16 Snapshot of the EU Soft Law Research Landscape

Main Issues and Challenges

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Abstract
Inspired by research into international soft law norms, the last two decades have seen an intensified investigation of the non-binding measures of the EU. With the proliferation of such norms at EU level, attempts at a taxonomy of EU soft law have been undertaken. The present paper tries to map the current status of EU soft law research, highlighting possible directions for future research.

16.1 Introduction

The body of EU soft law is vast and hard to pin down. It is an amorphous, ever-growing class of norms, with fuzzy borders, existing in close connection with hard law measures.[1] While seemingly unobtrusive, EU soft law norms should not be underestimated: they may be 'harder' than expected. Accordingly, legal scholars have long discovered the field of EU soft law research,[2] focusing in particular, on non-binding acts burgeoning in certain policy

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1 David M. Trubek *et al.* "Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity', *University of Wisconsin Legal Studies*, Research Paper No. 1002, 2005, p. 4.

2 *See* in particular Gustaaf M. Borchardt & Karel C. Wellens, 'Soft Law in European Community Law', *European Law Review*, Vol. 14, 1989, pp. 267-321; Linda Senden, *Soft law in European Community Law*, Hart, 2004; Linda Senden, 'Soft Law and its Implications for Institutional Balance in the EC', *Utrecht Law Review*, Vol. 1, Issue 2, 2005, pp. 79-99; Jürgen Schwarze, 'Soft law im Recht der Europäischen Union', *Europarecht*, Vol. 1, Issue 1, pp. 3-18; Anne Peters, 'Soft Law as a New Mode of Governance', *in* Udo Diedrichs *et al.* (eds.), *The Dynamics of Change in EU Governance*, Edward Elgar, 2011, pp. 21-51; Fabien Terpan, 'Soft Law in the European Union – The Changing Nature of EU Law', *European Law Journal*, Vol. 21, Issue 1, 2015, pp. 68-96; Oana Ştefan, 'Soft Law and the Enforcement of EU Law', *in* András Jakab & Dimitry Kochenov, *The Enforcement of EU Law and Values: Ensuring MS's Compliance*, Oxford University Press, 2017, pp. 200-217.

fields, such as competition law, state aid and fiscal policy, or innovative new governance mechanisms, such as the Open Method of Coordination. Meanwhile, the use of soft law in other areas (*e.g.* media law, agricultural land law *etc.*) has yet to be charted. The study of EU soft law continues to be an intriguing subject, giving rise to, it seems just as many questions as answers.

In the following, based on the survey of the relevant scholarly literature and CJEU case-law, I attempt to briefly summarize the chief areas and the main challenges of soft law research. I depart from an analysis of scholarly attempts to draw a distinction between hard law and soft law and proceed with the classification of the different types of soft law sources. I recount the possible reasons for the legislator to take recourse to soft law, explore the normativity of these acts and their role in shaping national jurisprudence. Finally, I also formulate some suggestions for future research.

16.2 Overcoming the Illusion of the Great Divide: 'Hybridity' and the 'Spectrum of Normativity'

It is worth noting, that neither the founding treaties, nor soft measures themselves or the relevant judgments of the CJEU speak of 'soft law', in fact, it is a term that is hardly ever employed in EU documents.[3] Nevertheless, it is clear that there is a group of norms that stands in stark contrast with binding measures of EU law, with the aim of affecting change through persuasion, cooperation or good practices. While the difference between the two classes of norms clearly exists, the exact markers of the soft/hard law divide are difficult to determine. As Terpan stresses,

> "the difficulty with soft law is the very fluidity of the notion. Paradoxically, soft law is an oft-used concept, which is still given very different meanings as no consensus has emerged in scholarship."[4]

Seeking to grasp the concept of soft law, Trubek *et al.* observe that it is

3 Vassilios Christianos, 'Effectiveness and Efficiency Through the Court of Justice of the EU', *in* Julia Iliopoulos-Strangas & Jean-François Flauss(†) (eds.), *Das soft law der europäischen Organisationen – The Soft Law of European Organisations – La soft law des organisations européennes*, Societas Iuris Publici Europaei (Sipe), Nomos, 2012, p. 327.

4 Terpan 2013, p. 5.

> "a very general term, and has been used to refer to a variety of processes. The only common thread among these processes is that while all have normative content they are not formally binding."[5]

Perhaps the most widely accepted and cited definition of soft law is that developed by Snyder, who describes them as

> "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain – indirect – legal effects, and that are aimed at and may produce practical effects."[6]

Yet with the proliferation of EU measures, drawing the line between binding and non-binding norms becomes an ever so challenging endeavor, since it is grounded in an assumed binarity inherent in the distinction between 'hard law' and 'soft law'.[7] In fact, this binary approach is criticized insightfully by Armstrong:

> "if expressed simply as a dichotomy, then it is obvious that the hard/soft law distinction is highly reductive as a means of accommodating pluralization of governance forms. Indeed, it tends to treat any departure from an archetypal 'hard law' position as the beginning of soft law making the soft law characterization analytically all-encompassing."[8]

Several authors have pleaded for a more holistic view of norms, abandoning the traditional quest for separating soft law and hard law.

