;12 Guidance on exceptional alternative measures in the face of a possible shortage of personal protective equipment;13 and Recommendations for mass events and activities in the context of the new COVID-19 norm.14

At the regional level, more than 150 soft law measures were adopted during the reference period, many of them formally published in the corresponding regional official journal (by contrast with the practice of the central government). Interestingly, they were adopted before, during and after the state of alarm-induced centralisation of public health competences. There are differences in how often the different Autonomous Communities

7 Spanish Ministries of Health and Work, ‘Procedimiento de actuación para los servicios de prevención de riesgos laborales frente a la exposición al SARS-CoV-2’ (8 June 2020), <https://www.mscbs.gob.es/profesionales/saludPublica/ccayes/alertasActual/nCov-China/documentos/PrevencionRRLL_COVID-19.pdf> last accessed on 25 September 2020.
8 Spanish Ministry of Health, ‘Buenas prácticas en los centros de trabajo: medidas para la prevención de contagios del COVID-19’ (11 April 2020), <https://www.mscbs.gob.es/gabinetePrensa/notaPrensa/pdf/GUIA110420172227802.pdf> last accessed on 25 September 2020.
9 Spanish Ministry of Home Affairs, ‘Documento técnico sobre recomendaciones en centros penitenciarios en relación al COVID-19’, no longer available at the Ministry’s website.
10 Spanish Ministry of Industry, Commerce and Tourism, ‘Guía de buenas prácticas para los establecimientos del sector comercial’ <https://www.mincotur.gob.es/es/gabinetePrensa/notasprensa/2020/documents/buenas%20pr%C3%A1cticas%20sector%20comercial.pdf> last accessed on 25 September 2020.
11 Spanish Ministry of Universities, ‘Recomendaciones a la comunidad universitaria para adaptar el curso universitario 2020-2021 a una presencialidad adaptada’ (31 August 2020) <https://www.csic.gob.es/centros/Universidades/Ficheros/Recomendaciones_del_Ministerio_de_Universidades_para_adaptar_curso.pdf> last accessed on 25 September 2020.
12 Spanish Ministry of Health, ‘Documento técnico sobre manejo en atención primaria y domiciliaria del COVID-19’ (18 June 2020) <https://www.mscbs.gob.es/profesionales/saludPublica/ccayes/alertasActual/nCov-China/documentos/ManejoPrimaria.pdf> last accessed on 25 September 2020.
13 Spanish Ministry of Health, ‘Medidas excepcionales ante la posible escasez de EPI: estrategias alternativas en situación de crisis’, no longer available at the Ministry’s website.
14 Spanish Ministry of Health, ‘Recomendaciones para eventos y actividades multitudinarias en el contexto de nueva normalidad por COVID-19 en España’ (16 September 2020) <https://www.mscbs.gob.es/profesionales/saludPublica/ccayes/alertasActual/nCov-China/documentos/COVID19_Recomendaciones_eventos_masivos.pdf> last accessed on 25 September 2020.
used soft law guidance to contain the spread of the virus or to fight its effects. For example, Andalusia, the Balearic Islands and Extremadura relied heavily on soft law instruments, while other regions as Madrid, Murcia and Cantabria issued fewer non-binding measures.  

Local authorities also adopted public health guidance, focusing mainly on measures to prevent the spread of the virus, especially after the lifting of the state of alarm in late June.

2. Purpose and rationale

This section analyses the functions performed by soft law measures adopted during the pandemic, as well as the potential reasons explaining its use by Spanish authorities to that end. Overall, the analysis of these measures demonstrates that non-binding public health guidance was mostly used in Spain for a normative purpose. Rather than constituting interpretative soft law aimed at clarifying how existing binding instruments should be applied, in nearly every case soft law was intended to guide and influence the conduct of either: (i) civil servants and other public employees providing essential public services; or (ii) citizens and businesses in general. The analysis further shows that often no clear distinction was drawn between soft law and hard law measures. Non-binding guidance sometimes reproduced (at least partially) the content of hard rules applicable and in force, or was found in informative documents that also reproduced or explained the content of binding provisions, without clearly distinguishing between them. Together with the lack of official publication of these non-binding instruments and their frequent updates, this results in a scenario of serious legal uncertainty.

The analysis also indicates that there was no relationship between the scope of competences of the different levels of Spanish administration and the intensity with which

15 During the first three months of the pandemic (March-April 2020), Andalusia adopted 11 soft law instruments with public health recommendations. The Balearic Islands and Extremadura adopted 13 and 10 instruments of this kind respectively. By contrast, Madrid used soft law in only 3 instruments, while Murcia and Cantabria did it only twice.

