

A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?

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*With the proliferation of European Union soft law instruments (Oana Andreea Ștefan, *European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects*, 75(5) *Modern L. Rev.*, 879, 879 (2012).) since the nineties, the legal bindingness of these measures has been the subject of several studies, (Most prominently, Gustaaf M. Borchardt & Karel C. Wellens, *Soft Law in European Community Law* 14(5) *Eur. L. Rev.* (1989); Linda Senden, *Soft Law in European Community Law* (Hart 2004); Linda Senden, *Soft Law and Its Implications for Institutional Balance in the EC*, 1(2) *Utrecht L. Rev.*(2005); Jürgen Schwarze, *Soft Law im Recht der Europäischen Union*, 1 *EuR* (2011); Anne Peters, *Soft Law as a New Mode of Governance*, in *The Dynamics of Change in EU Governance*, 21–51 (Udo Diederichs, Wulf Reiners & Wolfgang Wessels eds, Edward Elgar 2011); Oana Andreea Ștefan, *Soft Law and the Enforcement of EU Law*, in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (András Jakab & Dimitry Kochenov eds, Oxford University Press 2016).) indeed, various approaches (rationalist, constructivist, hybridity) (David M. Trubek, Patrick Cottrell & Mark Nance, 'Soft Law', 'Hard Law', and *European Integration: Toward a Theory of Hybridity*, 02(05) *Jean Monnet Working Paper* (2005); Oana Andreea Ștefan, *Hybridity Before the Court: A Hard Look at Soft Law in the EU Competition and State Aid Case Law*, 37(1) *Eur. L. Rev.* 49–69 (2012).) have been deployed to define and delimit soft law from hard law, even arriving at a sophisticated taxonomy of soft and hard measures. (Fabien Terpan, *Soft Law in the European Union – The Changing Nature of EU Law*. Working Paper Nr. 7 Sciences Po Grenoble (Nov. 2013); Anne Peters, *Typology, utility and Legitimacy of European Soft Law*, in *Die Herausforderung von Grenzen. Festschrift für Roland Bieber*, 405–428 (Astrid Epiney, Marcel Haag & Andreas Heinemann eds., Nomos 2007); Peter Christian Müller Graf, *Das Soft Law der Europäischen Organisationen: Einführung*, in *Das soft law der europäischen Organisationen*, 146–154 (Julia Iliopoulos-Strangas & Jean-Francois Flauss eds., Nomos 2012).) While these inquiries are of fundamental importance to formulate an ontology of European soft law, national courts and authorities implementing and applying soft law are faced with the more practical problem of the bindingness of these measures in a given case. Member States are often at a loss for which measures they are expected to apply and may 'unexpectedly' find themselves bound by certain soft law measures. Since the jurisprudence of the Court of Justice of the European Union sheds some light on the legal obligations ensuing from the*

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different types of European soft law, the present article is an attempt to categorize and determine the bindingness of such measures for national courts and authorities based on the relevant case-law of the Court.

Keywords: Soft law; bindingness; recommendation; informal measures; guideline; notice; comfort letter; communication; harmonization; sincere cooperation; legitimate expectations; consent.

1 FORMAL AND INFORMAL SOFT LAW MEASURES BEFORE THE COURT

Since the beginning of the nineties we have witnessed a steep increase in the number of European soft law measures in particular, in the ambit of competition law/state aid law¹ and social policy.² However, the prevalence of soft law in other policy fields, such as JHA and the regulation of financial markets³ cannot be overlooked, either. In part, this may be explained by the ambition first formulated in the Commission's White Paper on Governance that sought to achieve both flexible ('better and faster regulation – combining policy instruments for better results') and an inclusive legislation and policy.⁴ Concurrently, soft law measures were also employed to bridge the divide between the lack of formal legislative competences or Member State political will and the policy ambitions of European institutions.⁵ In parallel with the rise of *formal* soft law acts foreseen in the Treaty (Article 288 TFEU (ex-Article 249 EC)),⁶ that is opinions and recommendations, a

¹ Håkon A. Cosma & Richard Whish, *Soft Law in the Field of EU Competition Policy*, 14(1) Eur. Bus. L. Rev. (2013).

² Kerstin Jacobsson, *Between Deliberation and Discipline: Soft Governance in EU Employment Policy*, in *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* at 6 (Ulrika Mörth ed., Edward Elgar 2004); Damian Chalmers & Martin Lodge, *The Open Method of Co-ordination and the European Welfare State*. Discussion Paper No. 11, ESRC Centre for Analysis of Risk and Regulation (June 2003); Armin Schäfer, *A New Form of Governance? Comparing the Open Method of Co-ordination to Multilateral Surveillance by the IMF and the OECD*, 13(1) J. Eur. Pub. Pol'y 70, 79–80 (2006); Matthias Knauff, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem*, 305 et seq. (Mohr Siebeck 2010).

³ Thomas M.J. Möllers, *Sources of Law in European Securities Regulation – Effective Regulation, Soft Law and Legal Taxonomy from Lamfalussy to de Larosiere*, II Eur. Bus. Org. L. Rev. 379 (2010).

⁴ (COM(2001) 428 final. OJ C287 of 12.10.2001), see. Oana Andreea Ștefan, *European Competition Soft Law in European Courts: A Matter of Hard Principles?*, 14 Eur. L. J. 753, 758–760 (2008). It is interesting to note that 'the number of [soft law] references at the level of the Court of First Instance is much higher than at the level of the Court of Justice. (...) This could be explained by a concern to thoroughly motivate judgments at the first instance level, taking into consideration the possibility of appeal'. *Ibid.*, at 760.

⁵ '[E]uropean institutions have frequently regulated in a soft manner areas in which the EC lacked legal authority vis-à-vis the Member States, or where the division of competences between the EC and the Members was unclear. Only by soft law, the European institutions were able to initiate new policies which had no legal basis in the treaties'. Peters (2007), at 423.

⁶ Art. 288 (ex Art. 249 TEC): 'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

...
Recommendations and opinions shall have no binding force'.

burgeoning of *informal*, i.e. non-Treaty based measures including guidelines,⁷ communications, notices, etc.⁸ may be discerned and with it, soft law-related cases before the European Court of Justice also emerged.⁹ Member States are often left puzzled as to what their precise obligations are in respect of these soft Union measures and upon whom, if at all, they are binding. Although the number of such soft law-related judgments and rulings is still relatively modest, the jurisprudence of the Court of Justice of the European Union (CJEU) provides Member States with some clues as to the extent of their obligations ensuing from European soft law.

Softness of legal measures is but a question of perspective: those adopting the measure may be bound by it, since it can amount to an act of self-limitation,¹⁰ while those to whom it is addressed may also be bound by it, albeit to varying degrees. In the following, I shall concentrate on unfolding the binding quality (hereafter ‘bindingness’) of EU soft law measures for Member States, largely disregarding the bindingness of such norms on their author as well as the possible effects of such measures on individuals other entities. In the present article I conceptualize bindingness as a legal category, without considering moral and political aspects of soft law and ensuing voluntary alignment by national courts, authorities and other actors. Focusing on the jurisprudence of the CJEU, I suggest that from the perspective of bindingness, several categories of Union soft law can be distinguished, following the concept of graduated normativity. I propose that these general categories are meaningful irrespective of the given policy field these measures are related to. Finally, within these categories, a distinction between formal and informal soft law acts is made, refining the conditions for the bindingness of soft law acts. For my analysis, I selected those cases that are considered to be landmark judgments in leading soft law literature,¹¹ further, I surveyed the case law

⁷ ‘Akte sui generis’, Gunnar Pampel, *Europäisches Wettbewerbsrecht. Rechtsnatur und Rechtswirkungen von Mitteilungen der Kommission im europäischen Wettbewerbsrecht*, 1 EuZW 11, 12 (2005).

⁸ ‘[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’. Linda Senden & Sacha Prechal, *Differentiation in and Through Community Soft Law*, in *The Many Faces of Differentiation in EU Law* 186 (Bruno de Witte, Dominik Hanf & Ellen Vos eds, Intersentia 2001). See also Terpan, at 19–26; Cosma & Whish, *supra* n. 1, at 46.

⁹ Jürgen Schwarze, *Soft Law im Recht der Europäischen Union*, in *Das soft law der europäischen Organisationen*, 238–245 (Julia Iliopoulos-Strangas & Jean-François Flauss Nomos 2012).

¹⁰ Axel Kallmayer, *Die Bindungswirkungen von Kommissionsmitteilungen im EU-Wettbewerbsrecht – Mehr Rechtssicherheit durch Soft Law?*, in *Herausforderungen an Staat und Verfassung*, 673 (Christian Callies ed., Nomos 2015); Pampel, *supra* n. 7, at 12. Yet this is a form of ‘elastic self-limitation’, since the author is free to amend the rules and principles laid down in the soft law measure, see Schwarze, *ibid.*, at 11.

¹¹ Cf. Senden (2001), (2004) and (2005); Stefan (2012), (2016); Iliopoulos-Strangas (2012).

of the CJEU with key word searches and traced cases through references in soft law related judgments of the CJEU. From the resulting corpus of cases, I omitted those where the CJEU did not elaborate on the nature, normativity¹² or status¹³ of soft law acts, or where it merely restated its settled case-law without developing it further.¹⁴

Mapping the varied landscape of EU soft law, I briefly draw on the Senden's definition of the same and elaborate on the non-binary approaches to law, moving beyond the entrenched 'hard' and 'soft' divide. Next, I analyse the relevant case-law of the CJEU following a categorization of soft law centred on the formal/informal nature and the obligation imposed by the measures. Finally, I summarize my conclusions on the bindingness of EU soft-law for Member State courts and authorities based on the jurisprudence of the CJEU.