One way of overcoming the problematic binary approach to the soft/hard law conundrum is the practical approach of 'hybridity' as employed by the CJEU: acknowledging the close and interdependent nature of relevant binding and non-binding rules by applying

5 Trubek *et al.* 2005, p. 1.

6 Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', *The Modern Law Review*, Vol. 56, Issue 1, 1993, p. 32; *see* also Linda Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?', *Electronic Journal of Comparative Law*, Vol. 9, Issue 1, 2005, p. 22; Linda Senden, *Soft Law in European Community Law*, Hart Publishing, 2004, p. 112.

7 Thomas M. J. Möllers, 'Sources of Law in European Securities Regulation – Effective Regulation, Soft Law and Legal Taxonomy from Lamfalussy to de Larosiere', *European Business Organization Law Review*, Vol. 11, Issue 3, 2010, p. 388.

8 Kenneth A. Armstrong, 'The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance', *Current Legal Problems*, Vol. 64, Issue 1, 2011, p. 206.

them with due consideration to each other.[9] Hybridity is thus an approach which shifts the focus from differentiating between soft law and hard law, by acknowledging the reality that several policy fields are operated through a mesh of binding and non-binding rules, mutually supplementing, clarifying, detailing the requirements laid down.[10]

While hybridity may divert the attention from the differences between soft law and hard law, it is nevertheless an issue of application, and does little to integrate hard law and soft law on a conceptual level. Instead, this is achieved by efforts attempting to describe normativity as a spectrum, ranging from "non-legal positions to legally binding and judicially controlled commitments."[11]

Terpan attempts to navigate this spectrum by identifying soft and/or hard elements of a norm along the lines of source, content and enforcement, proposing that the category of hard law is conditional upon the 'hardness' both content and enforcement.[12] Terpan explains that the spectrum approach helps locate soft law between non-law and enforceable commitments, while also highlighting processes of transformation into hard and soft law, respectively.[13] These insights fit well with Peters' observation that

> "law can have a variety of legal impacts and effects, direct and indirect ones, stronger and weaker ones. To accept graduated normativity means to assume that law can be harder or softer, and that there is a continuum between hard and soft (and possibly other qualities of the law)."[14]

However, Peters further develops this approach with Pagotto, abandoning the idea of a strict division between hard law and soft law, submitting that "soft law is in the penumbra of law. […] [T]here is no bright line between hard and soft law. Legal texts can be harder or softer."[15]

They contend, that a 'prototype theory' of soft law is most workable: while a "fixed set of necessary and sufficient conditions" of soft law cannot be determined, in practice,

9 Tamara Hervey, 'Adjudicating in the Shadow of the Informal Settlement? The Court of Justice of the European Union, 'New Governance' and Social Welfare', *Current Legal Problems*, Vol. 63, Issue 1, 2010, p. 146.

10 Trubek *et al.* 2005, p. 33.

11 Terpan 2013, p. 2.

12 Id. p. 9. These 'distinguishing paramaters' are what Peters and Pagotto refer to the "intention to be legally bound" and the 'sanction potential' of norms. *See* Anne Peters & Isabella Pagotto, *Soft Law as a New Mode of Governance: A Legal Perspective*, New Modes of Governance Project, Project No. CIT1-CT-2004-506392, 2006, p. 10.

13 Terpan 2013, p. 2.

14 Anne Peters, 'Typology, Utility and Legitimacy of European Soft Law', *in* Astrid Epiney *et al.* (eds.), *Die Herausforderung von Grenzen. Festschrift für Roland Bieber*, Nomos, Baden-Baden, 2007, p. 410.

15 Peters & Pagotto 2006, p. 12.

lawyers will be able to identify soft law with the premise 'I know it when I see it', accepting that the boundaries between the concepts of soft law and hard law will remain blurry.[16]

Apparently, all-encompassing definitions and approaches seeking to capture the common denominator of the vast array of phenomena characteristic of soft law will only yield a bland concept and will invariably disappoint.[17] Hence, efforts to categorize and describe the different types of soft law measures to come closer to the precise forms in which soft law manifests itself, have also taken off.

16.3 The Categorization Conundrum: Attempts to Classify EU Soft Law Measures

Soft law measures are so varied and diverse in their form and nature that their classification is already a challenge. In fact, these sources may be categorized along various different lines.

