# III. FUNDAMENTAL QUESTIONS OF EU SOFT LAW

## *1. Introduction and overview*

### 1.1. Introduction

The purpose of Part III of this work is to address selected general issues of EU soft law in order to set the basis for the more specific questions dealt with in Parts IV and V. It is not intended to provide an all-encompassing account of EU soft law here, but above all to discuss matters which are relevant also for the following parts of this work. This is why, for example, no comprehensive taxonomy of EU soft law acts is provided for,[391] but only an overview in terms of the potential originators and the potential addressees of EU soft law, thereby referring also to legally non-binding EU acts below the level of soft law (2.). Subsequently, the focus is shifted to the competences to adopt EU soft law (3.) and to the effects of EU soft law (4.). These aspects shall be complemented by chapters on the purposes of (EU) soft law, essentially reflecting upon the reasons for its adoption, and for conferring (EU) soft law powers in the first place (5.), and the judicial review of EU soft law (6.).

Chapter 3 is the most expansive chapter of Part III and already at this stage requires some further remarks on the approach which shall be taken in it. It shall address the meaning of Article 288 TFEU for EU soft law and shall address the question whether the principle of conferral – the primary paradigm when it comes to the EU's competence order – is applicable also in the context of EU soft law. The answer to this question is far from obvious. Having addressed the relevant case law of the CJEU, we shall also take into account the explicit legal bases for the adoption of EU soft law – in particular: recommendations and opinions as those legally non-binding EU acts mentioned in Article 288 TFEU. This exercise serves a number of objectives. First, on a general scale, it is intended to show that the manifold use of soft law is not only a consequence of everyday administrative practice, but is actually – to some extent at least – explicitly mapped out in the Treaties. Second, it shall allow us to distinguish, in the given context,

391 For different approaches in the literature to build such a taxonomy see Ştefan/Avbelj/Eliantonio/Hartlapp/Korkea-aho/Rubio, Soft Law 17–20.



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different categories of competence clauses. Third, and more specifically, the explicit competences in the Treaties to adopt soft law may be telling with regard to the question of whether the principle of conferral also applies in the context of soft law. *Prima facie*, the multitude of such competences in the Treaties suggests that it does. An in-depth analysis, as we shall see, will lead to more nuanced results. Fourth and fifth, an account of the explicit Treaty competences to adopt recommendations and opinions may allow for insights as to the substantial difference between these two acts and as to the question whether the Treaties provide for a *numerus clausus* of soft law acts.

### 1.2. Overview of the historical and current use of EU soft law

Community law and, since the entry into force of the Treaty of Lisbon: exclusively Union law have/has developed into a highly integrated legal order, in the view of some even into 'the most advanced form of regional integration in the world'.[392] It builds a stark contrast to inhomogeneous, decentralised public international law in which – through its founding Treaties – it roots.[393] This holds true notwithstanding the incorporation of parts of public international law in the EU legal order.[394] Unsurprisingly, also at the level of *soft* law the Community/Union legal order on the one hand, and public international law on the other hand, exert a 'different dynamic'.[395] This can be exemplified by comparing the politically often very loaded soft law acts of public international law, eg the UN Universal Declaration of Human Rights,[396] with guidelines adopted by the European Securities and Markets Authority (ESMA), a common example of EU soft

392 Terpan, Soft Law (2015); for the special character of law as object and agent of integration see Dehousse/Weiler, Dimension 234.

393 See Bianchi, Butterfly 209 f; see also Kelsen, Law 93, emphasising that completely decentralised law is 'primitive law'.

394 See Article 216 para 2 TFEU and the CJEU's case law, starting with cases 21–24/72 *International Fruit Company*; see also Craig/de Búrca, EU Law 392 f.

395 Klabbers, Courts 221; for the different framework of EU soft law and public international soft law see also Ferran/Alexander, Soft Law Bodies 759; refusing a transferal of the international law concept of 'soft law' to EU law: Hummer, Interorganvereinbarungen 97. While *Terpan* emphasises that EU soft law is not 'intrinsically different from soft law in the international realm', he does not refuse to acknowledge existing deviations: Terpan, Soft Law (2013) 4.