16 For example in the municipality of Madrid (‘Decree of 19 June 2020 on recommendations for the resumption of education services in nursery schools’)

<https://sede.madrid.es/FrameWork/generacionPDF/boam8667_928.pdf?numeroPublicacion=8667&idSecccion=f9df32c8b19c2710VgnVCM2000001f4a900aRCRD&nombreFichero=boam8667_928&cacheKey=48
&guid=65a7fb643e2c2710VgnVCM1000001d4a900aRCRDCsv=true> last accessed on 25 September 2020.

17 For concrete examples on this, see footnotes 7 to 16 above.

18 This is the case inter alia of the Spanish Ministry of Health’s Protocol for occupational risk prevention services against exposure to SARS-CoV-2.
they have used soft law instruments to respond to the public health crisis. In other words, soft law has not been used by Spanish administrations to enact measures in areas where they lack the competence to adopt binding rules. This is logical in view of the fact that, under Spanish law, public authorities are bound by the rules on distribution of competences not only when they adopt hard law measures, but also when they enact soft law. The constitutional principle of autonomy (Article 2 CE) prevents the State and the Autonomous Communities from adopting soft law measures where they lack the competence to approve hard law. This means that soft law cannot be used as a means to circumvent the constitutional distribution of competences between both levels of governance.\(^{19}\) Because of this, soft law instruments can be challenged before the Constitutional Court when they are allegedly passed in breach of competence rules.\(^{20}\)

Notwithstanding this, the proliferation of soft law standards in Spain during the COVID-19 pandemic can be partially explained by certain specific competence-related provisions of hard law. For example, Royal Decree 463/2020 of 14 March declaring the state of alarm explicitly sets out that Ministers acting as delegated authorities competent for the management of the crisis may issue as many “interpretative resolutions and instructions” as necessary to ensure the provision of all services required for the protection of the public. At the regional level, some laws empower the authorities of the relevant Autonomous Community to adopt binding measures restricting the free movement, activity and provision of services in certain territorial areas in case of a pandemic, providing that “where possible, the relevant decisions shall include recommendations on how to prevent the risk on contagion (…) measures of binding nature must be expressly identified”.\(^{21}\) At the local level, in some municipalities mayors are empowered only to issue recommendations for the isolation and quarantine of individuals, but not to adopt hard law measures to that effect.\(^{22}\)

The extensive use of non-binding instruments can also be partially explained from an organisational perspective. Articles 71 and 73 of Law 16/2003 of 28 May on the cohesion and quality of the National Health System set out that the Interterritorial Council of the

\(^{19}\) Daniel Sarmiento, ‘La autoridad del Derecho y la naturaleza del soft law’ (2006) 28 Cuadernos de Derecho Público 221, 226.

\(^{20}\) Spanish Constitutional Court, judgments 54/1990 of 28 March (ECLI:ES:TC:1990:54) and 57/1983 of 28 June (ECLI:ES:TC:1983:57).

\(^{21}\) See for example Article 55 of Catalonian Decree Law 27/2020 of 13 July.

\(^{22}\) Such as in Catalonia. See Articles 9(b) and 40(1) of Catalonian Law 4/1997 of 20 May and the Order of the Administrative Court No. 3 of Barcelona of 22 July 2020 (ECLI: ES:JCA:2020:36A).
National Health System (Consejo Interterritorial del Sistema Nacional de Salud), the main coordination and cooperation body of the Ministry of Health, together with the health authorities of the Autonomous Communities, functions mainly through the issuance of recommendations. Accordingly, during the early months of the COVID-19 pandemic, the Interterritorial Council enacted several recommendations concerning inter alia the preventive measures to be taken to avoid transmission, the diagnosis and treatment of infected persons, and measures for the gradual lifting of restrictive measures.\(^23\) The Autonomous Communities have generally followed these recommendations when adopting their own public health measures, whether binding or not.\(^24\) From this perspective, the use of coordinated soft law measures between the different levels of government has proven to be useful to ensure consistent management of a common problem, thereby increasing the effectiveness of administrative action (Article 103(1) CE).

Beyond these specific competences and organisational reasons, the approach of the Spanish authorities in their response to the crisis can also be explained by the procedural and functional dimensions of non-binding rules.

From a procedural perspective, soft law is highly flexible because no procedural rules exist for the adoption of such measures under Spanish law, by contrast with the highly formalised administrative procedures established for the enactment of hard law measures.\(^25\)

As already mentioned, the only formal requirement under Spanish law, applicable to “internal” soft law (namely hierarchical instructions and guidelines addressed to subordinate administrative bodies and units) is that of official publication, which is necessary for the relevant instrument to have legal effect against third parties (Article 6(2)

\(^{23}\) See for example the Recommendations for areas with significant transmission rates: ‘Recomendaciones para zonas que se encuentren en fase de transmisión comunitaria significativa’, published on the Website of the Spanish Ministry of Health on 9 March 2020 (no longer available online).