2 BEYOND BINARITY: GRADUATED NORMATIVITY AND THE SPECTRUM OF BINDINGNESS

Examining the bindingness of soft law may on first sight seem futile in light of Snyder's well-known definition of such measures as 'rules of conduct which, in principle have no legally binding force but which nevertheless may have practical effects'.¹⁵ A deeper analysis of Union soft law measures reveals however, that while some instruments fit this description, others do not conform to this restricted concept of soft law. Senden offers a more comprehensive definition capable of framing all EU soft law measures, defining 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'.¹⁶ As regards the 'practical effects' of soft law measures, besides voluntary alignment these are the result of genuine legal obligations regarding the interpretation and application of Union soft law measures detailed in the case-law of the CJEU. These obligations imposed on national courts and authorities are what I consider to constitute the bindingness of soft law measures in the present article. Yet the practical effects and the bindingness of norms should not be conflated, since the following inquiry into the bindingness of soft law shall

¹² E.g.: *Marschall* (C-409/95) [1997] ECR I-6363, *Commission v. Portugal* (C-367/98) [2002] ECR I-4731, *Lodato Gennaro* (C-415/07) [2009] ECR I-2599.

¹³ I did not include case-law elaborating on what constitutes a decision capable of producing legal effects, delimiting non-law from soft law, e.g.: *Sucrimex* (C-133/79) [1980] ECR I-1299.

¹⁴ E.g.: *Altair Chimica* (C-207/01) [2003] ECR I-8875 ('duty to take into account'); *Chemische Fabrik Kreussler* (C-308/11) [2012] ECLI:EU:C:2012:548 ('no obligation'), see *infra*.

¹⁵ Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56(1) *Modern L. Rev.* 32 (1993).

¹⁶ Linda Senden, *Soft Law in European Community Law*, 112 (Hart Publishing 2004); (italics by me).

‘not include the degree to which rules are actually implemented domestically or to which states comply with them’.¹⁷

Unfolding the bindingness of Union soft law goes beyond simply juxtaposing ‘soft law’ with ‘hard law’. Indeed, the CJEU declines to employ these reductive concepts.¹⁸ The only time the term soft law appears in the judgments of the Court or General Court is when they are quoting arguments of the applicants.¹⁹ This could be due to the fact that the CJEU refuses to recognize the assumed binarity inherent in the distinction between ‘hard law’ and ‘soft law’.²⁰ Hervey notes that the CJEU follows the concept of hybridity by treating ‘outcomes of informal processes as normatively valuable’,²¹ including informal arrangements into its considerations. As a result, ‘the conceptual demarcation between “hard” and “soft” law, upon which traditional legal approaches are based, is removed under a relationship of transformation’.²² Accordingly, the CJEU seems to adhere to the view that the normativity of measures covers a broader spectrum²³ between the extremes of fully binding power and non-bindingness. This approach resonates 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)’.²⁴

In what follows I attempt to demonstrate that there is a graduation of normativity even among what are generally perceived as soft law measures. Moreover, I propose that – contrary to Ştefan’s claim – informal measures do not necessarily ‘follow the same legal regime as recommendations and opinions’,²⁵ opening up a spectrum of Member States’ obligations ranging from room for a total disregard for certain soft law instruments, to the obligation of due

¹⁷ Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*. 54(3) Int’l Org. 18 (2000).

¹⁸ Vassilios Christianos, *Effectiveness and Efficiency Through the Court of Justice of the EU*, in Iliopoulos-Strangas & Flauss (eds), *supra* n.9, at 327. ‘If expressed simply as a dichotomy, then it is obvious that the hard/soft law distinction is highly reductive as a means of accommodating pluralisation 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 characterisation analytically all-encompassing’. Kenneth A. Armstrong, *The Character of EU Law and Governance: From ‘Community Method’ to New Modes of Governance*, 64(1) Current Legal Probs. 206 (2011).

¹⁹ HGA et al. (C-630/11P) [2013] published electronically, *Pitsiorlas* (T-337/04) [2007] E.C.R. II- 4779.

²⁰ See also. Möllers, *supra* n. 3, at 388.

²¹ Tamara Hervey, *Adjudicating in the Shadow of the Informal Settlement?: The Court of Justice of the European Union, ‘New Governance’ and Social Welfare*, 63(1) Current Legal Probs. 145 (2010).

²² *Ibid.*, at 146.

²³ Cf. Luca Barani, *Hard and Soft Law in the European Union: The Case of Social Policy and the Open Method of Coordination*, 2 Webpapers on Constitutionalism & Governance beyond the State – conWEB 8 (2006); Terpan, at 12 et seq.

²⁴ Peters (2007), at 410, italics by me.

²⁵ Ştefan (2012), at 879.

consideration or even the binding implementation of provisions laid down in European soft law measures.

3 SOFT NORMATIVITY: THE DUTY TO ‘TAKE INTO ACCOUNT’ AND THE ‘DUTY TO WEIGH INTERESTS’

The present chapter provides an overview of the CJEU’s jurisprudence on soft law measures where the Court stipulated an obligation to ‘take into account’ the measure or the ‘duty to weigh interests’ enshrined in the same. These similar obligations however stem from measures that are different in form, that is, both formal and informal soft law measures may give rise to the same duty on the side of the national legislator, courts and authorities.

3.1 FORMAL MEASURES

3.1[a] *Grimaldi*

The landmark case in ascertaining the legal effects of European soft law and the obligations arising therefrom was *Grimaldi*.²⁶ The case concerned the status of a Community recommendation that the Belgian legislator had failed to implement.²⁷ In its assessment, the ECJ pointed out that measures other than regulations may not have direct effect, nevertheless, ‘this does not mean that [they] can never produce *similar effects*’.²⁸ Accordingly, recommendations belong to the purview of soft law, that is measures ‘laid down in instruments which have not been attributed legally

²⁶ *Grimaldi* (C-322/88) [1989] ECR 4407. Already before *Grimaldi*, cases concerning recommendations surfaced before the ECJ, such as the *Frecassetti* case (C-113/75) [1976] ECR 983. In this case, the ECJ expressly referred to Commission Recommendation of 25 May 1962 on the date to be taken into account in determining the rate of customs duty to be applied to goods declared for internal consumption (OJ 51, 29 Jun. 1962, at 1545–1546) stating that if the Commission had wished to indicate that the relevant regulation applies in a certain way, ‘it would have specified this since the recommendation was adopted more than one month after the [regulation’s] publication’ (para. 9). This implies that national courts are bound to consider also measures such as recommendations which assist in interpreting regular measures of EC law. Cf. Daniel Sarmiento, *European Soft Law and National Authorities: Incorporation, Enforcement and Interference*, in Iliopoulos-Strangas & Flauss (eds), *supra* 9, at 266.

²⁷ *Grimaldi*, an Italian migrant worker, requested the Belgian Occupational Diseases Fund to recognize the Dupuytren’s contracture he was suffering from as an occupational disease. Although the relevant Belgian schedule of occupational diseases did not include said disease, Recommendation 66/462 of the EC on the conditions for granting compensation to persons suffering from occupational diseases had already recommended a quarter of a century earlier, that, among others, Dupuytren’s contracture be recognized as an occupational disease. The Brussels labour court seized of the instant case referred a question to the ECJ asking whether the ‘European schedule’ of occupational diseases annexed to the relevant Commission Recommendation may have direct effect in the Member State that had failed to implement the measure.

²⁸ *Grimaldi*, para. 11 (italics by me).

binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects'.²⁹

In particular, it must first be determined whether the form of the measure in question conforms to the contents of the same. This requires piercing the soft law veil to find out whether there is a misfit between the choice of a soft legal instrument and the true legislative intent of producing binding effects.³⁰ As Senden puts it, soft law acts may 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'.³¹ 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'.³² Yet 'true recommendations',³³ such as the one under scrutiny in *Grimaldi* are not intended to produce binding effects and may therefore not 'create rights upon which individuals may rely before a national court'.³⁴ This does not mean however, that they have absolutely no legal effect.³⁵ Instead, according to the ruling 'national courts are *bound to take recommendations into consideration* in order to decide disputes submitted to them'.³⁶

Although 'the ECJ was silent on the potential breadth of the obligation'³⁷ and its wording seems to refer to the *Von Colson* jurisprudence,³⁸ recommendations do not trigger an obligation of consistent interpretation by the national courts, since 'that would indeed amount to admitting rights and obligations 'by the backdoor', also for private parties', contravening the principle of legal certainty.³⁹ As Krieger puts it, the judgment entails a large degree of reservation in comparison with other

²⁹ Senden, *supra* n. 16, at 112.

³⁰ *Grimaldi*, paras 14–16.

³¹ Senden *supra* n. 16, at 289. For an opposing view, cf. Peters (2007), at 411–412.

³² *Ibid.*, at 462–463; See cases *CIRFS*, *Ijssel-Vliet* and *Germany v. Commission*, *infra*.

³³ Allan Rosas, *Soft Law and the European Court of Justice*, in Iliopoulos-Strangas & Flauss (eds), *supra* n. 9, at 311.