16.3.1 Formal and Informal Soft Law Measures

Perhaps the most obvious differentia specifica is whether the given soft law measure is Treaty-based or not. Namely, beyond the restricted category of soft law acts foreseen in the Treaty [Article 288 TFEU (ex-Article 249 EC)],[18] that is, opinions and recommendations (formal measures), a burgeoning of non-Treaty based measures including guidelines,[19] communications, notices, green papers and white papers, comfort letters *etc.* (informal measures) may be discerned. The rise of informal measures is explained by Senden and Prechal as follows:

16 Id.

17 Peters and Pagotto are acutely aware of the problems with both the binary and the spectrum-based view, stressing: "The first danger is that of black-and-white painting, of construing dichotomies, in short: the danger of over-simplification. The contrary danger is that of losing oneself in endless subtle distinctions and overly fine shades and graduations. Overs-simplification and dichotomic arguing may prevent lawyers from adequately capturing the much more complex reality and may thereby contribute to unsound legal analysis and unfair results. Over-subtleties, on the other hand, may hinder the formulation of general concepts, leads lawyers to produce single-case solutions and forecloses generalizable and workable legal constructs." Id. p. 7.

18 Article 288 (ex-Article 249 TEC): "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendation and opinions. […] Recommendation and opinions shall have no binding force."

19 *'Akte sui generis'*, Gunnar Pampel, 'Europäisches Wettbewerbsrecht. Rechtsnatur und Rechtswirkungen von Mitteilungen der Kommission im europäischen Wettbewerbsrecht', *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 16, Issue 1, 2005, pp. 11-12.

> "[T]he instruments listed in Article 249 EC may be particularly inappropriate or disproportionate for the adoption of certain measures. […] It would seem that, even from the very beginning, the practice has made it clear that there is a need and desire for instruments other than those listed in Article 249 EC. However, the range of instruments, as provided for in this Article, has never been adapted to the changed circumstances and to the new needs resulting from the expanded sphere of Community action."[20]

This has consequences for the adoption of such measures: while the Treaty stipulates rules for the adoption of formal soft law (*e.g.* Article 292 TFEU), informal acts are captured under more general legal bases empowering Union institutions to take appropriate measures (*e.g.* Article 108 TFEU) or are left completely unregulated.

16.3.2 Differentiation by Source

EU soft law measures may be categorized on the basis of their source, resulting in a distinction between measures adopted by Union institutions or bodies (ranging from formal, Treaty-based acts to informal measures adopted by EU agencies, documents issued jointly by Member States (*e.g.* Charter of Fundamental Rights),[21] self-regulation and co-regulation instruments of stakeholders [*e.g.* European Advertising Standards Alliance (ESEA) self-regulatory body's work],[22] cooperation-based soft mechanisms operated by Member States and the institutions (*e.g.* OMC).[23]

16.3.3 Distinction by Function

Several authors distinguish between soft law instruments based on their function: accordingly, measures may serve preparatory and informative nature (pre-law), interpretative and decisional (law-plus), steering (para-law) functions.[24]

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20 Linda Senden & Sacha Prechal, 'Differentiation in and Through Community Soft Law', *in* Bruno de Witte *et al.* (eds.), *The Many Faces of Differentiation in EU Law*, Intersentia 2001, p. 186. *See* also Terpan 2013, pp. 19-26; Håkon A. Cosma & Richard Whish, 'Soft Law in the Field of EU Competition Policy', *European Business Law Review*, Vol. 14, Issue 1, 2013, p. 46.

21 Peters & Pagotto 2016, p. 18.

22 Senden traces back the origins of the self- and co-regulatory efforts on Community level to the White Paper for the Internal Market and the SEA, where "reflections on the existing body of European legislation and new legislation to be adopted and the burden it imposes on national authorities and companies have led to deregulatory and self-regulatory tendencies also at the EC level." Senden 2005, p. 4.

23 Peters & Pagotto 2016, pp. 17-23.

24 *See* in detail Senden 2004, p. 457. *et seq;* Peters & Pagotto 2016, p. 23.