\(^{24}\) For example, the above-mentioned Interterritorial Council’s Recommendations for areas with significant transmission rates were expressly invoked by the Autonomous Community of Castile and Leon in the Order of 11 March adopting preventive measures and recommendations regarding COVID-19 (‘Orden SAN/295/2020, de 11 de marzo, por la que se adoptan medidas preventivas y recomendaciones en relación con el COVID-19 para toda la población y el territorio de la Comunidad de Castilla y León’, Regional Official Journal of 12 March 2020) and by Extremadura in the Resolution of 11 March 2020 adopting preventive measures and public health recommendations concerning COVID-19 (‘Resolución de 11 de marzo de 2020, del Vicepresidente Segundo y Consejero, por la que se adoptan medidas preventivas y recomendaciones de salud pública en Extremadura como consecuencia de la situación y evolución del coronavirus’, Regional Official Journal of 12 March 2020).

\(^{25}\) Daniel Sarmiento, supra note 18, pp. 221-266.
Therefore, the authority that approves soft law instruments enjoys a very broad margin to act from a procedural point of view, which gives it a high degree of agility in doing so. In the context of the COVID-19 pandemic this was confirmed by Article 4(3) of Royal Decree 463/2020 of 14 March declaring the state of alarm, which provided that interpretative instructions adopted by the competent Ministers would not require an administrative procedure to be carried out.

From a functional perspective, the recommendations issued by the Interterritorial Council of the National Health System clearly show how non-binding instruments can enhance the implementation of certain principles governing the relations between the different territorial levels of administration, such as the principles of cooperation and coordination (Articles 2 and 103(1) CE). This is of paramount importance in areas where competences are shared between the State and the Autonomous Communities, as is the case with public health policy.

Beyond these cooperative functions, the attractiveness of soft law also stems from the fact that it allows for a proportionate response in the context of scientific uncertainty, where imposing binding obligations in the absence of certainty about their potential benefits and consequences may be inappropriate. In fact, the use of soft law instruments is one of the typical strategies of the law to deal with situations of uncertainty, and the experience at the EU level shows that non-binding instruments tend to be used in order to face new or relatively unexplored legal challenges. In this regard, pandemic soft law has been a useful tool in Spain to experiment when devising immediate responses to the crisis and, over time, to assess whether they should be turned into binding measures. The use of facemasks, at first issued as a recommendation and finally converted into a legal obligation, is a clear example of this.

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26 In this respect, see the judgments of the Spanish Constitutional Court 26/1986 of 19 February (ECLI:ES:TC:1986:26) and 150/1994 of 23 May (ECLI:ES:TC:1994:150).
27 For a concrete example of this, see supra note 22 and 23.
28 Luis Arroyo and Jose María Rodríguez de Santiago, ‘European and domestic soft law within Spanish administrative law’ (2020) Preprints series of the Center for European Studies Luis Ortega Álvarez and the Jean Monnet Chair of European Administrative Law in Global Perspective 2.
29 Mercé Darnaculleta, José Esteve Pardo and Indra Speecker Gen. Döhman (eds), Estrategias del Derecho ante la incertidumbre y la globalización (Marcial Pons, Madrid, 2020); José Esteve Pardo, ‘La apelación a la ciencia en la crisis del COVID-19’ (2020) 2 Teoría y Método: Revista de Derecho Público 35.
30 Linda Senden, Soft Law in European Community Law (Hart Publishing, Groningen, 2004); Emilia Korkeaa-Aho, Adjudicating New Governance: Deliberative Democracy in the EU (Routledge, London, 2015); Fabien Terpan, ‘Soft Law in the European Union. The Changing Nature of EU Law’ (2015) 21 European Law Journal 68; Miriam Hartlapp and Andreas Hofmann, ‘The use of EU soft law by national courts and bureaucrats: how relation to hard law and policy maturity matter’ (2020) West European Politics 1.
example of this. Moreover, this approach allows the addressees of future hard law rules to become acquainted with their content and to be more ready and willing to abide by them when such rules become binding.

An additional factor that could explain the trend by Spanish administrations to complement binding measures with soft law guidance could be the intensity of the pandemic and the comparatively limited capacity of public authorities to enforce lockdowns and other restrictive measures on a large scale. This circumstance turns persuasion and nudging through non-binding standards into a crucial tool for achieving social distancing as well as other preventive measures.

