Look like th' innocent flower, but be the serpent under 't?
"Robust" soft law provisions in European Union law

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Soft law has been pervarding the European Union legal order ever since its inception and in particular since the governance turn of the early 2000s. Despite its frequent practical effectiveness soft law is not considered to be "hard" law precisely because it lacks the quintessential legal binding force and, consequently, remains without the narrow confines of the law. In recent years, however, new forms of EU soft law have emerged which seriously challenge this finding.

Among them are comply-or-explain provisions which "pack up" seemingly soft recommendations with short deadlines for addressees, a high reason-giving burden to justify non-compliance with such "robust" soft law as well as reputational sanctions of "naming and shaming". In theory, such provisions might be considered to be mere optimization requirements ("*Optimierungsgebote*") similar to legal principles as foreseen by *Robert Alexy*. Material deviation would be allowed as long as the relevant principles and objectives are sufficiently taken into account. According to this narrative, which is present, at times, in some of the case-law of the EU courts, the interactions between the issuer and the addressee of the recommendation for compliance constitutes a deliberative process involving burdening levels of justification and exchanging information which enhances its overall legitimacy.

While the explanatory power of this narrative might be high with regard to traditional comply-or-explain provisions allowing for a genuine exchange of arguments, this paper aims at shattering such an approach with "robust" soft law as described above. Such "robust" comply-or-explain provisions amount, it might be argued, to not much less than binding regulatory powers. Quoting examples from the legislative packages introducing a partially centralized financial supervisory regime for the EU, which oxymoronically called for soft law regulatory powers "as binding as possible", this paper asks whether some of these robust soft law provisions are mere "constitutional workarounds", bringing about not only practical effects, but possibly having transgressed the border separating soft from hard law.