i. The pre-law function may be understood as the preparatory role of soft law norms. In this understanding, soft law precedes hard law with the potential of achieving convergence of Member State laws and enabling also the gathering of data on the effect of national legislation implementing such soft law. Lack of transposition or information gleaned from the impact assessment made possible by such preparatory norms may constitute the grounds for (and as such, the first step towards) the adoption of hard law in the very same field (*e.g.* the General Data Protection Regulation, informed by a number of working group recommendations, opinion *etc.*).[25] Peters and Pagotto refer to this as *'ultra vires'* soft law, since it "pave[s] the way to a formal extension of the competences of the organization which will be effected by a revision of the founding treaty."[26] But the informative function of soft law is also important: it represents the implicit consensus of institutions (*e.g.* declarations, gentleman's agreements *etc.*) or the reading of a single institution (*e.g.* opinion) on a given subject.[27]
ii. The law-plus function of soft law harks back to the empirical evidence of hybridity: "soft law and hard law increasingly intermesh and add up to more or less coherent normative regimes", with soft law providing an orienting, interpretative function to promote compliance (*e.g.* notices, guidelines, recommendations *etc.*).[28]
iii. The para-law role of soft law is to provide a meaningful alternative to hard law, with a steering function even in situations where the adoption of hard law instruments is impossible or unfeasible.[29] To distinguish between instances of hybridity and the para-law function of soft law, as a rule of thumb we may consider the proliferation of soft law in the policy field under scrutiny. In fact, where the proliferation of soft law norms is considered to be low (*e.g.* consumer protection, development policy) soft law much rather serves to supplement hard law regulation. Meanwhile, soft law appears as an alternative to hard law in areas (*e.g.* fiscal policy, economic governance, education and culture *etc.*) dominated by new modes of soft governance[30] for lack of supranational competence or the political will to harmonize.

While these efforts at taxonomy are sufficiently broad, they help bring the observer closer to understanding the specific nature and purpose of the different forms of soft law. However, the diversity inherent in the category of soft norms not only renders the concep-

25 Ulrika Mörth, *Soft Law and New Modes of EU Governance – A Democratic Problem?*, Paper presented in Darmstadt, November 2005, pp. 16. *et seq.*
26 Peters & Pagotto 2016, p. 23.
27 Id.
28 Id.
29 Id. pp. 23-24.
30 Terpan 2013, p. 31.

tualization of soft law problematic, but also excludes the formulation of sweeping notions regarding the practical effects and bindingness of these measures.

16.4 How Binding Are Non-Binding Measures of the EU?

As the CJEU pointed out in the landmark case *Grimaldi*, the fact that soft measures are not intended to produce binding effects, does not mean that they have absolutely no legal effect.[31] In fact, non-binding norms may well have 'practical effects', reflecting "the degree to which rules are actually implemented domestically or to which states comply with them."[32] Meanwhile, bindingness indicates the obligation of national courts, legislators and authorities associated with the interpretation, application or transposition of EU soft law.[33] To complicate matters, in line with the spectrum approach there is a discernible graduation of normativity within the realm of soft law measures. This results in a spectrum of Member States obligations ranging from room for a total disregard for certain soft instruments, to the obligation of due consideration or even the binding implementation of provisions laid down in European soft law measures.

16.4.1 'Harmonizing' Soft Law – Duty to Consider

Formal recommendations are measures proposing different actions to be taken by the Member States, effectively seeking to harmonize national law on a non-binding basis. Based on the *Grimaldi* case-law of the CJEU national courts are bound to take recommendations (*i.e.* formal soft law) into consideration in order to decide disputes submitted to them.[34] The breadth of the obligation was not detailed by the Court, yet commentators were quick to declare that it could not amount to an obligation of consistent interpretation.[35] In fact, nowhere does the CJEU require the national court (or any other Member State

31 Judgment of 13 December 1989, *Case C-322/88, Salvatore Grimaldi v. Fonds des maladies professionnelles (Grimaldi)*, ECLI:EU:C:1989:646, paras. 16 and 18.

32 Kenneth W. Abbott *et al.* 'The Concept of Legalization', *International Organization*, Vol. 54, 2000, p. 18.

33 Petra Lea Láncos, 'A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?', *European Public Law*, Vol. 24, Issue 4, 2018, pp. 755-784.

34 *Case C-322/88, Grimaldi*, para. 18.

35 Senden 2004, p. 473. "It was argued that the reading of this judgment should be less strict, and that national courts would be required to take soft law into consideration only when it helps to clarify the meaning of Community or national law." Ştefan 2017, p. 213; *see* also Albrecht von Graevenitz, 'Mitteilungen, Leitlinien, Stellungnahmen – Soft law der EU mit Lenkungswirkung' *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 24, Issue 5, 2013, pp. 169 and 173. By contrast, Christianos argues that there is a duty of consistent interpretation, *see* Christianos 2012, p. 327.

authority or body)[36] to the full extent of its discretion, to interpret national law in accordance with Community (soft) law. Instead, it seems to foresee "a duty of effort",[37] that is, the consideration of recommendations to a minimum standard where "only non-consideration is disallowed."[38]

The CJEU seems to foresee a similar obligation in respect of certain informal soft law measures, such as leniency programs under competition law, which are also designed to indirectly harmonize national laws, with no consent on the side of the Member State. In this case the principles of sincere cooperation and effectiveness require, that Member States promote all interests and rights guaranteed under European law through balancing the same on a case-by-case basis. As a result, a duty of the national court or authority very similar to the one expressed in *Grimaldi* arises: the duty to weigh interests.[39]