III. Fundamental Rights and Constitutional Limits

1. Soft law and restrictions of rights

In view of the significance of soft law as a mechanism for Spanish authorities to manage the public health crisis, it is important to examine whether and how non-binding instruments have been used to restrict fundamental rights beyond what was foreseen in hard law rules. Three considerations must be made in this regard.

Firstly, COVID-19 soft law measures adopted by Spanish authorities do not directly restrict fundamental rights. Although some of these recommendations refer to activities covered by constitutional rights and freedoms (such as the freedom of movement or the right of assembly), their lack of binding force prevents them from curtailing such rights.

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31 At the beginning of the COVID-19 outbreak, the Spanish Government recommended the use of facemasks only for medical personnel. On 11 April 2020, the Spanish Government issued a general recommendation to all employed persons to wear facemasks at their workplaces (by means of the document ‘Buenas prácticas en los centros de trabajo: medidas para la prevención de contagios del COVID-19’, see supra note 7). On 20 May 2020, the use of facemasks became obligatory for everyone above 6 years of age on public streets, in open air spaces, and in any indoor space for public use or that is open to the public, provided that it is not possible to maintain an interpersonal safety distance of at least two metres (Order of the Ministry of Health SND/422/2020 of 19 May). After the expiration of the state of alarm on 21 June 2020, the Autonomous Communities issued recommendations to the public to wear facemasks whenever social distancing was not possible. During the month on July, and as the virus spread rate begun to rise, all the Autonomous Communities converted the wearing of facemasks in public outdoor and indoor spaces into an obligation (so for example in Madrid through Order of the Regional Health Ministry 920/2020 of 28 July).

32 Michael Greenstone and Vishan Nigam, ‘Does social distancing matter?’ (2020) Becker-Friedman Institute for Economics Working Paper 2020/26 <https://ssrn.com/abstract=3561244> last accessed on 25 September 2020; James H. Stock, “Data gaps and the policy response to the novel coronavirus” (2020) 3 COVID Economics.
beyond their ability to persuade the holders of such rights to voluntarily refrain from exercising them in full. As will be seen in Section IV below, so far no cases have been brought before the Spanish courts concerning sanctions or other means of administrative enforcement of non-binding public health guidance against individuals as such. Nor are there, to date, any court decisions requiring individuals to comply with soft law measures. Rather the contrary: as will be explained later, some of these guidelines have been used by courts to reinforce the degree of protection available under certain fundamental rights, especially the right to personal integrity enshrined in Article 15 CE.

Secondly, and notwithstanding the above, indirect restrictive effects of COVID-19 soft law measures cannot be entirely ruled out. Such effects may arise from the way in which soft law measures have been adopted and published. As already mentioned, “pandemic soft law” has been generally adopted in fairly deficient conditions of transparency and legal certainty, especially at the State level. Determining what preventive measures were in place at any given time and distinguishing between binding and non-binding measures has proven to be an overwhelming challenge. This may have led to the perception by the public that some COVID-19 recommendations were of a binding nature. It has also made it difficult to know their exact content at any given time and in any given part of the territory, within the framework of the continuous production and updating of standards by the three levels of Spanish administration (State, Autonomous Communities, and local authorities). The extent to which these uncertainties may have resulted in self-imposed restrictions of rights by individuals remains unknown.

Thirdly, indirect restrictive effects stem from the fact that all three levels of Spanish administration have used soft law instruments (either domestic, European or international) to justify the adoption of hard law measures restricting fundamental rights. In March 2020 alone, the State adopted nine hard law measures invoking international and EU soft law, and the Autonomous Communities adopted 30 binding measures expressly invoking national soft law. Although in most of these cases soft law standards were invoked in

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33 See inter alia Royal Decree-law 6/2020 of 10 March (State Official Journal of 11 March 2020), Order PCM/2015/2020 of 10 March (State Official Journal of 10 March 2020), Royal Decree-law 7/2020 of 12 March (State Official Journal of 13 March 2020), and Royal Decree-law 8/2020 of 17 March (State Official Journal of 18 March 2020).

34 See for example Aragon’s Order of 16 March 2020 on measures concerning public passenger transports (Regional Official Journal of 16 March 2020); Asturias’ Resolution of 11 March 2020 on preventive measures in social centres for the elderly (Regional Official Journal of 12 March 2020); Extremadura’s Resolution of 13 March 2020 on preventive measures in educational centres (Regional Official Journal of 14 March 2020); Madrid’s Resolution of 11 March 2020 on preventive measures in centers for minors and for mentally
rather vague terms, it seems clear that they have played a central – albeit informal – role in facilitating the adoption of certain restrictive binding decisions and rules. This might be explained by the fact that non-binding guidance can be understood as criteria reinforcing the reasonableness of binding restrictions and diminishing the political cost that certain unpopular measures can entail for the authority that adopts them.