³⁴ Cf. *Hopkins* (C-18/94) [1996] ECR I-02281, para. 28, fn. 44.

³⁵ *Grimaldi*, paras 16, 18. Analysing the bindingness of recommendations and resolutions, Bast concludes that 'from the perspective of dogmatics, these obligations do not arise from the resolution, but much rather from the obligation of loyal cooperation between the institutions of the Union and the member states as laid down in Article 10 EC'. Jürgen Bast, *Grundbegriffe der Handlungsformen der EU*, 218 (Springer 2006). For more sources on the connection between the bindingness of soft law and the principle of loyalty, see fn. 85.

³⁶ *Grimaldi*, para. 18, italics by me.

³⁷ Anthony Arnall, *The Legal Status of Recommendations*, 15(4) Eur. L. Rev. 318 (1990); Emilia Korkeaho, *EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?*, 58 Scandinavian Stud. L. 155, 162 (2013).

³⁸ Ştefan, *supra* n. 4, at 753, 767.

³⁹ Senden, *supra* n. 16, at 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 (2016), at 13; See also. Albrecht von Graevenitz, *Mitteilungen, Leitlinien, Stellungnahmen – Soft Law der EU mit Lenkungswirkung*, 5 EuZW 169, 173 (2013). By contrast, Christianos argues that there is a duty of consistent interpretation, see. Christianos, *supra* n. 18, at 327.

cases involving consistent interpretation, since the ECJ does not require the national court, to the full extent of its discretion, to interpret national law in accordance with Community (soft) law. At this point, it merely foresees taking recommendations into account under a minimum standard where ‘only non-consideration is disallowed.’⁴⁰ Although the case-law is silent on the possible difference between the obligation of consistent interpretation and the prohibition of non-consideration, the extent of these obligations may differ. Consistent interpretation requires mandatory adherence⁴¹ to Union law (with the exception of *contra legem* situations), meaning that the CJEU case-law prescribes interpretative priority for achieving the result sought by the EU provision.⁴² By contrast, the prohibition of non-consideration may solely require that the relevant body substantiate it had taken the soft law measure into account, without the obligation to give more weight to the Union measure.

The ECJ further specified, that when deciding cases before them, national courts must take recommendations into account where these ‘are capable of casting light on the *interpretation* of other provisions of national or Community law’, or ‘where they are designed to *supplement* binding Community provisions’.⁴³ According to Senden deeming recommendations to be mandatory interpretation aids ‘entails in essence a duty of effort, i.e. to take account of recommendations when they can actually contribute to the establishment of the meaning and scope of hard Community law’.⁴⁴

Finally, as far as the addressees are concerned, as Sarmiento points out, although the ECJ referred to the obligations of national courts to take such measures into consideration, ‘nothing stops it from being extended to national administrations as well’,⁴⁵ 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

⁴⁰ Kai Krieger, *Die gemeinschaftsrechtskonforme Auslegung des deutschen Rechts*, 97 (Lit Verlag 2005).

⁴¹ ‘If the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive’. *Pfeiffer* (C-397-403/01) [2004] E.C.R. I-8835 para. 116. Martin Brenncke, *A Hybrid Methodology for the EU Principle of Consistent Interpretation* (10 Dec. 2016), Stat. L. Rev. (2017 Forthcoming). Available at SSRN: <https://ssrn.com/abstract=2883447>, at 5-7.

⁴² Brenncke, *ibid.*, at 8-9.

⁴³ *Grimaldi*, paras 18-19, italics by me. See also. Andreas Glaser, *Die Entwicklung des Europäischen Verwaltungsrechts aus der Perspektive der Handlungsformenlehre* 376 (Mohr Siebeck 2013).

⁴⁴ Senden, *supra* n. 16, at 474.

⁴⁵ Sarmiento, *supra* n. 26, at 267. Cf. *DHL* (C-428/14) ECLI:EU:C:2016:27, para. 41.

bodies be bound by the same obligations of interpretation and application of EU law, no matter their status as court or administrative authority.⁴⁶ Indeed, as evidenced by the following case, soft law measures may also give rise to obligations on the side of the national legislator:

3.1[b] *Commission v. Lithuania*

National authorities' 'must consider' obligation is further refined in the *Commission v Lithuania* (European emergency number) case,⁴⁷ which concerned a failure to implement a preferred solution for caller location tracking set forth in a recommendation.⁴⁸ In its judgment the Court concluded that the 'recommendation, in the light of its non-binding nature, cannot require the Member States to use a specific method in order to implement (...) the Universal Service Directive'.⁴⁹ However, since the measure was taken in the form of a recommendation, Member States are not released from properly considering its substance: 'national regulatory authorities *may choose not to follow* a recommendation adopted by the Commission on the basis of the latter provision, *on condition* that they inform the Commission thereof and communicate to the Commission the *reasoning* for their position'.⁵⁰

It is important to note that the Court expressly formulates the Member States' obligation to justify measures taken in implementation of a Directive which deviate from the preferred solution laid down in the Commission recommendation facilitating implementation. From this, we may conclude that the duty to give reasons for not following a recommendation is meant to give teeth to the otherwise undefined 'must consider' obligation of national authorities. Namely, the duty to state reasons ensures and evidences that the Member State actually gave serious thought to the subject, even if it finally decided to make use of its discretion under the recommendation and opts for another solution.

⁴⁶ *International Fruit* (Joined cases 51–54/71) [1971] ECR 1107, para. 3.

⁴⁷ *Commission v. Lithuania* (C-274/07) [2008] ECR I-7117.

⁴⁸ Lithuania failed to comply with the Directive's recital 36 which required Member States to ensure that 'undertakings which operate public telephone networks make caller location information available to authorities handling emergencies, to the extent technically feasible, for all calls to the single European emergency call number '112''. Commission Recommendation 2003/58 (Commission Recommendation 2003/558/EC of 25 July 2003 on the processing of caller location information in electronic communication networks for the purpose of location-enhanced emergency call services (OJ 2003 L 189, 49) facilitating the implementation of the Directive contained two optional methods for establishing the location of the caller placing the emergency call: the automatic transmission of caller location (*push*) and the provision of caller location only upon request (*pull*), promoting however the *push* method as the most effective in tracing the caller (recital 10).

⁴⁹ *Commission v. Lithuania*, para. 49.

⁵⁰ *Ibid.*, para. 50, italics by me.

3.2 INFORMAL MEASURES

3.2[a] *Polska Telefonía*

In *Polska Telefonía*,⁵¹ the Sąd Najwyższy (Polish Supreme Court) turned to the Court for a preliminary ruling with the main questions directed towards the applicability of guidelines to individuals, yet incidentally, the CJEU also offered some orientation regarding the bindingness of such measures for national authorities. According to the Court, the guidelines supplement the provisions of Directive 2002/21 by providing guidance on the definition and analysis of relevant markets that may become subject to regulation.⁵² The guidelines in question summarize relevant case-law, supplementing it with an overview of relevant Commission notices, including sections containing guidance on the implementation of the underlying Directive.⁵³ In particular, the Court stresses that the latter ‘sections are designed to describe the working of the cooperation procedures between the NRAs, the national competition authorities and the Commission’.⁵⁴ However, these guidelines are not binding, which is indicated also by the fact that they were published in the ‘C’ series of the Official Journal, which is ‘not intended for the publication of legally binding measures, but only of information, recommendations and opinions concerning the European Union’.⁵⁵ Incidentally, the elaborations of the Court indicate that although not binding, said guidelines must in fact be taken into utmost account by national authorities, since in substance they summarize existing case-law and otherwise orient the implementation of competition policy on the national level.^{56,57}

While the present article is not concerned with the effects of soft law on individuals, it is worth noting, that there seems to be a distinction between the effects of formal and informal measures on individuals. Paradoxically, while

⁵¹ *Polska Telefonía* (C-99/09) [2010] ECR I-06617.

⁵² *Ibid.*, para. 31.

⁵³ *Ibid.*, paras 32–33.

⁵⁴ *Ibid.*, para. 33.

⁵⁵ *Ibid.*, para. 35.

⁵⁶ See also, Walter Frenz, *Handbook of European Competition Law*, 295, at n. 870 (Springer 2016).