16.4.2 'True' Soft Law – No Duty Whatsoever

Within the varied category of EU soft law there is actually a sub-group of norms that is truly non-binding and without any practical effects: these are the so-called informative informal measures.[40] This sub-group includes *de minimis* notices and communications which only bind the Commission adopting them,[41] for reasons of legitimate expectations; 'comfort letters' of individual application, which are not even binding upon the issuing

36 As far as the addressees are concerned, as Sarmiento points out, although the CJEU referred to the obligations of national courts to take such measures into consideration, "nothing stops it from being extended to national administrations as well," framing the obligation of consideration to be of a more general scope. This may be due to the fact that while Member States are generally bound by the same obligations under EU law, there is great diversity among them with respect to the distribution of competencies between the judiciary and administrative bodies. The principle of loyalty should therefore require that national bodies be bound by the same obligations of interpretation and application of EU law, no matter their status as court or administrative authority – Daniel Sarmiento, 'European Soft Law and National Authorities: Incorporation, Enforcement and Interference', *in* Iliopoulos-Strangas & Flauss 2012, p. 267; *Cf.* Judgment of 20 January 2016, *Case C-428/14, DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v. Autorità Garante della Concorrenza e del mercato (DHL)*, ECLI:EU:C:2016:27, para. 41.

37 Senden 2004, p. 474.

38 Kai Krieger, *Die gemeinschaftsrechtskonforme Auslegung des deutschen Rechts*, Lit Verlag 2005, p. 97.

39 *Judgment of 14 June 2011, Case C-360/09, Pfleiderer AG v. Bundeskartellamt (Pfleiderer)*, ECLI:EU:C:2011:389.

40 Senden & Prechal 2001, p. 188; Cosma & Whish 2013, pp. 47-48.

41 *Judgment of 13 December 2012, Case C-226/11, Expedia Inc. v. Autorité de la concurrence and Others (Expedia)*, ECLI:EU:C:2012:795. Senden and Prechal classify de minimis notices as decisional instruments, which "indicate in what way a Community institution will apply Community law provision in individual cases where the institution has discretion. In other words, the decisional instruments are instruments structuring the use of discretionary powers, both for the civil servants within the institutions and for the outside world, which can, on this basis, anticipate the application of Community law in concrete cases." Senden & Prechal 2001, p. 190; Judgment of 19 July 2016, *Case C-526/14, Tadej Kotnik and Others v. Državni zbor Republike Slovenije (Kotnik and Others)*, ECLI:EU:C:2016:570.

Commission;[42] and leniency notices, which in no way change the fact that national procedural autonomy prevails.[43]

From the perspective of the Member States these measures foresee no obligations in substance and the element of consent to be bound is also lacking. This explains the fact that such measures confer no duties whatsoever on the Member States.[44] It is worth noting, that the CJEU additionally recalled the fact that these measures had only been printed in the 'C' series of the Official Journal for information purposes.[45] The CJEU understood this as a further indication of the soft law nature of the acts.

16.4.3 Hardening Soft Law – Fully Binding

Soft law adopted as an appropriate measure foreseen in the Treaty and developed in cooperation between the Commission and the Member States may become binding through the participation and consent of the Member States.

For example, so-called Commission disciplines in the field of state aid policy are elaborated in agreement with the Member States,[46] and as a consequence, they have binding

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42 *Judgment of 10 July 1980, Case C-37/79, Anne Marty SA v. Estée Lauder SA. (Anne Marty v Lauder)*, ECLI:EU:C:1980:190; Judgment of 10 July 1980, *Joined Cases 253/78 and 3/79, Procureur de la République and Others v. Bruno Giry and Guerlain SA and Others (Giry and Guerlain*), ECLI:EU:C:1980:188.

43 *Case C-428/14, DHL*. DHL had summited a leniency application to the European Commission for immunity from fines concerning cartel infringements in the international freight sector, while also providing some information on infringements in the Italian road freight forwarding business, from which the Commission decided only to pursue infringements related to international air freight forwarding services. At the same time, the Commission left it up to national competition authorities to pursue infringements concerning maritime and road freight services (para. 17.). Although DHL submitted a summary application for immunity under the Italian national leniency program, Schenker was considered to be the first company to have applied for and therefore granted immunity from fines in Italy for the cartel in the road freight forwarding sector (paras. 18-20 and 23-24.). DHL sought the annulment of the AGCM's decision and on appeal the *Consiglio di Stato* (Council of State) turned to the CJEU for a preliminary ruling, asking, among others, whether instruments adopted in the context of the European Competition Network are binding upon national competition authorities.

