

CONFERENCE REPORTS

Conference on the Bindingness of EU Soft Law

Report on the 'Conference on the Bindingness of EU Soft Law' Organized by Pázmány Péter Catholic University, 9 April 2021, Budapest*

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Abstract

The online 'Conference on the bindingness of EU soft law' was organized by the Ereky Public Law Research Center at Pázmány Péter Catholic University (Hungary), the Universidad de Castilla-La Mancha (Spain), and the Portsmouth Law School (United Kingdom) on 9 April 2021. The presentations described EU soft law instruments' legal effect on EU institutions and the Member States. The soft law instruments of different policy fields were also examined, including the analysis of the language of EU soft law.

Keywords: conference report, soft law, Pázmány Péter Catholic University, bindingness, Grimaldi.

There is no doubt about the existence of soft law norms in international law, especially in particular fields like environmental law. Nevertheless, the legal status, potential normativity and added value of these non-binding instruments are widely disputed. Some authors criticize these tools referring to a danger of relativizing normativity,¹ which process can lead to the destabilization of the international legal system.² However, others focus on the advantages offered by soft law norms, such as their flexibility and suitability in regulating uncertain and rapidly changing situations. Moreover, legally non-binding tools may facilitate agreement between international actors, especially those states whose

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1 About the danger of the so-called 'relative normativity', see Prosper Weil, 'Towards Relative Normativity in International Law?', *The American Journal of International Law*, Vol. 77, Issue 3, 1983, pp. 413-442.

2 The soft law instruments' negative or harmful effect on the legal certainty is a frequent argument against the use of these tools. See e.g. László Blutman, 'In the Trap of a Legal Metaphor: International Soft Law', *International and Comparative Law Quarterly*, Vol. 59, Issue 3, 2010, pp. 605-624.

sovereignty could be affected by the agreement.³ Sometimes it is argued that these instruments have an inherited legal potential, and they are interim steps between hard law norms and legally non-binding political statements.⁴

While soft law is a timely and popular topic of international law, the use of soft law norms in the EU is also emerging and on the one hand, shows similarities with the features of international soft law, on the other hand, it can be concluded that the EU's soft law displays its own trends and characteristics. All this was reflected in the presentations of the 'Conference on the bindingness of EU soft law'. The online conference was organized by the Ereky Public Law Research Center of the Pázmány Péter Catholic University (Hungary), the Universidad de Castilla-La Mancha (Spain), and the Portsmouth Law School (the UK) on 9 April 2021.

The increasing use of EU soft law is undeniable and according to soft law literature, may be categorized based on its different functions. According to this system, EU soft law norms can be considered as tools of providing information ('pre-law'); as interpretative instruments ('law-plus'), or as orientating norms ('para-law').⁵ The conference sought to take a step further in the investigation of EU soft law: it raised the issue of the potential bindingness of the EU soft law norm and also identifies the different forms of legal effects. Takis Tridimas⁶ stated in his keynote speech that the concept of bindingness is relative in the light of several aspects. For instance, the CJEU only considers bindingness in a formal normative sense, without taking into account the societal context, the norm's impact on behavior. This approach is restricted, since it defines bindingness by referring to specific process requirements, such as jurisdiction, causes of action, or remedies. Rejecting the use of a binary concept, Tridimas suggests considering bindingness as a continuum. This approach leads to a categorization system with four elements: soft law proper; hard soft law (e.g. recommendations, guidelines); soft hard law (e.g. Charter principles); hard law.

Using only the binary concept and contrasting hard law and soft law, without taking into consideration the different (sometimes even legal) effects of soft law, or the interaction and co-existence between the norms is outdated. This concept is increasingly recognized in EU soft law research and adapting this non-binary approach could also be advantageous in international law research. Wolfgang

3 About the advantages of the international soft law, see e.g. Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance', *International Organization*, Vol. 54, Issue 3, 2000, pp. 421-456.

4 See e.g. Andrew T. Guzman & Timothy L. Meyer, 'International Soft Law', *Journal of Legal Analysis*, Vol. 2, Issue 1, 2010, pp. 171-225.

