Petra Lea LÁNCOS

The Many Facets of EU Soft Law

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PREFACE

In 2016 I joined the group of researchers working on the project *European Administrative Space* at the Deutsches Forschungsinstitut für öffentliche Verwaltung (FÖV) located at the Deutsche Universität für Verwaltungswissenschaften in Speyer, Germany. In my three years at the FÖV I tried to discern the room for manoeuvre or leeway enjoyed by Member States in the face of European soft law sources ('EU soft law and national scope of action'). Preparing for my research, I quickly came to understand that the study of EU soft law was most concerned with the ontology and taxonomy of this particular category of legal sources. Abundant academic literature revolves around solving the conundrum of separating hard law from soft law, and the myriad non-binding measures employed by EU institutions and bodies continues to confound legal scholars. Meanwhile, the incremental proliferation of such measures to facilitate the efficient operation of EU policies also makes academic inquiry into novel areas of research necessary, such as the possible effects of EU soft law and the implementation and consideration of EU soft law within the Member States. I was lucky enough to have been given wide berth to design my research agenda within the *European Administrative Space* project and for having been invited to contribute to the *Soft Law Research Network* (SoLaR) focusing of the use of soft law by national courts and administrations. This enabled me to both approach the study of EU soft law from a broader perspective, trying to summarize existing EU soft law-related research, to map new areas of inquiry, including the confusing phenomenon of directive-like recommendations, and to focus on the national reception and use of EU soft law, my actual field of research at FÖV. This volume is an edited monograph containing my findings on EU soft law and its implementation (with a particular focus on Hungary) published during my work as a researcher at the FÖV, as well as the following years. It is an attempt at capturing in this moment of time the nature and function of this elusive and ever changing species of legal sources: the non-binding measures of EU law.

CHAPTER I
AN OVERVIEW OF EU SOFT LAW RESEARCH[1]

The body of EU soft law is vast and hard to pin down. It is an amorphous, ever-growing class of norms, with fuzzy borders, existing in close connection with hard law measures.[2] While seemingly unobtrusive, EU soft law norms should not be underestimated: they may be 'harder' than expected. Legal scholars have long discovered the field of EU soft law research,[3] focusing in particular, on non-binding acts burgeoning in particular policy fields, such as competition law, state aid and fiscal policy, or innovative new governance mechanisms, such as the Open Method of Coordination. Meanwhile, the use of soft law in other areas (e.g. media law, agricultural land law etc.) and their reception in national legal orders has yet to be charted.

Based on the survey of the relevant scholarly literature and CJEU case-law, in this chapter I try to briefly summarize the chief areas and the main challenges of soft law research. The main areas and findings discussed in this chapter will be the basis for the selected topics elaborated on in the following chapters, with the ambition of contributing to the study of EU soft law in novel fields of concern. I depart from an analysis of scholarly attempts to draw a distinction between hard law and soft law, proceeding with their efforts to classify the different types of soft law sources. I then turn to my own research and findings regarding EU soft law. I begin with an overview of the possible strategies pursued by the EU regulator when resorting to soft law regulation. Next, relying on the jurisprudence of the CJEU I try to categorize soft law sources based on their practical effects. I then describe the phenomenon of directive-like recommendations, finally, turning to the problem of the use of EU soft law by national courts and authorities._

1 A version of this chapter was published in: Láncos (2019a).

2 Trubek–Cottrel op. cit. 4.

3 See in particular, Borchardt–Wellens op. cit.; Senden (2005a) op. cit.; Schwarze op. cit.; Peters (2011) op. cit.; Terpan op. cit.; Ştefan (2016) op. cit.

1. Overcoming Binary Approaches to EU Legal Sources

Neither the founding treaties of the EU, nor the soft measures themselves or the relevant judgments of the Court of Justice of the European Union (CJEU) speak of 'soft law'; in fact, it is a term that is hardly ever employed in EU documents.[4] Nevertheless, it is clear that there is a group of norms that stands in stark contrast with binding measures of EU law, with the aim of affecting change through persuasion, cooperation or good practices. While the difference between the two classes of norms clearly exists, the exact markers of the soft/hard law divide are difficult to determine. As Terpan stresses, "the difficulty with soft law is the very fluidity of the notion. Paradoxically, soft law is an oft-used concept, which is still given very different meanings as no consensus has emerged in scholarship."[5]

Seeking to grasp the concept of soft law, Trubek and Cottrell observe that it is „a very general term, and has been used to refer to a variety of processes. The only common thread among these processes is that while all have normative content they are not formally binding".[6] Perhaps the most widely accepted and cited definition of soft law is that developed by Snyder, who describes them as "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain – indirect – legal effects, and that are aimed at and may produce practical effects."[7] Yet with the proliferation of EU measures, drawing the line between binding and non-binding norms becomes an ever so challenging endeavour, since it is grounded in an assumed binarity inherent in the distinction between 'hard law' and 'soft law'.[8]

In fact, this binary approach is criticized insightfully by Armstrong: "if expressed simply as a dichotomy, then it is obvious that the hard/soft law distinction is highly reductive as a means of accommodating 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."[9] Several authors have pleaded for a more

[4] Christianos op. cit. 327.

[5] Terpan (2013) op. cit. 5.

[6] Trubek–Cottrell op. cit. 1.

[7] Snyder (1993) op. cit. 32; see also: Senden (2005b) op. cit., 22; Senden (2004) op. cit. 112.

[8] Möllers op. cit. 388.

[9] Armstrong op. cit. 206.

holistic view of norms, abandoning the traditional quest for separating soft law and hard law. One way of overcoming the problematic binary approach to the soft/hard law conundrum is the practical approach of '*hybridity*' as employed by the CJEU: acknowledging the close and interdependent nature of relevant binding and non-binding rules by applying them with due consideration to each other.[10] Hybridity is thus an approach which shifts the focus from differentiating between soft law and hard law, by acknowledging the reality that several policy fields are operated through a mesh of binding and non-binding rules, mutually supplementing, clarifying and detailing the requirements laid down.[11]

While hybridity may divert attention from the differences between soft law and hard law, it is nevertheless an issue of application, and does little to integrate hard law and soft law on a conceptual level. Instead, this is achieved by efforts attempting to describe *normativity as a spectrum*, ranging from "non-legal positions to legally binding and judicially controlled commitments".[12] Terpan attempts to navigate this spectrum by identifying soft and/or hard elements of a norm along the lines of source, content and enforcement, proposing that the category of hard law is conditional upon the 'hardness' of both content and enforcement.[13] Terpan explains that the spectrum approach helps locate soft law between non-law and enforceable commitments, while also highlighting processes of transformation into hard and soft law, respectively.[14] These insights fit well with Peters' observation that "law can have a variety of legal impacts and effects, direct and indirect ones, stronger and weaker ones. To accept *graduated normativity* means to assume that law can be harder or softer, and that there is a continuum between hard and soft (and possibly other qualities of the law)".[15] However, Peters further develops this approach with Pagotto, abandoning the idea of a strict division between hard law and soft law, submitting that *"soft law is in the penumbra of law.* […] [T]here is no bright line between hard and soft law. Legal texts can be harder or softer."[16] They contend that a 'prototype theory' of soft law is most workable: while a "fixed set of necessary and sufficient conditions" of soft law cannot be determined, in practice, lawyers will be able

[10] Hervey op. cit. 146.

[11] Trubek–Cottrell op. cit. 33.

[12] Terpan (2013) op. cit. 2.

[13] Ibid, 9. These „distinguishing paramaters" are what Peters and Pagotto refer to the 'intention to be legally bound" and the 'sanction potential' of norms, see: Peters–Pagotto op. cit. 10.

[14] Terpan (2013) op. cit. 2.

[15] Peters (2007) op. cit. 410, italics by me.

[16] Peters–Pagotto op. cit. 12.

to identify soft law with the premise “I know it when I see it”, accepting that the boundaries between the concepts of soft law and hard law will remain blurry.[17]

Apparently, all-encompassing definitions and approaches seeking to capture the common denominator of the vast array of phenomena characteristic of soft law will only yield a bland concept and will invariably disappoint.[18] Hence, efforts to categorize and describe the different types of soft law measures to come closer to the precise forms in which soft law manifests itself, have also taken off.

2. Scholarly Attempts to Establish a Taxonomy of Soft Law Measures

Soft law measures are so varied and diverse in their form and nature that their classification is a challenge. In fact, EU soft law sources may be categorized along various different lines: basis, source and function.

2.1 Formal and non-formal soft law measures

Perhaps the most obvious differentia specifica is whether or not the given soft law measure is Treaty-based or not. Namely, beyond the restricted category of soft law acts foreseen in the Treaty [Article 288 TFEU (ex-Article 249 EC)],[19] that is, opinions and recommendations *(formal measures),* a burgeoning of non-Treaty based measures including guidelines,[20] communications, notices, green

[17] Ibid.

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

[19] Article 288 (ex Article 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.’

[20] Akte sui generis’, Pampel op. cit. 12.

papers and white papers, comfort letters etc. *(non-formal measures)* may be discerned.

The rise of non-formal measures is explained by Senden and Prechal as follows:

> "[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."[21]

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

2.2 Differentiation by source

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

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21 Senden–Prechal op. cit. 186. See also: Terpan (2013) op. cit. 19–26.; Håkon–Whish op. cit. 46.

22 Peters–Pagotto op. cit. 18.

regulatory body's work)[23] and cooperation-based soft mechanisms operated by Member States and the institutions (e.g. Open Method of Coordination, OMC).[24]

2.3 Distinction by function

Several authors distinguish between soft law instruments based on their function: accordingly, measures may serve preparatory and informative *(pre-law),* interpretative and decisional *(law-plus),* as well as steering *(para-law)* functions.[25]

The *pre-law* function may be understood as the preparatory role of soft law norms. In this understanding, soft law precedes hard law with the potential of achieving convergence of Member State laws, enabling also the gathering of data on the effect of national legislation implementing such soft law. Lack of transposition or information gleaned from the impact assessment made possible by such preparatory norms may constitute the grounds for (and as such, the first step towards) the adoption of hard law in the very same field (e.g. the General Data Protection Regulation, informed by a number of working group recommendations, opinions etc.).[26] Peters and Pagotto refer to this as 'ultra vires' soft law, since it "pave[s] the way to a formal extension of the competences of the organisation which will be effected by a revision of the founding treaty."[27] But the informative function of soft law is also important: it represents the implicit consensus of institutions (e.g. declarations, gentleman's agreements etc.) or the reading of a single institution (e.g. opinion) on a given concept, norm or subject.[28]

The *law-plus* function of soft-law harks back to the empirical evidence of hybridity: "soft law and hard law increasingly intermesh and add up to more or less coherent normative regimes", with soft law providing an orienting,

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

[24] PETERS–PAGOTTO op. cit. 17–23.

[25] See in detail: SENDEN (2004) op. cit. 457 et seq.; PETERS–PAGOTTO op. cit. 23.

[26] MÖRTH op. cit. 16 et seq.

[27] PETERS–PAGOTTO op. cit. 23.

[28] Ibid.

interpretative function to promote compliance (e.g.: notices, guidelines, recommendations etc.).[29]

The *para-law* role of soft law is to provide a meaningful alternative to hard law, with a steering function even in situations where the adoption of hard law instruments is impossible or unfeasible.[30] To distinguish between instances of hybridity and the para-law function of soft law, as a rule of thumb we may consider the proliferation of soft law in the policy field under scrutiny. In fact, where the proliferation of soft law norms is considered to be low (e.g. consumer protection, development policy) soft law much rather serves to supplement hard law regulation. Meanwhile, soft law appears as an alternative to hard law in areas dominated by new modes of soft governance,[31] for lack of supranational competence or the political will to harmonise (e.g. fiscal policy, economic governance, education and culture etc.).

While these efforts at taxonomy are sufficiently broad, they help bring the observer closer to understanding the specific nature and purpose of the different forms of soft law.

3. Strategies Behind the Adoption of Non-Binding Norms

As Guzman and Meyer note, "the central mystery of soft law is the fact that states opt for something more than a complete absence of commitment, but something less than full-blown […] law."[32] Why then, will the Commission or the co-legislators opt for the regulatory form of soft-law? Scholarly literature has suggested several reasons for the choice of soft measures: accommodating the hard realities of policy assignment, institutional constraints and the need for inclusive, fast and flexible decision-making.

Adopting soft law may actually be a foregone conclusion and mandated by the Treaty legal basis itself, for example in the case education policy measures enacted under Article 165 paragraph 4 TFEU.[33] This reflects certain prior constitutional choices of the masters of the treaties, that is, the Member States,

29 Ibid.

30 Ibid, 23–24.

31 Terpan (2013) op. cit. 31.

32 Guzman–Meyer (2009) op. cit. 10.

33 See Senden (2004) op. cit. 91 and 93; Láncos (2018c) op. cit. 258 et seq.

as enshrined in the *distribution of competences*.[34] In a Union "(still) marked by diversity in demands and national preferences, plus the (still) low mobility of families" hard law will be the exception, applied to policies „that have a clear supranational nature".[35] Only in areas of a clear 'supranational nature' where strong convergence is foreseen will the Union hold exclusive competences and/or the powers to enact hard law, for the harmonisation or unification of national laws.

Based on all this, the burgeoning of soft law in policy fields pertaining to the exclusive competence of the EU may come as a surprise. Yet the high number of soft norm in the area of e.g. customs policy may be explained by the regulator's quest for *greater flexibility*: the level of detail necessary in this area, the need for rapid amendments and the imperative of taking "the latest developments of technology, safety and security" into account all call for the employment of soft measures.[36] Meanwhile, the desire to *evade structural constraints* such as tedious and lengthy legislative procedures producing hard law, will also prompt decision-makers to find more flexible solutions with the help of soft law.

Finally, the Commission may resort to soft tools out of necessity, when the EU has *no legislative power* in the given policy area or where the *shadow of the veto* is too great to make headway through binding legislation. An example would be the directive-like recommendation discussed above: the Commission adotped soft law on the organization of gambling, since the co-legislators could not agree on regulating this area. Often, the informality of soft mechanisms will "prove to be the only way forward with a view to realizing certain transnational socio-economic goals that cannot be addressed otherwise."[37]

4. Practical Effects and the 'Bindingness' of EU Soft Law

The diversity inherent in the category of soft norms not only renders the conceptualization of soft law problematic, but also excludes the formulation of sweeping notions regarding the practical effects and 'bindingness' of these measures. As the European Court of Justice (ECJ) pointed out in the landmark case *Grimaldi*, the fact that soft measures are not intended to produce binding

[34] Cf. Menéndez op. cit. 80.

[35] Alves–Afonso op. cit. 9.

[36] Ibid, 227.; Láncos (2018c) op. cit. 268.

[37] Senden–van den Brink op. cit. 13–14.

effects, does not mean that they have absolutely no legal effect.[38] In fact, non-binding norms may well have 'practical effects', reflecting "the degree to which rules are actually implemented domestically or to which states comply with them".[39] Meanwhile, bindingness indicates the obligation of national courts, legislators and authorities associated with the interpretation, application or transposition of EU soft law.[40] To complicate matters, in line with the spectrum approach there is a discernible graduation of normativity within the realm of soft law measures. This results in a spectrum of Member States obligations ranging from room for a total disregard for certain soft instruments, to the obligation of due consideration or even the binding implementation of provisions laid down in European soft law measures.

4.1 Harmonising Soft Law

Formal recommendations are measures proposing different actions to be taken by the Member States, effectively seeking to harmonise national law on a non-binding basis. Based on the *Grimaldi* case-law of the CJEU *national courts are bound to take recommendations* (i.e. formal soft law) *into consideration* in order to decide disputes submitted to them'[41]. The breadth of the obligation was not detailed by the Court, yet commentators were quick to declare that it could not amount to an obligation of consistent interpretation.[42] In fact, nowhere does the CJEU require the national court (or any other Member State authority or body)[43] to the full extent of its discretion, to interpret national law in accordance

[38] *Grimaldi* (C-322/88) [1989] ECLI:EU:C:1989:646; paras 16, 18.

[39] Abott–Keohane–Moravcsik–Slaughter–Snidal op. cit. 18.

[40] Láncos (2018b) op. cit. 755–784.

[41] *Grimaldi,* para 18, italics by me.

[42] Senden (2004) op. cit. 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) op. cit. 13; see also: von Graevenitz op. cit. 173. By contrast, Christianons argues that there is a duty of consistent interpretation, see: Christianos op. cit. 327.

[43] 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,' framing the obligation of consideration to be of a more general scope. This may be due to the fact that while Member States are generally bound by the same obligations under EU law, there is great diversity among them with respect to the distribution of competencies between the judiciary and administrative bodies. The principle of loyalty should therefore require that national bodies be bound by the same obligations of interpretation and application of EU law, no matter their status as court

with Community (soft) law. Instead, it seems to foresee "a duty of effort"[44], that is, the consideration of recommendations to a minimum standard where "only non-consideration is disallowed".[45]

The CJEU seems to foresee a similar obligation in respect of certain non-formal soft law measures, such as leniency programs under competition law, which are also designed to indirectly harmonise national laws, with no consent on the side of the Member State. In this case, the principles of sincere cooperation and effectiveness require, that Member States promote all interests and rights guaranteed under European law through balancing the same on a case-by-case basis. As a result, a duty of the national court or authority very similar to the one expressed in *Grimaldi* arises: a duty to weigh interests.[46]

4.2 'True' soft law

Within the varied category of EU soft law there is actually a sub-group of norms that is truly non-binding and without any practical effects: these are the so-called informative non-formal measures.[47] This sub-group includes de minimis notices and communications which only bind the Commission adopting them,[48] for reasons of legitimate expectations; *'comfort letters'* of individual application, which are not even binding upon the issuing Commission;[49] and *leniency notices*, which in no way change the fact that national procedural autonomy prevails. From the perspective of the Member States these measures foresee no obligations in substance, for the element of consent to be bound is

or administrative authority, Sarmiento op. cit. 267. Cf. *DHL* (C-428/14) ECLI:EU:C:2016:27, para 41.

44 Senden (2004) op. cit. 474.

45 Krieger op. cit. 97.

46 *Pfleiderer* (C-360/09) [2011] ECLI:EU:C:2011:389.

47 Senden–Prechal op. cit. 188; Håkon–Whish op. cit. 47–48.

48 *Expedia* (C-226/11) [2012] ECLI:EU:C:2012:795. *Senden* and Prechal classify de minimis notices as decisional instruments, which „indicate in what way a Community institution will apply Community law provision in individual cases where the institution has discretion. In other words, the decisional instruments are instruments structuring the use of discretionary powers, both for the civil servants within the institutions and for the outside world, which can, on this basis, anticipate the application of Community law in concrete cases.' Senden–Prechal op. cit. 190. *Kotnik* and others (C-526/14) [2016] EU:C:2016:570.

49 *Anne Marty v Estée Lauder* (37/79) [1980] ECLI:EU:C:1980:190; *Giry and Guerlain* (joined Cases 253/78 & 1–3/79) [1980] ECLI:EU:C:1980:188.

also lacking. This explains why such measures confer no duties whatsoever on the Member States.[50]

4.3 Hardening Soft Law

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

For example, so-called Commission *disciplines* in the field of state aid policy are elaborated in agreement with the Member States,[51] and as a consequence, they have binding effect.[52] Accordingly, in the *CIRFS* case, a Commission discipline otherwise classified as an non-formal soft law measure, was found to be fully binding, both upon the issuing institution and the addressee Member States. Hence, not only the Commission, but the Member States implementing the discipline were held to be fully liable for breaching the principles of equal treatment and legitimate expectations. In Ijssel-Vliet[53] the ECJ held that *appropriate measures*[54] *of the Commission, the so-called guidelines on national aid schemes were binding. According to the ECJ, the elaboration of such guidelines involved* "an obligation of regular, periodic cooperation on the part of the Commission and the Member States",[55] where national observations were taken into account.[56] This periodic cooperation seems to amount to Member State consent in the understanding of the ECJ, giving rise to the bindingness of this otherwise soft measure.

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50 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. GEIGER op. cit. 325.

51 *CIRFS* (C-313/90) [1993] ECLI:EU:C:1993:111; paras 1, 3.

52 *CIRFS,* para 4.

53 *Ijssel-Vliet* (C-311/94) [1996] ECLI:EU:C:1996:383; paras 1–2, 13–15, 17, 20.

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

55 *Ijssel-Vliet*, para 36.

56 *Ijssel-Vliet*, paras 37–39.

5. Directive-like Recommendations: On the Spectrum Between Recommendations and Directives?

Soft law acts may be in fact be binding "despite [their] soft outward appearance", for example, "on the basis of their substance or as a result of an agreement between the author of an act and its addressees".[57] 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."[58] The CJEU has devised a test for determining whether the measure under scrutiny is in fact hard law,[59] foreseeing an assessment of the content, context, wording and intention of the measure to ascertain whether it is designed to produce legal effects as a binding measure

In the most recent attempt to reveal that a recommendation was in fact a hidden directive, Belgium sought the annulment of the Commission's recommendation on the organization of gambling.[60] The measure is what I have termed a *directive-like recommendation* (DLR): a specific version of Commission recommendations carrying a clause on implementation, deadlines and Member State reporting, highly reminiscent of directives.[61] Adopted in the form of a soft law measure, the Belgian government saw the gambling recommendation as a move towards achieving the harmonisation of gambling rules across the EU.

In its action, Belgium argued that the recommendation is in fact a binding measure in masquerading as a recommendation; the Commission however, maintained that the measure was not intended to have binding force, and for lack of legal effects, could not be challenged. While the General Court confirmed, that in line with the *Grimaldi* case-law "the mere fact that the contested recommendation is formally designated as a recommendation […] cannot automatically rule out its classification as a challengeable act,"[62] it underlined that the measure in question was "worded mainly in non-mandatory terms". Following a comparison of ten language versions of the gambling recommendation, it arrived at the conclusion that the measure was clearly not

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[57] Senden (2004), 289. For an opposing view, cf. Peters (2007) op. cit. 411–412.

[58] Senden (2004) op. cit. 462-463.; see case: *CIRFS* and *Ijssel-Vliet.*

[59] *Grimaldi,* paras 14–16.

[60] Commission Recommendation 2014/478/EU of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online. OJ L 214, 19.7.2014; *Belgium v Commission* (T-721/14) [2015] ECLI:EU:T:2015:829, (C-16/16 P.) [2018] ECLI:EU:C:2018:79.

[61] Commission Recommendation 2014/478/EU, Section XII.

[62] *Belgium v Commission,* T-721/14 para 20.

meant to be binding.[63] The General Court further recalled that when considering the nature of the legal act under scrutiny, one must examine the "purpose and general scheme of the rules of which it forms part".[64] In case the measure is not meant to harmonise national measures or impose obligations on the Member States, they do not have binding legal effects and as such, cannot be challenged before the Court.[65] Belgium then appealed to the Court, only to have the General Court's order confirmed.

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

6. The Use of EU Soft Law in the Member States

Unfortunately, the practical side of the use of Union recommendations has been paid scarce attention in scholarly literature, with no empirical data available regarding their perception and implementation by national regulatory bodies. To fill this gap, the Soft Law Research Network (SoLaR) has launched a comprehensive research project, addressing both theoretical and practical issues related to the approach to, and the use of EU soft law by Member State courts and authorities. The findings of this research project were published in the volume edited by Mariolina Eliantonio, Emilia Korkea-Aho and Oana Ştefan, entitled EU Soft Law in the Member States, published by Hart in 2021. Based on the national case studies included in the volume, the picture is quite diverse: from pragmatic approaches of using EU soft law where it is useful in the case at hand (Finland), through a strong judicial and administrative awareness of soft law (France) and an extensive use of the same (Germany) to a markedly policy field-based relevance of such norms (Cyprus, Hungary). It is clear that

63 *Belgium v Commission,* T-721/14 para 72.

64 *Belgium v Commission,* T-721/14 para 28.

65 *Belgium v Commission,* T-721/14 paras 29–37.

the national courts' and authorities' approach to soft law is strongly rooted in "different public law traditions" which "seem to lead to different outcomes".[66] Further inquiry into the national use of EU soft law is necessary in order explore factors continuing to undermine the uniform and efficient application of EU law, while at the same time addressing concerns of subsidiarity and legitimacy.

7. Structure of the Present Volume

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

Following this overview of the most topical areas of EU soft law research, in the next chapters I shall elaborate on the main points discussed above in detail. More specifically, since there is an abundant literature on the different taxonomies of EU soft law, I concentrate on the topics of 'Strategies behind the adoption of non-binding norms' unfolding certain considerations of the co-legislators and the Commission to resort to soft law regulation; 'Practical effects and the 'bindingness' of EU soft law', taking a closer look at the various effects of non-binding EU norms on EU institutions and Member State courts and authorities, respectively; 'Directive-like recommendations: On the Spectrum Between Recommendations and Directives', scrutinizing an intriguing form of EU soft law which defies traditional distinctions between hard directives and soft norms; and finally, National Implementation of EU Soft Law', analyzing the approach of Member States, and in particular, Hungary towards EU soft law.

66 Jääskinen op. cit. 359–363.

CHAPTER II
STRATEGIES BEHIND THE ADOPTION OF NON-BINDING NORMS

In the next chapters I analyze the use of soft law in two specific areas: education policy and media law, proposing answers to the question why the may regulator choose to resort to soft law measures to achieve convergence of national legislations. In my analysis of the different strategies driving the legislative and regulatory bodies of the EU to adopt soft law in the policy areas under scrutiny, I rely on different concepts of the law and economics literature, such as fiscal federalism, public choice theory and competition between legal orders.

1. EU Education Policy: Using Soft Law for Regulatory Flexibility[67]

The reluctance of national governments to surrender regulatory powers to the EU in the field of education policy[68] is generally understood as a reflection of the 'sensitivity'[69] of the policy area, seeking to avoid 'creeping competences'.[70] Member States' insistence on retaining control over their respective education policies and the weakness of EU competences in this field are well documented. In fact, cooperation between national governments in the field of education was first launched outside the EU framework (the Bologna process). However, there is more to softness in European law and policy than first meets the eye:

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[67] A version of this chapter was published in: LÁNCOS (2018c).

[68] WALKENHORST op. cit. 567.

[69] Alberto Amaral and Guy Neave open with the line: "In the sphere of higher education policy, the legal basis for Community intervention tends to be weak. Education has always been considered an area of national sensitivity". AMARAL–NEAVE–MUSSELIN–MAASSEN op. cit. 281. See also: BEGG op. cit. 8.

[70] LANGE–ALEXIADOU op. cit. *324.;* AMARAL–NEAVE–MUSSELIN–MAASSEN op. cit. 284–289.

introducing elements of softness into EU policies may serve multiple, or even conflicting aims.

The *law and political science perspective* justifies the need for retaining regulatory power in this area by the contention that education is constitutive and reflective of national identity[71]: "[e]ducation came to play a role in state building and political unification. […] In the context of the nation-state, as a transmitter of national identity, education plays the role of linking the private citizen with the public polity."[72] This perception of education[73] explains public resistance to establishing a common European education policy, with Eurobarometer polls showing that union citizens prefer that education remain within the purview of national policies.[74] In this reading, education policy is considered a 'high *politics'* area,[75] calling for weak supranational competences and soft regulatory means and mechanisms to preclude excessive EU intervention.[76] Overall, softness is perceived as a means for fending off creeping EU competences and safeguarding subsidiarity.[77]

While this account generally holds true, further factors in education and integration render the picture more complex. In fact, the national embeddedness of education policy notwithstanding, Bologna initiatives were quickly

71 Trampusch op. cit. 603.

72 Novoa–deJong-Lambert op. cit. 50.

73 "[T]he outstanding contribution universities have made to building the nation state makes them indivisible from the cultural, historic and innovative settings that permeate and link them to the society that surrounds them and supports them." Amaral–Neave–Musselin–Maassen op. cit. 281.

74 Novoa–deJong-Lambert op. cit. 51.; Gornitzka op. cit. 104.

75 "Observers, thus, came to conclude that education policy counts as 'high' politics, which the member states strongly aim to protect. Beukel notes, "the very notion of "Europeanization of education" causes concern in most countries in Europe, one reason being that it is equated with homogenization of the education systems that could imply a loss of national identity". Warleigh-Lack–Drachenberg op. cit. 1010.

76 As Gornitzka explains: "the transfer of competencies to the European level has been marked by differences in how nationally sensitive different issues are. […] Following this argument, the basis for EU action in education policy is then curbed by considerable national sensitivity attached to this policy area." Gornitzka op. cit. 103. This perception is well illustrated by AG Warner`s Opinion delivered in Casagrande, where he pointed out with respect to the education policy competences of the German Länder, "that any encroachment on them by Community law was regarded with some sensitivity". Casagrande v Landeshauptstadt München Opinion of AG Warner delivered on 11 June 1974, 783. As a result of these claims, an account of "a battle royal between national and Community interests" unfolds." Amaral–Neave–Musselin–Maassen op. cit. 286.