44 Geiger claims that such Commission communications and guidelines are 'factually binding', the principle of loyalty would deter national courts and authorities to depart from such measures for fear of an impending infringement procedure. This approach has not been confirmed by the CJEU. Andreas Geiger, 'Die neuen Leitlinien der EG-Kommission zur Anwendbarkeit von Art. 81 EG auf Vereinbarungen über horizontale Zusammenarbeit', *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 11, Issue 11, 2000, p. 325.

45 *Case C-428/14, DHL*, paras. 32-35. and 42; Judgment of 1 July 2010, *Case C-99/09, Polska Telefonia Cyfrowa sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej* (*Polska Telefonia*), ECLI:EU:C:2010:395, para. 35; *Case C-226/11, Expedia*, paras. 24 and 29-30.

46 Judgment of 24 March 1993, *Case C-313/90, Comité International de la Rayonne et des Fibres Synthétiques and Others v. Commission of the European Communities (CIRFS)*, ECLI:EU:C:1993:111, paras. 1 and 3. The International Rayon and Synthetic Fibers Committee (CIRFS) sought the annulment of the Commission's decision stating that there was no obligation for the prior notification of state aid granted to Allied Signal by the French government. In its action, CIRFS referred to a letter sent by the Commission on 19 July 1977 to the Member States headed 'Aid to the synthetic fiber industry', which read that due to the excess capacity

effect.[47] Accordingly, in the CIRFS case, a Commission discipline otherwise classified as an informal soft law measure, was found to be fully binding, both upon the issuing institution and the addressee Member States. Hence, not only the Commission, but the Member States implementing the discipline were held to be fully liable for breaching the principles of equal treatment and legitimate expectations.

In *IJssel-Vliet*[48] the CJEU held that appropriate measures[49] of the Commission, the so-called guidelines on national aid schemes were binding. According to the CJEU, the elaboration of such guidelines involved "an obligation of regular, periodic cooperation on the part of the Commission and the Member States",[50] where national observations were taken into account.[51] This periodic cooperation seems to amount to Member State consent in the understanding of the CJEU, giving rise to the bindingness of this otherwise soft measure. In this respect, it is worth mentioning that "the general duty of sincere cooperation as established in Article 10 EC does not provide sufficient ground for the recognition of legally binding force of 'agreed' acts",[52] and Member States are under no obligation to

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of the synthetic fiber industry in the EEC, Member States should desist from granting aid to the industry, and should notify the Commission beforehand of any aid Member States proposed granting to the sector. The discipline laid down in the letter was agreed to by all Member States. In its 1978 memorandum, the Commission defined the scope of the discipline as one that 'covered acrylic, polyester and polyamide fibers for textile or industrial use', while it continued to extend the temporal scope of the discipline every two years. When CIRFS and AKZO (a party that later withdrew from the proceedings) learned that the French government decided to award the manufacturer Allied Signal a regional planning grant for setting up a factory for the production of polyester fibers for industrial application to supply tire manufacturers, they wrote to the Commission and the Commission's Vice-President, Sir Leon Brittan respectively, to request their intervention with French authorities and ask for any comments. Both the Commission and the Vice-President of the Commission sent their replies, on the one hand explaining that the grant was awarded before the discipline was broadened to cover industrial fibers and therefore no obligation to give prior notification of the grant to the Commission existed, while Sir Leon Brittan noted that although the discipline was generally worded, the Commission interpreted it in a narrow sense as applying only to textile fibers.

47 *Case C-313/90, CIRFS*, summary of judgment, para. 4.

48 The judgment was rendered upon the reference for a preliminary ruling submitted by the Dutch Council of State in relation to an action brought by the Dutch company IJssel-Vliet contesting the refusal of its application by the Minister for Economic Affairs of the Netherlands for a subsidy for the construction of a fishing vessel. The Minister for Economic Affairs rejected the application since it failed to comply with the Netherlands national aid scheme approved by the Commission and based on the Guidelines of the Commission on the application of aid schemes and the 1987 multiannual guidance program for the fishing fleet, which did not authorize the grant of national aids for the construction of fishing vessels intended for the Community fleet. Judgment of 15 October 1996, *Case C-311/94, IJssel-Vliet Combinatie BV v. Minister van Economische Zaken (IJssel-Vliet)*, ECLI:EU:C:1996:383, paras. 1-2, 13-15, 17 and 20.

49 "Apparently, the Court is of the opinion that aid codes, disciplines and the like which the Commission adopts on the basis of this provision constitute such 'appropriate measures'. In particular, these rules must have been adopted on the basis of Article 93(1), providing for a specific duty of cooperation between the Commission and the Member States." Senden 2004, p. 279.