Fourthly, a further kind of restrictive effects of these soft law instruments stems from the fact that in some cases they may have deployed a relevant degree of pressure for other public administrations when deciding whether and how to adopt hard law measures restricting fundamental rights. From this perspective, a regional or local administration might feel compelled to adopt certain binding restrictive measures aligning with State recommendations if it considers that the failure to do so may have a political cost or even be regarded as arbitrary. This hypothesis seems to be confirmed when examining certain hard law instruments adopted by the Autonomous Communities over the last few months. When invoking soft law issued by the State, these instruments use a language that suggests that such soft law measures are binding – stating for example that restrictions are adopted “in accordance with” or “in compliance with” State recommendations. Interestingly, these regional instruments refer to guidance issued by the Spanish Government, with only a few very generic allusions to international recommendations and an almost total absence of EU soft law, which points to a very limited degree of direct incorporation of EU recommendations at the regional level.

2. Constitutional and legal limits of soft law

A further question is whether COVID-19 recommendations have been adopted and implemented in accordance with the limits imposed on soft law by the Spanish legal order. In this regard, it must be noted that no specific constitutional or statutory framework exists

35 See for example the Preamble to Royal Decree 463/2020 of 14 March declaring the state of alarm.

36 So for example, in Asturias, Resolution of 11 March 2020 on measures concerning social centres for the elderly (Regional Official Journal of 12 March 2020); in the Balearic Islands, Decree-law 7/2020 of 8 May on urgent measures in the field of education (Regional Official Journal of 9 May 2020); or, in Navarra, Order 3/2020 of 13 March on preventive measures against the COVID-19 outbreak (Regional Official Journal of 13 March 2020).
concerning non-binding administrative measures. However, some general remarks can be made from the perspective of the limits applicable to any type of administrative action.

As mentioned in Section I above, the competence-related limits that Spanish law sets on binding administrative measures are also applicable to administrative action in the form of non-binding instruments. Public health guidance issued in response to the pandemic does not seem to raise relevant concerns in this regard. Overall, Spanish authorities have not used soft law instruments to overstep their competences, and to date no cases have been brought before the courts in this regard. Insofar as no direct restriction of fundamental rights arises from COVID-19 soft law, these measures also seem to be in line with the constitutional principles governing restrictive administrative measures.

However, the above mentioned shortcomings concerning the lack of official publication of many of these recommendations, together with the difficulty of distinguishing them from hard law measures in some cases, are problematic from the standpoint of the constitutional principles of legal certainty (Article 9(3) CE) and of transparency of administrative action as a requirement implicit in the principle of democracy (Article 1(1) CE).

IV. Effectiveness: compliance by the public and judicial enforcement

In containing the spread of the virus, COVID-19 soft law measures seem to have been moderately effective mechanisms in steering the conduct of the public in the midst of the pandemic (part 1 below). Furthermore, they have proved to be a useful tool for the judiciary when assessing, in different ways, whether public administrations (and, in some cases, private subjects) were adequately safeguarding the rights to health and personal integrity of individuals (part 2 below).

1. Compliance by the public

No comprehensive empirical assessment on compliance rates with non-binding COVID-19 standards has been published by the Spanish authorities thus far: not at the national or at the regional and local levels. Nor are there any published studies regarding the attitudes of the public towards social distancing, stay-at-home guidelines and other public health recommendations, in contrast to other countries.\(^{37}\) This is paradoxical given the extensive

\(^{37}\) For Italy, see Ruben Durante, Luigi Guiso and Giorgio Gulino, ‘Civic capital and social distancing: evidence from Italians’ response to COVID-19’ (16 April 2020) <https://voxeu.org/article/civic-capital-and-
use of soft law instruments as mechanisms to steer the conduct of the public during the crisis in Spain, which makes it all the more necessary to assess their effectiveness in order to accordingly adjust regulatory strategies to stop or to slow down the spread of the virus.