77 Senden (2004) op. cit. 80 et seq., 90.

supranationalized[78] through the efforts of the Commission.[79] And it is apparent that Member States are ready to accept EU action in the field of education when it comes to the funding or coordination of European-level cooperation. Consequently, the interest in retaining control over education policy, as an area decisive for the formation of national identity on the one hand, and the need for responding to challenges of global competitiveness and benefitting from the economy of scale offered by the EU on the other, produces an EU education policy marked by tension. This tension between the interests served and the goals pursued within the framework of education policy is managed through soft policy instruments, such as weak EU competences and soft regulatory measures. In this framework, *weak EU competences are compensated for through the soft measure of OMC* designed as a sort of relief valve against the structural overprotectiveness of Member State powers. Hence, although both weak competences and informal governance mechanisms convey an overall impression of softness of the education policy, in fact, the reasons behind the specific distribution of competences and the use of soft governance tools stand in stark contrast to each other, with OMC emerging as a Realpolitik-type response to overcome the constraints of soft competence.

1.1. Reasons Underlying the Weak Education Policy Competence of the EU

While Member States did not plan to give up their competences in the field of education, the ever stronger interconnectedness of national economies made gradual integration in adjacent policies unavoidable.[80] The free movement of workers led to a gradual expansion of Community powers[81] in the ambit of

78 "[T]he Bologna processes [was] and initiative of European governments without the formal participation of the Commission, which was not allowed to sign the declaration. However, following the implementation of the Lisbon strategy, the Commission became an effective member of the Bologna follow-up group." Amaral–Neave–Musselin–Maassen op. cit. 134.

79 "Education is an area that falls within the exclusive competence of member states; thus it is subject to the principle of subsidiarity. While this legal position might easily lead to the assumption that European policy work in education has not changed over the last 20 years, it has, dramatically!" Milana op. cit. 73 et seq. Lisbon European Council, 23 and 24 March 2000 Presidency Conclusions, para 8 et seq., Veiga–Amaral, 135.

80 Unfortunately „the role of complementarities between various policy dimensions […] has so far been neglected in the theory of fiscal federalism. These complementarities play an important role in reality." Persson–Roland–Tabellini op. cit. 15.

81 For a detailed account, see: Amann op. cit. 28–84.

the mutual recognition of professional qualifications, access to education, study grants etc., shuffling into the crumbling stronghold of national education policy competence.[82] Since its inception however, education policy has also become 'inextricably intertwined' with regional policy, employment and social policy as well as the research and innovation policy of the EU.[83]

The nucleus of EU education policy was enshrined in the Rome Treaty: Article 128 provided for the legal basis of a common policy, albeit restricted to vocational training, with the aim of contributing to the common market and the harmonious development of national economies.[84] As a spill-over from free movement rights and to facilitate further mobility, the Maastricht Treaty rounded off this seminal competence with Community powers in matters pertaining to education in a broad sense. This expansion of EC competences took place in light of the increase of the EU budget and the potential for spending, as well as the globalization of higher education.[85] The Treaty basis for education (Article 126 TEC) stressed that the Community shall fully respect the responsibility of Member States for the content and the organization of education and training, limiting Community efforts to *supporting and supplementing* respective Member State actions and *fostering cooperation*. Conceived partly as a contribution to European identity, the civic aspect of European education policy was gradually discarded, concentrating on the market aspects of convergence in education.[86] Successive Treaty amendments retained the basic legal tenets of European education policy, with the Lisbon Treaty taking the step to cement it firmly in the ambit of supporting, coordinating and supplementing competences of the Union (Article 6 (e) TFEU).

The Lisbon innovation of codifying EU competences may be seen as an empowerment of the Union, granting competences that no primary law rules had done before. However, the cautious language of its legal basis excluding any harmonisation of national laws (Article 165 para 4 TFEU) and the soft regulatory means foreseen ('incentive measures' and recommendations) resulted in a weak supranational competence. It is in the framework of this soft education

[82] Ibid, 18–19.

[83] Ibid, 19.

[84] Mikulec op. cit. 13. This legal basis gave rise to the *Council Decision* 63/266/EEC of 2 April 1963. laying down general principles for implementing a common vocational training policy. (OJ 63, 20.4.1963, p. 1338–1341) and Council Decision 87/569/EEC of 1 December 1987 concerning an action programme for the vocational training of young people and their preparation for adult and working life (OJ L 346, 10.12.1987, p. 31–33).

[85] Walkenhorst op. cit. 574–575.

[86] Ibid, 577.

policy structure protective of national powers, that OMC, an inherently soft mechanism has become a trademark instrument for policy-coordination. As a result, both Union competence in the field of education policy and its respective regulatory toolkit may be considered soft,[87] in particular, when contrasted with exclusive or shared competences (Articles 3-4 TFEU) of the EU and the regulatory means available thereunder.[88] In what follows, however, I analyze the education policy competence and OMC trying to go beyond the surface of soft policy, to discern the existing tension between the weak competences and soft measures characterizing EU education policy.

1.2 The Education Policy Competence from a Fiscal Federalism Perspective

In my analysis of EU education policy.[89] I rely on theories of law and economics, in particular, the first generation *fiscal federalism approach* and insights from public choice theory. Within the fiscal federalism approach I depart from the assignment problem of powers (disregarding the different, albeit related question of resource allocation, i.e. the financing of specific policy actions, which has no bearing on the results of the present study).[90] As such, fiscal federalism provides a useful analytical framework for addressing the different facets of policy softness, helping to identify the tension between weak Union powers and soft measures of OMC in education policy.

European integration is itself an exercise in fiscal federalism, prompting with each successive deepening of integration fiscal federalism's main question: which policies should be assigned to the federal (EU) level and to what degree should these be shared with the Member States? The underlying assignment problem[91] of fiscal federalism[92] seeks to determine an optimal *equilibrium of*

87 Amann op. cit. 19.

88 Of course, soft law will also emerge under exclusive competences, primarily to evade decision-making constraints, yet these competences do not mandate the use of soft law, eg: customs policy.

89 For a critique of education policy as a public good in the Samuelson sense, see in detail: Daviet op. cit.; Moşteanu–Creţan op. cit. 33–40.

90 Boadway–Shah op. cit. 65 et seq.

91 Musgrave–Musgrave op. cit. 596 et seq.

92 An authority in fiscal federalism literature, Oates defines the theory as follows: as "fiscal federalism addresses the vertical structure of the public sector. It explores, both in normative

power sharing,[93] where public goods and services are efficiently rendered, equity between states and citizens is ensured and the system remains financially sustainable.[94] While principles of fiscal federalism have been incompletely implemented in the federal structure of the European Union, the theory nevertheless holds important insights for integration. The basic tenets of fiscal federalism put forward by Musgrave propose that the federal government be responsible for macroeconomic stabilization and income redistribution.[95] The assignment of the provision of public goods however, depends on whether their consumption is 'local' (eg. education) or non-territorial (eg. defense).[96] This approach, reformulated in the 'equivalence principle' requires that policies of federal impact be assigned to the central government, while policies with merely regional, local effects be decentralized.[97] Assigning the provision of public goods to the sub-federal level rests on the idea of 'embeddedness' and the 'decentralization theorem'. Polányi's well-known concept of 'embeddedness', refers to processes producing a "structure with a definite function in society; it shifts the place of the processes in society, thus adding significance to its history; it centres on values, motives and policy."[98] With other words, factors such as culture, religion, historical motives, etc. inform human economy, that is, a unique way of doing things in a given community, which becomes uniform and stable, i.e. 'embedded' over time and may be regarded as *preference*.[99]

Embeddedness is then instrumentalised in Oates' 'decentralization theorem' which holds that "by tailoring outputs of such goods and services to the particular preferences and circumstances of their constituencies, decentralized provision increases economic welfare above that which results from the more

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and positive terms, the roles of the different levels of government and the ways in which they relate to one another." Oates op. cit. 1120.

93 Alves–Afonso op. cit. 8.

94 von Hagen op. cit. 43.

95 "[R]egional measures for redistriubtion are self-defeating, since the rich will leave and the poor will move to the more egalitarian-minded jurisdiction. Fiscal redistriubtion […] must be uniform within an area over which there is a high degree of capital and labour mobility. […] It is readily seen that the use of fiscal policy for stabilization purposes has to be at the national (central level) […] Since each subunit exists as a completely 'open' economy within the national market area, local fiscal measures will meet with large import leakages [which] do not arise, or are substantially smaller, if such fiscal measures are undertaken at the national level." Musgrave–Musgrave op. cit. 606–607; Oates op. cit. 1121.

96 Oates op. cit. 1121–1122; Musgrave–Musgrave op. cit. 596–597.

97 von Hagen op. cit. 44.

98 Polanyi–Arensberg–Pearson op. cit. 249–250.

99 Cf. Musgrave–Musgrave op. cit. 602, 605.

uniform levels of such services that are likely under national provision."[100] Based on the above, fiscal federalism rests on the idea that federations comprise constituencies with heterogeneous interests due to citizens' cultural, ethnic, religious, linguistic, economic etc. backgrounds resulting in divergent preferences. In light of these divergent preferences, *decentralization serves as a tool to enhance efficiency* by allowing for sub-federal governments to provide different levels and qualities of the relevant public goods.

In light of this brief summary of fiscal federalism's assignment problem, education should – at a first glance – be assigned to the sub-federal level. This is because it appears as a public good that is strongly embedded in local, regional or national culture, supplied through the means of the 'national' language and consumed locally.[101] Yet the static nature of education is rapidly declining, in particular, in the realm of tertiary education: technological advancement has made e-learning in virtual classrooms and blended learning possible,[102] in particular, in the wake of the COVID-19 pandemic,[103] while more and more colleges and universities are offering remote instruction or joint degree programmes including semesters abroad. Besides exchange programmes and virtual classrooms which de-territorialise the consumption of education as a public good, in the face of globalization in general, the mobility of labour and the internationalization of research and development in particular, the effects of education radiate far beyond the purview of the nation state.[104] What is more, the competitiveness of the EU relies on the performance of the individual national education systems, meaning that the impact of Member State education policies is not confined to the domestic market, but much rather contributes to the position of the Union as a whole in global economy.[105] In summary, the

[100] OATES op. cit. 1121–1122.

[101] For Moravcsik, this diversity, or with other words, the lack of a European demos with a sense of European identity, is what contributed to further strengthening nation-states and national solutions, explaining the "weakness" of the EU in different policy fields. MORAVCSIK op. cit. 167.

[102] See: JONES–SKINNER op. cit.

[103] For an account of the use of soft law to regulate remote education at the time of the pandemic in Hungary, see: LÁNCOS–CHRISTIÁN op. cit.

[104] AL'ABRI op. cit. 493.

[105] Namely, „education is a very important policy area for the European Union as improving the quality of education is one of the major conditions for making Europe one of the most competitive knowledge-based economies in the world by 2010." HUMBURG op. cit. 4.

traditional appeal for the decentralization of education policy on the grounds that it hardly generates cross-border externalities no longer holds true.[106]

These characteristics also have an impact on the assignment of education policy powers in the context of the European Union: while the predominantly local consumption and the social and cultural embeddedness (diversity)[107] call for strong Member State competencies, mobility and technological advance speak for some integration, especially in the field of tertiary education as well as research and innovation.[108] Education will thus occupy a shifting area[109] between decentralization due to diversity and centralized supranational policy where „at the level of the redistribution function, a combination of some centralization and a significant space for decentralization would be an optimal solution".[110] As a result of these considerations, this crossover between decentralization and centralization is translated into weak powers of the EU in the field of education, captured under the category of *supporting, coordinating and supplementary competences* (Article 6 TFEU).[111] The legal bases allowing for EU action

106 Cf. Pigou op. cit.; Persson–Roland–Tabellini op. cit. 2. "[T]here has been 'pressure to decentralize' from OECD, UNESCO and APEC, and what seems to be emerging is variously a European education policy field and a global educations policy field." Gunter–Grimaldi–Hall–Serpieri op. cit. 179.

107 As Höpner and Schäfer point out, „political initiatives to re-embed markets have become extremely difficult as EU members have grown ever more diverse. With each round of enlargement, differences between the welfare and production regimes have increased, and whatever interest in harmonising social policy might have existed in the past has vanished […]. As a result, member states focus on 'soft coordination' rather than legislation." Höpner–Schäfer op. cit. 6.

108 Alves and Afonso point out that in the EU what with „the (still) marked diversity in demands and national preferences, plus the (still) low mobility of families" centralization will be the exception, applied to policies „that have a clear supranational nature". Alves–Afonso op. cit. 9. Portuese refers to EU 'economic supranationalism' and its capacity to take "into consideration the great benefits of satisfaction of local preferences by market circumstances rules without them incurring important costs" through the institution of selling arrangements elaborated in the jurisprudence of the ECJ. "The possible important discrepancies of citizens preferences across the Union with respect to the determination of selling requirements bring about a rationale for further decentralisation of decision making in line with the economics of federalism, or at least for a preserved local autonomy on these matters as long as market access for non-local producers is not disproportionately hindered.", Portuese op. cit. 628.

109 "[A] move towards centralization or decentralization in one dimension increases the benefit of moving in the same direction in other dimensions." Persson–Roland–Tabellini op. cit. 15.

110 Alves–Afonso op. cit. 9.

111 Article 6 TFEU: The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.

under these soft competences are constrained by guarantees of subsidiarity[112] and in particular non-harmonisation, explaining then, also the proliferation of soft mechanisms and measures permissible in these regulatory areas, and in particular, education policy. Accordingly, Article 2 paragraph 5 TFEU provides that under supporting, coordinating and supplementary competences "the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations."

Based on the above, weak EU competences in the field of education policy do not necessarily, or not only, flow from a persistent reluctance to cede regulatory powers to the supranational level, but from a well-founded fiscal federalism rationale of achieving greater efficiency through diverse regulatory solutions accommodating the preferences of national constituencies.

1.3 OMC as a Tool to Overcome Competence-Related and Decision-Making Constraints

In what follows, I describe the characteristic instrument of education policy, the Open Method of Coordination. I analyze the characteristic measure of education policy, the soft Open Method of Coordination through the lens of the public choice theory.[113] I will demonstrate, that while OMC complies with the strict reading of the weak competences above by offering a soft mechanism excluding harmonisation. In effect, it is mainly geared towards escaping the assignment straightjacket reflected in the rigid allocation of competences in the TFEU.

[112] The Decentralization Theorem directly leads to a version of the principle of subsidiarity which is now also enshrined in the European Union Treaty: In the presence of regionally heterogeneous preferences over public goods and services, public policies should be assigned to the lowest level of government that can deliver them efficiently. Evidently, the more different the preferences of citizens in different states are regarding public goods and services, the fewer are the competences that should be assigned to the federal government." VON HAGEN op. cit. 45.; "According to the principle of subsidiarity, the burden of proof lies on the advocates of centralization", PERSSON–ROLAND–TABELLINI op. cit. 1.

[113] Indeed, by "taking the actual cause of the behaviour of a [legal community] as the point of departure, compliance theories offer more tailor-made answers to how to deal with non-compliance in different situations than any legal study of the enforcement of an existing legal framework could provide." AMTENBRINK–REPASI op. cit. 179.

OMC, considered an non-formal, "alternative form of decision-making"[114] or a „new mode of governance",[115] is not specific to education policy, in fact, it had been used extensively in the realm of social and monetary policy. The broad concept of OMC is innovative in that it seeks to escape the confines of the rigid distribution of competences, transcending the confines of policy areas and government levels, offering flexibility to stakeholders and actors involved in the process.

1.3.1 Competence Constraints and the Compliance Pull

As Milana explains, while education policy remains an exclusive competence of Member States, starting with the Lisbon summit, the EU has been given the *power to by-pass competence constraints* through new governance mechanisms.[116] While there is a high degree of interconnectedness between the different policy areas within the EU, for reasons explained by fiscal federalism theory, these regulatory fields have been assigned to different levels of government in the EU. However, in order to tackle reforms in these intertwined policy areas, a broad approach is needed both horizontally, from a multi-policy perspective and vertically, involving actors on various levels. Competence constraints enshrined in primary law are therefore evaded through soft policy instruments, such as the OMC,[117] which is meant to promote efficiency through its broader approach, and legitimacy through the involvement of multiple stakeholders combining mandate and expertise. As such, the use of OMC "can be seen as a pragmatic accommodation between the emerging needs of the Union and the lack of will in Member States to make further institutional changes."[118] Instead of unfeasible changes to the founding treaty with respect to competences, decision-making and cooperation structures, the informal mechanism of OMC was launched by the European Council for the EU coordination of policies that

[114] Velluti op. cit. 59.

[115] Warleigh-Lack–Drachenberg op. cit. 1003.

[116] Milana op. cit. 76.

[117] "Soft law measures, particularly those aimed at strengthening and sustaining policy learning processes, with the inclusion of all interested parties (particularly private actors who play a transformative role with regard to state interests and identities), can foster a process of change in the way of conceiving governance and in helping revise the concept of sovereignty in the EU where there is continuous tension between the intergovernmental and supranational forces of European integration." Velluti op. cit. 59.

[118] Warleigh-Lack–Drachenberg op. cit. 1003.

would otherwise have been considered to be the reserve of the Member States.[119] Indeed, the Commission's Communication on Better Regulation[120] expressly refers to OMC as an intergovernmental method, launched "in areas where Union action cannot supersede Member State competence such as employment, social protection, social inclusion, education, youth and training. Depending on the areas concerned, the OMC involves so-called 'soft law' measures which are binding on the Member States in varying degrees but which never take the form of directives, regulations or decisions."[121]

As far as the legislative choice of OMC as an non-formal policy mechanism is concerned, institutions have ample leeway to determine the regulatory instrument employed, since the founding treaty merely speaks of 'measures'.[122] In such cases, opting for this a regulatory form can be explained by the requirement of *formal proportionality*, which "pulls in the direction of soft law".[123] The laconic wording of the Treaty on the proportionality principle was given flesh in the Commission 2002 Guidelines for better regulation foreseeing regulatory options "with special emphasis on the principle of subsidiarity and proportionality". This was later reinforced by the Protocol on the application of the principles of subsidiarity and proportionality.[124] As the Commission explains, "when the subsidiarity and proportionality analysis of possible ways to address a given problem demonstrate that traditional law instruments (regulations, directives, decisions) are not necessary, the Commission may resort to 'soft', more flexible approaches instead."[125] In fact, soft measures take priority, since the principle of proportionality provides that legislative intervention by the Union should take the least intrusive regulatory form possible while still achieving the desired legislative aim (degree of intervention).[126] According to

119 Veiga–Amaral op. cit. 137.; Lange–Alexiadou op. cit. 325.

120 Communication From the Commission: Better Regulation: Delivering Better Results for a Stronger Union. Brussels, 14.9.2016, COM(2016) 615 final.

121 Better Regulation: The Choice of Policy Instruments, http://ec.europa.eu/smart-regulation/guidelines/tool_15_en.htm, point 3.4.

122 Senden (2004) op. cit. 91.

123 Ibid, 92.

124 Kirkpatrick–Parker op. cit. 87.

125 Better Regulation: The Choice of Policy Instruments, http://ec.europa.eu/smart-regulation/guidelines/tool_15_en.htm, point 3.

126 As van den Brink notes, "the old Subsidiarity and Proportionality Protocol contained the requirement that 'Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement'. Also, directives should be preferred to regulations and framework directives to detailed measures." van den Brink op. cit. 233.

Senden, proportionality as a principle guiding legislative choice means “the form or way of action, that is the means and instruments and their legal nature” shall not go beyond what is necessary to achieve Treaty objectives.[127] This means that in the face of equally effective regulatory options, preference must be given to non-binding measures.[128] From a law and economics perspective, when the policy-maker is faced with a choice between regulatory measures, this question may be translated into a selection of instruments on the basis of which achieves the regulatory objective at lowest cost.[129] Indeed, as Portuese observes, the principle of proportionality, a general principle of EU law, is actually a principle of economic efficiency.[130]

OMCs differ greatly depending on the policy field in which they are employed, yet what is common to them is that they promote best practices and peer learning, without carrying out harmonisation. By setting EU headline goals, ‘benchmarking’ and review, some convergence is achieved.[131] Conforming to its ideal of softness, as “a policy-making instrument, it doesn’t lead to binding legislative measures nor does it require Member States to change their national law.”[132] As such, OMC is considered to be a form of soft governance,[133] an informal process lacking binding character, but nevertheless bringing about effects of convergence among the Member States.

Its lack of binding character explains why OMC may be an attractive regulatory choice: it implies flexibility in interpretation and/or implementation at a low cost. *Public choice* holds that where the adoption of a binding instrument is unrealistic (such as in the realm of supporting, coordinating and supplementing policies), soft mechanisms will be the feasible regulatory

127 Senden (2004) op. cit. 89.

128 Ibid, 90. „Although the Protocol on subsidiarity and proportionality does not explicitly refer to the use of non-binding measures, and thus to soft law, this preference must be considered implied therein.” Ibid.

129 Ogus (2002) op. cit. 3.

130 Portuese op. cit. 612.

131 Amann op. cit. 58. Amann brings the example of improving tertiary education attainment rates, where the EU headline goal is 40%, with Member State targets ranging between 27% (Italy) and 60% (Ireland). Ibid, 63. Brussels, 19.3.2014, COM (2014) 130 final/2, p. 13.

132 Amann op. cit. 57

133 Amann refers to OMC as soft law, Ibid, 57. And indeed such an approach may also be justified, taking Senden’s definition of soft law as a starting point, who stresses that the effect of the rules of conduct laid down in soft law measures depend “on factors other than legally binding force.” Senden’s definition encompasses two main elements: non-binding character and effects. Senden (2004) op. cit. 113.

compromise, generally involving less precision.[134] Soft governance measures are furthermore appealing, since they entail a lesser risk of sanction for defection. The possible vagueness of conditions will serve the case of reluctant Member States, with obvious defection involving reputational costs.[135] While defection cannot trigger infringement procedures and direct sanctions for the Member States, reputational costs will nevertheless be high in the EU context, since instruments are available to monitor and encourage compliance through peer reviews and reports, which increase the probability of detection.[136] In particular, OMC relies heavily on the pull of 'naming and shaming',[137] for example through the 'Lisbon scorecards' developed in education policy to categorize well-performing Member States as heroes and worst performers as villains.[138] This leads us to the other element of soft instruments, that is, its reliance "on factors other than legally binding force".[139]

Indeed, what is common to soft law mechanisms and measures is that they exert a stronger or weaker 'compliance pull'[140] – unrelated to binding character or enforceability. In the case of OMC, the *compliance pull* is enhanced by the expertise of participants contributing to the mechanism, voluntariness and peer pressure exerted by reviewing bureaucracies. The expertise ingrained in the mechanism provides legitimacy, "exerting a pull to compliance which is powered by the quality of the rule."[141] Mutual learning and the sharing of best practices in OMC is organized through 'clusters' involved in voluntary, bottom-up activities that build networks of policy learning.[142] Voluntary participation is based on the recognition that the process serves the participants' interests, while in turn, participation promotes the internalization of targets set forth under OMC.[143] Finally, expertise and voluntariness is complemented with peer pressure through reviews where "different member states also seeks to encourage

[134] Abott–Keohane–Moravcsik–Slaughter–Snidal op. cit. 445.

[135] Szalai op. cit. 161.

[136] Ibid.

[137] Cort op. cit. 168.

[138] Sin–Veiga–Amaral op. cit. 33.

[139] Senden (2004) op. cit. 113.

[140] Guzman–Meyer (2016) op. cit. 127.

[141] Franck op. cit. 9.

[142] Lange–Alexiadou op. cit. 324.

[143] Cf. Koh, cited by: Szalai op. cit. 154.

each member state to reflect on its own education practices, to stimulate policy learning," improving compliance.[144]

1.3.2 Decision-Making Constraints and their Circumvention

It is important to note, that OMC is not only a strategy to by-pass competence constraints, but also a way to *reshape power relations between the institutions* by evading decision-making constraints. A lesson from the public choice analysis of international law is that "informal agreements may [be used to] bypass domestic constitutional constraints on the creation of treaties."[145] Indeed, while hard law generally requires the involvement of the legislature, the executive branch may choose to invest in soft law so as to avoid entangling the legislature.[146] This is not necessarily a manifestation of institutional power struggles, instead, Scharpf emphasizes that maturing European integration brought with it the growing involvement of different bodies, in particular, the European Parliament in ever more complex decision-making mechanisms. OMC as a new governance method may be understood as a way out of impending legislative deadlocks, preventing regulatory 'breakdown'.[147]

This applies to both the national and the supranational level. As Milana points out, "OMC tends to marginalize the participation of national parliaments in favour of national governments in EU policy formation processes".[148] In the EU context, OMC excludes the participation of the European Parliament (as well as the scrutiny of the CJEU). Ironically, while considerations of subsidiarity and proportionality are meant to bring decision-making closer to the citizen, these principles "may function as a cover for not resorting to a proposal for legislation, whereas there may actually be a need or desire for that. This enables the Commission to circumvent the involvement of other Community institutions in the decision-making process."[149] As a result, OMC may be used to enhance discretion in the institutional power-struggle ousting the European Parliament.[150]

144 Lange–Alexiadou op. cit. 323.

145 Sykes op. cit. 12–13.

146 Kontorovich – Parisi op. cit. 3; Sykes op. cit. 5.

147 Scharpf; see also: Schäfer op. cit. 208.

148 Milana op. cit. 77.

149 Senden (2004) op. cit. 92.

150 Guzman–Meyer (2016) op. cit. 138.

In summary, the use of OMC is less concerned with sparing Member State powers from encroachment by the EU. As the public choice approach shows, OMC as a soft measure allows for transcending competence constraints and time-consuming legislative processes set forth in the Treaty. This new governance mechanism offers a more flexible decision-making procedure, at the 'lowest cost' for Member States, promoting compliance through persuasion and naming and shaming. OMC puts the Commission and national administrations effectively in charge of the area permeated by this soft measure, thereby empowering the technocracy active in the given policy-field on both the Union level (standard setting) and national level (implementation).

1.4 Flexibility to Overcome Competence and Regulatory Constraints

In the case of educations policy, what appear to be soft regulatory tools, is in fact a way to compensate for the weakness of EU competences by ensuring convergence through compliance pull and at the same time evading interference by national parliaments and the European Parliament. The analysis based on law and economics shows on the example of EU education policy that while assigning education policy to the realm of supporting, coordinating and supplementing competences with a focus on preserving national powers and excluding harmonisation implements the idea of decentralization, the soft, informal mechanism of OMC provides for flexibility to shake these structural constraints. In other words, the tension stemming from EU regulatory limitations under a lightly Europeanized education policy competence is relieved through the informal instrument of OMC employed to achieve common education policy goals in a more and more globalized education landscape.

The tools of fiscal federalism and public choice may also be successfully used to analyze soft aspects of other Union policies, such as for example, customs policy. Customs policy is a highly supranationalized policy field, where at a first glance, the exclusive competence of the EU does not quite seem to resonate with the preponderance of soft law measures guiding national implementation and ensuring uniform customs administration.[151] Since the EU has exclusive competence in the field of customs policy, one would expect the policy field to be regulated by hard law measures. This, however, is not the case: we are

[151] Limbach op. cit. 241–242.

witnessing a proliferation of soft law measures in customs. The burgeoning of soft law in the policy field of customs may be explained by the regulator's quest for greater flexibility: the level of detail necessary in this area, the need for rapid amendments and the imperative of taking "the latest developments of technology, safety and security" into account all call for the employment of soft measures.[152] Or, as formulated under the public choice approach, the need for evading structural constraints such as tedious and lengthy legislative procedures producing hard law, pushes towards the more flexible solutions of soft law.

The palpable tension thus arising between the hard structure of exclusive competence and the soft measures of customs policy guidelines and explanatory notes is well illustrated in a document on the Nature and Legal Value of Guidelines.[153] Here, the Commission explains that opting for soft law measures outside the Treaty basis for legal acts such as regulations, directives and decisions means that no new obligations may be laid down. Indeed, soft measures such as guidelines or explanatory notes are merely interpretative aids, intended to standardize national practices.[154] Yet while these measures "do not constitute a legally binding act and are of an explanatory nature […], where a national administration violates the interpretation set out in the explanatory notes/guidelines to a particular legal text, the Commission retains the option of instituting proceedings against that administration for infringement" of the principle of loyalty. In addition, "economic operators may also invoke them in their dealings with the administration or in the national courts".[155] In other words, legal bases for adopting EU hard law in the ambit of customs policy are neglected in favour of soft measures to evade lengthy and arduous decision-making in a fast changing customs environment. Meanwhile, convergence is achieved and potentially enforced both through the national and the EU judiciary, demonstrating a pragmatic approach to law-making and securing compliance.

In light of the above, resorting to soft measures may in fact be a result of the need to accommodate the hard realities of policy assignment, institutional constraints and the need for inclusive, fast and flexible decision-making. Indeed, resorting to soft tools may be "a necessity, because of lacking legislative powers

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[152] Ibid, 227.