⁵⁷ By contrast, Kowalik-Bańczyk stresses that ‘guidelines issued in the framework of EU competition law are not identical with the particular Guidelines to which the preliminary question refers to. The former are binding on the Commission but not on national authorities. See also, *The Netherlands v. Commission* (C-382/99) [2002] ECR I-5163, para. 24. At the same time, Guidelines on market analysis constitute the obligatory basis for market assessment undertaken by regulatory authorities’. Krystyna Kowalik-Bańczyk, *The Publication of the European Commission’s Guidelines in an Official Language of a New Member State as a Condition of Their Application – Case Comment to the Order of the Polish Supreme Court of 3 September 2009*, 3(3) Y.B. Antitrust & Reg. Stud. 306, 309 (2010). In a similar vein, von Graevenitz underlines that in some cases, guidelines have an effect that is similar to that of legislative acts: ‘this is the case in particular as regards ‘appropriate measures’ in the field of state aid (...). The telecommunication sector shows demonstrates similar characteristics’. von Graevenitz, *supra* n. 39, at 170–171.

guidelines are not binding upon individuals, they may affect their rights and obligations, which the CJEU duly recognizes and ‘in doing so, the judgment also clearly distinguishes, at a substantive level, between the legally binding force and the effects of the norms’.⁵⁸ Georgieva criticizes the ensuing legal situation, pointing out that ‘it is intriguing to contemplate the results of this decision in practice: Soft law cannot directly give rise to rights and obligations, but individualized decisions, which are eventually informed by the same soft law, undoubtedly affect the legal position of third parties’.⁵⁹

Indeed, the picture is somewhat complex. While the *Polska Telefonia* case is evidence that individuals may not rely on, but are affected by informal measures published only in the C series of the Official Journal, the *Hopkins* case is an interesting example for fully binding recommendations upon which individuals may rely: ‘It is settled case-law that the rules evolved by the Court to determine the effects of a directive which has not been transposed into national law apply equally to recommendations adopted under the ECSC Treaty, which are measures of the same kind, binding upon those to whom they are addressed as to the result to be achieved but leaving to them the choice of form and methods to achieve that result. (...) Whenever the provision of a recommendation based on Article 63(1) [EC] appear, as regards their subject-matter, to be unconditional and sufficiently precise, those provisions may therefore be relied upon directly by individuals before the national court on the same conditions as directives’.⁶⁰ This stands in stark contrast with the case-law rendered in relation to recommendations adopted on other legal bases, for example in *Grimaldi*, where the plaintiff could not rely on the Annex to the Recommendation and the national court merely had a ‘must consider’ obligation.

3.2[b] *Mediaset*

In *Mediaset*,⁶¹ the Tribunale Civile di Roma posed the question whether the proceeding national court must take into account the letters of the Commission when implementing the Commission’s decision on recovering state aid from Mediaset SpA. The Court reiterated that while decisions are binding on all organs of the State to which they are addressed and Member States are obliged to take all

⁵⁸ ‘It appears that while striving to impose a strict distinction between legally binding force and legal effects of soft law instruments the Court fails to give legal weight to important consequences that soft law can have on the rights and obligations of individuals and to the legal effects that soft law can actually have’. Ştefan (2012), at 886, 889–890.

⁵⁹ Georgieva, at 244.

⁶⁰ *Hopkins* (C-18/94) [1996] ECR I-02281, para. 28.

⁶¹ *Mediaset* (C-69/13) [2014] ECR I-0000.

measures necessary to ensure their implementation, letters sent by the Commission to ensure the execution of such decisions are not binding.⁶² Such letters cannot be considered as decisions or acts, but are statements of position ‘devoid of any binding effect’ upon the national court.⁶³

At this point, the Court takes recourse to ‘the obligation of cooperation in good faith between the national courts, on the one hand, and the Commission and the European Union Courts, on the other’.⁶⁴ The Court clarifies, that under the principle of sincere cooperation, national courts may seek guidance from the Commission on the implementation of binding decisions, whose statements of position – intended to facilitate the immediate and effective execution of binding recovery decisions – must be taken into account by the national court ‘as a factor in the assessment of the dispute before it’.⁶⁵ Again, this obligation is enforced through the additional task of Member State courts to ‘state reasons having regard to all the documents in the file submitted to them’,⁶⁶ meaning that Member States must ‘acknowledge and substantively engage with what is laid down in the Commission’s statement of position, without this amounting to an obligation of result’.⁶⁷

In essence, the *Mediaset* case-law reiterates the Member State obligation laid down for formal soft law measures, including the duty to take into account and the duty to state reasons, implying an obligation of the national court to account for any deviations from what is communicated in the Commission’s statement of position. While the bindingness – and the obligations flowing from – the informal measure of statement of position coincides with that described for recommendations, what sets this case slightly apart from the latter is the strong reliance on the abstract principle of sincere cooperation, which is meant to furnish informal measures with the necessary legal effects as will be demonstrated in the *Pfleiderer* case:

3.2[c] *Pfleiderer*

The *Pfleiderer* case⁶⁸ concerned an application for access to files in a leniency procedure conducted by the German competition authority and the question

⁶² *Ibid.*, paras 23–24.

⁶³ *Ibid.*, paras 25–28.

⁶⁴ *Ibid.*, para. 29.

⁶⁵ *Ibid.*, paras 31–32.

⁶⁶ *Ibid.*, para. 31.

⁶⁷ Astrid Epiney, *Die Rechtsprechung des EuGH im Jahr 2014: Europäisches Verfassungsrecht*, 34(11) NVwZ 704, 714 (2015).

⁶⁸ *Pfleiderer* (C-360/09) [2011] ECR I-5161.

whether national competition authorities may disregard relevant Commission notices on leniency.⁶⁹

In this case, it is interesting to examine the Opinion of the Advocate General, for although it was finally not followed by the Court it sought to clarify certain points regarding EU soft law. In his Opinion delivered on the *Pfleiderer* case, AG Mazák confirmed that neither Regulation No. 1/2003, nor the relevant Articles of the TFEU contain guidance for Member State competition authorities on granting third parties access to information supplied voluntarily by the leniency applicants,⁷⁰ indeed, since they enjoy procedural autonomy in this respect, there is no express obligation pursuant to EU law for national competition authorities to even operate leniency programmes.⁷¹ This procedural autonomy notwithstanding, ‘the ECN Model Leniency Programme is a non-binding instrument which seeks to bring about de facto or ‘soft’ harmonization of the leniency programmes of the national competition authorities’ setting out the treatment leniency applicants can anticipate in aligned ECN jurisdictions.⁷² AG Mazák stresses, that ‘despite the non-legislative nature of this instrument and indeed other instruments such as the Cooperation Notice and the Joint Statement, *their practical effects* in relation in particular to the operations of national competition authorities and the Commission *cannot be ignored*’.⁷³ Since transparency and predictability brought about by the Leniency Notice are necessary for the effective operation of the leniency programme,⁷⁴ therefore, where a Member State operates a leniency programme, ‘despite the procedural autonomy enjoyed by the Member State in enforcing that provision, it must ensure that the programme is set up and operates in an effective manner’.⁷⁵ The effective operation of the national leniency programme requires preserving to the extent possible the attractiveness of the programme; indeed, in AG Mazák’s view, applicants could possibly ‘entertain a *legitimate expectation* that pursuant to the Bundeskartellamt’s discretion on the

⁶⁹ *Pfleiderer* AG is a manufacturer which purchased goods in the years preceding the imposition of fines by the Bundeskartellamt from the producers involved in the national leniency programme. Preparing for the civil proceedings for the recovery of damages incurred due to the cartel, *Pfleiderer* AG applied to the Bundeskartellamt for comprehensive access to the relevant files, yet it merely received limited access to the same from which confidential business information, internal documents and other documents under the discretion of the Bundeskartellamt were removed. *Pfleiderer* appealed to the Amtsgericht Bonn seeking access to the complete case file, which in turn referred to the CJEU for a preliminary ruling, essentially asking whether national competition authorities are bound by the relevant Commission notices on leniency or not.

⁷⁰ Opinion AG Mazák in *Pfleiderer*, para. 25.

⁷¹ Opinion para. 33.

⁷² Opinion para. 24–26.

⁷³ AG Mazák deplores the fact that ‘documents such as the ECN Model Leniency Programme and the Joint Statement are not published in the Official Journal of the European Union for the purposes of transparency and posterity’. Opinion para. 26, italics by me.

⁷⁴ Opinion para. 32.

⁷⁵ Opinion para. 34.

matter, voluntary self-incriminating statements would not be disclosed'.⁷⁶ What is more, according to the Advocate General, although third parties' right to an effective remedy must be respected, and pre-existing documentation should be handed over to those claiming to have incurred damages as a result of the cartel, leniency applicants enjoy an '*overriding legitimate expectation*' with respect to the non-disclosure of self-incriminating evidence drafted for the competition authority.⁷⁷

However, the CJEU did not follow the Opinion handed down by AG Mazák and stressed that the notices and the model leniency programme under scrutiny are *not binding* upon the Member States,⁷⁸ despite the fact that these had indeed been '*designed to achieve the harmonisation of some elements of national leniency programmes*'.⁷⁹ Although the CJEU acknowledges that 'the guidelines set out by the Commission may have some effect on the practice of the national competition authorities',⁸⁰ it is nevertheless up to the courts and tribunals of the Member States, on the basis of their national law, yet also in conformity with the *principle of loyalty*,⁸¹ to weigh on a case-by-case basis⁸² the Community interest of the effective operation of leniency programmes⁸³ and the right of any individual guaranteed under EU law to seek damages caused by conduct which is liable to restrict or distort competition.⁸⁴

Accordingly, the CJEU refused to extend the obligation to respect the legitimate expectations of leniency applicants to national authorities, underlining the fact that the access to file rules of the soft law ECN model leniency programme merely bound the institution which had adopted it, namely the European Commission. In exchange for respecting the apparently overriding rule of *national procedural autonomy* in areas not covered by binding European law, the Court

⁷⁶ Opinion para. 45, italics by me.

⁷⁷ Opinion para. 45; Romina Polley, *Third Party Access to File in Competition Cases*, in *The EEA and the EFTA Court – Decentred Integration*, 452 (Carl Baudenbacher et al. eds, Hart Publishing 2014).

⁷⁸ *Pfleiderer*, para. 21.

⁷⁹ *Ibid.*, para. 22, italics by me.

⁸⁰ *Ibid.*, para. 23.