Up to now, the health guidance issued by the WHO, the EU, and (especially) the Spanish authorities seems to have been largely followed by the public. However, there is evidence that compliance rates were at times insufficient to contain the spread of the virus. For example, the Spanish (hard law) lockdown was partially triggered by an exodus of people living in the epicentres of the coronavirus crisis who returned to their family towns or to their vacation homes, despite recommendations not to move from the most affected cities.38 In turn, this exodus soared as rumours began circulating about an imminent nationwide lockdown to stop the coronavirus outbreak.39 Following the completion of the compulsory lockdown, the press reported that an increasing number of citizens and foreign tourists had begun to ignore the social distancing guidelines which remained in place or were newly adopted.40 This in turn has led to a progressive escalation in the transmission rate in some territories and to the adoption of new binding restrictive measures imposed by certain regional authorities.41 Although no official comprehensive data exists concerning

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38 See for example the news piece published in the newspaper: Francesc Bracero, ‘Miles de personas ignoran el confinamiento y salen de ocio o a segundas residencias’ La Vanguardia (Barcelona, 15 March 2020) [https://www.lavanguardia.com/vida/20200315/47414499175/confinamiento-coronavirus-covid-19-ocio-sierra-pirineo.html] last accessed on 25 September 2020.
39 Luis Orea and Inmaculada C. Álvarez, ‘How effective has the Spanish lockdown been to battle COVID-19? A spatial analysis of the coronavirus propagation across provinces’ (2020) FEDEA Working Paper 2020/03 [http://documentos.fedea.net/pubs/dt/2020/dt2020-03.pdf] last accessed on 25 September 2020.
40 See for example the news pieces: Crisis de Quiroga, ‘Los vecinos del sur de Madrid ignoran el confinamiento voluntario: ‘La gente se salta la cuarentena’ ABC (Madrid, 23 August 2020) [https://www.abc.es/espana/madrid/abci-vecinos-madrid-ignoran-confinamiento-voluntario-gente-salta-cuarentena-202008230009_noticia.html?ref=https%3A%2F%2Fwww.google.com%2F] last accessed on 25 September 2020.
41 As reported by: Idoia Ugarte, ‘Madrid’s new measures to control the expansion of the coronavirus, one by one’ El País (Madrid, 5 September 2020) [https://elpais.com/espana/madrid/2020-09-04/las-nuevas-medidas-de-madrid-para-controlar-la-expansion-del-coronavirus.html] last accessed on 25 September 2020.
the extent to which binding rules adopted during and after the lockdown had to be enforced by administrative authorities, the press reported that a part of the population was reluctant to comply with hard law rules imposing social distancing and other protective measures and that a number of administrative penalties had to be imposed by the police and other public officials. 

2. Enforcement by the judiciary

In addition to the rate of voluntary compliance by the public, another important element in measuring the effectiveness of COVID-19 soft law measures is the way in which they have been enforced by the courts. Research into the judicial decisions made by Spanish courts between 1 March and 31 July 2020 shows that the courts have enforced public health guidance by using it as an interpretative parameter of hard law rules. In this regard, three types of cases have been identified.

A first group of cases comprises those decisions by social and administrative courts obliging public administrations or private companies, as an interim measure, to provide civil servants, employees and other staff with adequate and sufficient personal protective equipment (PPE) and other health and hygiene safeguards for the exercise of their duties. Almost all of these measures were imposed inaudita parte in fast-track procedures for interim relief before the social courts. In most cases, PPE was requested by medical staff unions vis-à-vis public health services, although some of these interim measures were granted against the administration at the request of police unions, workers in penitentiary

42 See for example the news piece: Luis B. García, ‘España supera el millón de multas por violar las medidas del estado de alarma’ published in La Vanguardia (Barcelona, 20 May 2020)

43 In Spain, social courts are ordinary courts dealing with claims made related to labour law, both in individual and collective disputes, as well as social security claims or claims against the State when it bears liability under employment legislation.

44 Social Court No. 1 of Avila, Order of 26 March 2020 (ECLI:ES:JSO:2020:47A); Social Court No. 1 of Guadalajara, Order of 26 March 2020 (ECLI:ES:JSO:2020:5A); Social Court No. 1 of Palencia, Order of 27 March 2020 (ECLI:ES:JSO:2020:14A); Social Court No. 1 of Valladolid, Order of 27 March 2020 (ECLI:ES:JSO:2020:25A); Social Court No. 2 of Albacete, Order of 30 March 2020 (ECLI:ES:JSO:2020:4A).

45 High Court of Justice of the Basque Country (Social Chamber), Order of 23 April 2020 (ECLI:ES:TSJPV:2020:11A); Social Court No. 1 of Soria, Order of 8 April 2020 (ECLI:ES:JSO:2020:37A).
centres, or judicial staff. In certain cases, these urgent interim measures were imposed on private companies.

In the case of social courts, these resolutions describe the PPE and the safeguard measures to be provided to the applicants in accordance with the COVID-19 recommendations adopted by the WHO and by the Spanish Ministry of Health (in most cases, explicit mention is made of the Ministry’s Protocol for occupational risk prevention services against exposure to SARS-CoV-2). Sometimes, these cases broadly oblige employers to comply with “the protocols and guidelines adopted by the competent authorities” and provide their workers with antibody and/or diagnostic tests in the conditions determined thereon. Occasionally, interim relief was rejected on the basis that the applicants belonged to low-risk groups according to the recommendations of the Spanish Ministry of Health.