396 For similar examples see Cannizzaro/Rebasti, Soft law 214.



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law.[397] The former has a broad scope, its provisions are (and have to be) relatively short and hence open for different interpretations. The latter, on the contrary, normally are very specific, detailed and complex.[398] This exemplary comparison shall not suggest that more general EU soft law does not exist,[399] or that public international soft law is always short and fundamental,[400] but it ought to illustrate that due to Community/Union law's higher degree of integration also its soft law instruments tend to be more strongly integrated in everyday administration. More generally, it can be stated that they encompass a larger scale, ie they are more versatile as regards content, form, and purpose.[401]

Soft law – or the 'power to exhort and persuade', as the Court has recently phrased it[402] – has formed part of the ECs', and the EU's respectively, policy-making tools[403] ever since its foundation.[404] This is reflected upon in the EEC's founding treaty which in its Article 155 provides that the Commission shall 'formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Com-

397 Eg ESMA, Guidelines on stress test scenarios under the MMF Regulation, ESMA34–49–495 (27 January 2023); see more generally van Rijsbergen, Legitimacy.

398 While a high degree of detail may be an indicator of legal bindingness, an 'automatism' in that respect is inappropriate. Also soft law may contain detailed rules; see case T-721/14 *Belgium v Commission*, para 72; Opinion of AG *Bobek* in case C-16/16P *Belgium v Commission*, paras 128 f; stressing the increasing complexity of EU soft law in general: Korkea-aho, Courts 471. For the general (early) criticism of over-regulation by EU law see – in the context of the common agricultural policy – Opinion of AG *Verloren van Themaat* in case 292/81 *Jean Lion et Cie*, 3913, complaining about '[t]he flood of rules and regulations which [were referred to], quite rightly, as a "labyrinth"'.

399 See eg the CFR which for the time between 2000 and 2009 is to be qualified as a soft law act or, earlier, the Joint Declaration of the EP, the Council and the Commission of 27th April 1977, C103/1, on fundamental rights; see Österdahl, Soft Law 37; for the effectiveness of this kind of soft law explained with a view to the buzzwords 'visibility' and 'pedagogy' see Sarmiento, Soft Law 280 f.

400 See eg the non-binding procedures according to Articles 279–285 ('settlement of disputes') and Annex V of the UN Convention on the Law of the Sea (for the non-bindingness of the respective output see Article 7 para 2 of Annex V); see also the example given by Wirth, Assistance 225.

401 Similarly: Terpan, Soft Law (2013) 40.

402 Case C-16/16P *Belgium v Commission*, para 26; case C-501/18 *Balgarska Narodna Banka*, para 79; case C-911/19 *FBF*, para 48.

403 See case 293/83 *Gravier*, paras 22 f, according to which soft law acts contribute to the establishment of a policy.

404 See Sarmiento, Soft Law 264, with further references; for the field of competition law see Georgieva, Soft Law 226; D Lehmkuhl, Government 147 f.



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mission considers it necessary'.[405] The wording of this provision allows for a wide-spread use of Commission soft law. Similarly, Article 189 TEEC (Rome) and Article 161 of the Treaty establishing the European Atomic Energy Community (TEAC, Rome) stipulate that both the Council and the Commission shall, 'in accordance with the provisions of this Treaty, [...] make recommendations or deliver opinions'. While in the original version of the Treaty establishing the European Coal and Steel Community (TECSC) recommendations are – somewhat misleadingly – defined as: 'binding with respect to the objectives which they specify but [they] shall leave to those to whom they are directed the choice of appropriate means for attaining these objectives',[406] the Treaties of Rome apply a linguistically more orthodox (but still rather loose) definition,[407] according to which recommendations (and opinions) 'shall have no binding force'.[408]

In practice, already early in the history of the ECs their institutions, including the European Parliament and the European Council as 'institutionalised' in 1974,[409] have made use of a much wider set of soft law instruments than that explicitly provided for in the Treaties.[410] With regard to the Commission, its soft rule-making in the field of State aid policy may serve the purpose of illustration.[411] Starting in the early 70s, there has been a 'gradual increase' of State aid-related soft law acts such as guidelines, frame-

405 Similarly: Article 124, 2nd indent TEAC (Rome); Article 14 para 1 TECSC (Paris). Already at an early stage, Community soft law had been dealt with by the Court: see eg joined cases 1 and 14/57 *Usines à tubes*, in particular 114 f; referring to the so-called 'Christmas Communications' of December 1962 as 'probably first case and still primary example of administrative rules': Peters, Typology 414; similarly: Ştefan, Soft Law 67: 'first soft law instruments ever issued'; with regard to the example of the Commission Communication concerning the *Cassis* judgement see H Hofmann, Normenhierarchien 217.