[153] Customs Code Committee: Nature and legal value of guidelines. Brussels, 05/04/2006. TAXUD/1406/2006 –EN.

[154] Ibid, 2, 5.

[155] Ibid, 4, 6.

of the EU or because the Union legislator does not manage to adopt legislation or only to a (too) limited extent as a result of the applicability of the unanimity requirement and national sovereignty objections." As a result, the informality of soft mechanisms "may prove to be the only way forward with a view to realizing certain transnational socio-economic goals that cannot be addressed otherwise."[156]

2. Media-Policy: Using Soft Law to Bridge to Bridge the Gap between Unity and Diversity[157]

Turning to media policy, it is apparent that content considered harmful or 'seriously impairing'[158] to minors is regulated in soft law measures at the Union level. Below, I will demonstrate that in this instance, soft law measures are introduced as a bridge between the strongly converging policy area of European media law and the persistent diversity of highly fragmented national cultural traditions and moral convictions. For the purposes of my analysis, I shall posit that cultural traditions and moral convictions are uniform throughout the individual Member States (although strong differences between regions, religious or cultural groups may be present). For the sake of simplicity, I shall also consider the different legislative bodies of the European Union as a unitary actor ('European legislator'), since differentiating between them has no added value for the purposes of my analysis. In my inquiry I rely on the law and economics literature on competition between legal orders, in particular, the findings of Ogus and van den Bergh.

[156] Senden–van den Brink op. cit. 13–14.

[157] A version of this chapter was published in: Láncos (2018a).

[158] Cf. Article 20 of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L298, and Article 12 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1. While these directives use the wording seriously impairing content, the Communication of the Commission (Brussels, 16.10.1996 COM (96) 487 final) distinguishes between harmful and illegal content; since there is no substantive difference between the two, I shall use these terms interchangeably.

2.1 Case Study: Lessons From the 'Éden Hotel' Procedure

On the 6 April 2011 the TV reality show Éden Hotel was broadcast by Viasat, a media service provider established in the United Kingdom to Hungary on channel Viasat 3. At 9:35 pm the show featured two participants engaging in what appeared to be sexual intercourse. Just one week later, on the 11 April 2011 the new episode of Éden Hotel included a display of "sexual foreplay culminating in an oral act".[159] With its letter of 1 June 2011 the National Media and Infocommunications Authority (the central Hungarian public body exercising oversight over the implementation of rules governing the media) turned to Ofcom, the independent regulator for UK communications industries having jurisdiction over Viasat.[160] In the letter, the Hungarian authority requested that Ofcom investigate the case and, if necessary, take action against Viasat for breaching obscenity rules. However, Ofcom concluded that it was satisfied that its Broadcasting Code[161] had not been violated, since all shots featuring sexual behaviour were placed deliberately toward the end of the program so that these were shown following the "watershed period" (i.e. a slot in the evening

[159] Letter of the Ofcom to the Hungarian National Media and Infocommunications Authority, dated 22 August 2011.

[160] Although the Court of Justice of the European Union has extensive jurisprudence in matters related to jurisdiction where the service provider is established in one Member State, yet its services target exclusively the consumers of another Member State (Case *Weltimmo* (C-230/14) [2015] ECLI:EU:C:2015:639), as well as regarding justifications on grounds of public morality for restricting free movement in the internal market (Case *Regina v Henn and Darby* (34/79) [1979] ECLI:EU:C:1979:295; Case *Conegate* (121/85) [1986] ECLI:EU:C:1986:114) these do not apply to broadcasting cases. Under EU media law, it is the Member State where the media service provider is established that has jurisdiction to regulate and monitor the service provider according to its own concept of harmful content, while the country of reception, has little power to prevent receiving content perceived as harmful – see below (Oster op. cit. 121–128). The strict country-of-origin jurisdiction rule of broadcasting and the restricted application of public morality justifications in this area are the reasons why the most prominent judgment rendered by the ECJ in relation to minors and harmful media (Case *Dynamic Medien* (C-244/06) [2008] ECLI:EU:C:2008:85) content does not apply: the case was related to image storage media (goods), not broadcasting. Finally, in the Mesopotamia Broadcast and Roj TV case the CJEU confirmed that while Member States are not precluded from adopting measures against a broadcaster established in another Member State, on the ground that the activities and objectives of that broadcaster run counter to the prohibition of the infringement of the principles of international understanding ('incitement to hatred on grounds of race, sex, religion or nationality'), those measures may not prevent retransmission per se on the territory of the receiving Member State of television broadcasts made by that broadcaster from another Member State (Cases *Mesopotamia Broadcast* (C-244/10 and C-245/10) [2011] ECLI:EU:C:2011:607). This means that while the receiving country is allowed to take steps against the broadcaster, retransmission of programs can nevertheless not be prevented.

[161] Adopted on the basis of the Communications Act 2003: Broadcasting Code.

when children are not presumed to be watching),[162] all scenes were filmed using "night vision" to blur details and as regards the participants and their acts, "at no point [was] it clear what she [was] doing as a large proportion of his body [was] obscured by her body and long hair."[163]

The dispute outlined above demonstrates that the issue of what constitutes obscenity, i.e. harmful content in media remains a controversial and problematic area in the growing market of cross-border media services in the EU. In fact, due to socio-cultural differences between the Member States, the consideration of what is seriously impairing content for viewers, and in particular, minors, is extremely diverse. This diversity in Member State approaches to media content posed a potential obstacle to the freedom to provide cross-border media services in the EU which was therefore tackled by the Union legislator. Yet in the framework of EU legislation, while European media law is constantly evolving through ever more detailed hard law rules, the consistently soft law nature of EU rules addressing harmful content in the media is particularly conspicuous.

2.2 Preponderance of soft law measures governing harmful content in EU media law

Since the second half of the 20th century we are experiencing a steep rise in audiovisual media consumption, including a considerable part of the population: minors as viewers. While traditionally television was children's media of choice,[164] today, minors spend an increasing chunk of their free time online, surfing the net, viewing and creating content on social media and Web 2.0 applications, watching digital television, video on demand or playing video games.[165] As a result, minors are exposed to potentially harmful content, in

162 Broadcasting Code, rule 1.18: "'Adult sex material' material that contains images and/or language of a strong sexual nature which is broadcast for the primary purpose of sexual arousal or stimulation - must not be broadcast at any time other than between 22:00 and 05:30 on premium subscription services and pay per view/night services which operate with mandatory restricted access. In addition, measures must be in place to ensure that the subscriber is an adult". Rule 1.19 of the Code, which states that: "Broadcasters must ensure that material broadcast after the watershed which contains images and/or language of a strong or explicit sexual nature, but is not "adult sex material" as defined in Rule 1.18 above, is justified by the context."

163 Ofcom letter.

164 Strasburger–Jordan–Donnerstein op. cit. 535–537.

165 Attström–Ludden–Ilisescu op. cit. 17; Dussich op. cit.

particular since parental oversight of such media use remains low.[166] Although the harmfulness of exposure to violent and/or pornographic content for minors remains strongly debated,[167] based on examples of national legislation regulating the transmission or display of 'offensive' content, in light of burgeoning national rules regulating this area, policy-makers around the world seem to adhere to the view that there is a need for regulation in this area. In line with this approach, the European legislator also adopted several measures in relation to offensive content and the protection of minors.[168]

Certain hard law measures, such as the Audiovisual Media Services Directive[169] and the Decision on the multiannual program protecting children using the Internet[170] concern among others also the protection of minors in the context of media services. However, these merely provide the broad framework and the basis for adopting further, typically soft law measures aiming to give flesh the Union legislator's goal to overcome potential obstacles to the free movement of media services through offering solutions for Member States, media services providers and parents to safeguard the interests of minors. Such measures include green papers,[171] recommendations,[172] communications,[173]

[166] European Commission, Eurobarometer. Illegal and Harmful Content on the Internet (EB60.2 – CC-EB 2004.1) 3–5.

[167] Dussich op. cit. 85–93.; Schloessman Risner op. cit. 249–253; Flood op. cit. 388–394; Wilson op. cit. 93–95, 99–101; Millwood Hargrave–Livingstone op. cit. 41–48.

[168] Lievens–Valcke–Stevens op. cit. 9–12.

[169] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1.

[170] Decision No 1351/2008/EC of the European Parliament and of the Council of 16 December 2008 establishing a multiannual Community programme on protecting children using the Internet and other communication technologies [2008] OJ L348/118.

[171] Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services, Green Paper, Brussels, 16.10.1996 COM(96) 483 final.

[172] Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity [1998] OJ L 270; Recommendation of the European Parliament and the Council 2006/952/EC of 20 December 2006 on the protection of minors and human dignity and the right of reply in relation to competitiveness of the European audiovisual and information services industry [2006] OJ L 378/72; Commission Recommendation 2009/625/EC of 20 August 2009 on media literacy in the digital environment for a more competitive audiovisual and content industry and an inclusive knowledge society OJ [2009] L 227).

[173] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Illegal and harmful content on the Internet. Communication, Brussels, 16.10.1996 COM (96) 487 final.

programs, reports,[174] strategies,[175] action plans[176]. These *preparatory, informative and steering instruments*[177] are very diverse in form, function and effect. Nevertheless, these can all be considered soft law measures following Snyder's definition,[178] since they are "commitments which are more than policy statements but less than law in its strict sense. They all have in common, without being binding as a matter of law, a certain proximity to the law or a certain legal relevance."[179] In essence, these are "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects."[180]

To explain the preponderance of soft law measures in this particular area of EU media law, I rely on the theory of the competition of legal orders proposed by Ogus and van den Bergh. This approach is particularly salient for understanding the Union legislator's choice of soft law as a regulatory form, providing a credible narrative of integration tendencies in the area of European media law. It offers a birds' eye view of broad regulatory interests within the EU, explaining both tendencies of harmonisation and fragmentation and the specific structure of EU media law. By identifying policy areas amenable to legal convergence and national discretion, the regulatory techniques for negotiating the borderline between free movement of services and the protection of minors come to the fore.

174 Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of the Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity and of the Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and online information services industry Brussels, 13.9.2011 COM(2011) 556 final.

175 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Strategy for a Better Internet for Children Brussels, 2.5.2012 COM(2012) 196 final.

176 276/1999/EC on adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks L 33/1 6.2.1999.

177 In detail, see: SENDEN (2004) op. cit. 123–218.

178 Of course, the concept and definition of soft law remains disputed in scholarly literature, since the heterogeneity of these measures hardly allow for a single, catch-all definition. For an overview of German relevant definitions, see: ARNDT op. cit. 40–44.

179 SNYDER (1994) op. cit. 198.

180 SNYDER (1993) op. cit. 32.

2.3 Competition Between Legal Orders and Its Implications for Regulatory Choice

While consecutive waves of Union level harmonisation have resulted in a viable European market of media services, national approaches to what constitutes seriously impairing content is an area where Member States' statute books typically diverge. Namely, considerations regarding obscenity, decency, excessive violence, hatred, etc. are strongly tied to the 'public morality' or value choices of a given society. Upon this backdrop, the question arises: what were the forces behind media market integration and its fragmentation in respect of obscenity rules and how did the Union legislator attempt to square the circle of market unity and intra-European moral diversity?[181]

2.3.1 Theory of Competition Between Legal Orders

Departing from the premise of law and economics, Ogus claims that there is a tendency of legal convergence, that is, harmonisation between legal systems that are "at an equivalent stage of social and economic development".[182] The premise of this approach is that legal rules are defined by the social and economic circumstances of the nations.[183] As a guiding principle on whether harmonisation should take place, van den Bergh notes that "the more homogeneous preferences are, the weaker the argument in favour of competing rules will be."[184] Accordingly, this approach can be used as a predictive method, asserting that homogeneity in economic and social circumstances exert a pull towards convergence between legal orders, that is, harmonisation of rules. That is, in areas where actors' preferences proceeding under different jurisdictions are 'homogeneous' (similar or identical), 'facilitative measures' promoting *convergence of legal rules may be advantageous* to forego externalities, to avoid the distortion of competition,[185] to improve economies of scale and to reduce transaction costs.[186] Convergence, or effectively: harmonisation of domestic

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[181] In detail, see: DE WITTE op. cit. 1545.

[182] OGUS (1999) op. cit. 405.

[183] Ibid 406.

[184] VAN DEN BERGH op. cit. 438.

[185] BRETON–TREBILCOCK op. cit. 29.

[186] VAN DEN BERGH op. cit. 436, 438.

rules will facilitate free movement of economic actors, products and activities seeking to benefit under similar jurisdictions.

Such convergence, however, may be constrained by socially grounded aspects that have a contrary influence, hampering, slowing down or blocking convergence on points of disagreement.[187] These differences are manifested in 'legal cultures', marked by considerations related to justice, lobby interests or path dependency.[188] In particular, moral considerations and value choices reflected in law "do not lend themselves naturally to practices of transnational rationalization insofar as they are not necessarily universal but rather particular to a certain […] state".[189] Accordingly, Ogus distinguishes between situations where convergence is likely to occur, since "there is unlikely to be a significant variation in preferences […] between market actors in different jurisdictions", and those, where different deep seated constraints render convergence improbable and as a result, competition between legal system ensues.[190]

The case can be made that while different communities represent divergent preferences reflected in law, *preserving such regulatory diversity* will be beneficial by offering a range of legal solutions for consumers and producers to choose from.[191] Diversity between legal systems coupled with the mobility of consumers and/or products and services, as well as mutual recognition enable members of a given community to opt-out of their relevant legal systems. These individuals or firms may 'vote with their feet', choosing the jurisdiction that accommodates their preferences[192] by moving to another community, but they

[187] As de Witte puts it: "Such decisions on first principles differ from choices that underlie most other policy areas insofar as they reflect values that transcend instrumental policy concerns or rational cost/benefit analysis." de Witte op. cit. 1547.

[188] Kerber op. cit. 327; Visscher op. cit.; Deffains–Kirat op. cit. 15.; Eckhardt–Kerber op. cit.

[189] De Witte op. cit. 1545.

[190] Ogus (1999) op. cit. 406, 410, 412–414.

[191] "Consumers' preferences may be better satisfied if they can choose between different qualities of foodstuffs produced in accordance with divergent food regulations. In sum: in fields of law where preferences are heterogeneous and mobility can be guaranteed, there should be a presumption in favour of competition between legal systems. […] Offering additional choices, rather than harmonising immediately certain rules of substantive law, will also preserve the benefits of competition as a dynamic process." van den Bergh op. cit. 438, 440. Federal type polities typically offer a wider range of different solutions, "which better fit between citizens' preferences and public policies than would be the case in a unitary state." Choudhry–Perrin op. cit. 260.

[192] Van den Bergh op. cit. 437–438. Of course, competition between legal systems not only benefit individuals and corporations. Competition and the consequent migration of labor and investment yield important lessons for the legislator by "generat[ing] the benefits of a learning process. Differences in rules allow for different experiences and may improve the

may also "exit" their legal system by choosing foreign products and services of a different quality, produced according to divergent regulations.[193] As a result, regulatory competition emerges contributing to overall economic efficiency.[194]

2.3.2 European Integration as a Framework for Competition Between National Legal Orders

European integration and in particular, the development of EU media law can also be explained through the theory on competition between national legal systems. Indeed, "European law [plays] an important role by guaranteeing 'mobility' through enabling free choice of law, and by improving information on the markets for legislation, in particular by laying down measures of standardization."[195] As such, Union law provides the framework within which a regulated competition between national legal systems takes place.

Historically, the legal framework for the economic upswing expected from free trade and comparative advantage (as well as political integration) was provided in the form of the Treaty on European Economic Community. Market freedoms guaranteeing free movement for the factors of production and the development of the common market ensured the conditions[196] for a viable competition between Member State legal systems: an increase in trade volume and the emergence of multinational corporations.[197] According to Ogus, such circumstances should exert a pull towards further convergence in the area of so-called 'facilitative' law, i.e. "mechanisms for ensuring mutually desired

understanding of the effects of alternative legal solutions to similar problems," shedding light on the efficiency of the different regulatory systems. Ibid 436.

193 Tiebout, cited by: van den Bergh op. cit. 438; Peters (2014) op. cit. 49. "If the individual can have available to him several political units organizing the same collective activity, he can take this into account in his locational decisions. […] [T]his suggests that the individual will not be forced to suffer unduly large and continuing capital losses from adverse collective decisions when he can move freely to other units, nor will he find it advantageous to invest too much time and effort in persuading his stubborn fellow citizens to agree with him." Buchanan–Tullock op. cit. 88.

194 Smith op. cit.; van den Bergh op. cit. 438. For a summary of the neo-classical view on competition (free trade) and economic efficiency, see: Büthe op. cit. 215–217.

195 Van den Bergh op. cit. 440.

196 Ibid 435.

197 Ogus (1999) op. cit. 408, 418.

outcomes: contracts, corporations,[198] other forms of legal organisations and dealings with property."[199] And indeed, this groundwork brought about the second wave of European regulation and deregulation,[200] namely the legislative project of the 1980s focusing on the creation of the internal market, further deepening and refining economic integration and boosting mobility between the Member States. On the points of homogenous preferences, the budding internal market was promoted with 'facilitative' legislation and jurisprudence, such as the Brussels regulations governing private international law,[201] minimum harmonisation in the field of environmental protection, the harmonisation of sales taxes,[202] underpinned by the principle of mutual recognition developed by the ECJ.

Meanwhile, in more restricted areas marked by heterogenous interests, little or no integration took place, since so-called 'interventionist' rules pertaining to this category were based on particular values and interests, typically affording more protection to one of the parties affected by the legislation (e.g.: consumer protection, creditor protection, employee participation etc.). These interventionist rules codify value choices, preserving differences among converging legal orders.

2.3.3 European Media Law Between Competition and Convergence

The development of European media law fits neatly into this narrative of legal competition and convergence. In the early stages of European integration, *broadcasting was considered to belong to cultural policy* and as a corollary, in the national competence.[203] Consequently, no harmonisation on the Community level took place. Owing to technological advances and the massive increase in the volume of consumers with DBS home reception the conditions for cross-

198 "It has been maintained that a major reason for employing the process of approximation in the area of company law is to eliminate disparities in national law regarding the structures, operations, and obligations of companies, thus removing unwarranted legal incentives for locating in one Member State rather than the other." Wilner op. cit. 103.

199 Ogus (1999) op. cit. 410.

200 Peters (2014) op. cit. 58.

201 Kerber op. cit. 297–298; Peters (2014) op. cit. 49.

202 Klenk op. cit. paras 3–8; Bahns–Brinkman–Gläser–Sedlacek op. cit. paras 21–32.

203 Nagy op. cit. 134.

border media services within the EC were ensured by the seventies.[204] While the technological basis for a common market of media services was steadily evolving, it was up to the European legislator to provide for the necessary legal foundations of the budding European media market.

The Commission sought to balance the interests of the broadcasting industry, the consumers and the Member States by combining harmonisation with the principle of mutual recognition[205] in the so-called Television Without Frontiers Directive (TWFD).[206] In order to guarantee the free movement of media services within the internal market, an area typically prone to 'facilitative measures', the more sensitive issues of advertising rules, the protection of European works, the right of reply and the protection of minors had to be addressed.[207]

The *protection of minors was not harmonised*, but merely coordinated in the framework of Article 22 TWFD, which laconically stated that "Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include programs which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence",[208] foreseeing the exception for 'other programs' "where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts." The TWFD was amended twice and finally replaced by the Audiovisual Media Services Directive (AVMSD).[209] Article 12 AVMSD retained the exception in Article 22 TWFD for non-linear media services, meanwhile, for linear services it included a total ban on programs likely to seriously impair the development of minors (Article 27 para 1 AVMSD). The fact that textually so little has changed in the main secondary law source of media regulation could be indicative of Member States' consensus on this issue, but in fact, the opposite is the case.

204 Nyakas op. cit. 8; McDonald op. cit. 1993–1994.

205 Craufurd Smith op. cit. 105.

206 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. [1989 OJ L 298].

207 Gibbons–Humphreys op. cit. 139.

208 Cf. even where hard law applies, "there is still room for soft law. Hard instruments can have a soft content […] Some directives (or some parts of directives) are worded in a vague and non-normative way." Terpan (2015) op. cit. 84.

209 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) OJ L 95, 15.4.2010.

2.4 Accommodating Diversity Through Soft Law

Although there is consensus among the Member States regarding the need to protect minors from harmful media exposure,[210] national approaches as to what is to be considered 'seriously impairing content' varies strongly. This is well illustrated by the example of the reality show Éden Hotel, where the perception of the Hungarian regulator and Ofcom strongly diverged. What then, was the approach taken by the European legislator to deal with the potential internal market obstacle of seriously impairing content on the European audiovisual market?

Originally pertaining to the national realm of national cultural policy, Member State media and their regulation evolved independently and on the basis of *divergent cultural and moral convictions*. This naturally gives rise to a marked diversity of national,[211] and even regional legal solutions within the same country, ranging from criminal and civil law rules to self-regulation corresponding to the different cultural traditions and moral beliefs.[212] This was

210 While Commission acknowledges that the "identification of material which could be harmful to minors presents a basic problem: […] a consensus does not necessarily exist, even in medical circles as to what is likely to affect the moral or physical development of minors." Green Paper, Brussels, 16.10.1996 COM(96) 483 final, 18, 38.

211 "By way of illustration, there is a wide gap between the Nordic countries, which are tough on violent material but easy-going where sexually-explicit material is concerned, and the Latin countries, tough on sex but less so on violence." Green Paper, Brussels, 16.10.1996 COM(96) 483 final, 36.

212 Green Paper, Brussels, 16.10.1996 COM(96) 483 final, 36. In 2003 the Commission procured a study from the consultancy firm Olsberg SPI which analyzed the rating practices of the Member States in respect of films. The Olsberg Study concluded that in 78 percent of the films analyzed there was a difference in age rating greater than 6 years between the Member States. The study concludes that the diversity of ratings and standards among the Member States and regarding the different media creates confusion among parents responsible for protecting their children from harmful content. It also suggests that such diversity may even distort competition among service providers. Olsberg SPI points out that "the concept of complete 'harmonisation' may be, for now, seen as unachievable due to the different public policy objectives that are being pursued in the different countries, and because the cultural traditions (rating standards) still lead the way. For instance, the issue of how violence and sex is handled in the different countries has often been put forward as examples of the typical disparities in what is considered as particularly harmful or sensitive. Yet, it is imperative that the public has access to common references, and audiovisual professionals could increase the effectiveness of their business and increase the potential of their work to circulate across the countries through: the development of common descriptive criteria; the use of common codification in signaling the age categories defined according to these criteria.", Empirical Study on the Practice of the Rating of Films Distributed in Cinemas Television DVD and Videocassettes in the EU and EEA Member States Prepared on behalf of the European Commission (Final Report May 2003) 95–96, 111.

particularly the case for regulating content for the protection of minors, i.e. the concept of what is harmful and the tools to prevent exposure.[213]

As a result, harmonising the substance of harm, i.e. what seriously impairs the physical, mental or moral development of minors was never seriously considered. While in the adoption process of the AVMSD the European Parliament proposed that certain examples of content harmful to minors be included in the Directive, this was rejected by the Council and the Commission.[214] As Ukrow points out: "It was never the intention to co-ordinate through the Directive the concept of pornography for all Member States. […] It is not possible to determine a uniform European conception of morals, and the requirements of morals vary from time to time and from place to place."[215] As a result, while most Member States allude to violence, pornography, erotic or sexual material when regulating seriously impairing content, in practice, these general labels refer to very different standards. This is also why from an external point of view, certain cultures[216] seem to give more weight to the freedom of speech of the media service provider, while others seem to afford primacy to safeguarding minors' mental and physical health through strict protective measures.

While establishing a uniform, Europe-wide definition to 'seriously *impairing content'* was out of the question due to the differences between Member States mentioned above, some legislative intervention through effective measures was justified at the time. As the Commission elaborated in its Green Paper on the protection of minors and human dignity in audiovisual and information services: "divergencies (and the lack of transparency) in national rules on the outright prohibition on production, distribution and in some cases possession of certain material generate several major difficulties in relation to transnational services", which "pose the risk that new audiovisual and information services cannot

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213 "Member States have developed presents a landscape made of very diverse – and in a number of cases, even diverging – actions across Europe. This is in particular true of tackling illegal and harmful content, making social networks safer places and streamlining content rating schemes." Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 13.9.2011 COM(2011) 556 final; Casarosa op. cit. 19–20; Büttner op. cit. 121–128.

214 Cabrera Blázquez–Cappello–Valais op. cit. 28.

215 Ukrow op. cit. 708–709.

216 Racheal Craufurd Smith even goes so far as to claim that „cultural differences among the Member States render any attempt to agree common standards in sensitive areas such as child protection extremely difficult. Indeed, harmonisation at the European level would arguably run counter to the Community's commitment to respect the cultural diversity of its Member States set out in Article 151 of the EC Treaty" [Art 167 TFEU]. Craufurd Smith op. cit. 108.

reach their full economic, social and cultural potential".[217] To avert the risk of certain Member States undermining the budding European media services market, the European legislator had to afford them certain guarantees that the protection of minors shall be observed in the broadcasts received. As a result, the Commission set out to distinguish harmful content from illegal content,[218] the latter constituting content featuring sexual abuse and the exploitation of children and child pornography, which became the subject of several hard law measures.[219] By contrast, with respect to the protection of minors from exposure to harmful content, the European legislator merely sought to coordinate Member States' expectations. Over the years, this was done through a set of soft law measures, which primarily focused on three main issues: preventing exposure, improving media literacy, as well as promoting self-regulation and cooperation between national authorities.

These soft law measures promote the use of different methods to *prevent exposure of minors* to harmful content, including software for access restrictions, labelling, warning signals, watershed periods and age checks.[220] The use of these instruments are aimed at the industry and parents, caregivers, while Member States are to raise awareness regarding these methods.[221] As regards *media literacy*, a specific Commission recommendation took up the issue, committing

217 Green Paper, Brussels, 16.10.1996 COM(96) 483 final, 3, 36.

218 Of course, differentiating between harmful and illegal content is not always clear cut: "Although harmful and offensive material is, in principle, distinguished from that which is illegal (obscenity, child abuse images, incitement to racial hatred, etc.), it remains difficult to define the boundaries in a robust and consensual fashion. What contents are considered acceptable by today's standards, norms and values, and by whom? Borderline and unacceptable material may include a range of contents, most prominently though not exclusively 'adult content' of various kinds, and these may occasion considerable concern on the part of the public or subsections thereof." Millwood Hargrave–Livingstone op. cit. 25.

219 *Council Decision* of *29 May 2000* to *combat child pornography* on the Internet [2000] OJ L 138; 2002/629/JHA [2002] OJ L 203, replaced by *Directive 2011/36/EU* of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101, 1; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L 335. See also: Savin op. cit. 257.

220 98/560/EC: Council Recommendation, para 2.2., Green Paper, Brussels, 16.10.1996 COM(96) 483 final 48–50, Recommendation 2006/952/EC on the protection of minors and human dignity and the right of reply in relation to competitiveness of the European audiovisual and information services industry [2006] 2006 L 378/72).

221 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Strategy for a Better Internet for Children COM/2012/0196 final.

Member States to raise awareness through training, information events or education, encouraging the media industry to organize campaigns and provide information packs on the subject.[222] Finally, *self-regulation* of, and co-regulation by media service providers is also promoted,[223] including cooperation under the framework of the Commission's Coalition to make the internet a better place for kids.[224]

In its most recent report, the Commission draws attention to the fact that *age-rating and content classification* systems are an area of the "most extreme fragmentation – the conceptions of what is necessary and useful diverge significantly between and within Member States".[225] This seems evident, since classification is based on a concept of harmful content, while no definition of seriously impairing content is provided in the relevant soft law measures, referring vaguely to "content such as adult erotica", "erotic or pornographic photographs" or "nudity, sexuality, violence, bad language".[226]

What is the result of the continuing, culturally and morally grounded fragmentation of national approaches to seriously impairing content and oversight? While the free movement of media services is guaranteed, jurisdiction rules in European media law allocate the regulation and policing of the borderline between guaranteeing free speech and protecting public morality, an area left unharmonised, to the legislator and authorities of the Member State where the broadcaster is established. This however, does not necessarily coincide with receiving state and its audience exposed to the media content. As a result, the power of Member States to prevent receiving content they consider to be harmful by media service providers that do not fall under their jurisdiction, i.e.

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[222] Commission Recommendation of 20 August 2009 on media literacy in the digital environment for a more competitive audiovisual and content industry and an inclusive knowledge society [2009] OJ L 2279).

[223] In detail, see: Palzer op. cit.

[224] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Strategy for a Better Internet for Children/ COM/2012/0196 final.

[225] Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of the Council Recommendation of 24 September 1998 concerning the protection of minors and human dignity and of the Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and online information services industry – Protecting Children in the Digital World, Brussels, 13.9.2011 COM(2011) 556 final.