However, none of these judicial decisions is explicitly based on the soft law measures to which they refer, but rather on hard law provisions establishing in abstract terms the obligation for employers to provide their employees with adequate and safe labour conditions. These hard law provisions consist of Article 8 of Law 31/1995 on the prevention of labour risks and Article 8(1) of Royal Decree 664/1997 on the protection of workers from risks related to exposure to biological agents at work. This means that COVID-19 soft law measures have been used in these cases as interpretative parameters of the (abstract) hard law concepts of “adequate individual protective equipment”, “appropriate and specific surveillance of workers’ health in relation to risks from exposure to biological agents”, or “risk groups”.

In the case of administrative courts, soft law was occasionally invoked by the applicants in interim relief procedures in the context of actions against the administration’s inaction, namely against the failure to provide its medical personnel with sufficient and adequate PPE. In these cases, the applicants put forward the breach of Article 12(4) of Royal Decree

46 High Court of Justice of Catalonia (Social Chamber), Order of 8 April 2020 (ECLI:ES:TSJCAT:2020:149A).
47 Social Court No. 41 of Madrid, Order of 19 March 2020 (ECLI: ES:JSO:2020:3A).
48 High Court of Justice of the Basque Country (Social Chamber), Order of 24 April 2020 (ECLI: ES:TSJPV:2020:13A).
49 High Court of Justice of Madrid (Social Chamber), Order of 1 April 2020 (ECLI: ES:TSJM:2020:100A); High Court of Justice of Catalonia (Social Chamber), Order of 8 April 2020 (ECLI:ES:TSJCAT:2020:149A); High Court of Justice of the Basque Country (Social Chamber), Order of 24 April 2020 (ECLI: ES:TSJPV:2020:13A).
50 Social Court No. 8 of Santa Cruz de Tenerife, Order of 23 March 2020 (ECLI:ES:JSO:2020:2A).
463/2020 declaring the state of alarm (according to which the Ministry of Health shall guarantee the best possible distribution of all technical and personal resources to fight the crisis) and, as a result, the breach of the right to personal integrity under Article 15 CE. In these procedures, the Ministry argued that Article 12(4) did not require a specific level of performance and therefore no administrative inaction existed. According to the applicants, however, the level of performance should be determined by reference to the guidelines of the WHO and of the Ministry itself regarding the features of COVID-19 personal protective equipment. By contrast to the approach of social courts, the Administrative Chamber of the Spanish Supreme Court decided in these cases either that: (i) it was not possible to determine whether interim relief was necessary without first hearing the Administration’s arguments; or (ii) that interim relief inaudita parte should be granted, but only in abstract terms (ordering the Ministry of Health to take “all available measures to ensure the best possible distribution of protective equipment”), because an order to comply with soft law standards would have resolved the case on the substance and was therefore beyond the scope of the procedural steps taken for interim measures.

A second group of cases comprises decisions on the merits assessing whether public administrations or private companies breached workers’ labour rights and, in connection, fundamental rights to life and personal integrity (Article 15 CE) and to health (Article 43 CE) by failing to adopt sufficient protective measures against contagion in the workplace. All of these judgments were handed down by social courts. They apply substantive hard law rules, but use soft law measures as yardsticks to determine the level of protection required by such hard law provisions, some of them being of constitutional rank.

Some of these judgments were adopted in the context of actions lodged by workers’ unions through the preferential and summary procedure for fundamental rights protection before ordinary courts (Article 53(2) CE). In most of these cases, the applications were rejected on the ground that the respondent administration or company complied with the recommendations adopted by the competent health authorities. Other judgments of this kind were adopted in the context of collective redress procedures, in which workers’

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51 Spanish Supreme Court (Administrative Chamber), Order of 25 March 2020 (ECLI: ES:TS:2020:2418A).
52 Spanish Supreme Court (Administrative Chamber), Order of 20 April 2020 (ECLI: ES:TS:2020:2446A).
53 Preferential in the sense that the case is expedited; conducted and decided without waiting for the turn that would correspond to the case’s date of filing.
54 Social Court of Eibar, judgments of 28 April 2020 (ECLI: ES:JSO:2020:1847 and ECLI: ES:JSO:2020:1848); Social Court No 2 of San Sebastian, judgment of 24 April 2020 (ECLI: ES:JSO:2020:1651); Social Court No 2 of San Sebastian, judgment of 8 May 2020 (ECLI:ES:JSO:2020:1832).
unions claimed that their employers failed to stockpile adequate and sufficient protective equipment. Also here, the adoption of soft law measures against contagion by the respondent employer and its compliance with public health recommendations were considered enough to prove that a sufficient level of protection was provided and hence that no breach of the workers’ rights existed.  