406 Article 14 para 3 TECSC (Paris). Note the similarity to the directive as defined now in Article 288 TFEU; emphasising the equivalence of recommendations under the ESCS and directives under the E(E)C: Grunwald, Energierecht 103 (in particular fn 15).

407 See Schermers/Blokker, Institutional Law, § 1217.

408 Article 189 TEEC (Rome); Article 161 TEAC (Rome); see Bothe, Soft Law 761.

409 For this institutionalisation see Nicolaysen, Gemeinschaftsrecht 28; Everling, Wirkung 139. The European Council's institutionalisation *stricto sensu* – that is its elevation to an institution of the EU – was brought about only by the Treaty of Lisbon in 2009.

410 See Senden, Soft Law 4. For an early categorisation of the different acts and their creators see Bothe, Soft Law 762 ff.

411 See Aldestam, Soft Law 14–16.



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works, communications or codes adopted by the Commission.[412] While the State aid provisions of primary law have provided and still provide for the possibility of Council regulations fleshing out the Treaty provisions,[413] after two unsuccessful Commission proposals in 1966 and 1972 respectively, the legal possibility of a Council regulation practically had for a long time become irrelevant.[414] The State aid regime within which the Commission exercises considerable (and 'hard') powers also makes its soft law output highly authoritative. Accordingly, non-compliance by the MS with the respective soft law has led to re-evaluations and negative decisions.[415] More generally, in its seminal White Paper of 1985 – designated by *Pelkmans* as an 'exercise in deregulation'[416] – the Commission announced to make increasing use of communications.[417]

The Council has continuously rendered soft law acts in order to utter its opinion and bring in its ideas, often in reaction to a policy initiative set by the Commission. These acts have been named resolutions,[418] conclusions, declarations, etc.[419] The European Parliament has expressed its opinion in particular where it has been consulted in a decision-making procedure,

412 See Cini, Soft law approach 198; postulating an increase of Community soft law more generally after 1968: Ştefan, Soft Law 12.

413 Now: Article 109 TFEU.

414 See Cini, Soft law approach 199. In the late 90s, eventually two Council Regulations on exemptions from the State aid rules and on procedural issues were adopted (meanwhile replaced by new versions). That the Commission's soft output does not infringe the Council's legislative competences in this context was confirmed by the CJEU *inter alia* in case C-526/14 *Kotnik*, para 59.

415 See Cini, Soft law approach 201 f.

416 Pelkmans, Design 364.

417 See Commission, 'Completing the Internal Market' (White Paper), COM(85) 310 final, para 155.

418 For the Council's adoption of recommendations which had been gradually superseded by resolutions see Everling, Wirkung 138. On the important role of resolutions in EU law more generally see von Bogdandy/Arndt/Bast, Instruments 115–117.

419 Eg Council Resolution on a new approach to technical harmonization and standards, C 136/1. While the adoption of these acts are not (explicitly) provided for in the Treaties, the Treaty concerning the Accession of the Republic of Croatia to the European Union (2012), for example, acknowledges their existence and their effects (Article 3 para 3). These designations are not very distinctive: see case 32/79 *Commission v United Kingdom*, paras 11 f, in which the Court uses the terms 'resolution' and 'declaration' as synonyms; with regard to the similarity of 'declarations' and 'conclusions' see Senden, Soft Law 198. On the lack of distinction between different soft law acts (recommendations, declarations, conventions) in public international law see Schermers/Blokker, Institutional Law, § 1216.



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either obligatorily according to the Treaties or on a facultative basis.[420] But also emanations on its own motion, above all in the field of foreign policy, have had a long history.[421] The latter, however, often do not display any normative content and hence do not qualify as soft law. As regards the European Council, many of the (both legal and soft law) acts – namely those which did not have an explicit Treaty base – have belonged to the realm of public international law rather than that of Community/Union law.[422] This is the case in particular in foreign and security policy which has had a strong intergovernmental character, and – to a lesser degree – still has this character.[423] But also in other policy fields the European Council has expressed itself by means of soft law and other legally non-binding acts, 'in different kinds of *Communiqués*, under different names, like press releases, declarations, conclusions and resolutions',[424] some of which have had a pivotal influence on the political development of the ECs/EU.[425]

While a variety of soft law instruments by name unknown to the Treaties has been used by the mentioned institutions, when it comes to general-abstract rule-making up until the late 80s the so-called Community method appears to be the predominant approach.[426] The Community method designates integration by means of supranational – that is by definition: hard – law (Community/Union law), with a supranational executive body independent of the MS pursuing the Community/Union interests (the Commission), with the possibility to overrule a minority of MS in the legislative process (qualified majority voting in the Council), and with the possibility of judicial enforcement (before the CJEU) at hand.[427] Starting in the 90s,

420 See Constantinesco, Recht 456–460.

421 See eg Kreppel/Webb, Resolutions; with regard to the Council conclusions adopted in the context of the CFSP see Council, Comments on the Council's Rules of Procedure (2022) 100 f.