[226] Green Paper, Brussels, 16.10.1996 COM(96) 483 final 4, 10, 53. For a recent comparison of what is understood under seriously impairing content, see the table compiled in: Cabrera Blázquez–Cappello–Valais op. cit. 28–29.

to assert public morals over content consumed by their viewers are very limited and restricted to the so-called circumvention procedure.

Although the Article 3 AVMSD provides for the *circumvention procedure* (only applicable to television broadcasting), this is largely ineffective.[227] According to this procedure, in case a broadcaster under the jurisdiction of another Member State provides a broadcast wholly or mostly directed towards the territory of another Member State, the latter may contact the Member State of jurisdiction "with a view to achieving a mutually satisfactory solution to any problems posed." Where no satisfactory solution is found, after conciliation with and authorization by the Commission, the receiving Member State may take proportionate and non-discriminatory measures against the broadcaster, in case the broadcaster established itself in another Member State to circumvent stricter rules.[228] Yet the European Commission itself acknowledges, that "except for one case, the circumvention procedure has not been used in practice",[229] a further problem is that with respect to on-demand services, no comparable instrument exists.

As a result of the interplay between a lack of harmonisation of what constitutes harmful content, country-of-origin jurisdiction rules and the ineffective circumvention procedure, Member States' power to enforce a more 'conservative' stance on seriously impairing content received from other Member States is gradually non-existent. While the European soft law measures adopted in this field allowed Member State to retain power over media rights and wrongs under their own jurisdiction, they became defenseless against content targeting their viewers in a growing European media market.

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227 ERGA report on territorial jurisdiction in a converged environment (May 2016) 40–41.

228 It is almost impossible to prove deliberate circumvention under these rules, see: ERGA report on territorial jurisdiction in a converged environment (May 2016) 9.

229 Commission Staff Working Document: Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities Brussels, 25.5.2016 SWD (2016) 168 final 102, 167. The Progress Report of the General Secretariat of the Council reads "[s]ome delegations underlined that the procedure in question, circumvention procedure, is not currently effective due to its complexity, and that the Commission proposal does not make its application easier. The Commission stated that the circumvention procedure restricts freedom of establishment which justifies strict and restrictive application of this procedure. At the same time the Commission admitted that the procedure has so far not been used. Since the circumvention procedure can only be applied to TV broadcasting, some delegations asked for it to be extended to on-demand services." Progress Report, Brussels, 15 November 2016, 13624/1/16REV 1.

Based on the above, the European media market remains highly fragmented around content classifications, age limits, oversight and sanctions, with a diversity of national[230] legal solutions corresponding to different cultural traditions and moral convictions.[231] Legislative intervention on the European level is restricted to soft law measures, which are confined to offering an array of possible solutions for protecting minors in the European audiovisual services market.

2.5 The Use of Soft Law in Areas of 'Interventionist Law'

The theory of the competition of legal orders helps us to differentiate between policy areas amenable to harmonisation through 'facilitative law', and those, where national preferences call for maintaining legislative diversity through 'interventionist measures'. As mentioned above, interventionist measures are typically introduced by the legislator to afford more protection to certain parties affected by the legislation based on moral convictions of right and wrong. Regulating media content is one such area: although generally all Member States agree that minors should be protected from exposure to seriously impairing content, some national solutions seem to afford more weight to the freedom of expression of media service providers, while others offer more protection to minors.

While full blown harmonisation was out of the question, both the European legislator and the Member States had an interest in achieving some middle ground, albeit for different reasons. The Commission sought to dismantle Member States' reluctance towards the establishment of a European market of audiovisual services and was therefore ready to both uphold national diversity in regulating content, and to give certain guarantees to national legislators that the protection of minors within the internal market was a priority. In other words, soft law measures "can be seen as a compromise between retaining Member State responsibility for a policy area and giving the EU a co-ordinating, possibly even policy-shaping role that Member States could accept."[232] While

230 "By way of illustration, there is a wide gap between the Nordic countries, which are tough on violent material but easy-going where sexually-explicit material is concerned, and the Latin countries, tough on sex but less so on violence." Green Paper, Brussels, 16.10.1996 COM(96) 483 final 36.

231 Ibid.

232 Warleigh-Lack–Drachenberg op. cit. 1003.

mediating national expectations regarding the protection of minors from seriously impairing content, such soft measures, however did not bring about convergence in national approaches to the substance of harmful content, age-rating or enforcement.

The example of regulating harmful content in European media law shows, that soft law legislation may among others emerge on the fringes of 'interventionist law', seeking to bridge, yet nevertheless uphold the divide between divergent national solutions and the need for legal convergence. In these cases, soft law acts as a *buffer and alternative to harmonisation* in an otherwise strongly converging audiovisual market. One of the uses of soft law therefore, is to offer a regulatory solution where Member States "have considerable interests that they do not want to put at risk […] [yet they] want to further EU integration in sensitive fields, while avoiding a loss of sovereignty at a time when the citizens' support for European integration is called into question."[233]

In effect, soft law measures adopted in this field merely provide a *common term of reference* facilitating dialogue between national authorities exercising oversight in the broadcasting sector, and focusing co- and self-regulation efforts in the area of the protection of minors. As such, the concept of harmful content remains just as soft as the measures it is framed in, without harmonising the substance of harmfulness. Recent developments suggest that this area continues to resist convergence: leading up to the proposal for the amendment of the AVMSD, the Commission carried out an impact assessment,[234] the findings of which were that although REFIT evaluation identified the insufficient protection of minors in the media context as one of the three main problems to be addressed, there is still no consensus among stakeholders in this regard and therefore no harmonisation shall take place. As a result, the only alignment in the revised Directive with respect to the protection of minors is that protection of minors shall be extended to encompass not only TV broadcasting but on-demand media service provision as well.

Based on the above, the adoption of soft law in policy fields marked by strong cultural preferences and moral convictions may serve to bridge existing regulatory cleavages between the Member States to respect national (regional)

233 Terpan (2013) op. cit. 32.

234 Commission Staff Working Document: Executive Summary of the Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities. SWD/2016/0169 final – 2016/0151 (COD).

specificities and legislation resisting convergence and at the same time enable the smooth functioning of the internal market. In other words, the regulatory choice of soft law is strategical to provide a frame of reference for the Member States without taking a step towards harmonisation in a field pertaining to the realm of interventionist measures. Upon this backdrop, soft law measures emerge as mutual guarantees regarding the protection of minors from seriously impairing content, while insulating relevant national approaches from further convergence, allowing Member States to retain control over definitions of harmful content and the exact policy mix for monitoring and enforcing content rules. While soft law is often used as a first step towards gradually achieving harmonisation (pre-law function of soft law), in light of the heterogenous preferences related to the protection of minors from harmful media content, soft law in this particular area is not likely to give way to hard legislation any time soon.

CHAPTER III
PRACTICAL EFFECTS AND THE 'BINDINGNESS' OF EU SOFT LAW

1. Introduction

Since the beginning of the nineties we are witnessing a steep increase in the number of European soft law measures. In parallel with the rise of formal Article 288 TFEU (ex-Article 249 EC)[235] soft law acts, that is opinions and recommendations, a burgeoning of non-formal, non-Treaty based measures including guidelines,[236] communications, notices, etc.[237] may be discerned and with it, soft law-related cases before the ECJ also emerged.[238] Although the number of such soft law-related judgments and rulings is still relatively modest, the jurisprudence of the ECJ revealed that these non-binding measures nevertheless have certain legal effects, providing Member States with some clues as to the extent of their obligations ensuing from European soft law.

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235 Article 288 (ex Article 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.'

236 'Akte sui generis', Pampel op. cit. 12.

237 "[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." Senden–Prechal op. cit. 186. See also: Terpan (2013) op. cit. 19–26.; Håkon–Whish op. cit. 46.

238 Schwarze op. cit. 238–245.

2. The Different Categories of EU Soft Law Based on Member States' Obligations[239]

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; nevertheless, the jurisprudence of the CJEU sheds some light on the legal obligations and rights ensuing from the different types of European soft law. Departing from the disctinction between formal and non-formal soft law developed by Senden, in this chapter, I propose different categories of EU soft law depending on the obligations of the Member States emanating from such non-binding norms.[240]

2.1 Harmonising Soft Law: The Duty to 'Take Into Account' and the 'Duty to Weigh Interests'

The landmark case in ascertaining the legal effects of European soft law and the obligations arising therefrom was *Grimaldi*.[241] The case concerned an Italian migrant worker, who requested that the Belgian Occupational Diseases Fund (Fonds des maladies professionnelles) 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, a formal soft law measure, had already recommended a quarter of a century earlier, that, among others, Dupuytren's contracture be recognized as an occupational disease.[242] The Brussels labor court seized of the instant case referred a question to the ECJ asking whether

239 Láncos (2018b) op. cit. I would like to thank Krisztina Rozsnyai for her suggestions.

240 Senden (2005a) op. cit. 79–99.

241 Already before Grimaldi, cases concerning recommendations surfaced before the ECJ, such as the Frecasetti case (C-113/75) [1976] ECLI:EU:C:1976:89. 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, 29.6.1962, p. 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 formal measures of EC law. Cf. Sarmiento op. cit. 266.

242 *Grimaldi,* paras 2–4.

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.[243]

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*".[244] Accordingly, recommendations belong to the purview of soft law, that is measures "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"[245] 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[246] (see the Belgian gambling case discussed in Part V Chapter 3. below).

As Senden puts it, a soft law act may be binding despite its soft outward appearance, for example, on the basis of its substance. 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".[247] Yet 'true recommendations',[248] 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".[249] This does not mean however, that they have absolutely no legal effect.[250] Instead, according to the ruling "national courts are *bound to take recommendations into consideration* in order to decide disputes submitted to them".[251]

243 *Grimaldi,* paras 5, 10.

244 *Grimaldi,* para 11 (italics by me), confirming Snyder's renowned definition of soft law: 'rules of conduct which, in principle have no legally binding force but which nevertheless may have practical effects'. Ştefan (2012) op. cit. 880.

245 Senden (2004) op. cit.112.

246 *Grimaldi,* paras 14–16.

247 Senden (2004) op. cit. 462–463.; see: *CIRFS, Ijssel-Vliet.*

248 Rosas op. cit. 311.

249 Cf. *Hopkins* (C-18/94) [1996] ECLI:EU:C:1996:180, para 28, fn. 44.

250 *Grimaldi,* paras 16, 18. Analyzing 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.', Bast op. cit.

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

Although "the ECJ was silent on the potential breadth of the obligation"[252] and its wording seems to refer to the *von Colson* jurisprudence,[253] 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", which would contravene the principle of legal certainty.[254] As Krieger puts it, the judgment entails a large degree of reservation in comparison with other 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".[255] As such, the obligation to take 'true recommendations' into account can produce indirect legal effects through "validation by the subjects of the law and legal authorities".[256]

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"[257] (see the law-plus function of soft law, above). 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".[258] 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",[259] framing the obligation of consideration to be of a more general scope.

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252 Korkea-Aho op. cit. 162.

253 Ştefan (2008) op. cit. 767.

254 Senden (2004) op. cit. 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) op. cit. 13; see also: von Graevenitz op. cit. 173. By contrast, Christianons argues that there is a duty of consistent interpretation, see: Christianos op. cit. 327.

255 Krieger op. cit. 97.

256 Georgieva op. cit. 225.

257 *Grimaldi,* paras 18–19, italics by me. See also: Glaser op. cit. 376.

258 Senden (2004) op. cit. 474.

259 Sarmiento op. cit. 267. Cf. *DHL* (C-428/14) ECLI:EU:C:2016:27, para 41.

More light is shed on the national courts' and authorities' 'must consider' obligation in the earlier *Commission v Lithuania* (European emergency number) case,[260] which also concerned the implementation of the Universal Services Directive. 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[261], again a formal soft law measure, which facilitated 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).

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".[262] 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".[263]

While 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, this obligation emanates from the Directive and not soft law. Here, the duty to state reasons ensures 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.

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

261 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).

262 *Commission v Lithuania,* para 49.

263 *Commission v Lithuania,* para 50, italics by me.

In *Polska Telefonia*,[264] the Sąd Najwyższy (Polish Supreme Court) turned to the Court for a preliminary ruling with the main question whether competition related guidelines, i.e. non-formal measures adopted by the Commission of which 'national regulatory authorities shall [take] utmost account' are applicable to individuals established in a Member State. Although the Supreme Court's questions were directed towards the applicability of non-formal soft law measures to individuals, 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.[265] 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[266] (law-plus function). In particular, the Court stressed that the latter "sections are designed to describe the working of the cooperation procedures between the NRAs, the national competition authorities and the Commission."[267] 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."[268] Incidentally, the elaborations of the Court indicate that although not binding,[269] said guidelines must in fact be taken into utmost account by national

[264] *Polska Telefonia* (C-99/09) [2010] ECLI:EU:C:2010:395.

[265] *Polska Telefonia,* para 31.

[266] *Polska Telefonia,* para 32–33.

[267] *Polska Telefonia,* para 33.

[268] *Polska Telefonia,* para 35.

[269] Paradoxically, while the guidelines are not binding upon individuals either, they may affect their rights and obligations, which the CJEU duly recognizes: 'in doing so, the judgment also clearly distinguishes, at a substantive level, between the legally binding force and the effects of the norms.' Ştefan criticizes the ensuing legal situation, claiming that '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) op. cit. 889–890. See also: Kowalik-Bańczyk op. cit. 309. 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 cases in particular as regards 'appropriate measures' in the field of state aid […]. The telecommunication sector shows demonstrates similar characteristics.' von Graevenitz op. cit. 170–171.

authorities, since in substance they summarize existing case-law and otherwise orient the implementation of competition policy on the national level.[270]

In *Mediaset*,[271] 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 measures necessary to ensure their implementation, letters sent by the Commission to ensure the execution of such decisions are not binding.[272] Such letters cannot be considered as decisions or acts, but are statements of position "devoid of any binding effect" upon the national court.[273] 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".[274] 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".[275] 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 it",[276] 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".[277]

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. It is important to note, that in this case, the non-formal statement of position in question is, in contrast with recommendations, not of general

270 See also: Frenz op. cit. at n. 870.

271 *Mediaset* (C-69/13) [2014] ECLI:EU:C:2014:71.

272 *Mediaset,* paras 23–24.

273 *Mediaset,* paras 25–28.

274 *Mediaset,* para 29.

275 *Mediaset,* paras 31–32.

276 *Mediaset,* para 31.

277 Epiney op. cit. 714.

scope, but much rather an individual measure. While the bindingness – and the obligations flowing from – the non-formal 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 non-formal measures with the necessary legal effects as will be demonstrated in the Pfleiderer case.

The *Pfleiderer* case[278] concerned an application for access to files in a leniency procedure conducted by the German Competition Authority, the Bundeskartellamt. 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 competent national court seeking access to the complete case file, which in turn referred to the CJEU for a preliminary ruling, essentially asking whether national competition authorities may disregard relevant Commission notices on leniency.

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,[279] 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.[280] This procedural autonomy notwithstanding, 'the ECN Model Leniency Programme is a non-binding instrument which seeks to bring about de facto or 'soft' harmonisation of the leniency programmes of the national competition authorities' setting out the treatment leniency applicants can anticipate in aligned ECN jurisdictions.[281]

278 *Pfleiderer* (C-360/09) [2011] ECLI:EU:C:2011:389.

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

280 Opinion para 33.

281 Opinion para 24–26.

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*.'[282] Since transparency and predictability brought about by the Leniency Notice are necessary for the effective operation of the leniency programme,[283] 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."[284] 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 matter, voluntary self-incriminating statements would not be disclosed".[285] What's 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.[286]

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,[287] despite the fact that these had indeed been "designed to achieve the harmonisation of some elements of national leniency programmes".[288] Although the CJEU acknowledges that "the guidelines set out by the Commission may have some effect on the practice of the national competition authorities",[289] 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

282 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.

283 Opinion para 32.

284 Opinion para 34.

285 Opinion para 45, italics by me.

286 Opinion para 45; Polley op. cit. 452.

287 *Pfleiderer,* para 21.

288 *Pfleiderer,* para 22.

289 *Pfleiderer,* para 23.

the *principle of loyalty*,[290] to weigh on a case-by-case basis[291] the Community interest of the effective operation of leniency programmes[292] and the right of any individual guaranteed under EU law to seek damages caused by conduct which is liable to restrict or distort competition.[293]

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. 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".[294] 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."[295]

290 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 op. cit. 399. See also Korkea-aho op. cit. 165–166; Temple Lang op. cit. 32–33. For his part, Klamert specifies the duty flowing from the principle of loyalty 2as 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. Klamert op. cit. 127.

291 *Pfleiderer,* para 31.

292 *Pfleiderer,* para 26.

293 *Pfleiderer,* para 28; Frese op. cit. 103–104.

294 Polley op. cit. 453.'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.' Silva Morais op. cit. 125

295 Ştefan (2016) op. cit. 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.allenovery.com/publications/en-gb/Pages/Disclosing-leniency-documents-to-damages-claimants--no-ECJ-guidance.aspx

2.2 ‘Hardening’ Soft Law: The Duty of Cooperation

Cooperation is also a key notion of the next line of cases described below, both actually, involving an element of consensus, 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.

The CIRFS case[296] concerned an action for the annulment of a Commission decision (notified to the applicants in a letter from the Vice-President of the Commission)[297] providing that there was no obligation for the prior notification of state aid granted to Allied Signal by the French government. In its action, the International Rayon and Synthetic Fibres Committee (CIRFS) referred to a letter sent by the Commission on 19 July 1977 to the Member States headed ‘Aid to the synthetic fibre 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 so-called *discipline* laid down in the letter was agreed to by all Member States.[298] 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.[299] 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 tyre 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

[296] *CIRFS* (C-313/90) [1993] ECLI:EU:C:1993:111.

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

[298] *CIRFS,* paras 1, 3.

[299] *CIRFS,* paras 4–5.

worded, the Commission interpreted it in a narrow sense as applying only to textile fibres.[300]

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,'[301] The Court however, clarified that the fact that a discipline is rooted in an agreement[302] between the Member States and the Commission cannot strip it of its binding effect.[303] 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. Such disciplines cannot be unilaterally amended without breaching the principles of equal treatment and the protection of legitimate expectations.[304]

The contested measure, otherwise classified as a non-formal 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.'[305] However, referring to an instance of implied consent, with respect to the Commission's unilateral attempt to amend the 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".[306] As Senden points out, the Court most probably implied a further precondition for the bindingness of the communication upon the Member States, namely the

300 *CIRFS,* paras 8–10.

301 *CIRFS,* para 32.

302 See also: para 42 of the Opinion of Advocate General Lenz in CIRFS.

303 *CIRFS,* para 36.

304 *CIRFS,* paras 44–45.

305 *CIRFS,* para 4.

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

applicability of the *duty of cooperation* as laid down in Article 93 para 1 EC on state aid.[307] This also follows from the judgment rendered in Ijssel-Vliet.[308]

The Ijssel-Vliet ruling 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.[309] 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 programme for the fishing fleet, which did not authorize the grant of national aids for the construction of fishing vessels intended for the Community fleet.[310]

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 measures[311] 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".[312] 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.[313] In this '*spirit* of cooperation', the Dutch Government assured the Commission in its letter that it observed the criteria laid down by the

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[307] "[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 (2004) op. cit. 278.

[308] *Ijssel*-Vliet (C-311/94) [1996] ECLI:EU:C:1996:383.

[309] *Ijssel-Vliet*, paras 1–2.

[310] *Ijssel-Vliet*, paras 13–15, 17, 20.

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

[312] *Ijssel-Vliet,* para 36, italics by me. See also: Ștefan (2016) op. cit. 11. Cf. however: *Salt Union* (T-330/94) [1996] ECLI:EU:T:1996:154.

[313] *Ijssel-Vliet,* paras 37–39.

Guidelines with respect to aids granted in the fisheries sector.[314] 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".[315] 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.[316]

Based on the Ijssel-Vliet ruling we may deduce that the fully binding nature of non-formal 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.[317] 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,"[318] 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".[319] Consequently, the specificity of the legal basis prescribing cooperation sets such measures strongly apart from other non-formal measures coupled with the mere general obligation of sincere cooperation (Article 4 para 3 TEU) analyzed in Pfleiderer and Mediaset, amplifying the bindingness of such instances of soft law.

2.3 'True' Soft Law: No Duty Whatsoever

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'[320] non-formal soft law measures. Based on what follows, Member States 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.[321]

314 Letter of 31 January 1989, *Ijssel-Vliet,* para 40.

315 *Ijssel-Vliet,* para 42.

316 *Ijssel-Vliet,* para 49.

317 Senden (2004) op. cit. 277.

318 Ibid, 465.

319 Ibid, 279.

320 Senden–Prechal op. cit. 188; Håkon–Whish op. cit. 47–48.

321 Cf. Ştefan (2016) op. cit. 20.

In *Expedia*,[322] the applicant challenged the lawfulness of launching national cartel proceedings on the bases of Article 101 para 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 percent 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 bound[323] 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.[324]

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.[325] 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.[326]

In the *Estée Lauder* case,[327] the nature and legal effects of so-called 'comfort letters' issued by the Commission were at stake. Comfort letters are administrative letters of individual applicatioon, issued by the Commission

[322] *Expedia* (C-226/11) [2012] ECLI:EU:C:2012:795.

[323] 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 op. cit. 190.

[324] *Expedia,* para 26, 28.

[325] *Expedia,* paras 24, 29–30.

[326] *Expedia,* 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 op. cit. 295.

[327] *Anne Marty v Estée Lauder* (37/79) [1980] ECLI:EU:C:1980:190.

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.[328] 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.[329] In its judgment, the Court declared, that comfort letters do not bind national courts[330] – 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 question"[331] comply with Community competition rules. While Albors-Llorens reads the judgment as one which compels national courts to take such letters into account,[332] a comparison of the different language versions[333] 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.

Contrary to what is suggested by Albors-Llorens and Ştefan, i.e. that the case-law on comfort letters "should be read in conjunction with the judgment in the case Grimaldi"[334] 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 non-formal, individual measures as interpretation aids on the national level. This is confirmed in *Guerlain,*[335] where the Court expressly refers to the powers of the Commission to adopt formal legal acts pursuant to formal rules.[336] While Member State courts are barred from applying national competition law where this "would result in an exemption

[328] *Anne Marty v Estée Lauder,* paras 2–3.

[329] *Anne Marty v Estée Lauder,* paras 5, 3.

[330] See also: SCHERMERS–WAELBROECK op. cit. 334–335.

[331] *Anne Marty v Estée Lauder,* para 10.

[332] "[T]hey should be taken into account by the national courts." ALBORS-LLORENS op. cit. 128.

[333] "berücksichtigen können", „pueden tener en cuenta", „peuvent prendre en compte", „possono tener conto"; *Anne Marty v Estée Lauder,* para 10.

[334] ŞTEFAN (2008) op. cit. 767–768.

[335] *Giry and Guerlain* (joined Cases 253/78 & 1–3/79) [1980] ECLI:EU:C:1980:188.

[336] *Giry and Guerlain,* paras 9–11.

granted by a decision or a block exemption being called into question",[337] 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".[338] 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.

More recently, the Court revisited the bindingness of leniency notices upon national competition authorities in the *DHL* case.[339] DHL had summited a leniency application to the European Commission for immunity from fines concerning cartel infringements in the international freight sector, while also providing some information on infringements in the Italian road freight forwarding business, from which the Commission decided only to pursue infringements related to international air freight forwarding services. At the same time, the Commission left it up to national competition authorities to pursue infringements concerning maritime and road freight services.[340] Although DHL submitted a summary application for immunity under the Italian national leniency programme, 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.[341] 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.

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".[342] The Court further pointed out that ECN is "a forum for discussion and cooperation in the application and enforcement of EU competition policy".[343] As such, it seems to

[337] *Giry and Guerlain,* para 17.

[338] *Giry and Guerlain,* para 18.

[339] *DHL* (C-428/14) ECLI:EU:C:2016:27.

[340] *DHL,* para 17.

[341] *DHL,* paras 18–20, 23–24.

[342] *DHL,* para 30.

[343] *DHL,* para 31, referring to recital 15 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of

refer an obligation of cooperation, while the substance of the measure appears to indicate an aim to indirectly harmonise the application of competition law. Nevertheless, the Court stressed 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.[344] 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",[345] 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".[346] 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.[347]

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 programme. Although "leniency programmes 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".[348] 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".[349] Since Member States are not obliged to put a specific leniency programme in place under the notice and since leniency programmes on the EU and the national level run in parallel with each other,

the Treaty, (OJ L 001, 04/01/2003 p. 1–25) and para 1 of Commission Notice on cooperation within the Network of Competition Authorities, (OJ C 101, 27/04/2004, p. 43–53).

344 *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, p. 17–22).

345 *DHL,* para 36.

346 *DHL,* para 43.

347 See also: Stancke op. cit. 685.

348 *DHL,* para 78; Grafunder op. cit. 463.

349 Mândrescu op. cit.

disregarding the non-binding leniency notice does not undermine the effective application of EU law. Indeed, the parallelity of multiple cartel proceedings and different leniency programmes further increase uncertainty for cartel members, fostering compliance with competition rules and bolstering the effectiveness of EU competition law.

The *Kotnik* case[350] concerned the interpretation of the non-formal soft law measure of the Banking Communication[351] 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.[352] 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 Slovenian Constitutional Court.[353] 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 CJEU, seeking a preliminary ruling on, among others, the bindingness of the Banking Communication underlying the national law on the banking sector.[354]

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.[355] 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

[350] *Kotnik* and others (C-526/14) [2016] ECLI:EU:C:2016:767.

[351] Communication from the Commission on the application, from 1 August 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, p.).

[352] Banking Communication, paras 1-3, Opinion AG Wahl in *Kotnik,* paras 1–3.

[353] *Kotnik,* paras 24–26, 28.

[354] *Kotnik,* paras 28–29.

[355] *Kotnik,* paras 37–39.

of the financial crisis is compatible with the internal market".[356] The laconic reasoning of the Court may be supplemented by AG Wahl's Opinion for further clarification.[357]

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".[358] 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".[359] Although "the Commission may publish acts of 'soft law'",[360] compatibility is nevertheless "from a legal point of view" still governed by Article 107 para (3)(b) TFEU.[361] While AG Wahl expressly refers to the obligation of Member States stemming from the duty of sincere cooperation under Article 4 para 3 TEU, he nevertheless concludes that any effect of the Communication on the Member States "can at most be incidental or indirect".[362]

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 para 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".[363]

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356 *Kotnik,* paras 40. 44–45.

357 Opinion AG Wahl in *Kotnik*.

358 Opinion, para 27.

359 Opinion, paras 28, 36–37.

360 Opinion, para 38.

361 Opinion, para 44.

362 Opinion, para 40.

363 Pampel op. cit. 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 op. cit. 677, see also: von Graevenitz op. cit. 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

The Court of First Instance also took the chance to highlight the non-binding character of the Commission's *appropriate measures* in Salt Union.[364] 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 Dutch Government from granting state aid to Salt Union's rival company, Frima.[365] 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 Dutch Government or State, they would not be bound to adopt them".[366] 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 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".[367]

3. Conclusions

The CJEU expressly holds that while certain measures may not be binding, they *"cannot therefore be regarded as having no legal effect"*.[368] Legal effects arise "on the basis of their substance or as a result of an agreement between the author of an act and its addressees",[369] binding either only the author of the measure or both the institution that issued the measure in question and the Member States, albeit to varying degrees.[370] The survey of the CJEU's jurisprudence reveals

[without the necessary competence], these should be completely disregarded in the course of the application of primary and secondary law', ibid.

364 *Salt Union* (T-330/94) [1996] ECLI:EU:T:1996:154.

365 *Salt Union,* paras 4–5.

366 *Salt Union,* para 35.

367 Conte op. cit. 300.

368 *Grimaldi,* para 17.

369 Senden (2004) op. cit. 289. For an opposing view, cf. Peters (2007) op. cit. 411–412.

370 Von Graevenitz even goes so far as to claim that soft law measures such as communications, guidelines and opinions 'suggest an expectation that national authorities and courts will observe them.' von Graevenitz op. cit. 169.

that the bindingness of European soft law measures results from the interplay between the duty and degree of cooperation, the substance of the norm and the consent of the Member States to be bound by the same.[371]

Non-formal 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. 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.[372] The principle of sincere 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.

Formal soft law measures, such as recommendations are formal acts under Article 288 TFEU, the substance of which is the indirect harmonisation of national laws. These measures were enacted with the participation of the Member States (agreement in Council),[373] 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 institution[374] 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 do not exist. At the same time, their duty may 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

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[371] 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 op. cit. 18.

[372] 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. GEIGER op. cit. 325, 325.

[373] Article 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.'