⁸¹ Referring to Member State obligations regarding soft law measures, Möllers argues that Member States 'are obliged to examine them closely and to either conform with them or, where appropriate, to deviate from them only with sufficient explanation. This flows from the general duty of loyalty in Article 4 TEU (formerly Article 10 TEC)'. Möllers, *supra* n. 3, at 399. See also Korkea-aho, *supra* n. 37, at 165–166; John Temple Lang, *The Duty of Cooperation of National Courts in EU Competition Law*, 17(1) Irish J. Eur.L. 27, 32–33 (2014). For his part, Klamert specifies the duty flowing from the principle of loyalty as the principle of effectiveness, and stresses that the principle of loyalty requires not only that Member States observe and promote the effective enforcement of EU law, but also that EU bodies respect the division of competences under the duty of refraining from measures that may encroach upon the powers of the Member States. Marcus Klamert, *The Principle of Loyalty in EU Law*, 127 (Oxford University Press 2014).

⁸² *Pfleiderer*, para. 31.

⁸³ *Ibid.*, para. 26.

⁸⁴ *Ibid.*, para. 28; Michael J. Frese, *Sanctions in EU Competition Law*, 103–104 (Hart 2014).

conceded to possible uncertainties in the national implementation of leniency programmes with respect to confidentiality and effective legal remedy to injured parties. While garnering criticism for deepening uncertainty in the realm of the national implementation of leniency and private enforcement,⁸⁵ Polley notes that the ruling must be ‘regarded as the result of the ECJ’s judicial self-restraint in a field where the EU legislator had not established any rules’.^{86,87} Indeed, as Ştefan points out, the Court’s ‘conclusion affords importance to the principle of national procedural autonomy: national authorities cannot see their discretion limited by a soft law instrument which is exterior to them’.⁸⁸

3.3 CONCLUSIONS

Formal soft law measures, such as recommendations are formal acts under Article 288 TFEU, the substance of which is the indirect harmonization of national laws. These measures were enacted with the participation of the Member States (agreement in Council),⁸⁹ therefore, it is clear that Member States intended the measure to have certain legal effects – nevertheless, the measure cannot be fully binding, otherwise the author of the measure would not have opted for, or the competence conferred on the institution⁹⁰ would not have been limited to adopting a recommendation. What then, is the extent of the Member States’ obligation under these formal measures? The ‘must consider’ obligation entails that Member States cannot disregard such measures and pretend they

⁸⁵ According to Polley, the *Pfleiderer* judgment ‘contributed to an increased legal uncertainty regarding the conditions of third party access to the case file of a competition authority, because they advocate a case-by-case assessment in order to strike the right balance between the different interests at stake speaking for and against disclosure. Polley, *supra* n. 77, at 453; See also Barry Doherty & Anne Fitzpatrick, *Courage to Change? The Rocky Road to Directive 2014/104/EU and the Future of Private Competition Law Enforcement in Ireland*, 18(12) Irish J. Eur. L. 15, 20–21 (2015).

⁸⁶ ‘An ad hoc balancing approach inevitably leads to an appreciable degree of uncertainty. Indeed, the solution in *Pfleiderer* has already attracted a great deal of criticism. In my view, this criticism is largely unfair, since the ECJ, given the current state of the law, could not really go much further than this’. Luís Silva Morais, *Integrating Public and Private Enforcement in Europe: Legal Issues*, in *European Competition Law Annual – 2011. Integrating Public and Private Enforcement. Implications for Courts and Agencies*, 125 (Philip Lowe & Mel Marquis eds, Hart 2014).

⁸⁷ Polley, *supra* n. 77, at 453.

⁸⁸ Ştefan (2016), at 13. Taking a different view, Louise Tolley traces back the ECJ’s reluctance to accept AG Mazák’s proposal to give preference to leniency applicants with respect to self-incriminating files to the difficulty in distinguishing between pre-existing documents and those created for the purposes of the leniency application. <http://www.allenoverly.com/publications/en-gb/Pages/Disclosing-leniency-documents-to-damages-claimants-no-ECJ-guidance.aspx> (20 June 2017).

⁸⁹ Art. 292 TFEU: ‘The Council shall adopt recommendations. It shall act on a proposal from the Commission in all cases where the Treaties provide that it shall adopt acts on a proposal from the Commission. It shall act unanimously in those areas in which unanimity is required for the adoption of a Union act. The Commission, and the European Central Bank in the specific cases provided for in the Treaties, shall adopt recommendations’.

⁹⁰ E.g.: Art. 167 para. 5 conferring the competence on the Council to adopt recommendations (on proposal from the Commission) in the field of culture.

do not exist. At the same time, their duty goes beyond a mere acknowledgment of the measure in question: the verifiable consideration of recommendations is secured through the obligation to state reasons for deviating from its provisions. Finally, the ‘must consider’ obligation stops short before becoming a duty of consistent interpretation, since reasoned deviation is allowed and no obligation to interpret national law in the light of Union soft law is foreseen. The same considerations seem to apply to formal soft law measures enacted by the Commission based on the power conferred on it and generally formulated in Article 292 TFEU and provided for in specific Articles of the Treaty.

Similarly, certain informal soft law measures, such as the leniency programme are also designed to indirectly harmonize national laws, yet no consent on the side of the Member State exists. At the same time, 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. Based on the above, there is no real difference between the duty to take into account expressed in *Grimaldi*, the same duty foreseen in *Mediaset* and the duty to weigh interests laid down in *Pfleiderer*, since both amount to the obligation of the national court or authority to consider European law when taking its decision – whether this takes place through the application of a provision or the weighing of different interests is merely a question of application. However, in the case of informal soft law measures, the principle of sincere cooperation and effectiveness seem to replace the missing express consent on the side of the Member States to provide legal effect.

4. FULLY BINDING SOFT LAW MEASURES: THE ‘DUTY OF COOPERATION’

4.1 HARDENING INFORMAL MEASURES

Cooperation is a key notion in the next line of cases described below, both actually, involving an element of participation and consent, and legally, with a concrete legal basis prescribing close cooperation between the Commission and national authorities. This has a transformative effect on the bindingness of the affected soft law measures.

4.1[a] *CIRFS*

The *CIRFS* case⁹¹ concerned an action for the annulment of a Commission decision⁹² which was based on a discipline laid down in a letter agreed to by all

⁹¹ *CIRFS* (C-313/90) [1993] ECR I -1125.

⁹² Decision 85/18/EEC of 10 Oct. 1984 on the French regional planning grant scheme (OJ 1985 L 11, p. 28).

Member States.⁹³ In the course of the proceedings launched by CIRFS, the French government and Allied Signal argued that disciplines are merely guidelines that the Commission wishes to follow ‘after the Member States have given their assent to the terms and scope of its communications’,⁹⁴ The Court however, clarified that the fact that a discipline is rooted in an *agreement*⁹⁵ between the Member States and the Commission cannot strip it of its binding effect.⁹⁶ In particular, the rules of state aid set out by the Commission in a communication (discipline) and *accepted* by the Member States, *have binding effect and constitute a measure of general application*.⁹⁷ Such disciplines cannot be unilaterally amended without breaching the principles of equal treatment and the protection of legitimate expectations.⁹⁸

The contested measure, 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. As a result, not only the Commission, but the Member States implementing the discipline were also fully liable for breaching the principles of *equal treatment and legitimate expectations*. The wording of the judgment seems to indicate that ‘acceptance by Member States’ may also be manifested in non-contestation on the side of the Member States: ‘It is common ground that that definition of the scope of the discipline was not contested by the addressee Member States at that time’.⁹⁹ However, referring to an instance of implied consent, with respect to the Commission’s unilateral attempt to amend the

⁹³ CIRFS, paras 1, 3. The International Rayon and Synthetic Fibres 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 of the synthetic fibre 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 fibres 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 fibres 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 fibres 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 fibres.

⁹⁴ CIRFS, para. 32.

⁹⁵ See also, para. 42 of the Opinion of Advocate General Lenz in CIRFS.

⁹⁶ CIRFS, para. 36.

⁹⁷ *Ibid.*, summary of judgment, para. 4.

⁹⁸ *Ibid.*, paras 44–45.

⁹⁹ *Ibid.*, para. 4.

discipline by deciding to authorize aid to Faserwerk Bottrop Advocate General Lenz stresses that ‘the fact that the Faserwerk Bottrop decision was not challenged, even though it was notified to all the Member States, is irrelevant. The Member States could not have been aware that their “silence” would trigger such a legal consequence. It cannot therefore be regarded as consent’.¹⁰⁰ As Senden points out, the Court most probably implied a further precondition for the bindingness of the communication upon the Member States, namely the applicability of the duty of cooperation as laid down in Article 93 paragraph 1 EC on state aid.¹⁰¹ This also follows from the judgment rendered in *Ijssel-Vliet*.¹⁰²

4.1[b] *Ijssel-Vliet*

The *Ijssel-Vliet* ruling concerned the status of Commission guidelines in the implementation of national aid schemes.¹⁰³ In its questions, among others, the Dutch Council of State asked whether Guidelines – upon which the national aid schemes are to be based – are binding. The Court pointed out that the applicable Article 93 paragraph 1 EC empowers the Commission to review national systems of aid and to propose appropriate measures¹⁰⁴ in close cooperation with the Member States, involving ‘an obligation of *regular, periodic cooperation* on the part of the Commission and the Member States, from which neither the Commission nor a Member State can release itself’.¹⁰⁵ Guidelines issued by the Commission form an integral part of the *regular and periodic cooperation* of the parties, and are elaborated in consultation with the Member States, taking into account their respective observations.¹⁰⁶ In this ‘spirit of cooperation’, the Netherlands

¹⁰⁰ Opinion AG Lenz in *CIRFS*, para. 130.