422 See Constantinesco, Recht 545–547; Nicolaysen, Gemeinschaftsrecht 44; Wellens/Borchardt, Soft Law 296 f, with further references and 299; see, however, the inclusive approach in favour of Community law of the CJEU as expressed eg in case 38/69 *Commission v Italy*.

423 See Wellens/Borchardt, Soft Law 298 f; note, however, that a number of acts adopted under CFSP actually display legal bindingness, and only lack enforceability; see Terpan, Soft Law (2015) 80.

424 Wellens/Borchardt, Soft Law 298.

425 Eg the Conclusions of the Presidency of the European Council (5 December 1978), *inter alia* referring to the introduction of the European Monetary System (EMS).

426 See Terpan, Soft Law (2015) 87.

427 See Commission, European Governance – A White Paper, COM(2001) 428 final, 6; see also Costa, European Parliament 60; for the role of the Court heed its elemental



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this has changed and the still dominant Community method in some instances has given way to softer forms of governance – regularly at the cost of Parliament participation and Court control.[428] This transformation can be perceived as the result of a growing discontent with EC legislation since the early 90s.[429] In the late 90s, the number of soft law has seen another boost, in particular in the area of competition and State aid law.[430] While soft law instruments are still firmly situated within the toolkit of EU governance, also with regard to (hard) law as the traditional method of EU regulation some mechanisms have been introduced in order to improve (in different ways) the legislative and other law-making processes.[431] These small reforms reflect the influence emerging new modes of governance have had (also) on traditional regulation.[432]

In 2001, the Commission in one of its White Papers proclaimed a new era of European governance.[433] In this programmatic document – which is to be understood as a response to a number of instances of governance failure in the EU[434] – the Commission, *inter alia*, called for '*combining* formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a *commonly agreed framework*. This highlights the need for close coherence between the use of different policy instruments and for *more thought to be given to their selection*' (emphases added).[435] The Open Method of Coordination (OMC) which has been applied in particular in the field of socio-economic policies since the Spring

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expression in joined cases 90 and 91/63 *Commission v Luxembourg*, 631: 'Member States shall not take the law into their own hands'.

428 See Terpan, Soft Law (2015) 88. NB that *Terpan* applies a wider understanding of soft law, also encompassing hard obligations with only soft or no means of enforcement; see ibid 74–76; Beckers, Juridification 575 f; Dawson, New Governance 4–6, with further references; Scott/Trubek, Gap 4 f; for the strong increase in legislative activity immediately before this period, starting in the mid-80s under the *Delors* Commission see Stone Sweet, Integration 204–206.

429 See Senden, Soft Law 11 f; see eg Conclusions of the Presidency of the Edinburgh European Council, 11–12 December 1992, SN 456/1/92 REV 1, 33, calling for 'clearer and simpler' Community legislation; Commission, 'Simpler Legislation for the Internal Market (SLIM): A Pilot Project' (Communication), COM(96) 204 final.

430 See Petit/Rato, Enforcement 202.

431 See Craig, Administrative Law 220.

432 See Dawson, Waves 213–216.

433 European Commission, European Governance – A White Paper, COM(2001) 428.

434 See Dawson, Waves 210.

435 European Commission, European Governance – A White Paper, COM(2001) 428, 19.



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European Council Summit in Lisbon in 2000, and which 'encourages actors to make commitment to obligations',[436] is one prominent example of such a soft governance approach.[437] According to the calculations of *von Bogdandy*, *Arndt* and *Bast*, in 2004 the most frequent forms of EU soft law – recommendations, opinions, and resolutions – amounted to 10 per cent of all Community/Union law (in a broader sense) which was in force by then.[438] Since then this share has significantly increased.[439]