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

in case hard law so prescribes. 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 non-formal soft law measures, such as the leniency programme are also designed to indirectly harmonise national laws, yet no agreement 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 non-formal soft law measures, the principle of sincere cooperation and effectiveness seem to replace the missing consensus on the side of the Member States to provide legal effect.

Finally, in the case of non-formal measures formulated and agreed to in an ongoing cooperation between the Commission and the Member States, both the substance of the measure and the agreement of the Member State to be bound by the same and to apply the measure speak for the fully binding nature of such acts. 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 non-formal measures have in fact 'hardened' to become fully binding through the agreement of the Member States and may be considered *hard law measures masquerading as soft law*. Accordingly, only in these cases does the obligation for Member States to respect legitimate expectations arise from a European 'soft law' measure.

Of course, the different categories of soft law outlined above shall rarely exist in pure form: Kallmayer stresses that 'the different functions are often present at the same time.'[375] referring to the fact that the same measure may

[375] Kallmayer op. cit. 668.

serve the purpose of both informing and orienting national implementation (see in particular *Polska Telefonia*).

It is not by chance that the CJEU declines to employ the term 'soft law' in its judgments;[376] the only time the term soft law appears in the judgments of the Court or General Court is when these are quoting arguments of the applicants.[377] This could be due to the fact that the CJEU refuses to recognize the binarity inherent in the distinction between 'hard law' and 'soft law',[378] and seems to adhere to the view that the normativity of measures much rather covers a broader spectrum[379] between the extremes of fully binding power and non-bindingness (for details on the spectrum approach, see Part I.). Softness of such 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,[380] while those to whom it is addressed may also be bound by it, albeit to varying degrees. Based on the case law of the CJEU, I propose that, contrary to Ştefan's claim, non-formal measures do not necessarily "follow the same legal regime as recommendations and opinions",[381] 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 consideration or even the binding implementation of provisions laid down in European soft law measures. As Peters points out referring to soft law, "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)".[382]

376 Christianos op. cit. 327.

377 *HGA and Others* (C-630/11P) [2013] ECLI:EU:C:2013:387; *Pitsiorlas* (T-337/04) [2007] ECLI:EU:T:2007:357.

378 See also: Möllers op. cit. 388.

379 Cf. Barani op. cit. 8; Terpan (2013) op. cit. 12 et seq.

380 Kallmayer op. cit. 673; Pampel op. cit. 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 op. cit. 11.

381 Ştefan (2012) op. cit. 879.

382 Peters (2007) op. cit. 410, italics by me.

CHAPTER IV
DIRECTIVE-LIKE RECOMMENDATIONS: ON THE SPECTRUM BETWEEN RECOMMENDATIONS AND DIRECTIVES

In what follows, I discuss an extraordinary legal source, which I have coined directive-like recommendations. This intriguing Union act carries the traits of both soft law recommendations and hard law directives, giving rise to much trepidation amongst scholars seeking to categorize it and litigation to determine its possible legal effects. In the next chapters I describe the phenomenon of directive-like recommendations, trying to discern the added value of adopting such untypical measures in selected policy fields, in particular, focusing on their implementation on the example of the Hungarian practice of legal harmonisation. I then turn to the case brought before the ECJ to determine the exact nature and legal effects of directive-like recommendations. As the decisions in *Commission v Belgium* demonstrate, lawyers are intrigued by acts that seem to transcend the confines of their allotted genre. The decisions described showcase the attempt of unlocking the potential of seemingly soft norms through questioning their affiliation to the category of European soft law by means of creative lawyering.

1. The Phenomenon of Directive-like Recommendations[383]

Based on the TFEU, directives are hard legal acts of harmonisation, allowing some room for Member States to choose how to implement them: both formally and substantively. Implementation is then notified to, and controlled by the European Commission. Meanwhile, recommendations are defined as non-binding measures, which, according to the case-law of the CJEU are intended to aid interpretation, prepare legislation or achieve voluntary legal alignment.

[383] A version of this chapter was published in: Láncos (2019b).

By their very nature, it is left up to the Member States whether or not they choose to follow them. No formal notification obligations are attached to recommendations, nor does the Commission consistently and regularly check Member States' laws for compliance with the same.[384]

However, such distinctions seem less obvious in the face of the reality of diverse legislative acts: in grey zone between the ideal types of legal measures, there are in fact legal measures that seem to converge towards each other. These measures include e.g. full harmonisation directives resembling regulations requiring mere translation and promulgation, and recommendations setting forth implementation deadlines, not unlike directives.[385] The latter category of measures, which I refer to as directive-like recommendations (DLR), are geared towards achieving harmonisation through national implementing legislation and include provisions promoting implementation by the Member States.

Directive-like recommendations are defined and adopted as recommendations, nevertheless, they exhibit one or several features characteristic of directives. These features make them appear to be 'more' than simple recommendations by seemingly increasing their normativity. Senden notes that often recommendations will be restricted to specific cases without general reach,[386] or only strive to achieve closer cooperation or coordination in a given field. However, in some cases, it is clear that recommendations are geared towards harmonisation.[387] It is within this category that Senden identifies Commission recommendations which strongly resembling directives.[388]

[384] Senden (2004) op. cit. 321.

[385] Ibid, 162–165.

[386] Ibid, 162–163.

[387] Ibid, 166; Blutman op. cit. 174.

[388] Senden (2004) op. cit. 163, 167. Senden herself collected some examples for recommendations mimicking directives by referring to transposition deadlines and notification in the realm of financial regulation, such as Commission Recommendation 87/63/EEC of 22 December 1986 concerning the introduction of deposit-guarantee schemes in the Community (OJ L 33, 4.2.1987, p. 16–17); Commission Recommendation 87/62/EC of 22 December 1986 on monitoring and controlling large exposures of credit institutions (OJ L 33, 4.2.1987, p. 10–15); Commission Recommendation 88/590/ EEC of 17 November 1988 concerning payment systems, and in particular the relationship between cardholder and card issuer (OJ L 317, 24.11.1988, p. 55–58); Commission Recommendation 90/109/EEC of 14 February 1990 on the transparency of banking conditions relating to cross-border financial transactions (OJ L 67, 15.3.1990, p. 39–43); Commission Recommendation 97/489/EC of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder (OJ L 208 , 2.8.1997, p. 52–58); Commission Recommendation 98/288/EC of 23 April 1998 on dialogue, monitoring and information to facilitate the transition to the euro (OJ L 130, 1.5.1998, p. 29–31).

Senden argues that apart from their title as recommendation, the wording, the structure and the general nature of these recommendations make it difficult to distinguish them from hard law.[389] Commission recommendations are generally of 'external nature',[390] usually addressed to "the member states which are called upon to implement the recommendations by any necessary measures; legislative, administrative or otherwise. […] It is therefore the member states that must ensure that any other concerned parties apply the rules contained in the recommendation".[391] An important feature of these Commission recommendations is a section or *provision on implementation*. This may even include a deadline, effectively enshrining 'the desire of implementation'.[392] Meanwhile, the Commission may accompany such recommendations with a 'threat' to propose binding legislation in case implementation is untimely or insufficient.[393] And "finally, as a rule, the recommendations contain requests to inform the Commission of the implementation measures that have been taken and of any other action to comply with the recommendation in question. It seems that in most cases one could even speak of information and notification obligations in respect of these measures, given the mandatory way in which they are often formulated."[394]

According to officials of the European Commission, such implementation clauses are enshrined in recommendations where the competent Directorate General preparing the draft recommendation is of the view that the given measure is of particular importance. While the Commission is acutely aware of the fact that recommendations (including provisions on implementation deadlines and reporting) are not binding, it nevertheless wishes to give particular emphasis to

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389 Senden (2004) op. cit. 164; Géczi op. cit. 181, 185.

390 Senden (2004) op. cit. 162.

391 Ibid, 164.

392 Ibid, 349.

393 Ibid, 164. Ortega sheds light on this practice through the example of Commission Recommendation 2005/737/EC of 18 October 2005 on collective *cross-border management* of *copyright* and related rights for *legitimate online music services*. He notes: "The Recommendation seems to be designed to flesh out the existing Directives on copyright in the Information Society and rental right and lending right and on certain rights relating to copyright. Given that its main aim is to encourage multi-territorial licensing and recommend how it should be regulated, the Commission is putting particular policy options into effect. In doing so, it must be conscious that its position as the Community Executive and guardian of the Treaties, gives its recommendation authority above and beyond its status as a nonbinding act of Community law. Indeed, the Commissioner has stated publicly that "if I am not satisfied that sufficient progress is being made, I will take tougher action". This is tantamount to imposing sanctions for non-compliance with a non-binding act." Medina Ortega op. cit. 5.

394 Senden (2004) op. cit. 165.

its desire that Member States follow what is set forth in the recommendation. In summary, although recommendations are non-binding, this specific form recommendation adopted by the Commission raises "the expectation that it will be implemented and complied with, and its application monitored."[395] These characteristics, taken together, strongly resemble those of directives,[396] meriting the designation of this category of norms as directive-like recommendations.

Differences between directives and recommendations regarding the Commission's role in controlling implementation are key also for the stance of government bodies towards the implementation and 'notification' of recommendations. As Senden notes, the Commission sometimes evaluates and reports on the national implementation of certain soft law acts, "but this is not a general or consistent practice".[397] Yet DLRs differ from other recommendations in that they expressly refer to implementation, notification or monitoring, which shifts the focus onto the Member States' legislative response (or a lack thereof).

2. Member States' Duties in Respect of Directive-like Recommendations

The TFEU is very laconic on the effects of recomendations, yet it has been supplemented by the jurisprudence of the CJEU detailing the obligations of the Member States arising from these legal sources. Flowing from the non-binding, voluntary nature of recommendations, the CJEU clarified that there is no general obligation of implementation or compliance by Member States.[398] In light of the *Grimaldi* and the *European emergency number*[399] case law, however, it is clear that the non-binding nature of recommendations does not mean that they have absolutely no legal effect.[400] Indeed, while recommendations cannot require Member States to use a specific method of implementation, according to the jurisprudence of the CJEU, Member States *must consider the substance* of these recommendations. In light of the principle of loyalty, it is not merely the courts and national authorities that are obliged to consider recommendations,

395 Ibid, 164.

396 See also: Cannizzaro–Rebasti op. cit. 221.

397 Senden (2004) op. cit. 321.

398 Ibid, 346; Cannizzaro–Rebasti op. cit. 222.

399 *Commission v Lithuania* (C-274/07) [2008] ECLI:EU:C:2008:497.

400 *Grimaldi,* paras 16, 18.

but national legislators as well.[401] Accordingly, government bodies involved in implementation must also duly consider the deadlines for implementation and reporting obligations set forth in DLRs.

As Thürer expands in general with respect to soft law, "the principle of community loyalty gives rise to certain legal obligations, such as the duty to consider and make an effort to comply with soft law and not to act against it unless good reasons for doing so are set out."[402] This approach to the definition of national obligations under Union soft law measures includes the must consider duty, the general duty to abstain from measures jeopardizing the attainment of the goals set out in soft law measures with the caveat that departing from the same is possible on legitimate grounds which the legislator may have to expressly justify. On the part of the legislator, these duties may involve regulatory, deregulation or justification tasks, respectively.[403]

2.1 Case Study: The Implementation of EU Recommendations in Hungary

In what follows, I describe the implementation of EU recommendations on the example of the Hungarian system of legal harmonisation, with special attention to the approach of Hungarian regulatory bodies (used as an umbrella term to encompass the Hungarian Government and ministries involved in implementation, as well as the Hungarian National Assembly) to EU recommendations. For the purposes of this analysis, I speak of implementation to capture efforts on the national level to enact legislation fulfilling what is set forth in the recommendation.

401 *International Fruit* (Joined cases 51-54/71) [1971] ECLI:EU:C:1971:128, para 3.

402 Thürer op. cit. 134. While Cannizzaro and Rebasti sought to rebuke the relevance of the principle of loyalty in creating obligations for the national legislator in respect of soft law based on Case *Brother Industries v Commission* {(229/86) [1987] ECLI:EU:C:1987:403, at 3763}, in fact, the findings of that decision cannot be generalized for all soft law sources. Indeed, the Brother Industries case related to a memorandum which did not "ask the national authorities to make any specific decision […] but merely asks them to reach a decision on the basis of their own national legislation. Indeed, the position could not be otherwise having regard to the fact that an obligation on the Member States to adopt specific measures cannot be created by a Commission memorandum in the absence of a particular provision in the Treaty or in binding acts adopted by the institutions." Recommendations as treaty-based soft law acts, often enacted in connection with binding acts of the institutions, requesting national authorities to adopt legislation of a specific content clearly differ from the measure at hand in the Brother Industries case.

403 Adone–Greco op. cit. 86.

The Hungarian legislator guarantees compliance with implementation obligations under EU law through a host of decrees and explanatory guidelines governing the tasks entrusted to government bodies involved in implementation. The central piece of legislation in this regard is the Harmonisation Decree setting forth the procedure to be followed and the tasks of the different government bodies in the course of implementation.[404] In this procedure, the Ministry of Justice's Legal Harmonisation Department takes central stage, coordinating the implementation efforts of other government bodies and arranging for notification towards the European Commission. The Hungarian Minister of Justice also operates a Harmonisation Database comprising harmonisation tasks and implementing national measures.

In the following, I examine the issue whether the Hungarian regulatory bodies differentiate between regular recommendations and DLRs when deciding whether and how to implement them. Or with other words: are the similarities between DLRs and directives accounted for in the implementation process? To answer this question, in 2017 I conducted interviews with 3 officials of the Legal Harmonisation Department and the EU Legal Compliance Department of the Hungarian Ministry of Justice and compared the data obtained with the statutory rules on harmonisation. The interview centred on the following questions: Does the Legal Harmonisation Department treat recommendations equally as directives and send these on to the competent ministries to draft implementing national law? Does it differentiate between directive-like and regular recommendations? Does the EU Legal Compliance Department of the Ministry of Justice conduct special notification in respect of recommendations in general, or DLRs in particular? Why are not all implemented recommendations uploaded into the harmonisation database?

The Legal Harmonisation Department monitors EU legislation to identify possible legislative tasks of the government bodies involved in implementation. Based on the data collected in my interviews, when faced with EU recommendations (unlike in the case of directives), the Department shall not automatically call upon competent ministries to take action. Indeed, it is left up to the Department staff to decide whether or not they consider the recommendation (be it a DLR or not) to give rise to legislative tasks. This means that it is in the Department's discretion to specifically call the ministries' attention to certain recommendations. Accordingly, while the Legal Harmonisation Department

[404] Government Decree No. 302/2010 (XII. 23.) on the fulfilment of legislative preparatory tasks necessary for compliance with European Union law.

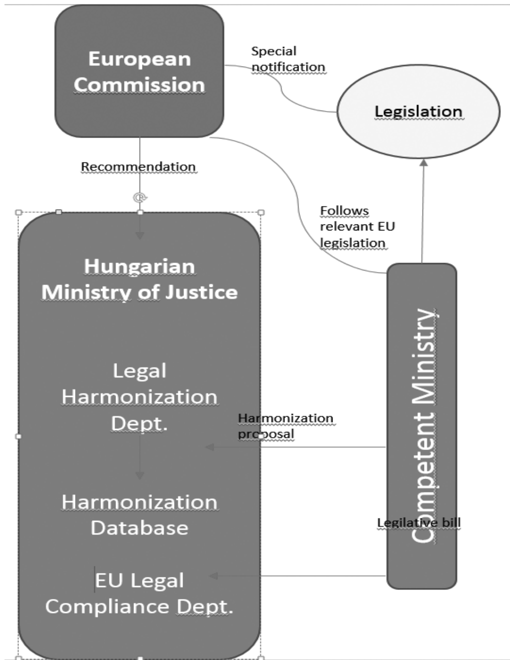
does not treat recommendations similarly to directives, in case it is of the opinion that legislative tasks may arise from recommendations, it shall forward these to the competent ministries.

When the Legal Harmonisation Department decides to transfer the recommendation to the competent ministry and the latter puts forward a proposal to implement it the implementation process shall correspond to the general transposition model for directives. Meanwhile, ministries also monitoring EU legislation and may decide that certain recommendations fall within their field of competence and they wish to initiate implementing legislation. In this case, they either submit a proposal to the Legal Harmonisation Department for harmonisation, or simply implement the recommendation without arranging for it to be entered into the Harmonisation Database. (Conversely, recommendations shall in practice be entered into the Harmonisation Database in case corresponding Hungarian legislation already exists.) Hence, even if the legislator decides to implement a recommendation, there is no one solution for managing the implementation of the recommendations.

An important indicator of the EU origins of a norm and a tool for guaranteeing transparency within the national legal order is the *harmonisation clause*. While the Guideline of the Ministry of Justice on harmonising legislation had since been repealed, it set forth important points regarding inter alia the use of the harmonisation clause. Although the Guideline is not enforceable, the Ministry of Justice called the attention of government bodies involved in implementation to comply with these points if possible. In particular, point 128 of the Guideline expressly foresaw in respect of "national legislation related to recommendations" that it include a harmonisation clause with the wording "for compliance with […]", where the designation of the Union recommendation shall be inserted.[405] However, the Guideline itself acknowledges, that "Member States retain the right to introduce legislation corresponding to the issues regulated in the soft law measure without referring to the same." Indeed, in practice, this seems to be the norm, actually departing from the relevant provisions of the Decree on the drafting of laws.[406] This means that even if the legislator opts for the implementation of a recommendation, this will be difficult to track. With the rare exception of certain recommendations entered into the Harmonisation Database, evidence for the fact that implementation took place is hard to find.

405 Guideline No. 7001/2005. (IK 8.) of the Ministry of Justice, Official Gazette 2005/117/II.

406 Articles 88–90 of Decree No. 61/2009 (XII. 14.) of the Minister of Justice and Law Enforcement on the drafting of laws.



As far as notification is concerned, the implementation of recommendations *does not fall under the notification obligation* of the Member States. However, communication between the regulatory bodies involved in implementation and the European Commission related to recommendations may come under the concept of special notification. Since special notification refers to conveying information to an EU institution as prescribed by a Union legal act, correspondence between ministry officials and the European Commission with respect to DLRs may be deemed a form of special notification. Such special notification may then take place 'informally', through electronic means. While it is primarily the EU Legal Compliance Department that conducts special notification, competent ministries may also be directly involved in this communication alongside the Department.

The interview conducted with ministry officials and the model of national implementation practice revealed that notwithstanding their directive-like characteristics, the implementation of DLRs does not show more affinity towards the transposition of directives. In fact, the implementation of recommendations in general and DLRs in particular actually rather resembles the approach taken when adopting national measures for the execution of regulations.

2.2 Do Directive-like Recommendations Have Any Added Value?

As described above, DLRs carry the traits of both directives and recommendations, employing in any given combination: strongly normative language, implementation deadlines, reporting duties of the government bodies involved in implementation and monitoring tasks of the European Commission.

The Commission relies on these directive-like characteristics for the perceived enhanced compliance pull of such recommendations. Although Member States do not consider such clauses to be binding, the Commission uses these elements to underline the desire for national implementation, channelling national efforts from the aspects of both timeliness and efficiency. Stipulating reporting duties lays the foundations for a streamlined communication between the Commission and the Member States regarding the implementation of the recommendation in question.

However, as the lessons from Hungarian legislative practice have shown, regulatory bodies involved in implementation do not consider DLRs to be more binding than other recommendations. The implementation practices of Hungarian regulatory bodies seem to substantiate that even though DLRs are bolstered with features designed to promote implementation, on the national level, directive-like and regular recommendations are treated equally. While the Commission seeks to reinforce the normativity of certain recommendations that are not merely intended as an interpretative aid but are meant to prompt substantive harmonisation on the national level, regulatory bodies undertaking implementation understand such measures as giving them full freedom to reject taking legislative action. It is apparent, that in the participating regulatory bodies' view, the normativity of these recommendations is not further boosted through provisions on implementation and reporting; consequently, they are of the view that they enjoy *absolute leeway in implementing* them.

This perception of DLRs also explains the haphazard approach to their implementation and the lack of straightforward implementation procedures in their case. The Legal Harmonisation Department of the Hungarian Ministry of Justice and the competent ministries all enjoy complete freedom in deciding whether or not the DLR gives rise to legislative action on the national level. This non-systematic approach of Hungarian state bodies involved in implementing recommendations appears to be at odds with the *Grimaldi* case-law of the CJEU, which prescribes that Member States, including the national legislator take recommendations into due consideration. As such, the case may be made that the non-systematic approach followed in Hungary for considering the implementation of recommendations may be insufficient to guarantee *due consideration*. Nevertheless, even if the *Grimaldi* case-law calls for the consideration of recommendations, there is nothing in the Treaty or the CJEU case-law that suggests certain recommendations give rise to greater obligations on the side of the legislator. Indeed, apart from the Commission's visible intent to encourage implementation, neither the case-law of the CJEU nor the practice

of Hungarian state bodies involved in implementation seem to suggest that DLRs should be given more weight in national implementation procedures than regular recommendations.

Since national courts and authorities are also bound to take recommendations into consideration,[407] the argument may be made that in case a recommendation is in fact implemented in national law, a failure to systematically indicate implementation by including a harmonisation clause referring to the recommendation flies in the face of the clarity and transparency of the legal system.

Yet neither considerations relating to the clarity of the legal order, nor Member State duties under the principle of loyalty and the *Grimaldi* case-law seem to substantiate that DLRs are more likely to be implemented than regular recommendations. Indeed, in light of the Hungarian legislator's practice, the directive-like traits of DLRs do not give rise to a difference of treatment in the legislative process. As a result, we may declare that based on the practice of national implementation, no added value of the DLR may be discerned as opposed to the form of regular recommendations.

Based on this finding, the general question may be formulated whether introducing elements supposed to promote implementation by mimicking directives, such as deadlines, reporting and monitoring tasks even makes sense in respect of soft law measures. Acknowledging the limitations regarding the general validity of this analysis' findings, the lessons from the Hungarian legislative practice nevertheless seem to underscore the relative uselessness of implementation provisions in soft law measures.

3. The CJEU's Jurisprudence Regarding the Nature and 'Bindingness' of Directive-like Recommendations

In what follows, I expand upon the jurisprudence of the CJEU regarding directive-like recommendations based on the decisions rendered in *Belgium v Commission*,[408] brought in cases contesting the gambling recommendation. The European Commission sought to regulate cross-border gambling and gaming services through Commission Recommendation 2014/478/EU. Certain Member

407 Grosse Ruse-Khan–Jaeger–Kordic op. cit. 909; Géczi op. cit. 188.

408 *Belgium v Commission* (T-721/14) [2015] ECLI:EU:T:2015:829; *Belgium v Commission* (C-16/16 P) [2018] ECLI:EU:C:2018:79.

States considered this directive-like recommendation to be a species of 'hidden directive', harmonising gambling regulation and eroding national regulatory prerogatives. The decisions are important milestones in the gambling feud between the Commission and the Member States, but more importantly, they shed light on the nature and non-bindingness of DLRs.

3.1 Factual Backdrop of the Directive-like Recommendation on Gambling

To understand the core of the problem underlying the legal dispute before the General Court and the appeal lodged at the Court, one must go back to the European Economic Community of the early 90's: the budding internal market and the enduring stand-off between the Commission and the Member States on the issue of gambling regulation. The problem boils down to the position of the Member States who considered the exclusive competence to regulate gambling as a way to "control and limit the supply of gambling in their territory and to ensure that the revenue of gambling is to a certain extent used for the public benefit".[409] This, in turn was perceived by the Commission as a protectionist stance of Member States insisting on retaining their monopoly on state-run gambling to secure huge revenues.[410]

Notwithstanding the fact that gambling would naturally fall under the scope of services in the meaning of EU internal market law[411] and through convenience, a certain measure of cross-border gambling did in fact take place,[412] due to the *resistance of the Member States*, gambling was excluded from the Services Directive.[413] Meanwhile, the Member States continued to regulate and operate

409 Vlaemminck–de Wael op. cit. 177.

410 Maulding op. cit. 414.

411 Ibid, 417.; Vlaemminck–de Wael op. cit. 177.

412 European Commission: Gambling in the Single Market – A study of the Current Legal and Market Situation. 1991. 18–19, 33.

413 Fiynaut op. cit. 4. The reason for the exclusion of such services from the scope of the Directive was the familiar allusion to the role of Member States in managing social challenges related to gambling. "Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection." Recital (25) of Directive 2006/123/EC.

gambling to satisfy demand, while upholding public order and securing a considerable revenue for the state.[414]

The rise of the internet held the opportunity of reshuffling the gambling market, enabling unlimited, borderless gambling and the emergence of a true internal market of online games of chance.[415] National regulatory regimes sought to accommodate online gambling through licensing or state monopolies, accompanied by the emergence of 'grey' and illegal on-line gambling markets across the Member States.[416] The Commission took the opportunity to launch a consultation with stakeholders in its 2011 Green Paper to determine whether EU action was necessary. The Commission's Communication adopted just a year later, entitled 'Towards a comprehensive European framework on

[414] European Commission: Gambling in the Single Market – A study of the Current Legal and Market Situation. 1991. 3, 16. The issue of cross-border gambling emerged before the European Court of Justice, starting with the Schindler case, where agents of the German public body Süddeutsche Kassenlotterie were charged under the Lotteries and Amusements Act 1976 for sending invitations to UK nationals to participate in the SKL lottery. While certain intervening governments, including Belgium, tried to argue that lotteries are not an economic activity, since they are heavily controlled in the public interest, with no economic purpose and being of solely recreational or amusement nature, the ECJ clarified, that in line with the Commission's position, lottery activities must be considered services within the meaning of the Treaty. In particular, the ECJ emphasized that the economic nature of lotteries could not be called into question with reference to the morality of these activities, since they are not prohibited in the Member States. Nor does the element of chance, the entertainment nature or the allocation of the profits made by a lottery deprive them of their economic character. Nevertheless, the ECJ allowed, that lotteries are of special nature, where different moral, religious, cultural, health and law enforcement considerations are at play, which may justify the application of non-discriminatory restrictions by national authorities to protect players and maintain public order. ECJ 24 March 1994, *Schindler* (Case C-275/92) [1994] ECLI:EU:C:1994:119, paras 16, 25, 59–61.

[415] Nair op. cit.; Eadington op. cit. 73–74; Maulding op. cit. 439.

[416] Green Paper on on-line gambling in the Internal Market, SEC (2011) 321 final, p. 3. Indeed, in several cases the CJEU found against protectionist elements of the national gambling systems, while upholding the Member States right to organize gambling in line with general interest considerations. In Global Starnet the CJEU confirmed, that "betting and gambling is one of the areas in which there are significant moral, religious and cultural differences between the Member States. Failing any harmonisation on the issue at EU level, the Member States enjoy a wide discretion as regards choosing the level of consumer protection and the preservation of order in society which they deem the most appropriate", where the organization of gambling and games of chance must meet the conditions of justification by overriding reasons in the general interest and their proportionality" (CJEU 20 December 2017, Case C-322/16, *Global Starnet Ltd.,* para 39.) See also Gindler op. cit. 285. In Sporting Odds the CJEU expressly stated that while the freedom of establishment does not preclude a dual system where certain games of chance are held by the state monopoly and others fall under a concession and license scheme, this system must be objective, and cannot introduce disguised discrimination by reserving licenses exclusively for operators holding concessions for casinos located in the Member State (CJEU 28 February 2018, Case C-3/17 *Sporting Odds Ltd. v Nemzeti Adó- és Vámhivatal*).

online gambling'[417] declared that "as a first step the Commission will prepare a Recommendation on common protection of consumers",[418] foreseeing its adoption for 2013. This time, surprisingly, the European Parliament sided with the Commission, calling upon the institution to propose legislation for tackling gambling addiction.[419]

The resulting Commission Recommendation 2014/478/EU was finally adopted in 2014, based on Article 292 TFEU, the general legal basis in the TFEU authorizing the adoption of recommendations.[420] A typical DLR, this specific recommendation contained a clause on 'Reporting', foreseeing a deadline for national implementation, the notification of the Commission of measures taken, impact assessment and Commission evaluation.[421] Although adopted in the seemingly unthreatening form of a soft law measure, the Belgian government feared that the recommendation would constitute a first step in the process of harmonising gambling regulation across Europe, claiming that the measure was in fact, a directive in disguise. Furthermore, it also understood the gambling recommendation as a move to circumvent the Council, where the Commission would have otherwise expected some push-back.

3.2 Decisions Rendered by the CJEU

Belgium filed its action for the annulment of the recommendation in October 2014 at the General Court, with supporting interventions from Greece and Portugal. The applicant pleaded that the Commission breached fundamental principles of the EU by exceeding its powers, upsetting the institutional balance and failing to provide sufficient time for the national members of the expert group to carry out their consultative mandate. Furthermore, Belgium argued that the Commission adopted the measure without an appropriate legal basis, and that the recommendation is in fact a binding measure in disguise, actually giving rise to obligations on the side of the Member States. The Commission

[417] Communication from the Commission to the European Parliament, the Council, the Economic and Social Comittee and the Committee of the Regions: Towards a comprehensive European framework for online gambling. COM/2012/0596 final.