5 This categorization is used by several authors, e.g. Petra Lea Lánkos, 'Az uniós soft law kutatásának főbb eredményei és aktuális kihívásai', *Iustum Aequum Salutare*, Vol. 14, Issue 4, 2018, pp. 55-68; Emilia Korkea-Aho, 'EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?' *Maastricht Journal of European and Comparative Law*, Vol. 16, Issue 3, 2009, pp. 158-161; Linda A. J. Senden, 'Soft Law and Its Implications for Institutional Balance in the EC', *Utrecht Law Review*, Vol. 1, Issue 2, 2005, pp. 79-99.

6 Title of the presentation: "The evolution of EU soft law".

Weiß⁷ analyzed EU soft law as an increasingly significant governance tool that may improve the implementation and enforcement of EU law at different levels: at the supranational level of the EU (implemented by EU institutions) and at the domestic level (implemented by national authorities). Soft law is present in all phases of regulation and implementation, serving as a tool to prepare legislation or as an instrument of interpretation, and it can help the implementation of other norms. At the domestic level, soft law can promote uniform and consistent implementation of EU law. According to the speaker, these considerations highlight the link between bindingness and legal effect because the different levels or the type of competence can affect the degree of the bindingness. The various degrees of bindingness can come from the different functions of soft law measures, as it was demonstrated by Luis Arroyo.⁸ Legal effect may arise in four ways. (i) One is in soft law's interpretative function, which can also have genuine legal effect, e.g. if it defines the scope of interpretation. Besides serving as an ordinary interpretative tool, it can have a qualified effect, e.g. when authorities must consider the soft law norm in the course of their interpretation. (ii) Secondly, soft law can trigger subsequent annulment for instance, if its content is incorporated into hard law or recognized by the CJEU or in case of the above mentioned situations where authorities must take soft law into account. (iii) Thirdly, in certain scenarios, soft law can be linked to compensation, e.g. in case of an infringement of legitimate expectations. (iv) Finally, even if it lacks legally binding force, soft law may have an internal punitive effect, e.g. in the field of administration, in the context of the principle of hierarchy.

Legal effect and bindingness are not only graduated but demonstrate a special dynamic characteristic as well. Law is traditionally aimed at regulating social relations, Napoleon Xanthoulis emphasized, referring to concepts developed by Sigmund Freud.⁹ In this concept, the law represses desires and exists because of this repression at the same time, which indicates that law was mandatory from the very beginning of human civilization. However, this situation has changed, and regulation is much subtler today, giving rise to hybrid modes of governance and regulation. An example for such a hybrid model is the EU's structure and its instruments which can cause direct but indirect legal effects too. Thus, legal effect shall not be considered a static and one-dimensional phenomenon, because it can flow through multiple acts, e.g. a soft law act as a recommendation can trigger the legal effect of another provision, e.g. acts of national authorities. So, at the time of the adoption of a certain act, its potential legal effect cannot be predicted. Addressing this dynamic approach can have the benefit of measuring the actual effect of soft law, by taking into account its function and effect.

Besides dealing with the concept of bindingness and its graduation, several speakers identified main areas where EU soft law is dominant, illustrating the

7 Title of the presentation: "Reconsidering the legal effect of EU soft law in national implementation: Bindingness by private response?".

8 Title of the presentation: "Beyond bindingness: a typology of soft law legal effects".

9 Title of the presentation: "From soft law to bindingness".

theoretical approaches with practical examples of soft law instruments. However, it must be highlighted that the speakers also revealed possible problems relating to the use of soft law in particular fields and proposed solutions as well. One of these fields is the area of state aid, where soft law acts, such as guidelines, recommendations, communications, notices are abundant and show particular legal effects in two ways, as Verena Rosic¹⁰ explained. These soft law instruments can have a legal effect through enforcement, *e.g.* when the European Commission's decision is based on soft law. Moreover, they have legal effect, if the Member States voluntarily follow them to avoid the negative consequences. The second area is environmental protection, where, according to Verena Rosic, soft law can also have normative importance, in an informative and preparatory manner or a steering manner. The former includes the promotion of negotiations or the enhancement of better implementation, while the latter can provide practical help in implementation, especially in the case of framework measures, which are common in EU environmental protection. The third and perhaps most challenging areas is public health, in particular during the current COVID-19 pandemic.