¹⁰¹ ‘[T]he reasoning of the Court in this case makes very clear that acceptance alone is not sufficient. Although in the *CIRFS* Case the Court did not as such consider the existence of a legal basis to be a relevant element in determining whether the discipline at issue there had binding force, in my view this element is somehow implied in the Court’s judgment’. Senden, *supra* n. 16, at 278.

¹⁰² *Ijssel-Vliet Combinatie* (C-311/94) [1996] ECR I-5023.

¹⁰³ 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 of 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. *Ijssel-Vliet*, paras 1–2, 13–15, 17, 20.

¹⁰⁴ ‘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 Art. 93(1), providing for a specific duty of cooperation between the Commission and the Member States’. Senden, *supra* n. 16, at 279.

¹⁰⁵ *Ijssel-Vliet*, para. 36, italics by me. See also. Ştefan (2016), at 11. Cf. however: *Salt Union* (T-330/94) [1996] ECR II-1475.

¹⁰⁶ *Ijssel-Vliet*, paras 37–39.

Government assured the Commission in its letter that it observed the criteria laid down by the Guidelines with respect to aids granted in the fisheries sector.¹⁰⁷ The Court built on its *CIRFS* case-law, where it ‘recognized that a ‘discipline’ of the same legal nature as the Guidelines, whose rules were accepted by the Member States, was binding’.¹⁰⁸ Finally, the Court summarized its findings concluding that a Member State subject to the duty of cooperation under Article 93 paragraph 1 EC which has accepted the rules of the Guidelines in question is bound by the same and must apply them.¹⁰⁹

Based on the *Ijssel-Vliet* ruling we may deduce that the fully binding nature of informal soft law measures such as guidelines presuppose the a) existence of a *specific duty of cooperation* rooted in a concrete legal basis and the b) *acceptance* of the soft law measure by the Member State concerned.¹¹⁰ Senden underlines 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’,¹¹¹ and Member States are under no obligation to agree to such measures of the Commission, ‘only if they choose to do so, are they bound by them’.¹¹² Consequently, the specificity of the legal basis prescribing cooperation sets such measures strongly apart from other informal measures coupled with the mere general obligation of sincere cooperation (Article 4 paragraph 3 TEU) analysed in *Pfleiderer* and *Mediaset*, amplifying the bindingness of such instances of soft law:

4.1[c] *Germany v. Commission*

In the judgment of 2000 rendered in the *Germany v Commission* case the Court reiterates its settled case-law regarding the bindingness of guidelines referring to the *CIRFS* and *Ijssel-Vliet* rulings, emphasizing that Guidelines constitute an element of the obligation of regular and periodic cooperation between the Commission and the Member State, furthermore, ‘the German Government took part in the procedure for the adoption of the Guidelines and ... approved them’.¹¹³ Thus, only approval on the side of the Member State confirms the bindingness of the given soft law measure for the Member State concerned, and as Senden puts it, ‘intention plays an important role. Thus, it must be possible to derive an intention

¹⁰⁷ Letter of 31 Jan. 1989, *Ijssel-Vliet*, para. 40.

¹⁰⁸ *Ijssel-Vliet*, para. 42.

¹⁰⁹ *Ibid.*, para. 49.

¹¹⁰ Senden, *supra* n. 16, at 277.

¹¹¹ *Ibid.*, at 465.

¹¹² *Ibid.*, at 279.

¹¹³ *Germany v. Commission* (C-288/96) [2000]ECR I-8237, paras 64–65.

to ... be legally bound from the substance of an act, if it is to be capable of having binding force'.¹¹⁴

However, as pointed out by the General Court in the state aid related *Volkswagen* case,¹¹⁵ although the rules laid down by the Commission in the 'Community framework' 'are entirely devoid of binding force and bind Member States only if the latter have consented to them, there is nothing to prevent the Commission from examining the aid which must be notified to it in the light of those rules'.¹¹⁶ Thus, while Member States that had failed to agree to the soft law measure are not bound to apply them, the institution adopting the measure in question remains bound by the same and may consider these when assessing aids granted by non-consenting Member States.

4.2 CONCLUSIONS

All measures pertaining to this category are informal measures formulated and agreed to in an ongoing cooperation between the Commission and the Member States. Both the substance of the measure and the consent of the Member State to be bound by the same and to apply the measure speak for the fully binding nature of such acts. This has a transformative effect on informal measures which would otherwise be destined to qualify as soft law. Reaching back to the *Grimaldi* jurisprudence, we may conclude that here we are faced with a misfit between the choice of a soft legal instrument and the true legislative intent of producing binding effects. In essence, such informal measures have in fact 'hardened' to become fully binding through the consent of the Member States and may be considered hard law measures masquerading as soft law. At the same time, a corollary of consent, the obligation for Member States to respect legitimate expectations arises.

5 NON-BINDING SOFT LAW MEASURES: NO DUTY WHATSOEVER

5.1 INFORMATIVE INFORMAL MEASURES

The obligation of national courts and authorities to consider a non-binding measure issued by a Community institution seems to be lessened with respect to 'informative'¹¹⁷ informal soft law measures. Based on what follows, Member States

¹¹⁴ Senden, *supra* n. 16, at 289.

¹¹⁵ *Volkswagen* (joined cases T-132/96 & T-143/96) [1999] ECR II-03663. See in detail. Fiona G. Wishtlade, *Regional State Aid and Competition Policy in the European Union*, 25–28 (Kluwer Law International 2003).

¹¹⁶ *Volkswagen*, para. 209.

¹¹⁷ Senden & Prechal, *supra* n. 8, at 188; Cosma & Whish, *supra* n. 1, at 47–48.

must not even formally acknowledge such measures, since there is no duty to refer to the same, not to mention any duty to state reasons for possible deviations.¹¹⁸

5.1[a] *Expedia*

In *Expedia*,¹¹⁹ the applicant challenged the lawfulness of launching national cartel proceedings on the bases of Article 101 paragraph 1 TFEU Article against it, claiming that its market share together with its competitor SNCF with which it had set up a subsidiary did not amount to 10% as set out in the Commission's *de minimis* notice. In its ruling, the Court emphasized that while the principles of equal treatment and the protection of legitimate expectations require that the Commission be bound¹²⁰ by the *de minimis* notice it issued, the notice itself contains no reference to declarations made by national competition authorities that they acknowledge and abide by the principles set out in the same.¹²¹

Indeed the wording of the *de minimis* notice, the fact that it was only published in the 'C' series of the Official Journal of the European Union intended only for information, as well as the relevant case-law of the Court regarding Commission notices all point to the fact that such measures are not binding upon the competition authorities and courts of the Member States.¹²² Therefore, although Member States are free to take into account the thresholds established in the *de minimis* notice, they are by no means required to do so: 'such thresholds are no more than *factors among others that may enable* that authority to determine whether or not a restriction is appreciable by reference to the actual circumstances of the agreement', thus, failure to consider the threshold established by the notice shall not infringe EU law.¹²³

¹¹⁸ Cf. Ştefan (2016), at 20.

¹¹⁹ *Expedia* C-226/11 [2012] ECR 000.

¹²⁰ 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, *supra* n. 8, at 190.

¹²¹ *Expedia*, para. 26, 28.

¹²² *Ibid.*, paras 24, 29–30.

¹²³ *Ibid.*, para. 31–32. 'AG Kokott views the De Minimis Notice as a 'guideline' for the most effective and uniform application of the rules on competition possible across the entire European Union; even if they are not binding, the national authorities and courts should be required to address the assessment of the Commission as expressed in the Notice and supply judicially reviewable ground in the event of a deviation. However, this would also gloss over the circumstance that Commission Notices are not legal standards but rather are merely indicative'. Frenz, *supra* n. 9, at 295.

5.1[b] *Estée Lauder*

In the *Estée Lauder* case,¹²⁴ the nature and legal effects of so-called ‘comfort letters’ issued by the Commission were at stake. Comfort letters are administrative letters issued by the Commission informing undertakings that in the Commission’s opinion they had not breached relevant cartel rules – however, sending such a letter does not prevent the Commission from reopening the undertakings’ file. In the instant case, *Estée Lauder* denied supplying the plaintiff’s shop with its products due to its system of distribution agreements.¹²⁵ In its defence, *Estée Lauder* relied on the registered letter of the Commission which confirmed, that the distribution agreements in question were not in breach of Community competition law and claimed, that this should be recognized as valid under national law.¹²⁶

In its judgment, the Court declared, that comfort letters do not bind national courts¹²⁷ – indeed, they did not even bind the Commission, since it was free to reopen the file of the undertaking concerned at any time – yet the Court nevertheless stated that ‘the opinion transmitted in such letters nevertheless constitutes a factor which the national courts *may take into account* in examining whether the agreements or conduct in question¹²⁸ comply with Community competition rules. While Albers-Llorens reads the judgment as one which compels national courts to take such letters into account,¹²⁹ a comparison of the different language versions¹³⁰ of the judgment indicates that there is no hard obligation for national courts to use comfort letters as interpretation aids, but may decide to do so at their own discretion.