[418] Nair op. cit. 17.

[419] See European Parliament resolution of 10 September 2013 on online gambling in the internal market (2012/2322(INI) P7_TA(2013)0348 (10 September 2013 – Strasbourg), para 6.

[420] Article 292 TFEU: The Commission, and the European Central Bank in the specific cases provided for in the Treaties, shall adopt recommendations.

[421] Paragraphs 52–54 of Commission Recommendation 2014/478/EU.

however, raised the plea of inadmissibility, and maintained throughout that the recommendation has no binding force, and being a measure with no legal effect, it cannot be challenged before the CJEU.

In its order, the General Court upheld the Commission's plea of inadmissibility, supporting its decision with grounds related to the wording, content, context and intention of the Recommendation and its ensuing lack of binding legal effect, as well as additional procedural considerations. Upon appeal by Belgium, the Court's judgment upheld the order of the General Court and dismissed the action.

3.2.1 Reasoning of the General Court

In what follows, I analyze the order of the General Court, focusing on the pleadings put forward by Belgium and the reasoning of the General Court in its order. Belgium's pleadings may be divided into two main parts: the assertion that the recommendation was in fact a hidden directive and that the recommendation does indeed have 'negative legal effects' breaching fundamental principles of EU law, and as such, may be challenged under Article 263 TFEU.

A central claim made by Belgium in the case was that the recommendation was is in fact a 'hidden directive', *recommendation in form, but a directive in substance*: a legislative instrument with the aim of harmonising and liberalizing the gambling market, running counter to CJEU case-law and exceeding the Commission's powers.[422] To substantiate the claim that the intention behind the recommendation was in fact harmonisation, Belgium pointed to the very detailed nature of the recommendation's provisions and its directive-like paragraphs on notification, impact assessment and Commission evaluation, i.e. all the elements of the recommendation that rendered it a DLR.[423]

In its order, the General Court confirmed, that in line with the *Grimaldi* case-law "the choice of form cannot alter the nature of the measure […] the mere fact

422 *Belgium v Commission* (Case T-721/14) [2015] ECLI:EU:T:2015:829, para 60.

423 Paragraphs 52–54 of the recommendation. Belgium also referred to the recitals of two earlier draft recommendations, which stated that "the Member States' rules on the protection of consumers, players and minors from online gambling are fragmented and the objective of the recommendation could be better achieved by action at Union level", implying that the Commission intended to harmonise the area. However, the General Court did not accept that draft recommendations should be taken into account, especially given the fact that the Recommendation under scrutiny did not reflect this harmonising aim. *Belgium v Commission,* T-721/14 paras 76–77.

that the contested recommendation is formally designated as a recommendation […] cannot automatically rule out its classification as a challengeable act.'"[424] It then proceeded to scrutinize the recommendation in particular, starting with an *assessment of its wording*, underlining that it is "worded mainly in non-mandatory terms". Following a comparison of the French, Danish, German, Estonian, Spanish, Italian, Dutch, Polish, Swedish and English language versions of the recommendation, it came to the conclusion that the measure was clearly not meant to be binding. Acknowledging that certain language versions (German, Spanish, Dutch) seem to have a more mandatory connotation, it held that these are only slight differences, not calling into question the non-binding nature of the recommendation.[425] In addition, it noted that the detailed nature of the provisions had no bearing on the bindingness of the recommendation.[426]

Turning to the *content, context and intention* of the recommendation, the General Court recalled that where the language versions of a legal text diverge, heed must be paid to the "purpose and general scheme of the rules of which it forms part".[427] In fact, several provisions of the recommendation clarify, that the measure is not meant to interfere with national regulatory prerogatives in the area of gambling. The General Court recalled that in the absence of harmonisation, Member States are free to design their own policies for the organization of gambling and the protection of consumers.[428] The General Court specifically elaborated on the special directive-like Section XII of the measure, noting that "despite the binding wording of [the relevant paragraphs] of the recommendation in certain language versions, the recommendation does not impose any obligation" on the Member States effectively to apply the principles set out in the act.[429]

Not only did the comparison of the different language versions and the 'disclaimer' of the Commission that the recommendation was not meant to interfere with national regulatory power indicate a lack of mandatory nature according to the General Court, but also the "analysis of its context". Here, the Court took recourse as interpretative aids to a Communication[430] and an impact

424 *Grimaldi,* para 14; *Belgium v Commission,* T-721/14 para 20.

425 *Belgium v Commission,* T-721/14 paras 21–27.

426 *Belgium v Commission,* T-721/14 para 72.

427 *Belgium v Commission,* T-721/14 para 28.

428 *Belgium v Commission,* T-721/14 paras 29–31.

429 *Belgium v Commission,* T-721/14 paras 33–35.

430 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European

assessment[431] of the Commission on gambling, where – at least for the time being – the adoption of EU legislation on gambling is rejected.[432] The General Court further noted, that since recommendations do not limit the discretion of Member States to protect and enforce their respective values and moral convictions, there was actually no interference with national regulatory powers in the case at hand.[433] Hence, it concluded that since the recommendation "does not have and is not intended to have binding legal effects", it cannot be challenged in an action for annulment, and dismissed the action as inadmissible.[434]

As far as the asserted *'negative legal effects'* are concerned, Belgium claimed that in line with the case-law of the CJEU, the duty of sincere cooperation entails that national courts must take recommendations into account when deciding disputes before them, and national authorities are required to comply with these norms. Therefore, "the formal absence of binding force for the contested recommendation is irrelevant in view of the significant legal consequences of the recommendation.'"[435]

Belgium further pleaded that the recommendation infringed the principle of conferral, upset the institutional balance and breached the duty of sincere cooperation between the institutions and the Member States. Regarding the infringement of the principle of conferral, in its oral pleadings Belgium argued that it did not suffice for the Commission to refer to Article 292 TFEU as a sort of blank check to be the legal basis for adopting the recommendation. It should have been accompanied by a reference to a substantive Treaty legal basis indicating the relevant scope *ratione materiae* of EU competence. Belgium also claimed that the Commission further breached the duty of sincere cooperation by not leaving sufficient time for the group of experts composed of representatives of the Member States to consider the draft recommendation.[436] Finally, Belgium

framework for online gambling. COM/2012/0596 final.

431 Impact Assessment accompanying the document Commission Recommendation on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online. C(2014) 4630 final} SWD(2014) 233 final.

432 *Belgium v Commission,* T-721/14 para 36.

433 *Belgium v Commission,* T-721/14 para 68.

434 *Belgium v Commission,* T-721/14 para 37.

435 *Belgium v Commission,* T-721/14 para 42.

436 Belgium noted that while the Commission's impact assessment indicated Articles 114, 168 and 169 TFEU as possible legal bases for the Recommendation, these were later abandoned and not featured in the act. Meanwhile, Belgium also noted that even these articles failed to empower the Commission to adopt a recommendation on games of chance. In fact, Article 168 TFEU only empowers the Council upon a proposal made by the Commission, while

submitted that by exceeding its regulatory competences and breaching its duty of sincere cooperation, the Commission had also failed to respect the institutional balance, disenfranchising the co-legislators. Recommendations must at least be open to *a limited review*, otherwise effective judicial protection would be compromised.[437]

Without examining the substance of the claims made by Belgium, the General Court focused on the procedural issue of contestability. In its order, the General Court noted, that while the *Grimaldi* case-law of the Court stipulates that recommendations cannot be regarded as having no legal effect and as such must be taken into consideration by national courts, this does render them challengeable, since that "would lead to the conclusion that any recommendation constitutes a challengeable act".[438] The General Court further added that the possible illegality of an act does not give rise its contestability:[439] "the seriousness of the alleged infringement by the institution concerned or the extent of its adverse impact on the observance of fundamental rights cannot justify an exception to the absolute bars to proceedings laid down by the Treaty."[440] As a result, not even a possible breach of fundamental principles or procedural rules could render an otherwise non-challengeable act subject to review.

3.2.2 Findings of the Court's Judgment

Upon appeal by Belgium, the Court rendered its judgment C-16/16 P focusing on the assessment of the standard of review employed by the General Court. The Court reiterated that acts not producing legal effects fall outside the scope of acts reviewable within the framework of annulment proceedings, however, "in exceptional cases, the impossibility of bringing an action for annulment against a recommendation does not apply if the contested act, by reason of its content, does not constitute a genuine recommendation."[441] Nevertheless, recapitulating that the analysis of whether a measure is intended to produce binding legal

Article 169 TFEU only provides for the adoption of acts via ordinary legislative procedure. (Impact Assessment C(2014) 4630 final} SWD(2014) 233 final).

437 *Belgium v Commission,* T-721/14 para 49.

438 *Belgium v Commission,* T-721/14 para 44.

439 *Belgium v Commission,* T-721/14 para 50.

440 *Belgium v Commission,* T-721/14 para 51.

441 *Belgium v Commission,* T-721/14 paras 27, 29.

effects should be ascertained with due consideration to its *wording, content, context and intention*, the CJEU repeated the assessment of the General Court and arrived at conclusion, that the analysis of the General Court was to the requisite legal standard and that the recommendation could indeed not be challenged under Article 263 TFEU.[442]

3.3 Critique of the CJEU's Decisions

The decisions of the General Court and the Court are important milestones in the case-law rendered on EU soft law, however, in many respects, they are deeply unsatisfactory. As a positive aspect, we may note that finally, the hitherto unanswered status of DLRs was clarified: it is now clear *DLRs are no more binding than any other recommendation* adopted by the institutions, notwithstanding the special implementation clause and the possibly more mandatory terms. No graduation between recommendations is accepted: a measure will either be considered a genuine recommendation which is necessarily non-binding, or, in case its wording, content, the context and intention of its adoption so indicates, it will be a mandatory measure producing legal effects, mistakenly adopted in the form of recommendation. This conclusion yet again calls into question the expedience of developing the specific template of DLRs employed by the Commission in several policy fields, for in light of the decisions it is clear that DLRs have no added value when compared with other recommendations.

However, the repetitive and poorly edited order, as well as the judgment rendered on appeal may exacerbate existing problems of the fragile institutional balance, without supporting Members States with guidance as to how Union law should be interpreted. Namely, the case-law of the CJEU on language comparison forces national authorities to bear the onus of interpreting measures in the elaboration of which they did not partake, or hardly participated in. Since national experts, ministerial officials were excluded from, or hardly had the chance to participate in the legislative procedure, it will be particularly difficult for them to understand the exact intention of the act. Making sense of the text will be all the more confusing, where one or several official language versions of the measure translated by EU translation services contain 'more mandatory terms' than others. The CJEU has consistently failed to give guidance as to the number and/or set of language versions to be compared in order to arrive at

[442] *Belgium v Commission,* C-16/16 P para 37.

a correct interpretation of the measure concerned. Moreover, even where the majority of language versions indicates a certain meaning or interpretation, this shall not necessarily mean that conclusions based on the same will be correct. It may well be the case that it is the 'minority meaning' that "conforms with the purpose of the rule as understood by the Court or with the actual intention of the person who drafted the rule and the objective which that person wanted to achieve."[443]

The CJEU also insisted that possible breaches of procedural rules and fundamental principles, such as the choosing the wrong legal basis for adopting the recommendation, infringing the prohibition of *ultra vires* decision-making, the duty of sincere cooperation or upsetting institutional balance must yield to rules governing the scope of judicial review laid down in the Treaty. While doctrinally sound, disappointingly the order and the judgment seem to be giving a green light to the Commission to disregard competence constraints, rules of law-making and fundamental principles that would otherwise apply. The fact that neither the General Court, nor the Court found it necessary to address the possible procedural violations of the Commission effectively normalizes this unwelcome practice, inviting the risk that the Commission will increasingly turn to soft law measures disenfranchising co-legislators and the Member States. On the long run, this may result in a shift in the distribution of competences between the institutions, and the Member States respectively. Senden notes that such recourse to soft law may distort the institutional balance by "being used as a means to circumvent the influence of other institutions in the 'regular' decision-making process."[444] Finally, the laconic findings of the EU courts are particularly unsatisfactory, since they totally disregard the very pressing reasons why the Commission may effectively be forced to circumvent procedural constraints. As evidenced by the present case, the Commission found itself locked in the double bind: while the European Parliament called upon it to propose legislation on online gambling, Member States and consequently the Council were sure to oppose any measure to be put forward. As such, the unchecked recourse of the Commission to soft measures, and in particular, DLRs in areas where convergence is desired, but legislation is unfeasible, is actually a strategy to meet the demands of both legislators.

The fact that the recommendation has in the end been found to be non-binding does ameliorate the quandary. In fact, while a binding measure could have

[443] Ćapeta op. cit. 7.

[444] Senden (2004) op. cit. 79.

been challenged under Article 263 TFEU and possibly annulled, this soft law measure will persist and in line with the CJEU's consistent case-law[445] Member State legislators, authorities and courts must consider its substance. More generally, this means that recommendations adopted in flagrant disregard for the participation of national experts, the competences of other institutions and the choice of the correct legal basis must nevertheless form part of Member State courts' and authorities' considerations. And while Belgium may be satisfied that the recommendation was found to be a genuine recommendation with no binding effect, excluding any direct obligations of the Member States, the fact that the recommendation could not be annulled means that these unwanted and uncontestable effects of the same will prevail: the slow push toward the Europeanization and the liberalization of gambling market – living up to the pre-law function of soft law.

[445] *Grimaldi,* paras 7, 16 and 18; *Altair Chimica* (C-207/01) [2003] ECLI:EU:C:2003:451, para 41; Cases *Alassini and Others* (C-317/08 to C-320/08) [2010] ECLI:EU:C:2010:146, para 40.

CHAPTER V
THE USE OF EU SOFT LAW IN THE MEMBER STATES

This part explores the perception and use of EU soft law in the Member States, with a particular focus on Hungary. The analysis covers the national approaches to non-binding measures and 'external' measures in general, and the specific, policy dependant use of EU soft law by court and authorities in particular. The research was conducted by collecting empirical data through interviews and surveys, as well as searches in public databases in the year 2019.

1. Empirical Research Into the Use of EU Soft Law: A Road Less Travelled

Until the launch of the European Network on Soft Law Research, research into the use of EU soft law by national administrations was largely neglected. The output of the SoLaR research was the volume 'EU Soft Law in the Member States', edited by Mariolina Eliantonio, Emilia Korkea-Aho and Oana Ştefan (Hart, 2021). Besides theoretical considerations, the volume contains ten chapters on the use of EU soft law in the Member States, compiled on the basis of data collected from interviews and questionnaires. This pioneering research is the first step towards mapping the perception and use of EU soft law on the national level and the diverse national approaches discernable through empirical analysis.

The Commission itself only seems to focus on the national implementation of certain types of soft measures, such as DLRs. The Commission's collection of data on soft law implementation is therefore unsystematic and restricted in focus: which soft provisions had been implemented through national legislation and to what extent. What we are missing is the mapping of systems and procedures at national level governing soft law implementation and the considerations of

Member State legislators guiding the decision on whether or not to implement. Furthermore, an evaluation of the role soft law plays in the decisions taken by national courts and authorities is also lacking. This data could be used as a starting point for determining indicators for the effectiveness of Union soft law and its contribution to the convergence of Member States' law.

2. The Approach to, and Use of EU Soft Law in Hungary[446]

This chapter analyzes the application of EU soft law in Hungary, with a particular focus on the fields of competition law and environmental law, two policy fields marked by abundant EU soft law that is received very differently on the national plane.[447] The analysis of the reception of EU soft law in Hungary shows a mixed picture. The application of EU competition soft law in Hungary may be considered a success, owing chiefly to the system of EU competition law enforcement and the proactive stance of the Hungarian Competition Authority (Gazdasági Versenyhivatal, GVH).[448] Meanwhile, the application of EU environmental soft law is problematic, and the gathering of reliable data is hampered by the dismantling and fragmentation of environmental authorities in Hungary.

2.1 Research Context and Methodology

Besides the specific policy contexts of soft law application, it is necessary to recall the *dualist traditions of the post-socialist state* to understand the status of EU soft law in the national legal order and the approach of Hungarian courts and authorities to these norms. This tradition, coupled with *text-positivism*, continues to exert its influence on the use of what are considered 'external' legal sources. In addition, this chapter will also analyze the system governing the transposition of EU soft law. The finding is that the transposition of EU soft law is non-systematic, a situation exacerbated by the fact that, as mentioned above, implementing legal acts do not necessarily refer to their EU origin

446 A version of this chapter was published in: LÁNCOS (2021).

447 Due to lack of space, financial regulation and social policy are not covered.

448 Gazdasági Versenyhivatal, the competition authority of Hungary entrusted with enforcing anti-trust and consumer protection rules, as well as the prohibition of unfair market practices.

through a harmonisation clause, concealing the EU origins of implementing domestic norms. Awareness about soft norms is also low: judges in general have scarce knowledge of the existence and applicability of EU soft law, while there are huge differences in the awareness and application of soft norms among Hungarian national authorities.

To determine the attitude of Hungarian courts and public authorities towards EU soft law, I conducted a survey in 2019 for the SoLaR network among the National Office for the Judiciary,[449] the Hungarian Constitutional Court, and individual judges among my personal contacts, as well as the Deputy Commissioner Responsible for Future Generations ('Green Ombudsman'), the regional authorities responsible for environmental protection, and the Hungarian Competition Authority totalling 18 responses. Besides the survey, a total of six expert interviews were also conducted with different public authorities. The survey and the interview questions were based on the SoLaR template. Finally a keyword search analysis was conducted using the two different public databases containing Hungarian court judgments. On the basis of the data, I tried to determine the status of EU soft law in the Hungarian legal order.

2.2 Perception of Soft Law Norms in Hungary

While there is such a thing as domestic soft law in Hungary, issued primarily by authorities, courts and rarely and more recently, by ministries, these recommendations, opinions, protocols and ethical codes are *not part of university curricula, nor are there scholarly works* detailing their taxonomy or application. Their reception and use by courts shows a mixed picture.[450] Where soft norms are issued by authorities, the courts are quick to underline the non-binding nature of these norms.[451] Meanwhile, where soft law, usually in the form of recommendations, stems from the Curia (the Supreme Court of Hungary), lower courts refer to it and comply with its substance.[452]

449 Országos Bírósági Hivatal, entrusted with the administration of the Hungarian judicial system. Oversight over the National Office for the Judiciary is exercised by the National Judicial Council.

450 Based on a survey of 2020 court decisions found in the Compendium of Court Decisions, see below.

451 E.g. Decision No. Kf.VI.38.198/2018/6. of the Curia; decision No. 19.Gf.40.284/2019/9 of the Metropolitan Regional Court.

452 Decisions No. 10.Gf.40.601/2019/16., 19.Gf.40.236/2019/19 and Gf.III.30.025/2020/5. of the Metropolitan Regional Court; Gf.III.30.025/2020/5.

Hungary follows a dualistic system requiring the transposition of 'external sources' before they become part of Hungarian law.[453] This dualist mindset impacts legal practice, because norms not transposed into Hungarian law are rarely considered by national courts and authorities. Among others, commentators trace this judicial approach back to text-positivism,[454] according to which referring to external sources of jurisprudence is uncustomary.[455] Text-positivism is a characteristic of socialist legal practice, where legal interpretation was to be merely declaratory reflecting the exact will of the legislator, but it also reflects strong state-centredness: "sovereignty was perceived as international independence which also applied against international human rights treaties", and international sources in general.[456] In addition, judges in the socialist legal order felt it was safe for them to stick to the letter of the national positive law enacted by the single-party legislature.[457]

A survey of domestic court judgments conducted by Csatlós arrives at the conclusion that courts only "exceptionally refer to a non-binding decision of an international organization in their reasoning".[458] Where they do, Hungarian courts usually refer to a relevant decision of the Constitutional Court citing international soft law, or measures referenced in Curia decisions, with the result that in certain narrow areas of the law, references to international non-binding sources may gradually become routine. Nevertheless, there seems to be a persistent and mistaken conviction amongst judges of ordinary courts that they are only bound by 'national law'.[459]

While in general, one may conclude that references in Hungarian court judgments to what were once considered 'external sources' are increasing,[460] the same cannot be said of EU soft norms. One reason for this seems to be the *low awareness of EU soft law* owing to the non-systematic implementation

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453 Cf. Art. Q paragraph 3 of the Fundamental Law, Molnár op. cit.

454 Cf. Jakab op. cit. 193 et seq.

455 Bán op. cit. 47.

456 Jakab–Fröhlich op. cit. 395, 397.

457 As Csaba Varga observed, Central and Eastern European legal practice were pervaded by "legal positivism, a mainstream organising idea that once transfigured from continental pre-WWII textual or rule-positivism into so-called Socialist normativism in the entire region. It is a syndrome called "textocentrism" that originates from it. This resulted in 'perverted forms of mechanical jurisprudence: applying law according to its letter'", see: Varga op. cit. 11–12. See also: Sajó op. cit. 331 et seq.

458 Csatlós op. cit. 480.

459 Weller op. cit. 59.

460 On the reception of 'Strasbourg case law' in Hungary see: Láncos (2020) op. cit.

of non-binding EU measures in Hungary,[461] that is, the haphazard approach to implementation and the lack of harmonisation clauses in implementing national act. As a result, even when EU soft law had been implemented, national courts and authorities may have the impression that they are simply applying domestic law, failing to recognise, consult and refer to the original EU soft law measure.

Indeed, due to their excessive case-load and time constraints, Hungarian judges rarely have the time to explore whether there are EU recommendations relevant to the case before them. Instead, they largely rely on the parties' pleadings, looking into recommendations invoked by the same. It is true, that harmonisation clauses make it easier for courts to identify applicable Union law, which they are bound to examine, whether these had been transposed into Hungarian law or not.[462]

2.3 Findings: Sporadic Use of EU Soft Law on the National Level

Based on the data gathered in this research, the general finding is that, with the exception of the field of competition law, Hungarian judges and public officials rarely, if ever, deal with soft law instruments. In particular, respondents working in the field of constitutional law, civil law and criminal law reported a lack of contact with EU soft norms. Judges responding to the survey pointed out that, if EU soft law is used, it is invoked by parties and considered an interpretative aid to facilitate the application of hard law. While accepting that soft law may be the appropriate device to fill in legal gaps and clarify problems of interpretation, soft law will generally only be applied to reinforce an argument. If the judge does not agree with the thrust of the soft norm, they will not refer to it or will underline the measure's non-binding nature. The respondents agreed that, save for competition cases, there is absolutely no culture of EU soft law application in domestic courts or public authorities. Finally, the perception of soft law with all its possible advantages and disadvantages varied widely from one respondent to the other, with opinions ranging from a total rejection of soft law as non-legitimate, to calls for more an extensive consideration and application of these norms.

461 The symptomatic non-consideration of soft law norms in Hungary stands in stark contrast with the fact that one of the very first scholars to identify and describe international soft law was the Hungarian László Buza, who termed them 'program-like norms', which are legal commitments without giving rise to enforceable rights. Buza op. cit. 19.

462 Blutman op. cit. 176.

To glean data on the application of EU soft law by national courts and public authorities, I relied on various publicly available electronic databases. (It is worth noting that the lack of open access databases in the case of administrative authorities, the non-systematic referencing used by courts and the Competition Authority, and the poor search functions made data collection tedious or simply impractical.) In Hungary, judicial practice may be traced with the help of the electronic database called the Compendium of Court Decisions, operated by the National Office for the Judiciary.[463] To determine the number of references to EU soft law in general, and EU competition and environmental soft law in particular, I conducted a keyword search in the Compendium focusing on specific soft law instruments in the field of competition law and environmental law. With certain exceptions the Compendium includes anonymised judgments, decisions and opinions of Hungarian courts, rendered since 1 July 2007. With the database now spanning a decade's worth of judgements, changes in the judicial frequency of referencing EU soft law may also be traced.

The fact that there are no standard rules for citing EU law in Hungarian court decisions complicates the use of keyword search. To overcome this obstacle, I first carried out specific searches for the title of the specific soft law acts on environmental law and competition law. These searches yielded no results, because Hungarian court decisions rarely give a full citation of the EU act they refer to. I then conducted another search combining document numbers and more general terms, such as 'Commission communication'. These searches returned a total of 13 hits, including all kinds of EU soft law measures. The results from the Compendium included 11 references to competition cases and two decisions citing environmental soft law. These judgments either made an incomplete reference to the soft law measure concerned or completely lacked the title and document number. In order to triangulate the findings I also conducted a keyword search in another database, operated by the Hungarian Competition Authority. This database[464] only comprises court decisions rendered in competition law matters between 1994 and 2017. Based on the hits generated through this database, the Curia and the Budapest Court of Appeal referred 13 times to various EU guidelines and communications in the context of competition law. As the search in the Compendium returned only 11 hits in the competition law, the database search in the Compendium missed at least two court decisions referring to soft law.

[463] Bírósági Határozatok Gyűjteménye, birosag.hu/birosagi-hatarozatok-gyujtemenye.

[464] https://www.gvh.hu/dontesek/birosagi_dontesek

The questionnaires and keyword searches confirm that Hungarian courts only sporadically refer to EU soft law measures. The fact that a decade's worth of judgments yielded a rough average of only one reference to EU soft law per year, means that even though there is a possibility that due to the non-systematic referencing of such measures in court judgments some references may have been missed, there is no routine of referring to EU soft law by the Hungarian courts.

Looking at the decisions including references to soft law, it is apparent that Hungarian courts refer to such EU measures for various reasons. The grounds for citing EU soft law range from references made by parties, but left unconsidered by the court,[465] through bolstering the court's findings with further arguments,[466] using them as interpretative aids,[467] to applying them directly to the case.[468] In the rare cases where courts refer to these sources to bolster findings, aid interpretation or solve the case, the non-binding nature of these norms is not emphasised.

2.4 Analysis of the Use of EU Soft Law in Specific Policy Fields

In what follows, I focus on the use of EU soft law measures in the field of competition law and environmental law by courts and authorities in Hungary. These two policy fields perfectly illustrate the contradictoriness of soft law application in Hungary: while the field of competition law enforcement may be considered a relative success story of EU soft law application, the area of environmental protection shows a more mixed picture. The survey and the interviewers conducted in the framework of this research help understand the development and transformation of the organisational background of, and the institutional approach to these policy areas.

465 E.g. Judgment of the Budapest Municipal Court, judgment No. 15.G.40.806/2010/24, citing Guidelines on Vertical Restraints (2010/C 130/01).

466 E.g. Judgment of the Debrecen Court of Appeal, judgment No. Gf.II.30.106/2015/7, citing Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the on the European Union Strategy for the Protection and Welfare of Animals 2012–2015 (COM (2012) 6).

467 E.g. Judgment of the Tatabánya Regional Court, judgment No. 9.G.40.083/2011/20, citing Communication from the Commission - Guidelines on the Application of Article 81(3) of the Treaty (2004/C 101/08).

468 E.g. Judgment of the Budapest Capital Regional Court, judgment No. 23. G. 41.739/2013/125, citing Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty (2004/C 244/02).

2.4.1. Competition Policy

From the perspective of the use of EU soft law by the Hungarian competition authority, the GVH, competition policy may be considered a success story in Hungary. There are several reasons for this. Competition policy, law and enforcement is highly integrated throughout the Member States, including Hungary, owing to the system of competition law enforcement introduced by Regulation 1/2003.[469] This system relies on national competition authorities to proceed in both national and EU level competition cases, compelling Member State authorities to apply EU soft norms adopted by the Commission.

Due to their double-hatted nature as enforcers of EU and national competition law, with a view to increase predictability for undertakings, certain national competition authorities (NCAs) apply EU soft law not only in EU level, but also in domestic cases. Thus, while EU competition law still leaves some leeway for Member States to pursue their own policy, for example, in leniency and until recently, in fining, the Hungarian Competition Authority for example chose to harmonise its rules with the soft law of the EU.[470] In fact, in the case of fining rules,[471] the Hungarian Competition Authority chose the path of so-called spontaneous approximation, converging its rules[472] to an EU soft norm that was not designed to induce voluntary harmonisation but was of merely informative nature (see in detail: Chapter 3).[473]

[469] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 4.1.2003, pp. 1–25.

[470] On Member States' voluntary convergence in the field of competition enforcement, see Commission Staff Working Paper Accompanying the Report on the Functioning of Regulation 1/2003 {COM(2009)206 final}, 61–62.

[471] See in detail: Láncos (2019d) op. cit. 541.

[472] Communication No. 11/2017 of the President of the Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the setting of the amount of fines in case of anti-competitive agreements and concerted practices, the abuse of dominant position and the abuse of significant market power.