Corina Andone and Florin Coman-Kund¹¹ drew attention to the emerging use of soft law instruments (mostly adopted by the Commission) enacted in an attempt to deal with the pandemic. It involved the 'hardening' of some soft law instruments, which causes legitimacy problems, the potential imbalance between its adoption form, namely, that while the norm is adopted as soft law, its actual substance may be driven by the intention of 'hardening'. In fact, this can exacerbate legal uncertainty and institutional imbalance. However, soft law measures are designed to provide quick answers to rapidly changing situations and benefit voluntary coordination. Oana Stefan¹² also analyzed soft law instruments adopted in response to the COVID-19 pandemic and specifies further fields where they can have a significant impact, such as the area of state aid and antitrust law, the use of technology in the fight against the pandemic, or the background of safe re-opening. She also recalled that soft law tools are used by the Commission during a crisis, such as the financial crisis or the H1N1 pandemic.

The fourth area discussed was the field of the EU telecommunication law. Emanuel Kollman¹³ pointed out that while the regulatory framework is defined by EU law, implementation is carried out by independent National Regulatory Agencies (NRAs). This raises the challenge of harmonization; therefore, the Commission adopts soft law instruments, recommendations, guidelines, or notices. Finally, Robert Böttner¹⁴ discussed the financial market supervision,

10 Title of the presentation: "EU soft law: Validity, normativity and "bindingness" reviewed".

11 Title of the presentation: "Persuasive rather than 'binding' EU soft law? An argumentative perspective on the European Commission's soft law instruments in times of crisis".

12 Title of the presentation: "EU soft law in the time of coronavirus".

13 Title of the presentation: "Hard Rules for Soft Law. The case of European Union telecommunications law".

14 Title of the presentation: "The comply-or-explain mechanism in the European Supervisory Authorities, or: Does Meroni allow nudging?".

where four agencies¹⁵ issue guidelines and recommendations. There is a particular mechanism, the so-called ‘comply or explain’ mechanism, which is linked to these instruments, based on related funding regulations. This mechanism entails that the national authorities should aim to comply with the documents or if they don’t, they must give reasons to the supervisory authority concerned. Moreover, ‘naming and shaming’ may also arise if they do not comply, since agencies make public their findings public.

The blurring lines as illustrated by the above-mentioned examples require the application of interdisciplinary research methods, such as combining legal and linguistic research methods. Namely, the language of norms says a great deal about their legal nature. Regarding the Commission’s soft law COVID-specific recommendations and guidelines, Corina Andone and Florin Coman-Kund pointed out that their language is similar to that of hard law, and they outlined four argumentative aspects,¹⁶ of which the proper design is related to language. According to this, the soft law instruments’ language should be in accordance with their legal nature. Danai Ionescu and Mariolina Eliantonio¹⁷ analyzed the language of the guidance documents of four directives.¹⁸ The guidance documents of these hard law instruments are soft law at first sight. In line with that the speakers raised the question, why do national authorities aim to comply with them if they do not show legally binding traits? The answer may be found in their language, since Ionescu and Eliantonio revealed that most of the language use contained ‘strong’ words (‘must’, ‘shall’), *e.g.* the definitions. This indicates strong obligations and does not provide a margin for choice. Furthermore, the examined documents also used ‘moderate’ language (‘should’), for example, demonstrating good practices. The lowest rate is assigned to documents using ‘weak’ language (‘can’, ‘could’), *e.g.* mentioning additional examples.¹⁹ They added that sometimes strong language can be accompanied by moderate language like in the case of procedural recommendations. This means alternative (moral, social, or political) types of bindingness, that can be as strong as legal bindingness, and these blurring lines could raise legitimacy concerns and democratic problems. Eljalill Tauschinsky and Petra Láncoš²⁰ applied a computer-based technique to cluster the language of directive-like recommendations (DLRs) in English, German and Spanish language. The DLRs are formally soft law instruments but they are worded as directives, which are hard law norms. Their research divided the non-

15 The European Banking Authority (EBA); the European Securities and Markets Authority (ESMA); the European Insurance and Occupational Pensions Authority (EIOPA); the European Systemic Risk Board (ESRB) – together the European System of Financial Supervision.