5.1[c] *Guerlain*

Contrary to what is suggested by Albers-Llorens and Ştefan, i.e. that the case-law on comfort letters ‘should be read in conjunction with the judgment in the case *Grimaldi*’¹³¹ and the obligation on national courts should be construed as a stricter ‘must consider’ obligation, I propose that the Court expressly sought to dampen the relevance of such informal measures as interpretation aids on the national level.

¹²⁴ *Anne Marty v. Estée Lauder* (37/79) [1980] ECR 2481.

¹²⁵ *Estée Lauder*, paras 2–3.

¹²⁶ *Ibid.*, paras 5, 3.

¹²⁷ See also, Henry G. Schermers & Denis F. Waelbroeck, *Judicial Protection in the European Union* 334–335 (Kluwer Law International 2001).

¹²⁸ *Estée Lauder*, para. 10.

¹²⁹ ‘[T]hey should be taken into account by the national courts’. Albertina Albers-Llorens, *EC Competition Law and Policy*, 128 (Routledge 2002).

¹³⁰ ‘berücksichtigen können’, ‘pueden tener en cuenta’, ‘peuvent prendre en compte’, ‘possono tener conto’; *Anne Marty v. Estée Lauder* (37/79) [1980] ECR 2481, *Estée Lauder*, para. 10.

¹³¹ Ştefan, *supra* n. 4, at 767–768.

This is confirmed in *Guerlain*,¹³² where the Court expressly refers to the powers of the Commission to adopt formal legal acts pursuant to formal rules.¹³³ While Member State courts are barred from applying national competition law where this ‘would result in an exemption granted by a decision or a block exemption being called into question’,¹³⁴ a mere comfort letter of the Commission cannot ‘have the result of preventing the national authorities from applying to those agreements provisions of national competition law which may be more rigorous than Community law in this respect’.¹³⁵ Therefore, instead of likening the bindingness of administrative letters sent by the Commission to that of recommendations in *Grimaldi*, these are much closer to the *Expedia* jurisprudence and the lack of binding power for national courts.

5.1[d] *DHL*

More recently, the Court revisited the bindingness of leniency notices upon national competition authorities in the *DHL* case.¹³⁶ The CJEU recalled that the cooperation mechanism established between the Commission and national competition authorities was aimed at ensuring ‘the coherent application of the competition rules in the Member States’.¹³⁷ The Court further pointed out that ECN is ‘a forum for discussion and cooperation in the application and enforcement of EU competition policy’.¹³⁸ As such, it seems to refer to an obligation of cooperation, while the substance of the measure appears to indicate an aim to indirectly harmonize the application of competition law. Nevertheless, the Court stressed

¹³² *Giry and Guerlain* (joined Cases 253/78 & 1–3/79) [1980] ECR 2327.

¹³³ *Ibid.*, paras 9–11.

¹³⁴ *Ibid.*, para. 17.

¹³⁵ *Ibid.*, para. 18.

¹³⁶ *DHL* (C-428/14) ECLI:EU:C:2016:27. DHL had submitted 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 (*DHL*, 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 (*DHL*, paras 18–20, 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.

¹³⁷ *DHL*, para. 30.

¹³⁸ *DHL*, para. 31, referring to recital 15 of Council Regulation (EC) No 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, (OJ L 001, 04 Jan. 2003, at 1–25) and para. 1 of Commission Notice on cooperation within the Network of Competition Authorities, (OJ C 101, 27 Apr. 2004, at 43–53).

that it has already held that neither measures stemming from the ECN, such as the ECN Model Leniency Programme, nor the Notice on Cooperation or the Leniency Notice are binding upon, and cannot create obligations for the Member States, pointing out, that these had merely been printed in the ‘C’ series of the Official Journal for information.¹³⁹

Further, ‘in the absence of a centralized system, at the EU level, for the receipt and assessment of leniency applications in relation to infringements of cartel rules’,¹⁴⁰ national procedural autonomy prevails. The bindingness of the Leniency Notice and the ECN Model Leniency Programme for Member States was completely rejected, although Member States ‘have formally undertaken to respect the principles set out in the Notice on Cooperation’.¹⁴¹ The Court maintained that the latter ‘does not change the legal status, under EU law, of that notice, nor that of the ECN Model Leniency Programme’, underlining the independence of EU and national leniency applications and procedures.¹⁴²

Both the *Pfleiderer* and the *DHL* case concern the bindingness of the leniency notice, yet the Court negated the existence of any obligation of the national court in *DHL*. The answer to this quandary could be that while there were two competing EU policy interests at stake in *Pfleiderer* which had to be reconciled, the *DHL* case merely concerned the rival status of leniency applicants within the national leniency program. Although ‘leniency programs must be exercised in accordance with EU law’, in particular, the principle of *effet utile* requires that Member States ‘not render the implementation of EU law impossible or excessively difficult’.¹⁴³ Thus, under competition law ‘the autonomy of the NCA is only limited to the extent that [it] might undermine the effective application of EU law’.¹⁴⁴ Since Member States are not obliged to put a specific leniency program in place under the notice and since leniency programs on the EU and the national level run in parallel with each other, disregarding the non-binding leniency notice does not undermine the effective application of EU law. Indeed, the parallelism of multiple cartel proceedings and different leniency programs further increase uncertainty for cartel members, fostering compliance with competition rules and bolstering the effectiveness of EU competition law.

¹³⁹ *DHL*, paras 32–35, 42, referring to the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, at 17–22).

¹⁴⁰ *DHL*, para. 36.

¹⁴¹ *DHL*, para. 43.

¹⁴² See also. Fabian Stancke, *Kronzeugenregelung. Nebeneinander von unionsrechtlichen und nationalen Kronzeugenregelungen*, 10 *Zeitschrift für Versicherungsrecht, Haftungs- und Schadenersatzrecht*, 677, 685 (2016).

¹⁴³ *DHL*, para. 78. René Grafunder: *EuGH zum Verhältnis von verschiedenen Kronzeugenregelungen in der EU*, 8 *Der Betrieb*, 462, 463 (2016).

¹⁴⁴ Daniel Mândrescu, *One Stop Shop? Not Quite There Yet*. <http://leidenlawblog.nl/articles/one-stop-shop-not-quite-there-yet> (11 Feb. 2016)

5.1[e] *Kotnik*

The *Kotnik* case¹⁴⁵ concerned the interpretation of the informal soft law measure of the Banking Communication¹⁴⁶ and specifically its bindingness for national law on the banking sector. In its ruling, the CJEU confirmed that the Treaty confers a wide discretion on the Commission to assess the compatibility of aid measures with the internal market, including the possibility to adopt guidelines spelling out the criteria of compatible aid.¹⁴⁷ While the Commission is bound by its own guidelines and – for reasons of equal treatment and legitimate expectations – may not depart from the same, ‘the Banking Communication is not capable of imposing independent obligations on the Member States, but does no more than establish conditions, designed to ensure that State aid granted to the banks in the context of the financial crisis is compatible with the internal market’.¹⁴⁸ The laconic reasoning of the Court may be supplemented by AG Wahl’s Opinion for further clarification.¹⁴⁹

It is interesting to note, that in his Opinion AG Wahl pointed out, that the Constitutional Court’s questions seemed to be premised on the assumption that the Banking Communication ‘is, if not de jure, at least de facto binding on the Member States’.¹⁵⁰ AG Wahl was quick to point out that Member States are not bound by the Communication and are not obliged to implement the same in national legislation, since the Commission has no general legislative power to lay down binding rules determining which aid is compatible with the internal market – indeed, ‘any such body of binding rules would be null and void’.¹⁵¹ Although ‘the Commission may publish acts of “soft law”’,¹⁵² compatibility is

¹⁴⁵ *Kotnik et al.* (C-526/14) [2016] EU:C:2016:570.

¹⁴⁶ The Communication (from the Commission on the application, from 1 Aug. 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (‘Banking Communication’), (OJ 2013 C 216)) was adopted by the European Commission as the seventh of its Crisis Communications permitting aid to remedy serious disturbances in the economies of Member States. The Banking Communication provides guidance on the compatibility of state aid with the internal market which were geared towards combating the financial crisis and ensuring the stability of the financial markets (Banking Communication, paras 1–3, Opinion AG Wahl in *Kotnik*, paras 1–3.). Following a bail-out of five Slovenian banks duly notified to, and authorized by the Commission and carried out on the basis of the law on the Slovenian banking sector implementing the Banking Communication, several applications for the review of the constitutionality of the bail-out measures were submitted to the Ustavno sodišče (Slovenian Constitutional Court) (*Kotnik*, paras 24–26, 28.). Since the objections of the applicants were directed against those provisions of the law which implemented the Banking Communication, the Constitutional Court stayed the main proceedings and referred several questions to the Court of Justice of the European Union, seeking a preliminary ruling on, among others, the bindingness of the Banking Communication underlying the national law on the banking sector (*Kotnik*, paras 28–29.).

¹⁴⁷ *Kotnik*, paras 37–39.

¹⁴⁸ *Ibid.*, paras 40, 44–45.

¹⁴⁹ Opinion AG Wahl in *Kotnik*.

¹⁵⁰ Opinion, para. 27.

¹⁵¹ Opinion, paras 28, 36–37.