[473] Guidelines on the method of setting fines imposed pursuant to Article 23 (2)(a) of Regulation No 1/2003 (2006/C 210/02) OJ C 210, 1.9.2006, 2. Guidelines are non-formal soft law measures, ie non-binding acts of the Commission not mentioned in Article 288 TFEU enumerating secondary sources of EU law. The CJEU underlined that "in the absence of binding regulation under European Union law on the subject, [it was up to the] Member States to establish and apply national rules" on issues governed by guidelines. Although guidelines merely bind the author, they are in fact important informative measures. Such is the case with the Commission's guideline on fines, which enables undertakings to estimate possible sanctions to be imposed on them for anti-competitive behaviour.

The *openness of Hungarian competition policy* towards European competition law dates back to the transition of the country to democracy[474] and its association agreement with the European Communities concluded in the early 1990s.[475] In fact, Act No. LVII of 1996 on the prohibition of unfair and restrictive market practices (Competition Act), the law governing competition rules and enforcement in force today reproduced in essence the substantive rules of EU competition law. This sameness of Hungarian and EU competition rules has consequences for the interpretation and application of the Competition Act. As the CJEU observed in the *Allianz* case, "the [Competition Act] must in fact be interpreted in the same way as the equivalent concepts in Article 101(1) TFEU and that it is bound in that regard by the interpretation of those concepts provided by the Court".[476]

Describing the institutional approach of Hungarian competition policy, Tihamér Tóth noted that "[the] sovereign approach emphasizing the distinctness of competition policy and enforcement in Hungary has never materialized".[477] Instead, the Hungarian Competition Authority "has always been open to following EU case law and the practice of the EU Commission. Even when it had no legal obligation to do so, it often relied upon the relevant judgments of the EU courts and the relevant guidelines of the Commission".[478] Apart from the apparent reflex to follow EU competition law, reasons for spontaneous harmonisation included regulatory economy: as András Tóth, Vice President of the Hungarian Competition Authority observed, it is important to look for workable solutions to avoid unnecessary duplication of regulatory efforts, making the incorporation of Commission solutions for domestic cases and obvious choice.[479]

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474 Cited by Tóth (2013) op. cit. 1.

475 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part. OJ L 347, 31 December 1993.

476 *Allianz Hungaria Biztosító Zrt. and Others v Gazdasági Versenyhivatal* (C-32/11) ECLI:EU:C:2013:160, paras 21–22.

477 Tóth (2013) op. cit. 1.

478 Ibid, 4.

479 Communication No. 11/2017 follows the Commission's guidelines on fines, while Communication No. 6/2017 of the President of the Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority which, among others, discusses the application of Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings in domestic merger cases. "Even in areas where there was no formal law harmonisation obligation, the Hungarian

This approach to EU competition law and EU soft law in general was confirmed by the Competition Authority. The Authority noted that in case of "the textual sameness and the identical interpretation of the concepts"[480] it follows and refers to EU law, including EU soft law norms for the enforcement of competition law also in domestic cases. The interview conducted with Competition Authority staff further substantiated that the use of EU competition soft law was routine practice at the Authority, resulting in an awareness of, and openness towards EU soft law unprecedented at courts and other authorities in Hungary. Competition Authority officials stated in the interview that in the majority of cases they apply EU soft law to interpret hard rules of competition law or to give additional weight to an argument. As such, these norms help increase the transparency of rights and obligations of undertakings and enhance the predictability of legal consequences in case of infringement. The Competition Authority's staff also underlined the important role EU competition soft law plays in ensuring the uniformity of competition law application, including the effective enforcement of EU law. Finally, the Competition Authority's staff reported that they perceived EU soft law as a means for avoiding overregulation and to ensure *effet utile*, yet they acknowledged that the lack of legitimacy behind soft sources and the apparent flexibility they ensure may lead to diverging interpretations causing uncertainty.[481]

As stated above, based on the search for EU soft law in general in the Compendium of Court Decisions and the results of the survey, on the whole, Hungarian courts rarely refer to such norms. By contrast, in the narrower field of competition law, and as a consequence of the consistent application of soft norms by the Competition Authority discernible from its database containing the Authority's decisions, undertakings are well aware of these norms, making frequent references to them in domestic court cases. Consequently, references to such EU soft norms also appear in the decisions of the national courts. All of the eleven cases found in the Compendium where reference is made to EU soft law are competition law cases.[482]

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legislator, relying on the proposals elaborated by the GVH, imported certain procedural instruments which worked well on the European level". Tóth (2013) op. cit. 4.

480 Decision Vj/055/2013.

481 Interview conducted with staff members of the Hungarian Competition Authority on 2 July 2019; on file with author.

482 Competition law related hits in the Compendium: judgments of the Budapest Municipal Court: 7.K.31.116/2007/44; 15.G.40.806/2010/24; 19.K.33/718/2009/42, judgment of the Budapest-Capital Administrative and Labour Court: 5.K.33.512/2014/53, judgments of the Kúria: Kfv.III.37.441/2016/7; Kfv.II.37/110/2017/13; Kfv.VI.38.108/2016/26, judgment of the

2.4.2 Environmental Policy

The institutional system of environmental protection in Hungary seems to be suffering centrifugal tendencies with an ongoing fragmentation of institutions and responsibilities. The past decade of environmental protection in Hungary has been characterised by a gradual dismantling of the institutional system, which may have left its mark on both the awareness and the use of European environmental law sources in Hungary. In 2010 the Ministry for Environmental Protection was abolished and its responsibilities were distributed between other ministries,[483] Hungary becoming the only EU Member State without a ministry dedicated to the protection of the environment. At a lower level, departments for environmental protection and nature preservation are assigned to the regional government offices.

When I sent out the questionnaire to such regional government offices, I received no answer, save for one department, which indicated that it is awaiting permission to answer the questions. To gain insight into the practice of public authorities active in the field of environmental law, I relied on my personal contacts at different public authorities involved in managing different aspects of the broad topic of environmental protection. In particular, I interviewed members of the Office of Deputy Commissioner Responsible for Future Generations ('Green Ombudsman').[484] The Green Ombudsman, as the institution is referred to in general parlance, investigates issues related to the right to a healthy environment, the right to the preservation of physical and mental health, and the protection of natural values.[485] One of the most important powers of the Green Ombudsman is the power to initiate the constitutional review procedure of the

Budapest Court of Appeal: 2-Lf-27-042/2011/5, judgments of the Budapest-Capital Regional Court: 3.G.40.722/2014/946, 23.G.41.739/2013/125 and judgment of the Tatabánya Regional Court: 9.G.40.083/2011/20.

483 greenfo.hu/hir/akik-maradtak-szivnak-a-kornyezetvedelmi-apparatust-megsemmisitettek/

484 The General Ombudsman worked alongside the Ombudsman Responsible for National and Ethnic Minorities and the Data Protection Ombudsman before the position of the Ombudsman for the Protection of Future Generations was established in 2007. See in detail: Csink op. cit. 600 et seq.

485 According to Art. P) of the Hungarian Fundamental Law (constitution): 'Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations.' Art. XX paragraph (1) of the Fundamental Law stipulates: 'Everyone shall have the right to physical and mental health.' Finally, Art. XXI paragraph (1) guarantees: 'Hungary shall recognise and give effect to the right of everyone to a healthy environment […].'

Constitutional Court in relation to legislation that is potentially harmful to the environment (or cultural heritage).[486]

Based on the interviews conducted with three members of the Office of the Green Ombudsman,[487] the environmental soft law of the EU is considered highly important in their work, in particular for its role in clarifying hard law rules, but also as an inspiration for national environmental protection legislation. The interviews highlighted the advantage of soft law in accommodating existing diversity within the Member States while offering them ambitious commitments to voluntarily undertake.

As far as judicial references to environmental soft law of the EU are concerned, the search in the Compendium of Court Decisions yielded, as noted above, only two hits related to EU soft law on environmental protection, used as an interpretative aid and to bolster the court's reasoning, respectively.

2.5 No Culture of EU Soft Law Application in Hungary

Based on the findings gleaned from a general assessment of soft law application by Hungarian courts and authorities, and a more specific analysis of the areas of competition law enforcement and environmental protection, the relevance of EU soft law in the Hungarian legal order is negligible. Save for the isolated field of competition law enforcement and the practice of the Office of the Green Ombudsman, there is *no culture of soft law application*. This is confirmed by both the results of searches conducted in the Compendium of Court Decisions and the survey responses given by judges and public officials.

The majority of respondents considered soft law to be an important source for interpreting hard law rules and reinforcing arguments preferred by the court or the authority. Nevertheless, while only a few respondents emphasised the disadvantages of EU soft law, citing its lack of legitimacy and its possible contribution to uncertainty, most judges and officials do not apply EU soft law routinely in cases before them. Besides the excessive case load of courts, or

[486] Such initiatives include the initiative for the constitutional review of the Joint Decree No. 27/2008. (XII. 3.) of the Ministry for Environmental Protection and Rural Development and the Ministry of Health on setting the thresholds for environmental noise and vibration pollution (case no. II/00902/2012); the constitutional review of Governmental Decree No. 358/2008. (XII. 31.) on licensing activities for businesses (case no. II/00782/2012) and the initiative for the constitutional review of Act No. XXXVII of 2009 on forests, the protection of forests and forest management (II/00201/2019).

[487] 11 June 2019; 20 July 2019 and 3 August 2019.

the workload of public officials, this is due to the low awareness of EU soft law. Owing to the state-centred disregard for 'external sources', judges and public officials will only refer to measures that had been brought into focus by the parties or higher courts applying EU soft law to fill in legal gaps. Overall, the routine use of EU soft law appears to be restricted to competition law enforcement in Hungary.

3. Case Study: Spontaneous Approximation of Fining Policies for Anti-competitive Conduct in Selected Member States[488]

In what follows, I analyze a specific example of the use of EU soft law in the Member States: the spontaneous approximation of national rules to EU soft law in the field of competition policy, a highly integrated policy area, as explained above. This chapter shows, that for institutional and competence-related reasons, although Member States enjoyed complete autonomy to design national fining policies, many chose to follow EU soft law on fines in competition cases.[489]

Based on the general principles of subsidiarity and national procedural autonomy,[490] as well as Regulation No. 1/2003 governing EU competition law, adopting rules on the calculation of fines in cartel and abuse of dominant position cases were put in the hands of proceeding national competition authorities (NCA) and the Commission, respectively, opening up the possibility for diverging regulatory solutions.[491] However, the European co-legislators adopted Directive 2019/1/EU to empower the competition authorities of the Member States to be more effective enforcers of competition law and to ensure

[488] A version of this chapter was published in: Láncos (2019c) op. cit. and Láncos (2019d) op. cit. I am indebted to Wolfgang Weiß (Deutsche Universität für Verwaltungswissenschaften, Speyer), Tihamér Tóth (Péter Pázmány Catholic University, Budapest), Jörg Nothdurft (Bundeskartellamt), Stephanie Jungheim-Hertwig (Bundeswirtschaftministerium), András Tóth, Botond Horváth, József Sárai, Dorina Juhász, Boglárka Priskin (Hungarian Competition Authority), Balázs Csépai (Oppenheim Law Firm), Viktor Bottka (European Commission, Legal Service), Krisztián Krecsmár (COM) and Katalin J. Cseres (University of Amsterdam) for their invaluable help.

[489] Guidelines on the method of setting fines imposed pursuant to Article 23 (2)(a) of Regulation No 1/2003 (2006/C 210/02) OJ C 210, 1.9.2006.

[490] Dunne op. cit. 458-459.

[491] Cseres (2010) op. cit. 13–14, 31.; Dunne op. cit. 458 et seq.

the proper functioning of the internal market.[492] Among others, the so-called ECN+ Directive seeks to harmonise the fundamental tenets of national fining policies in EU cartel and abuse of dominant position cases, to eliminate divergences in fining policies currently compromising the effective enforcement of EU competition law. A brief survey of certain Member States' fining policies reveals that in fact, many national fining rules already comply with what is set forth in the ECN+ Directive. Indeed, most Member States' policies even go beyond the Directive, closely aligning the details of their fining rules to the Commission's guideline on fines in an exercise of spontaneous approximation. This is all the more surprising, since the Commission's guideline on setting fines only binds the author and has no objective to indirectly harmonise national fining policies.

3.1 Focus and Methodology of the Case Study

In this chapter I try to determine why certain Member States or NCAs voluntarily chose to follow the Commission's guideline when designing their respective policies. Besides the evaluation of relevant EU and national measures on the calculation of fines in cartel and abuse of dominant position cases, as well as related preparatory documents (where available), this inquiry included interviews conducted with staff members of the DG COMP and two NCAs, the German Bundeskartellamt and the Hungarian Gazdasági Versenyhivatal, as well as other officials and experts of national competition law.[493] For reasons of access, I chose the German Bundeskartellamt's guidelines on fines and the Hungarian Gazdasági Versenyhivatal's (GVH) communication on fines as my case study. Focusing on these two fining policies is also substantiated by the fact that it allows for a comparison of the approach of an 'old' and 'big' Member State with considerable competition law traditions with that of a 'new', 'small' Member State which only introduced competition law in aspiration of its accession to the EU. Based on the evolution of the fining policies and staff interviews from these NCAs I sought to identify the main driving forces behind the spontaneous approximation of national fining rules.

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[492] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33.

[493] Cf. Dunne op. cit. 459. These jurisdictions have been selected for reasons of linguistic access to relevant fining measures of the NCAs.

3.2 The Phenomenon of Spontaneous Approximation

Drawing on comparative law literature, I refer to instances of voluntary regulatory conduct where national rules converge with EU law without the latter prescribing or intending harmonisation as *spontaneous approximation*.[494] Binding EU legislation clearly results in the convergence of national laws, but even soft law measures which have harmonisation as their objective, exert at least indirectly, a certain compliance pull[495] and, as discussed above, impose obligations of consideration onto the legislator, courts and authorities.[496]

By contrast, "[s]pontaneous harmonisation occurs exclusively on a voluntary basis: an obligation to adapt national law to European law only exists for those areas where European law has come about. That is exactly not the case in a non-harmonised area. In principle, European law does not oppose the European rule being applied as a rule of national law in an area which is not covered by it."[497] Spontaneous approximation shall therefore only take place voluntarily, i.e. in respect of EU (or other) measures that do not require or envisage implementation in any way, neither directly, nor indirectly.[498] Such supranational measures are in no way binding upon the Member State, nor do they have to be considered by national courts or authorities in the course of applying Union or national law. Since such measures do not give rise to any legislative obligations for Member States and national legislators or regulatory bodies enjoy considerable leeway in designing national rules in the relevant area of the law. Therefore, spontaneous approximation occurs when the Member State legislator or regulatory body

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494 "While vertical interaction lies at the heart of the application of Community law, the horizontal interaction in the field of procedural law is still embryonic. However, the horizontal interaction is as important as the vertical interaction in the process of spontaneous approximation of the legal systems of the EU Member States." NAZZINI op. cit. 30.

495 What is common to soft law mechanisms and measures is that they exert a stronger or weaker 'compliance pull' unrelated to binding character or enforceability. This is down to the authority of the issuing body or the expertise of those participating in the elaboration of the soft law measure etc. GUZMAN–MEYER (2016) op. cit.; LÁNCOS (2018c) op. cit.

496 *Grimaldi* (C-322/88) [1989] ECR 4407, paras 16, 18; SENDEN (2004) op. cit. 473.; see also: VON GRAEVENITZ op. cit. 173. Such harmonising soft law measures often have a pre-law function, i.e. preparing the introduction of hard law, potentially achieving convergence of Member State laws, while also enabling the gathering of data on the effect of national legislation implementing them. This is also true for the international legal arena, where soft law regulation is often the anteroom for creating hard law. Cf. soft law as a „pioneer of hard law": SINDICO op. cit. 836.

497 LOOS op. cit. 8.

498 VENTORUZZO op. cit. 172.

voluntarily chooses to adopt the system and/or wording of a given EU or other legal measure at its own discretion.

Spontaneous approximation is therefore the *use of legal transplants*, the borrowing of foreign legal institutions at the discretion of the regulator. In this context, national regulators are looking for rules to borrow "in a market of legal culture[s] where rule suppliers are concerned with satisfying demand [and] ultimately the most efficient rule will be the winner."[499] The borrowing regulator's choice will be governed by the need for efficient implementation of national legislative policies and to some extent, the proximity of the legal or social culture.[500] In the case of EU NCAs as regulators, spontaneous approximation takes place within a specific context of political, economic and legal integration, where supranational and other Member State regulatory solutions play an outstanding role. Indeed, while the 'borrowing' Member State's legislative or regulatory body has considerable leeway to design its own solution, the supranational rule may become a common point of reference, carrying more authority than other regulatory solutions available,[501] making the choice of EU or other Member States' regulatory solutions more likely than transplanting 'foreign' solutions.

3.3 The Commission's Guidelines on Fines

The first few decades of Commission competition policy were conducted without any published orientation on the imposition of fines in cartel and abuse of dominant position cases, which was highly criticized for its lack

[499] MOUSOURAKIS op. cit. 227.

[500] Ibid, 227, 229. „The destinies of legal transplants in diverse cultural, socio-economic and political contexts are important to examine for determining the desirability and applicability of such transplants for legislative and judicial practice. It may be true that ethno-cultural, political and socio-economic differences between the exporting and the importing countries do not necessarily preclude the successful transplantation of legal rules and institutions. Legal rules can be taken out of context and can serve as a model for legal development in a very different society. However, one should keep in mind that an imported legal norm is occasionally ascribed a different, local meaning, when it is rapidly indigenized on account of the host culture's inherent integrative capacity."

[501] Generalizing Mulder's observations regarding the limitations of traditional comparative law perspectives on legal transplants when it comes to processes of European harmonisation, legal convergence is not only an efficient regulatory response to society's needs, for "research on legal transplants has demonstrated that laws are often adopted not because of need or suitability, but rather prestige and authority". MULDER op. cit. 730–731.

of transparency.[502] Predictability and transparency were brought into the Commission's fining policy with the 1998 guidelines on fines,[503] which, for the first time enabled undertakings to calculate possible fines with some accuracy. However, vague categories, such as "likely fines", and gravity expressed as "minor", "serious" and "very serious" made precise predictions impossible.[504] Almost a decade later, the Commission published the 2006 guideline on fines imposed in cartel and abuse of dominant position cases,[505] which sought to bring more clarity into how the fine shall be determined in individual cases.[506]

While both the 1998 and the subsequent, 2006 guideline on fines set a limit of 10% of overall turnover for calculating fines, there are clear differences between the two generations of guidelines in setting the basic amount of the fine and the scope of mitigating and aggravating factors to be considered in determining the final amount of the fine. In setting the basic amount of the fine, the early guideline merely took the gravity and duration of the infringement into account, developing three broad categories of both gravity (minor, serious and very serious infringements with corresponding "likely fines") and duration (short, medium and long duration). Meanwhile, the currently effective 2006 guideline is more tailored to the specific performance of the infringing undertaking, calculating the basic amount by reference to its value of sales.[507] The value of sales (i.e. the value of the sale of goods or services covered by the infringement in the relevant geographic market within the EEA) will be the reference amount from which, based on the gravity and duration of the infringement the basic amount of the fine will be calculated.[508] A comparison of the mitigating and aggravating factors listed in the guidelines reveals, that the 1998 list was non-

[502] Geradin–Henry op. cit. 7.

[503] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No. 17 and Article 65 (5) of the ECSC Treaty (98/C 9/03) OJ C 9, 14.1.98, p. 3.

[504] Geradin–Henry op. cit. 13.

[505] The legal basis for the guideline is Article 23 para 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 4.1.2003, p. 1–25.

[506] Cf. Recital 29 and Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4.1.2003, p. 1–25. According to the Regulation, the Commission may by decision impose fines on undertakings, where the fine shall not exceed 10 % of the total turnover of each participating undertaking. In determining the amount of the fine, the Commission must consider the gravity and the duration of the infringement.

[507] Kienapfel op. cit. 1225.

[508] Paras 12–26, Guidelines on the method of setting fines imposed pursuant to Article 23 (2)(a) of Regulation No 1/2003 (2006/C 210/02) OJ C 210, 1.9.2006, p. 2. See also: Barbier de la Serre–Lagathu op. cit. 328.

exhaustive, and only partly coincided with the factors enumerated by the 2006 guideline.[509] It is worth noting, that within the framework of the guideline, the Commission enjoys ample discretion in setting the individual fines, to ensure the necessary deterrent effect.[510]

Guidelines are non-formal soft law measures, i.e. non-binding acts of the Commission not mentioned in Article 288 TFEU enumerating secondary sources of EU law. Guidelines are not binding upon individuals, undertakings or Member States,[511] and, like other soft measures, are published only in the 'C' series of the Official Journal.[512] While acknowledging that "guidelines set out by the Commission may have some effect on the practice of the national competition authorities", the CJEU underlined, that "in the absence of binding regulation under European Union law on the subject, [it was up to the] Member States to establish and apply national rules" on issues governed by guidelines.[513] Meanwhile, for reasons of legitimate expectations, guidelines bind the author,[514] that is, the Commission "in so far as those guidelines do not contradict Treaty rules."[515] Although *guidelines merely bind the author*, they are in fact important informative measures. Such is the case with the Commission's guideline on fines, which enables undertakings to estimate possible sanctions to be imposed on them for anti-competitive behaviour.

In summary, while the majority of European soft law is aimed at indirect harmonisation, the sole purpose of this particular guideline is to provide transparency as to the fining policy of the Commission. Since the guideline on fines only binds the author, i.e. the Commission, and has no express or tacit harmonisation purpose, it is at first glance surprising that a national authority enjoying considerable leeway to regulate its practice of calculating fines would choose to gradually align its rules to those of the Commission.

509 For a summary of the Commission's guidelines on fines, see: DUNNE op. cit. 455 et seq.

510 KIENAPFEL op. cit. 1197–1198.

511 Incidentally, certain 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. LÁNCOS (2018b) op. cit. 10.

512 KOVÁCS–TÓTH–FORGÁCS op. cit. 63; HARGITA op. cit. 83–84, 86–88.

513 *Pfleiderer* (C-360/09) ECLI:EU:C:2011:389, summary of the judgment.

514 WEISS (2008) op. cit. 8.

515 *The Netherlands v. Commission* (C-382/99) [2002] ECR I-5163, para. 24.

3.4 The Context and Design of National Fining Policies

The 2003 decentralization of competition enforcement and the direct applicability of Articles 101 and 102 TFEU by NCAs put national competition law rule-making and practice into sharp focus.[516] While NCAs apply the same substantive rules in cartel cases for both EU-level and domestic cases, and partly the same rules for abuse of dominant position on both levels, "Regulation 1/2003 engages in only light touch harmonisation of domestic procedural rules, including rules on sanctions."[517] Article 5 of Council Regulation No 1/2003 on the implementation of the rules on competition provides that the competition authorities of the Member States shall have the power to impose fines, periodic penalty payments or any other penalty provided for in their national law. However, as Dunne observes, the "notion of national procedural sovereignty does not preclude bottom-up convergence by Member States coalescing around a "European model," nor does it prevent the Union legislature from subsequently requiring greater harmonisation of procedural rules."[518] And in the case of regulating fining policies, it turns out that both processes are at play.

Within the framework of the leeway granted under Article 5 of Regulation 1/2003, Member States' NCAs adopted national measures governing the calculation of fines. NCAs enjoyed considerable leeway in developing their own fining policies for competition law infringements. Nevertheless, as in any other regulatory area, when designing their fining policy, *NCAs must adhere to the principle of effectiveness* for rules governing the calculation of fines imposed in EU-relevant cases.[519] What is interesting is that a great many Member States chose to adopt fining rules strongly aligned to the Commission's relevant guideline, resulting in spontaneous approximation ("soft convergence" or "autonomous harmonisation").[520] Thus, although they were free to adopt different fining rules (the only guiding principle binding them in this respect was that their fines be effective means in enforcing EU competition law), they chose not to make use of this leeway but to borrow the solution enshrined in the Commission's guideline on fines. Moreover, not only do these rules apply to

516 Whelan op. cit.

517 Cseres (2010) op. cit. 17; Dunne op. cit. 458.

518 Dunne op. cit. 459.

519 Cseres (2017) op. cit. 195.

520 Ost op. cit. 69.

fining in EU-relevant cases, but also to domestic cartel and abuse of dominant position cases.

3.4.1 The Bundeskartellamt's Guidelines on Fines

Prior to 2006 the Bundeskartellamt proceeded to impose fines based on Artikel 81 of the Competition Act against restraints on competition (GWB).[521] The original text of the GWB however, constrained the fining policy of the Bundeskartellamt and only allowed for higher fines in case the anticompetitive conduct resulted in extra earnings. According to scholarship, the Bundeskartellamt was aspiring towards the greater discretion enjoyed by the Commission, oriented solely by the gravity and duration of undertaking's conducted and its turnover.[522]

The 7th amendment of the GWB empowered the Bundeskartellamt under the new Article 81 para 7 to establish "the general administrative principles governing the exercise of its discretion".[523] Upon this legal basis, the Bundeskartellamt adopted its first guideline on fines in 2006.[524] The 2006 guideline of the Bundeskartellamt was already highly reminiscent of the Commission's guideline on fines. While the convergence of German antitrust fining rules with the Commission fining guideline was driven by the Bundeskartellamt, it may have also been influenced by the other actors driving the amendment of the GWB. In fact, according to the recommendation of the Economic and Labour Committee regarding Article 81 GWB, i.e. the legal basis of the Bundeskartellamt's guideline on fines, "in order to give practical effect ("effet utile") to the decentralized application of European competition law, the German regulation governing the calculation of fines shall be adapted to the European rules. Hence, in the framework of teleological interpretation, the guidelines employed by the European Commission for the procedure of determining fines must also be considered."[525]

The guideline was replaced by a new guideline in 2013 with due consideration to the judgement of the Bundesgerichtshof (Federal Court of Justice) rendered

521 Gesetz gegen Wettbewerbsbeschränkungen of 26 August 1998, Federal Gazette I. 2546.

522 Bach–Klumpp op. cit. 3524–3525.

523 Haus op. cit. 183.

524 Bundeskartellamt Notice 38/2006 of 15 September 2006, NJW 2006, 3544.

525 Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Arbeit (9. Ausschuss) zu dem Gesetzentwurf der Bundesregierung (Drucksache 15/3640): Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, 9 March 2005, 50.

in the *Grauzementkartell* case.[526] Based on the system of the soft guideline on fines, the Bundeskartellamt first determines its 'sanctioning leeway', i.e. 10% of the relevant turnover, which, in a second step is multiplied by certain coefficients based on the "profit and damage potential" thus identified.[527] The greater the turnover of the undertaking, the higher the coefficient will be. This amount will be corrected based on a balancing of mitigating and aggravating factors, including the type and duration of the infringement, its geographical reach, the role of the undertaking, economic performance, position on the market, repeat violations or cooperation with the NCA, etc.[528]

As a result of the development of GWB provisions on fines, Article 81 now enshrines the most important elements of the Commission's guideline on fines, i.e. the 10% turnover limit, applicable to the world wide turnover of the economic unit, as well as the consideration of the gravity and the duration of the infringement. With this, the GWB already complies with Articles 13 and 14 of the ECN+ Directive on the calculation of fines.

This *readiness for alignment* represents a turn in the German position. As an official of the German Ministry for the Economy noted, "in contrast with the situation of Regulation 1/2003, where the Bundeskartellamt only hesitantly gave up its reserved approach, the German NCA was a decisive driver of Directive

[526] While the 2006 guideline of the Bundeskartellamt followed the Commission's practice of applying the 10% turnover limit as a cap on fines, the Bundesgerichtshof found this approach to be mistaken, resulting in similar fines for violations of different gravity and duration. The Bundesgerichtshof therefore stated that in light of the constitutional requirement of certainty, the 10% turnover limit should be applied as an "upper limit" on fines. Indeed, while the principle of equality requires that the Bundeskartellamt be bound by its Guideline, the national courts have full review over the decisions on fines and may even increase the amount of the fine. Article 103 para 2 Grundgesetz (German constitution). For an analysis of the judgment see: Pustlauk op. cit. 289–296. Since courts exercise full review over decisions of the Bundeskartellamt (as required under ECtHR case-law: judgments of October 23, 1995), Schmautzer, Umlauft, Gradinger, Pramstaller, Palaoro and Pfarrmeier v. Austria, Series A nos 328 A-C and 329 A-C, §§ 34, 37, 42 and 39, 41 et 38; ECtHR (judgment of September 27, 2011), Menarini Diagnostics v Italy, case n° 43509/08, § 59.), the change introduced through the Grauzementkartell jurisprudence in the maximum of fines led to increased fines in many cases on appeal. To ensure transparency and predictability, some called for legislative intervention and the enactment of binding fining rules in competition cases binding both the NCAs and the German courts. Were this solution to be followed, the NCAs would lose their prerogative of issuing self-binding fining rules. Mäger op. cit. 293.; Ost op. cit. 122; Messmer–Bernhard op. cit. 11. Leitlinien für die Bußgeldzumessung in Kartellordnungswidrigkeitenverfahren (2013), paragraph 13.