16 Content; design; effectiveness; and soundness.

17 Title of the presentation: “Words Are Stones: Constructing Bindingness Through Language in EU Environmental Soft Law”.

18 The Environmental Impact Assessment (EIA) Directive (85/337/EEC); the Strategic Environmental Assessment (SEA) Directive (2001/42/EC); the Habitats Directive (92/43/EEC); and the Birds Directive (2009/147/EC).

19 According to the speakers’ presentation the overall results of the 26 guidances’ and over 4500 statements’ analysis was the following: strong: 48%; moderate: 31%; weak: 21%.

20 Title of the presentation: “Verbal markers of ‘softness’ in EU law? A computer-based analysis to delimit soft law and hard law focusing on directive-like recommendations”.

lemmatized and lemmatized²¹ results; the non-lemmatized version is important because the hortatory or mandatory forms of a word can be manifested in various forms. The non-lemmatized results showed that DLRs use directive-like terms ('shall', 'ensure', 'shall apply') and weaker terms such as 'invite' and 'encourage'. While the non-lemmatized versions provided more or less identical same results in the three language versions analyzed, the lemmatized results revealed differences, in particular in English. In light of the language-focused presentation, it can be concluded that this kind of analysis is essential to examine specific soft law instruments that use strong or moderate words and terms that are normally typical of hard law. However, the several versions in line with the EU's official language can be a challenge in such research.

Finally, one of the most interesting aspects of EU soft law is the position of the CJEU. We know that the CJEU refrains from using the term soft law, but the essence of the relevant case-law is decisive. Wolfgang Weiß recalled *Grimaldi*,²² where the CJEU observed that national courts must take into account EU soft law. However, the CJEU's approach is not unequivocal because in the most recent cases, e.g. in *Expedia*²³ the CJEU stated that the Member State's national authorities are not legally required to do this. Takis Tridimas illustrated the issue of uncertainty by referring to the source of authority in *Chrysostomides*,²⁴ in which the CJEU declared that the Euro Group is not an EU body, and it does not possess the power of decision-making and its decisions are not subject of review and cannot give rise to EU liability. Tridimas underlined, while the Treaties did not establish the Euro Group, Protocol No. 14²⁵ requires that certain tasks be carried out by the Euro Group, which may be a point of conflict. Verena Rosic added that in the area of environmental protection, the framework norms' implementation is supported by the Commission's guidance. Sometimes the interpretation of hard law can lead to different results. In these cases, the Commission's guidance has priority and even the CJEU takes them into consideration.

In conclusion, the presentations took a step beyond the binary concept of soft law and hard law, putting the focus on the legal effect in the context of the several functions of EU soft law instruments. The conference's main merit was the illustration of the function and specific legal effect of these instruments in certain areas of EU law, such as the field of state aid, environmental protection, telecommunications law, the European System of Financial Supervision, and public health, in particular during the COVID-19 pandemic. The presentations also drew attention to the blurring lines between hard and soft law and presented legal and linguistic analyses, drawing attention to the fact that the context and wording of these documents can be decisive in eliciting legal effect. The

21 Lemmatizing means reducing a word's different forms and after this use one single form.

22 Judgment of 13 December 1989, *Case C-322/88, Grimaldi*, ECLI:EU:C:1989:646.

23 Judgment of 13 December 2012, *Case C-226/11, Expedia*, ECLI:EU:C:2012:795.

24 Judgment of 16 December 2020, *Joined Cases C-597/18 P, C-598/18 P, C-603/18 P, and C-604/18 P, Council v Chrysostomides & Co. and others, Council v Bourdovali and others, Chrysostomides & Co. and others v Council, Bourdovali and others v Council*, ECLI:EU:C:2020:1028.

25 See Protocol No. 14 on the Euro Group.

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conference also mentioned the CJEU's (not fully unequivocal) approach to EU soft law. The presentations also revealed that the Commission is likely to use soft law instruments, for example where the hard law is only framework-like, or in the course of harmonization or in the field of crisis management. The speakers also highlighted the possible dangers and issues of the hardening tendency of EU soft law. Finally, they also identified the further areas of research. The main findings of the conference are not only significant for EU law, for overcoming the outdated binary approach may be beneficial in international law as well.