50 *Case C-311/94, IJssel-Vliet*, para. 36. *See* also Ştefan 2016, p. 11. *But cf.* Judgment of 22 October 1996, *Case T-330/94, Salt Union Ltd v. Commission of the European Communities (Salt Union)*, ECLI:EU:T:1996:154.

51 *Case C-311/94, IJssel-Vliet*, paras. 37-39.

52 Senden 2004, p. 465.

agree to such measures of the Commission, "only if they choose to do so, are they bound by them."[53] However, when they do, the substance of the measure and Member State consent has a transformative effect on informal measures which would otherwise be destined to qualify as soft law. In fact, such informal have 'hardened' to become fully mandatory and we are actually faced with a misfit between the choice of a soft legal instrument and the true legislative intent of producing binding effects.

16.5 DLRs: A Spectrum between Recommendations and Directives?

As indicated above, soft law acts may be in fact be binding "despite [their] soft outward appearance", for example, "on the basis of their substance or as a result of an agreement between the author of an act and its addressees."[54] In such cases there is "an intention of binding force and what is at issue then is not true soft law, but hard law in the clothing of a soft law instrument."[55] The CJEU has devised a test for determining whether the measure under scrutiny is in fact hard law,[56] foreseeing an assessment of the content, context, wording and intention of the measure to ascertain whether it is designed to produce legal effects as a binding measure.

In the most recent attempt to reveal that a recommendation was in fact a hidden directive, Belgium sought the annulment of the Commission's recommendation on the organization of gambling.[57] The measure is what I have termed a directive-like recommendation (DLR): a specific version of Commission recommendations carrying a clause on implementation, deadlines and Member State reporting, highly reminiscent of directives.[58] Although it was adopted in the seemingly unthreatening form of a soft law measure, the Belgian government understood the gambling recommendation as a move to circumvent the Council, where the Commission would have otherwise expected some push-back. Belgium also feared that the Recommendation would constitute a first step in the process of harmonizing gambling regulation across Europe.

Belgium filed its action for annulment of the Recommendation in October 2014 at the General Court. Among others, Belgium pleaded the recommendation is in fact a binding measure in disguise, giving rise to obligations on the side of the Member States. The Commission maintained throughout that the recommendation has no binding force, and

53 Id. p. 279.
54 Senden 2004, p. 289. For an opposing view, *cf.* Peters 2007, pp. 411-412.
55 Senden 2004, pp. 462-463; *see* the cases *CIRFS, IJssel-Vliet* and *Germany v. Commission* below.
56 *Case C-322/88, Grimaldi*, paras. 14-16.
57 Commission Recommendation 2014/478/EU of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online.
58 Commission Recommendation 2014/478/EU, Section XII.

being a measure with no legal effect, it cannot be challenged. While the General Court confirmed, that in line with the *Grimaldi* case-law "the mere fact that the contested recommendation is formally designated as a recommendation […] cannot automatically rule out its classification as a challengeable act"[59] it underlined that the measure in question was "worded mainly in non-mandatory terms."[60] Following a comparison of the French, Danish, German, Estonian, Spanish, Italian, Dutch, Polish, Swedish and English language versions of the recommendation, it came to the conclusion that the measure was clearly not meant to be binding.[61]

Turning to the content, context and intention of the Recommendation, the General Court recalled that heed must be paid to the "purpose and general scheme of the rules of which it forms part."[62] In fact, several provisions of the Recommendation clarify, that the measure is not meant to interfere with national regulatory prerogatives in the area of gambling, recalling that in the absence of harmonization, Member States are free to design their own policies for the organization of gambling and the protection of consumers.[63] The General Court specifically elaborated on the special directive-like Section of the measure, noting that "despite the binding wording of [the relevant paragraphs] of the recommendation in certain language versions, the recommendation does not impose any obligation" on the Member States to effectively apply the principles set out in the act.[64] Hence, the General Court concluded that since the Recommendation "does not have and is not intended to have binding legal effects", it cannot be challenged in an action for annulment, and dismissed the action as inadmissible.[65] Belgium then appealed to the Court, only to have the General Court's order confirmed.

Since DLRs are considered to be non-binding and share the same fate as any other recommendation, there is no spectrum between recommendations and directives. Since the CJEU considers them to be simple recommendations, they do not seem to have any added value. Therefore, the question arises, why does the Commission regularly take recourse to this specific type of measure in various policy-fields? Is it a strategy to achieve directive-like effects through the compliance-pull of soft law while side-stepping the co-legislators?

59 Order of the General Court (Second Chamber) of 27 October 2015, *Case T-721/14, Kingdom of Belgium v. European Commission*, ECLI:EU:T:2015:829, para. 20.
60 Id.
61 Id. para. 72.
62 Id. para. 28.
63 Id. paras. 29-31.
64 Id. paras. 33-35.
65 Id. para. 37.