[527] Leitlinien für die Bußgeldzumessung in Kartellordnungswidrigkeitenverfahren (2013), paragraph 13.

[528] Leitlinien für die Bußgeldzumessung in Kartellordnungswidrigkeitenverfahren (2013), paragraph 16.

1/2019." In fact, according to the official, Germany was pushing for the 10% rule to be included into the Directive, to render discussions about the alleged unconstitutionality of the 10% turnover limit obsolete and confirm the position held by the German NCA.[529]

3.4.2 The Gazdasági Versenyhivatal's Communications on Fines

The President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority issued the latest communication on fines to be imposed in cartel and abuse of dominant position cases in late 2017.[530] The GVH's communication is strongly aligned to the European Commission's guideline on setting fines, adopting its system and general features.

The legal basis of GVH communications may be found in Article 36 of the Law on unfair market practices, with Article 78 para 3 providing a non-exhaustive framework of factors that the Competition Council shall consider in setting a fine (gravity of the infringement, i.e. the threat to competition, harm suffered by consumers, scope; the duration of the agreement; the income generated by the infringement; the market position of the perpetrator; liability and cooperation with the Competition Authority; repeated infringement). Besides this general framework affording the Competition Council a wide margin of appreciation, for the purposes of legal certainty the President of the Authority and the Chair Competition Council adopted soft measures, that is, communications to enhance transparency and predictability in the calculation of fines.[531]

To date, the GVH has published three communications governing the imposition of fines for cartel and abuse of dominant position cases. The first

[529] Ost op. cit. 70. More importantly for the Federal Government, the ECN+ Directive is silent about whether the 10% maximum is a cap on, or an upper limit of the fine, which, for the time being, also allows the Bundeskartellamt to comply with the Grauzementkartell jurisprudence without breaching EU law. Triantafyllou op. cit. 476.

[530] A Gazdasági Versenyhivatal elnökének és a Gazdasági Versenyhivatal Versenytanácsa elnökének 11/2017. közleménye a versenykorlátozó megállapodásokra és összehangolt magatartásokra, a gazdasági erőfölénnyel való visszaélésre, valamint a jelentős piaci erővel való visszaélésre vonatkozó tilalmakba ütköző magatartások esetén a bírság összegének megállapításáról (Communication No. 11/2017 of the President of the Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the setting of the amount of fines in case of anti-competitive agreements and concerted practices, the abuse of dominant position and the abuse of significant market power).

[531] Tóth (2018) op. cit. 15.; Nacsa op. cit. 99.

communication of the President and Chair concerning fines was issued in late 2003 before Hungary's accession to the EU and repealed in 2009. This was followed by three years of no guidance on the setting of fines on the national level, leading up to the adoption of the 1/2012 communication on fines in cartel cases. Finally, the third communication on fines in cartel cases was adopted in 2017.

The latest communication on fines is structured as follows: it enshrines the principles governing the imposition of fines, the methodology, the amount serving as the basis of calculation, the basic value of the fine, aggravating and mitigating factors, including frequency, deterrence and possible corrections with due regard to the cap on fines, and finally, a possibility to request payment of the fine in instalments. Not unlike its earlier counterparts, the communication's scope of application extends to both cartel and abuse of dominant position cases, without differentiating between cases decided on the basis of Articles 101 and 102 TFEU or Articles 11-22 of the Act.[532] Consequently, the calculation of fines will be the same for EU level and national anti-competitive agreements or abuse of dominant position situations. It is important to note, that not only the Act. but also the communication itself foresees a margin of appreciation for the GVH in determining the final amount of the fine imposed.

As regards the nature of the communication, Judgment No. Kfv.II.37.453/2009/5 of the Kúria (Hungarian Supreme Court) declared that in its procedures, the Competition Council is bound by its communications. In another judgment[533] the Kúria pointed out that any deviation from these communications is only permissible in case the slavish application of the same would be in breach of the law or manifestly unreasonable.[534] Meanwhile, the 'non-binding' nature of GVH communications is underscored by the fact that while the author is bound by the soft measure, the national court in review proceedings is not.[535]

532 With the exception that according to Article 78 paragraph 8 Competition Act in domestic cases, the GVH may waive the fine and issue a warning where the undertaking in question is a small or medium sized company. This waiver cannot be extended to EU relevant cases without compromising the effective enforcement of EU competition law.

533 No. Kfv. III.37.697/2011/9.

534 Tóth (2018) op. cit. 15–16.

535 Judgment No. Kfv.VI.37.232/2011/13 of the Kúria, Nacsa op. cit. 99. The GVH enjoys an amicus curiae position before the proceeding national court, participating in the proceedings and delivering opinions on competition cases. Article 88/B paragraph (2) of the Competition Act: „The court shall notify the Hungarian Competition Authority without delay if in a lawsuit the need arises to apply the provisions laid down in Chapters III to V of this Act.

Article 36 of the Competition Act expressly declares, that these communications have no binding force. This is further refined in the jurisprudence of the Hungarian Constitutional Court, which declared that communications, such as the GVH communication on fines, are *not legal acts, but informative measures* to ensure the predictability of the author's application of the law.[536] It is worth noting that the decision of the Constitutional Court makes several references to European soft law in general and the Commission's guideline on fines, in particular, drawing parallels with the nature of the same: "with due regard to European Union practice, these communications provide indications for relevant market actors", "the same applies to [the article of the Competition Act governing fines], in particular, since the European Union itself provides for a leniency policy, that is, in the case of cartels, an immunity from or a reduction of fines".[537] That is, the Constitutional Court sought to underline similarities and draw a connection between the activities of the GVH and the Commission, as well as the soft measures they issue for information purposes.

While the system applied by the GVH seems more elaborate than the list of factors enshrined in the Commission's guideline, it is apparent, that the GVH's communication essentially follows both the system and nature of the guideline.[538] Firstly, although the framework set forth under Article 23 paragraphs 2 to 4 of Regulation 1/2003 governing the rules for determining fines in cartel and abuse of dominant position cases solely binds the Commission, the GVH nevertheless chose to adopt both the substantive thresholds and consideration of gravity and duration enshrined therein.

Second, beyond the substantive elements foreseen under the Regulation, the GVH also adopted the calculation and maximum (30%) of the basic amount by reference to the relevant turnover expressed as the value of the sales of goods and services to which the infringement relates. While the communication is more detailed in that it includes specific percentages to be taken into account in case of lesser aggravating factors (0-5% and 5-15%), it follows the guideline's paragraph 25 in foreseeing an additional sum between 15% and 25% of the value of sales in case of hardcore cartels (horizontal price-fixing, market-sharing and output-limitation agreements).[539] The margin of appreciation left to the GVH

536 Tóth (2010) op. cit. 12.

537 Decision No. 1392/B/2007 (I. 27.) of the Constitutional Court, III. 1.

538 By contrast, Tóth claims that „in respect of sanctions, Hungarian competition law continues to tread its own path, without following the calculation of fines introduced by the European Commission". Tóth (2018) op. cit. 14.

539 Paragraph 30 of communication No. 11/2017.

in adjusting the fine for deterrent effect, the 10% total turnover cap on the fine, leniency and considerations regarding the undertakings' ability to pay are all important substantive elements gleaned from the Commission's guideline.[540]

3.4.3 Spontaneous Approximation in Other Member States' Fining Policies

It is worth stressing that it is not only the German and Hungarian NCA who resorted to the spontaneous approximation of national fining policies. A number of other Member States have also "voluntarily converged their procedural rules to the EU procedural provisions applicable to the Commission".[541] Cseres compiled a comparative table on the convergence of national rules to those governing the Commission in competition law cases, which in 2010 included 9 Member States that calculated fines applying a maximum threshold of 10% of the undertaking's turnover (besides Hungary[542] the table includes the Czech Republic, Slovenia, Slovakia, Latvia, Romania, Lithuania, Bulgaria and Poland).[543]

Nine years on, a brief survey of those national competition rules I can access from a linguistic point of view show that other Member States have also followed suit, spontaneously harmonising their fining rules to the Commissions' guideline. These Member States include the UK (CMA's Guidance CMA 73)[544], Belgium (Guideline of 26 August 2014 on fines for undertakings)[545] and France (Communication of 16 May 2011 on the calculation of fines).[546] Their fining

[540] Paragraphs 51–52 of of communication No. 11/2017 and paragraphs 30–31 of the 2006 guideline. Although the soft law nature of guidelines and communications is also a shared feature, I do not consider the nature of the formal legal source an aspect of spontaneous approximation. In fact, several Member States adopt binding legislation to regulate the calculation of fines.

[541] Cseres (2010) op. cit. 17. Indeed, the ECN Working Group's Decision-Making Powers Report of 31 October 2012 concludes, that "A significant degree of voluntary convergence of Member States' laws has been achieved to date. Basic elements of decision-making powers and procedures are present in all or in a very vast number of jurisdictions. […] This demonstrates that national legislators have made clear efforts to make their procedures for the enforcement of Articles 101 and 102 TFEU more convergent. The trend to take account of developments elsewhere in the ECN is welcome. It has however not led to uniformity."

[542] Articles 12 and 21 of the Competition Act.

[543] Cseres (2010) op. cit. 18.

[544] CMA's Guidance of 18 April 2018 as to the appropriate amount of a penalty.

[545] Lignes directrices concernant le calcul des amendes pour les entreprises et associations d'entreprises prévu à l'article IV.70, § 1, premier alinéa CDE pour infractions aux articles IV.1, § 1 et/ou IV.2 CDE, ou aux articles 101 et/ou 102 TFUE.

[546] Communiqué du 16 mai 2011 relatif à la méthode de détermination des sanctions pécuniaires.

rules calculate with the 10% total turnover cap, consider gravity and duration of the infringement and adjust for deterrence. At the same time, certain minor differences as to the baseline of the basic amount, as well as certain mitigating and aggravating factors persist. Save for minor differences, these national procedural rules on fines are further evidence of the trend of spontaneous approximation.

3.5 Possible Explanations for the Spontaneous Approximation of National Fining Policies

In light of the fact that Article 5 of Regulation 1/2003 furnishes Member State NCAs with a broad mandate to adopt national fining policies in cartel and abuse of dominant position cases, the question arises: why did NCAs fail to make use of their leeway in designing an autonomous national fining policy? Are there any special attributes of EU competition policy that are conducive to spontaneous approximation?

To determine whether or not the Bundeskartellamt and GVH policies on fines were a case of true spontaneous approximation and to unpack the possible reasons for this phenomenon, in 2019 I conducted interviews with members of the Commission's staff, Bundeskartellamt and Gazdasági Versenyhivatal and other officials and experts active in the field of competition law. The questions presented were the following: Was there an express or unwritten Commission policy on fines that encouraged Member States to align their respective rules with the Commission's guideline on fines? Was there any exchange between the Commission and the NCAs on this issue?

Summarizing the answers received, there seemed to be no express or tacit agenda set forth by the Commission encouraging NCAs to adapt their policies to that of the Commission. The Commission's staff and Hungarian and German NCA officials interviewed confirmed, that NCAs were not encouraged in any way by the Commission to follow its guideline. This statement was echoed by all those participating in the interview, notwithstanding the fact that the ECN+ Directive and the underlying impact assessment clearly show that the Commission now takes the view that divergences between national fining policies render EU level competition law enforcement inefficient.

What then, could be the reason for the perceptible spontaneous approximation of national rules governing the regulation of fines? The possible answer to this question is manifold, in fact, it seems that the parallel enforcement of European

competition law by national competition authorities, the institutional framework of the ECN and the fundamental rights standards and principles attached to its enforcement may be particularly conducive for the convergence of related national rules.

3.5.1 Harmonisation 'spill-overs'

The context of EU competition policy seems to play a prominent role in the emergence of spontaneous approximation. In particular, the 2003 decentralization of competition law enforcement and the ensuing two-fold mandate of national competition authorities renders voluntary national regulatory alignment increasingly likely. Since national NCAs are wearing double hats, proceeding in cartel and abuse of dominant position cases of both EU and domestic relevance, Member States already aligned their complete substantive legislation governing cartels to Articles 101 TFEU. National provisions on abuse of dominant position may be more stringent than Article 102 TFEU, yet as far as the NCAs considered in this study are concerned, we still see the application of the same national fining rules to both EU-relevant and domestic cartel and abuse of dominant position cases.

In effect, substantive EU competition rules spill over to national legislation, which then seem to exert a pull effect on procedural rules as well.[547] József Sárai of the GVH pointed out that while there is no obligation for NCAs to follow the Commission's fining policy, for reasons of consistency, in light of identical substantive rules on cartel and abuse of dominant position cases with EU relevance, it makes sense to apply similar fines. Indeed, since NCAs enforce EU competition rules on behalf of the Commission, who in turn may take over EU-relevant cases at any time, from the perspective of equal treatment of

[547] In fact, spontaneous approximation may also take place as a form of gap-filling, where EU judicial law-making offers conceptual solutions for national regulators. Discussing a similar pull effect of European terms and provisions of private international law, Kramer describes spontaneous approximation in the field of national rules on civil procedure: „Private international law rules may also result in a gradual and 'spontaneous' approximation of civil procedure. This may be the consequence of the inclusion of necessary definitions of procedural issues or measures. These definitions are seldom found in the Hague conventions, and these conventions of course lack a uniform interpretation by an international court. The EU private international law instruments contain explicit definitions, and the ECJ has also played an important role in this regard." Kramer explains that some of these definitions shall be borrowed by national procedural laws, resulting in converging standards. KRAMER op. cit. 129–130.

undertakings, it make sense to apply similar fining rules, irrespective of which competition authority handles their case.[548]

This does not however explain why the NCAs choose to apply the very same fining rules for domestic cases. An argument for standard rules applying to both EU-level and domestic cases could be transparency and the reduction of transaction costs. A different fining regime for domestic cases would unnecessarily complicate the system. As Tihamér Tóth notes, "the GVH has always been open to following EU case law and the practice of the EU Commission. Even when it had no legal obligation to do so, it often relied upon the relevant judgments of the EU courts and the relevant guidelines of the Commission."[549] András Tóth, Vice President of the Hungarian Competition Authority and Chair of the Competition Council of the Hungarian Competition Authority speaks of the need to avoid that duplication of regulatory efforts. Since the Commission's guideline on fines was a tried and tested measure, there was no need to come up with a largely different national solution for the calculation of fines.[550]

Based on the above, one could arrive at the conclusion that the alignment of national substantive competition rules to those of the EU may exert a *pull effect on national regulators* to voluntarily align procedural rules as well. Therefore, the fact that a national legislator is bound to harmonise national rules with primary law governing cartels and abuse of dominant position may be conducive for spontaneous approximation in the same Member State in the ambit of fines.

3.5.2 Policy Learning or Agent Relationship

The borrowing of specific standards could be the result of the specific institutional framework of competition law enforcement. More specifically, spontaneous

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[548] This view is also held in Hungarian literature. As Tihamér Tóth observes, „equal treatment demands that the sanctions imposed on a company should not differ according to the identity of the competition agency. For the sake of consistency and the integrity of the system, national competition authorities should not be allowed to adopt significantly differing fines for the same, or for the same type of infringement". Tóth (2013) op. cit. 25. The danger of forum shopping on behalf of undertakings may also be avoided through the consistent application of converged rules. Willem Kist–Tierno Centella op. cit. 383.

[549] Ibid, 4.

[550] "Even in areas where there was no formal law harmonisation obligation, the Hungarian legislator, relying on the proposals elaborated by the GVH, imported certain procedural instruments which worked well on the European level." Tóth (2013) op. cit. 4.

harmonisation may be the *product of horizontal cooperation within the ECN* or a hierarchical agency relationship between the Commission and the NCAs.

As far as the voluntary, cooperation based explanation for convergence is concerned, comparative law literature teaches us that legal transplants are relied upon when regulators are looking to find solutions to "fill a gap or meet a particular need in the importing country".[551] Instead of developing their own regulatory response, regulators will lower transactions costs by copying a working solution developed by another regulator, often relying also on the practice developed under the transplanted provisions. As echoed by András Tóth, Chair of the Competition Council, when explaining the rationale for aligning Hungarian fining rules to those of the Commission, "the underlying reason for these legal transplants could be that once these rules and enforcement methods work effectively and efficiently in the hands of the Commission, they will also prove successful in the hands of the NCAs."[552]

Certain solutions are developed by NCAs through considering the Commission's soft law measures and monitoring other NCA's solutions, as was the case with the first Hungarian communication on fines: „the communication was not a simple copy of the relevant Commission document. [It] involved the study of similar documents from various jurisdictions, of which the EU model was just one."[553] In the context of European competition law enforcement, borrowing solutions is facilitated by the ECN, a network of interdependent EU competition authorities[554] where cooperation and policy learning takes place.[555] The ECN has issued several recommendations to boost voluntary convergence, covering areas such as investigative powers and sanctions, collection of digital evidence, setting of priorities, commitment procedures[556] etc. As such, the ECN has been "operational in invigorating policy discussions and policy learning between its members with visible effects on the design of the EC competition policy,"[557] having a "clear influence on both EU and national competition laws,

551 Mousourakis op. cit. 227.

552 Cseres (2017) op. cit. 196.

553 Tóth (2013) op. cit. 25.

554 Monti op. cit. 19.

555 Cengiz (2016) op. cit. 18.; Cseres op. cit. 193.

556 http://ec.europa.eu/competition/ecn/recommendation_powers_to_investigate_enforcement_measures_sanctions_09122013_en.pdf; http://ec.europa.eu/competition/ecn/ecn_recommendation_09122013_digital_evidence_en.pdf; http://ec.europa.eu/competition/ecn/recommendation_priority_09122013_en.pdf; http://ec.europa.eu/competition/ecn/ecn_recommendation_commitments_09122013_en.pdf.

557 Cengiz (2009) op. cit. 20.

demonstrated by the voluntary harmonisation of procedural laws."[558] The function of the ECN as a framework of policy learning allows for the "the adoption of shared concepts and principles [and] makes it possible to compare models adopted under national law, to share experiences and best practices and, if appropriate, to change national law or practice in the framework of an osmotic process."[559]

The concept of the ECN simply as a framework of policy learning, however, fails to explain why the primary blueprint for NCAs voluntary alignment was the fining policy conceived by the European Commission and not that of any other competition authority participating in the network. In this respect, it must me stressed that even in the context of decentralized competition enforcement and horizontal cooperation in the ECN, the Commission plays a special role: it is characterized by the dominance of the Commission in guiding the process of regulatory convergence.[560] The ECN was developed mainly by the Commission and as Townley suggests, "the Commission sees the ECN as an important antidote to the risk of diversity."[561] As Cseres points out, the "comparison of national laws within the ECN seems to be steered from the centre by the Commission, establishing the EU rules as the benchmark for harmonisation. While the Commission was seemingly decentralising enforcement powers, in fact it has retained a central policy-making role but without any control mechanism."[562] The steering role of the Commission is coupled with the idea that procedural rules elaborated by the Commission, such as those governing fines, proved to be efficient on the level of EU competition law enforcement and shall therefore also serve NCAs well.[563]

Meanwhile, the *concept of agency* was also proposed by Dunne to explain the need for approximating national fining policies. The idea of an agency relationship between the Commission and NCAs rests on the premise that "NCAs are auxiliary organs of the Commission with respect to decentralized application of the competition rules, whose activities thus form an integral part of the Commission's enforcement mission. […] The logic of agency suggest that harmonisation of sanctions is not merely permissible but actually essential

[558] Cseres (2010) op. cit. 26.

[559] Nazzini op. cit. 29–30.

[560] Dunne op. cit. 472.; Tóth (2013) op. cit. 8.

[561] Weiss (2018) op. cit. 25; Townley op. cit. 349.

[562] Cseres (2010) op. cit. 41.

[563] Ibid, 39.

insofar as the outcome of NCA enforcement should be as if enforcement is by the Commission."[564] This approach seems straightforward, since NCAs may be handling antitrust cases that affect the trade between Member States, moreover the Commission may at any time take over such cases from the NCAs. The aggregate nature of EU competition law enforcement is further underlined by the fact that fines imposed by NCAs for violation of cartel or abuse of dominant position prohibitions in cases of internal market relevance are covered by the *ne bis in idem* principle,[565] and the Commission is barred from sanctioning the affected undertaking as well.[566] Coherence in fining practices is therefore indispensable due to the hierarchical, agency relationship between enforcers and the predictability of outcome, no matter which enforcer handles the case.[567] While this concept is appealing, it does not explain why the Union legislator had chosen to uphold the principle of procedural autonomy in this regard and opt out from harmonising fining policies from the outset.

3.5.3 Procedural Convergence Through Cooperation

A more universal narrative for the convergence of national fining rules tries to capture the process by focusing on the multi-dimensional relationship between the Commission and the NCAs, and the tension between procedural autonomy, the uniform application of EU law and the protection of undertaking's rights. In this reading, procedural convergence takes place in a multi-dimensional force field of competition law enforcement, with pull effects of different nature leading to an incremental alignment of, among others, national fining policies.

The system is multi-dimensional, because while the Commission plays a central role due to its privilege of taking over cases, its information rights and the bindingness of its decisions, enforcement of EU competition law is based on cooperation, both vertical and horizontal between the Commission and the NCAs, respectively. As Weiß elaborates, the system "is not so much a hierarchical multi-level network, but much rather a common European administration characterised and made up by mutually interwoven European and national

[564] Dunne op. cit. 470–471.

[565] Cf. Cseres (2017) op. cit. 191.

[566] Kienapfel op. cit. 1203–1204.

[567] Dunne op. cit. 463.

authorities cooperating in an abundance of ways."[568] Cooperation between the Commission and the NCAs includes according to Regulation 1/2003/EC information and consultation procedures (Article 11), exchange of evidence (Article 12) and mutual assistance (Article 20-22). Besides the laconic rules on cooperation laid down in secondary law, ECN meetings and workshops help fill the gaps left in respect of procedural guarantees, "developing an extensive body of uniform competition policy and harmonising issues not regulated in Regulation 1/2003, namely procedural issues and sanctions."[569]

The existence of divergent procedural laws within the EU is complicated by the different applicable fundamental rights regimes attached to them. However, when it comes to cooperation for the purposes of competition law enforcement, i.e. information and evidence exchange as well as mutual assistance, these shall fall under the scope of Union law. Accordingly, it is the EU fundamental rights standard that shall apply,[570] or, alternatively, the more stringent national fundamental rights regime of the proceeding NCA.[571] The EU fundamental rights regime is interpreted by the CJEU which has on several occasions delivered judgments on the enforcement of fundamental rights in competition case. Hence, the CJEU's jurisprudence on defence rights such as the right to refuse to give evidence, the presumption of innocence, attorney-client privilege etc. are also important elements of EU competition procedural law, which find their way into national procedural rules.[572]

Convergence is not only driven by NCAs acting as regulators of relevant procedural provisions,[573] but also national courts, which, reviewing decisions

[568] Weiss (2008) op. cit. 26.

[569] Ibid, 25.

[570] Ibid, 71.

[571] But only in case the higher level of proection does not compromise the primacy, unity and effectiveness of EU law, see: Case *Melloni* (C-399/11) [2013] ECLI:EU:C:2013:107, para 60. Meanwhile, „where there is a leeway for harmonisation, such as in the case of antitrust law, one must proceed with caution when invoking the supremacy, unity and effectiveness of Union law to limit national fundamental rights protection." Dannecker op. cit. 15.

[572] Dannecker argues for the development of a European fundamental rights standard in antitrust cases to forego the fragmentation of the standard of protection along the lines of the allocation of cases between NCAs and the Commission, ibid.

[573] Tóth, referring to Hungarian regulatory practice in the field of competition law underlines that „Hungarian harmonisation efforts did not only take as a basis EU legislation and soft law but also the case law of the EU Courts. […] [T]he Competition Council based its decisions on the principles of the EU courts' case law and the soft law documents issued by the EU Commission. A divergent interpretation of EU and Hungarian competition norms was the exception to the rule, a consequence of human factors rather than the result of conscious resistance." Tóth (2013) op. cit. 7.

of NCAs in competition cases make references to CJEU fundamental rights case-law.[574] Finally, respect for fundamental rights in the course of the taking and handling of evidence, the information gathered by the authorities enforcing competition law shall have an effect on the legality of sanctioning decisions, i.e. fines and other sanctions imposed. More importantly, in the case of similar sanctions, there is an assumption of comparability of procedural rules and guarantees and requests for assistance from other NCAs will be readily granted.[575] This assumption may induce NCAs to align their sanctioning policies to avoid scrutiny of their procedural and fundamental rights standards and to ensure smooth cooperation with other enforcers. In the multi-dimensional framework of competition law enforcement, convergence may come about in specific areas where the effectiveness and the unity of EU law require the consistency also of procedural rules applied as a consequence of the enforcement of harmonised substantive law.

3.6 Summary of findings

In the past decade, we have witnessed a gradual regulatory alignment among others in the field of national fining policies, with the Commission's guideline on fines serving as the main template. While NCAs were in no way bound to implement informative soft law measures of the Commission, they nevertheless chose not to make use of their regulatory leeway and design completely new fining policies. Instead, they ostensibly filled the regulatory gap with solutions from the Commission's guideline. This holds true for both 'old' and 'new', 'big' and 'small' Member States of the EU as substantiated by the two case studies presented above. Consequently, approximation pulls seem to be stronger than the possible differences in regulatory or competition law traditions of experienced or new Member States.

Based on this chapter's findings, one may conclude that it is in the interest of all relevant players of the European competition law landscape that national fining rules converge: similar fining policies are beneficial for undertakings who can predict the maximum amount of fines they will receive; borrowing standards from the Commission's guidelines reduces transaction costs for

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[574] Weiss (2016) op. cit. 264; Weiss (2008) op. cit. 23. See for example decisions of the Hungarian Kúria on the evaluation of evidence (Kfv. II. 37. 110/2017/13) and the presumption of innonce (Kfv.II.37.672/2015/28) in competition cases.

[575] Ibid 267 and Weiss (2008) op. cit. 67.

NCAs, while also fostering mutual trust and ensuring smooth cooperation with other NCAs; finally, it is in the interest of the Commission, as evidenced by the push towards harmonisation in the ECN+ Directive.[576] As for the application of identical fining rules for both EU level and national cartel and abuse of dominant position cases, there seems to be no clear answer for this development. However, one may assume that the requirements of legal clarity, transparency and consistency, as well as the possible pull effect of identical or largely similar substantive provisions on procedural rules are the main factors at play.

Precisely what role the Commission plays in driving convergence was hard to determine, since the findings of my interviews and the relevant literature stand in stark contrast with each other. While no direct pressure for alignment of fining policies coming from the Commission was confirmed by my interviews, Cseres states that "there is also strong top-down pressure from the Commission to the Member States to align national competition rules to the EU law provisions."[577] Consequently, this line of inquiry was inconclusive. Nevertheless, based on the 2014 Staff Working Document of the Commission and the subsequently initiated ECN+ Directive adopted by the co-legislators, the Commission was of the view that voluntary convergence of national fining policies were insufficient for the effective enforcement of EU competition law. Unfortunately, the impact assessment prepared for the ECN+ Directive is very laconic on this issue and fails to provide convincing data to substantiate how the by now strongly aligned national fining policies render EU competition law enforcement ineffective. Indeed, the national fining rules I considered in this chapter went beyond the fining provisions laid down in the Directive and are more strongly aligned to the guideline of the Commission. In light of this, it is questionable how the Directive's rudimentary provisions can contribute to a more effective enforcement by codifying provisions already aligned by NCAs.

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[576] It is worth mentioning that the existing framework and forces of spontaneous approximation in the field of competition law enforcement are not without criticism. Cseres underlines that a Commission led ECN cannot fulfill its role as a platform of equals where voluntary policy learning and borrowing of legal transplants can take place based on free choice of proven, efficient solutions. Indeed, "national laws should not be steered by the Commission and should not be based on the benchmark provided by the EU rules." Cseres (2010) op. cit. 28. The system and functioning of the ECN should be adjusted if it is "to serve as a valid framework for regulatory competition between Member States' laws", leaving it up to a "competitive process to yield the most effective or most efficient rules" (Ibid.) from among all national and EU solutions designed for the purposes of competition law enforcement. See also: Dunne op. cit. 464.

[577] Cseres (2017) op. cit. 192.

Nevertheless, the ECN+ Directive has now in part replaced the process of gradual and voluntary alignment in NCA fining policies witnessed over the past decade with harmonised provisions. Owing however to the abovementioned rudimentary nature of these harmonising provisions referring solely to maximum thresholds and the due consideration of gravity and duration, NCAs' spontaneous approximation for filling the remaining gaps with detailed rules may continue unobstructed.[578]

578 Cf. Townley suggests that the push towards incremental harmonisation may be misguided, instead, some diversity should be maintained: „legal provisions cannot be applied perfectly uniformly. The real question is how much difference is desirable in the EU. […] The idea is that the EU Courts lay down the law. However, the Commission and the NCAs can experiment in the gaps." Townley op. cit. 243.

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