¹⁵² Opinion, para. 38.

nevertheless ‘from a legal point of view’ still governed by Article 107(3)(b) TFEU.¹⁵³ While AG Wahl expressly refers to the obligation of Member States stemming from the duty of sincere cooperation under Article 4 paragraph 3 TEU, he nevertheless concludes that any effect of the Communication on the Member States ‘can at most be incidental or indirect’.¹⁵⁴

Both the *DHL* and the *Kotnik* case involve a reference to the duty of sincere cooperation, yet this abstract obligation is merely a general duty of national courts and authorities to refrain from jeopardizing the effective application of EU law, without specifically rendering any soft law measure to be binding upon the Member States. As a result, the general principle of sincere cooperation under Article 4 paragraph 3 TEU gives rise ‘to no obligation of the national competition authorities and courts to consider [anti-competitive] agreements in compliance with the guidelines, i.e. to consider the content of such guidelines to be binding’.¹⁵⁵

5.1.[f] *Salt Union*

The Court of First Instance also took the chance to highlight the non-binding character of the Commission’s *appropriate measures* in *Salt Union*.¹⁵⁶ The case revolved around the action launched by *Salt Union* against the decision of the Commission contained in its letter refusing to adopt appropriate measures to prevent the Netherlands Government from granting state aid to *Salt Union*’s rival company, *Frima*.¹⁵⁷ The Court of First Instance dismissed the action, since it was brought against an incontestable measure, laconically stating that ‘according to the actual wording of Article 93(1) of the Treaty, ... appropriate measures are merely proposals. In particular, if such measures were proposed to the Netherlands Government or State, they would not be bound to adopt them’.¹⁵⁸ At first sight, this seems to be at odds with the findings in *Ijssel-Vliet* where the Court argued that appropriate measures taken under Article 93 paragraph 1 EC involve an obligation of regular and periodic cooperation between the Commission and the

¹⁵³ Opinion, para. 44.

¹⁵⁴ Opinion, para. 40.

¹⁵⁵ Pampel, *supra* n. 7, at 13. As Kallmayer points out, ‘although national competition authorities (and courts) are called upon to apply and enforce EU competition law – together with the Commission – within the European Competition Network’, this network is not headed by the Commission and she does not exercise supervisory or legality control over the other members of the group. Kallmayer, *supra* n. 10, at 677, *see also*. von Graevenitz, *supra* n. 39, at 170. This is important since according to certain scholars, ‘the Commission can only issue guidelines in case she is entrusted with the necessary supervisory or steering competences under primary or secondary law. (...) Should the Commission nevertheless issue guidelines [without the necessary competence], these should be completely disregarded in the course of the application of primary and secondary law’. Von Graevenitz, *supra* n. 39, at 170.

¹⁵⁶ *Salt Union* (T-330/94) [1996] ECR II-1475.

¹⁵⁷ *Ibid.*, paras 4–5.

¹⁵⁸ *Ibid.*, para. 35.

Member States from which neither can release itself. However, as Conte underlines, this appropriate measure only becomes binding in case the Member State accepts the proposed measure: ‘since the Member State could also refuse the proposed appropriate measures, their acceptance depends at least initially upon a free choice to be made by the Member State’.¹⁵⁹

5.2 CONCLUSIONS

Informal measures, such as the de minimis notice or the comfort letters of the Commission with the sole aim of informing third parties about the conduct the Commission shall follow are only binding upon the author of the measure, if at all. The fact that comfort letters are of individual applications and notices are not, does not seem to make a difference with respect to their non-binding nature for Member States. Appropriate measures, where there is a lack of Member State consent, are also devoid of bindingness. 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.¹⁶⁰ The principle of sincere cooperation (without a specific duty of cooperation) may or may not be mentioned in judgments declaring the non-binding nature of such measures, yet these references do not carry much weight in practice.

The CJEU expressly holds that while certain measures may not be binding, they ‘cannot therefore be regarded as having no legal effect’.¹⁶¹ While this statement is generally accepted, I also proposed that informal measures do not necessarily ‘follow the same legal regime as recommendations and opinions’,¹⁶² but much rather cover a range of normativity.

Indeed, it seems that the bindingness of the measures analysed through the lens of the case-law of the CJEU is spread on a spectrum, graduated between fully-binding, non-binding and a range in between, imposing a duty of consideration. The analysis of CJEU case law encompassing a broad range of soft law instruments substantiates that the bindingness of soft law measures is unrelated to which policy field they pertain to. Instead, what matters from the perspective of bindingness is

¹⁵⁹ Giuseppe Conte, *The EC Rules Concerning Existing Aid: Substantial and Procedural Aspects*, in *International Competition Law Series: EC State Aid Law*. Liber Amicorum Francisco Santaolalla Gadea, 300 (Kluwer Law International 2008).

¹⁶⁰ 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*, 11 EuZW, 325, 325 (2000).

¹⁶¹ Grimaldi, para. 17.

¹⁶² Ștefan (2012), at 879.

the specific combination of the form and substance of the measure. This article proposes a general scheme for the categorization of any Union soft law, irrespective of the given policy area in which it emerged.

Based on the case-law of the CJEU, whether the measure is Treaty-based or not is of relevance only in the sense that formal soft law measures cannot fall under either the category of non-binding or full-binding measures.¹⁶³ However, when it comes to informal measures, these measures may be located at any point within the full span of graduated normativity, thus, in their case, determining bindingness depends on further considerations. In this respect, it is worth recalling Senden's claim that legal effects of soft law measures arise 'on the basis of their substance or as a result of an agreement between the author of an act and its addressees'.¹⁶⁴ The survey of the CJEU's jurisprudence reveals however, that a further element must be taken into account when determining the bindingness of European soft law measures for national courts and authorities: beyond the substance of the norm and the consent of the Member States to be bound by it, the specific duty and degree of cooperation foreseen is also of relevance.¹⁶⁵

Considerations regarding the protection of third parties do not seem to 'harden' Member State obligations flowing from EU soft law. In fact, the duty to respect legitimate expectations seems to be attached only to fully binding informal measures agreed in the framework of regular and periodic cooperation between the Commission and the Member States. At the same time, while the effects of EU soft law on individuals exhibits great variety (compare *Grimaldi*, *Hopkins*, *Polska Telefonia* above), these are not necessarily aligned to the considerations of the form and bindingness of EU soft law measures described in the present article.

From the perspective of bindingness of soft law measures for Member States, identifying fully-binding informal measures seems to be most pressing. Based on the case-law of the CJEU informal measures may 'despite [their] soft outward appearance',¹⁶⁶ become fully-binding where there is express consent on the side of the Member State to be bound by the same. It is important to note, however, that even if the majority of the Member States had consented to being bound by the relevant informal measure, it still cannot be considered binding in respect of those Member States that failed to agree to the same. As a result, the same informal measure may be

¹⁶³ The different categories of soft law rarely exist in pure form, Kallmayer stresses that 'the different functions are often present at the same time', referring to the fact that the same measure may serve the purpose of both informing and orienting national implementation (see in particular *Polska Telefonia*), Kallmayer *supra* n. 10, at 668.

¹⁶⁴ Senden, *supra* n. 16, at 289. For an opposing view, cf. Peters (2007), at 411–412.

¹⁶⁵ Schwarze draws attention to the fact that the Lisbon amendments had failed to develop EU soft law into a 'standard, well defined category of the law with established requirements governing its adoption and legal consequences'. Schwarze, *supra* n. 9, at 18.

¹⁶⁶ Senden, *supra* n. 16, at 462–463; See cases *CIRFS*, *Ijssel-Vliet* and *Germany v. Commission*, *infra*.

fully-binding on consenting Member States and non-binding on non-consenting Member States. This means firstly, that the bindingness of the measure is wholly dependent on the will of the Member State, and second, that the outward ‘soft’ appearance of the norm in itself tells us nothing about its bindingness, which must be investigated individually with respect to each Member State concerned. Consequently, Member States must be aware that when it comes to certain informal measures of the EU, there may indeed be a hard core under the soft shell.

Table 1 ‘Graduated Normativity’¹⁶⁷ of European Soft Law Based on the Jurisprudence of the CJEU

<i>Type</i>	<i>Substance</i>	<i>Agreement</i>	<i>Purpose</i>	<i>Bindingness for Member State</i>	<i>Duty of Member State to Observe Legitimate Expectations</i>
Informal measure (de minimis notice, comfort letter) <i>Expedia, Estée Lauder, Guerlain, DHL, Kotnik, Salt Union</i>	Informs third parties on Commission’s conduct	None	Information	Non-binding	None
Formal measure (recommendation) <i>Grimaldi, European Emergency number</i>	Designed to indirectly harmonize	Participation and/or competence Sincere cooperation/ Effet utile	Interpretative aid, supplement to binding provisions Factor to be considered	Duty to take into account Duty to weigh interests, take factor into account	None None
Informal measure (programme, guideline, communication) <i>Pfleiderer, Mediaset, Polska Telefonía</i>	Designed to indirectly harmonize				

¹⁶⁷ Peters (2007), at 410.

<i>Type</i>	<i>Substance</i>	<i>Agreement</i>	<i>Purpose</i>	<i>Bindingness for Member State</i>	<i>Duty of Member State to Observe Legitimate Expectations</i>
Informal measure (discipline, appropriate measures) <i>CIRFS, Ijssel-Vliet, Germany v Commission</i>	Implementation of policy	Specific obligation of cooperation + consent	Rule to be implemented	Fully binding	Duty to observe legitimate expectations