16.6 Going Soft: Strategies for Adopting Non-Binding Norms

As Guzman and Meyer note, "the central mystery of soft law is the fact that states opt for something more than a complete absence of commitment, but something less than full-blown […] law."[66] Why then, will the Commission or the co-legislators opt for the regulatory form of soft law? Scholarly literature has suggested several reasons for the choice of soft measures: accommodating the hard realities of policy assignment, institutional constraints and the need for inclusive, fast and flexible decision-making.

Adopting soft law may actually be a foregone conclusion and mandated by the Treaty legal basis itself, for example in the case of education policy measures enacted under Article 165(4) TFEU.[67] This reflects certain prior constitutional choices of the masters of the treaties, that is, the Member States, as enshrined in the distribution of competences.[68] In a Union "(still) marked by diversity in demands and national preferences, plus the (still) low mobility of families" hard law will be the exception, applied to policies "that have a clear supranational nature."[69] Only in areas of a 'clear supranational nature' where strong convergence is foreseen will the Union hold exclusive competences and/or the powers to enact hard law, for the harmonization or unification of national laws.

Based on the above, the burgeoning of soft law in policy fields pertaining to the exclusive competence of the EU may come as a surprise. Yet the high number of soft norm in the area of *e.g.* customs may be explained by the regulator's quest for greater flexibility: the level of detail necessary in this area, the need for rapid amendments and the imperative of taking "the latest developments of technology, safety and security" into account all call for the employment of soft measures.[70] Meanwhile, the desire to evade structural constraints such as tedious and lengthy legislative procedures producing hard law, will also prompt decision-makers to find more flexible solutions with the help of soft law. Finally, the Commission may resort to soft tools out of

> "a necessity, because of lacking legislative powers of the EU or because the Union legislator does not manage to adopt legislation or only to a (too) limited

66 Andrew T. Guzman & Timothy L. Meyer, 'Explaining Soft law' *Berkeley Program in Law and Economics, Working Paper Series*, 2009, p. 10.

67 *See* Senden 2005, pp. 91 and 93; Petra Lea Láncos, 'Soft Structure vs. Soft Measure: Fleshing Out the Tension in EU Education Policy', *Legal Issues of Economic Integration*, Vol. 45, Issue 3, 2018, pp. 258. *et seq*.

68 *Cf.* Agustín José Menéndez, 'A Proportionate Constitution? Economic Freedoms, Substantive Constitutional Choices and Dérapages in European Union Law', *in* Edoardo Chiti *et al.* (eds.), *The European Rescue of the European Union? The Existential Crisis of the European Political Project*, Oslo, 2012, p. 80.

69 Rui Henrique Alves & Oscar Afonso, 'Fiscal Federalism in the European Union: How Far Are We?', *in* Jesús Ferreiro *et al.* (eds.), *Fiscal Policy in the European Union*, Palgrave Macmillan, 2008, p. 9.

70 Láncos 2018, p. 268.

> extent as a result of the applicability of the unanimity requirement and national sovereignty objections."

An example would be the DLR discussed above: the Commission recommendation on the organization of gambling, a measure adopted in the form of soft law, due to the tension between the push for legislation coming from the European Parliament and the lack of Council support on this issue. Often, the informality of soft mechanisms will "prove to be the only way forward with a view to realizing certain transnational socio-economic goals that cannot be addressed otherwise."[71]

16.7 Summary and Suggestion for Further Research

This short overview of the notion, classification and normativity of soft law measures in general and EU soft law in particular sheds light on the relative imprecision characteristic of legal concepts. Soft law may be employed by the EU legislator for a plethora of reasons and the manifold soft instruments and mechanisms will give rise to very different obligations on the side of the Member States as elaborated in the relevant jurisprudence of the CJEU. This complex system of soft norms supplementing, substituting and interpreting hard law is so diverse, one could say each Union policy field has its own selection of preferred soft instruments and the strategies for adopting them.

Meanwhile, research into Union soft law seems to completely disregard the national implementation of the same, or the lack thereof. Even the Commission seems only to focus on the national implementation certain types of soft measures, in particular DLRs. The Commission's collection of soft law implementation data is therefore unsystematic and is restricted in focus: which soft provisions had been implemented through national legislation and to what extent. What we are missing is the mapping of systems and procedures at national level governing soft law implementation and the considerations of Member State legislators guiding the decision on whether or not to implement. This data could be used as a starting point for determining indicators for the effectiveness of EU soft law and its contribution to the convergence of Member States' law.

71 Linda Senden & A. (Ton) van den Brink, 'Checks and Balances of Rule-Making', *European Parliament Policy Department C – Citizens' Rights and Constitutional Affairs*, 2012, pp. 13-14.