However, in some of these cases, COVID-19 soft law measures were used to declare that public administrations or private employers breached their workers’ fundamental rights. This is particularly interesting because non-binding measures were used in these cases simultaneously in three ways.

- Firstly, all the recommendations and guidelines issued by the WHO and the Spanish authorities since January 2020 were interpreted as an element proving the foreseeability of what would become an urgent need for PPE from March 2020 onwards. From this follows the rejection of the respondent employer’s claim that the lack of such equipment during the most acute phase of the COVID-19 crisis was an unforeseeable and unavoidable force majeure event. Soft law guidelines had the effect of activating a duty to act with reinforced caution and foresight, and therefore employers should have stocked sufficient PPE in advance.

- Secondly, the lack of such equipment was deemed a breach of the employers’ obligations enshrined in hard law provisions, but also of the relevant guidelines and recommendations themselves, which are described as “rules”.

- Thirdly, the respondent employer was ordered to re-establish the infringed rights by providing its employees with the appropriate PPE, which in turn is described in accordance with the content of soft law measures.

Lastly, in a third group of cases, social courts expressly dismissed the normative character of COVID-19 soft law, holding that compliance with it was not enough to prove that the respondent employer provided its employees with a sufficient degree of protection. In these cases, it is stated that “the protocols produced by the Ministry of Health lack a normative character, amounting to mere recommendations and/or instructions”, as demonstrated inter alia by “the fact that they were not subject to official publication”, and that therefore “compliance with them can in no way exempt the employer from its

55 High Court of the Basque Country (Social Chamber), judgment of 1 July 2020 (ECLI: ES:TSJPV:2020:347).

56 Social Court of Teruel, judgment of 3 June 2020 (ECLI:ES:JSO:2020:1544).
responsibility in the area of occupational risk prevention”.

Paradoxically, these judgments conclude that employers (in the cases at hand, public administrations) breached their hard law obligations towards employees and thereby infringed the right to personal integrity in Article 15 CE precisely by failing to adopt “sufficient protective measures”. As in the first group of cases, this undefined legal concept is interpreted in the light of soft law measures and hence the respondent public administration was ordered to provide its workers with sufficient and adequate PPE as described in the ministerial protocols.

Overall, the identification and analysis of all three groups of cases shows that, thus far, COVID-19 soft law has predominantly been used by social courts – and to a much lesser extent by administrative courts – in order to make abstract and protective hard law rules (of fundamental rights) operational. This leads to the conclusion that non-binding public health guidance plays an important role in enhancing the effectiveness and the uniformity in the enforcement of binding rules, as well as to increase the effectiveness of judicial review.

In all these cases, soft law standards have been indirectly enforced against employers (either administrations or private companies), and not against individuals. Interestingly, no reasons whatsoever are given concerning the legal nature of these non-binding standards and why or how they are used to fill indeterminate hard law legal concepts. Another interesting finding is that public health guidance is treated in similar terms irrespective of its international or domestic origins, and that it is invoked and applied in rather vague terms, without clearly defining in most cases the concrete provisions of soft law measure applied.

IV. Conclusion

The analysis above shows that the COVID-19 pandemic constitutes an unprecedented testing ground from the point of view of the use of soft governance mechanisms in Spain. Soft law instruments have enabled Spanish administrations: to enhance coordination among themselves; to react quickly; to adapt their response to changing circumstances; to prepare the ground for subsequent binding law measures; and to adapt the intensity and content of their measures in light of scientific knowledge available at any given time. In the

57 High Court of Justice of the Basque Country (Social chamber), judgments of 3 June 2020 (ECLI: ES:TSJPV:2020:323 and ECLI:ES:TSJPV:2020:324).
58 Ibid.
59 Luis Arroyo and José María Rodríguez de Santiago, supra note 27.
judicial arena, the use of soft law instruments as elements to enhance the enforcement of binding rules seems to be a growing trend, particularly when it comes to cases before the social courts.

Although the constitutional and legal limits of soft law seem to have been respected in general terms, serious concerns arise as regards the transparency of administrative action and the principle of legal certainty. Moreover, the widespread use of soft law measures as criteria justifying the adoption of binding measures restricting fundamental rights may have consequences from the perspective of the democratic accountability and judicial control of executive action. Overall, this points to the need to reconsider the current system of constitutional and legal constraints attached to this form of regulation, for example by introducing some binding procedural rules relating to its adoption and its publication, as well as by clarifying its legal effects and the mechanism through which it can be enforced by courts.