The developments bolstered by the White Paper on European Governance were not embraced by all political actors. In a 2007 Resolution, for example, the Parliament criticised that 'soft law also tends to create a public perception of a "super bureaucracy" without democratic legitimacy, not just remote from citizens but actually hostile to them, and willing to reach accommodations with powerful lobbies in which the negotiations are neither transparent nor comprehensible to citizens, and [that] this may raise legitimate expectations on the part of third parties affected (eg consumers), who then have no way of defending them at law in the face of acts having adverse legal effects for them'.[440]

436 Dawson, Soft Law 7.

437 The output of OMC often does not meet the level of concreteness required for soft law according to the definition applied here (see II.1.3.4. above). This may be one of the reasons why it is rather referred to as 'soft governance' by Trubek/Trubek 343 (fn 2); see also Láncos, Facets 38, with further references. For the historical development of the OMC see eg Craig, Administrative Law 199–202; for the Commission's warning that OMC may 'dilute the achievement of common objectives in the Treaty or the political responsibility of the Institutions' – arguments which the use of soft law more generally may be confronted with – see Commission, European Governance – A White Paper, COM(2001) 428, 21; for a legal qualification of OMC see Dawson, New Governance 51–66; Terpan, Soft Law (2015) 81–84; with regard to the MS as the (potential) creators of soft law in the course of the OMC see Lafarge, Coopération, in particular 78 f; Müller-Graff, Soft Law 26.

438 See von Bogdandy/Arndt/Bast, Instruments 97.

439 See the study of Cappellina/Ausfelder/Eick/Mespoulet/Hartlapp/Saurugger/Terpan, Soft law, in particular 7 f, which may not apply the same definition/methods as von Bogdandy/Arndt/Bast, but which nevertheless shows – for the time period 2004-2019 – a clear tendency of an increase of the soft law share in the overall number of EU rule-making acts.

440 European Parliament, Resolution on institutional and legal implications of the use of 'soft law' instruments, 2007/2028(INI), para Y. It is not by chance that it is the European Parliament arguing against the merits of soft law here. After all, it is its very legislative competence (in particular in the ordinary legislative procedure) which is challenged by alternative modes of regulation; see Knauff, Regelungsverbund 299; with a view to the OMC: Borrás/Jacobsson, Method 200.



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In spite of this criticism, perceived holistically, soft law by now appears to be a well-established regulatory instrument in EU governance. While the two non-binding 'legal acts'[441] mentioned in the catalogue of the Treaties (now Article 288 TFEU) are recommendations and opinions, in practice many other designations have been in use. Due to the trend of institutional decentralisation which has strongly transformed the institutional morphology of I E(E)C/EU, in particular since the early 90s, the number of bodies adopting soft law has increased considerably.[442] Apart from the institutions, there is now – arguably *in principle* in accordance with primary law – a large number of other entities adopting EU soft law, eg the European Ombudsman,[443] the European Anti-Fraud Office OLAF, or the variety of European agencies.[444] The EU's varied reaction to the COVID-19 pandemic has again aptly displayed the importance of soft law as a tool allowing for swift regulatory action as well as its partial lack of legitimacy.[445]

441 See also case C-424/07 *Commission v Germany*, para 75, in which the Court refers to two soft law acts as 'legal instruments'; see also <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l14534&from=DE> accessed 28 March 2023, listing communications, recommendations, white and green papers as 'sources of European Union law'. The terminology the TFEU applies ('legal acts') suggests an incorporation of EU soft law in EU law; see von Bogdandy/Arndt/Bast, Instruments 111; Wörner, Verhaltenssteuerungsformen 216. While this may hold true in a perspective limited to Article 288 TFEU and related provisions, it cannot do away with the fact that legal bindingness is one of the *conditiones sine quis non* of law – also in EU law; see Hofmann/Rowe/Türk, Administrative Law 544, with regard to the 'provocation' to include legally non-binding acts in the category of 'legal acts' (The term 'provocation' in this context has already been used by *von Bogdandy*, *Arndt* and *Bast*, *opus citatum* 111).

442 See Everson/Joerges, Europeanisation 524–520; with regard to the increase of soft law-making bodies at the international level: d'Aspremont, Pluralization 185.

443 The European Ombudsman is established by primary law anyway: Article 228 TFEU.

444 See Görisch, Verwaltung 204–207; Raschauer, Verhaltenssteuerungen 686–688; Raschauer, Leitlinien.

445 See Andone/Coman-Kund, EU soft law 1; Eliantonio/Ştefan, Legitimacy; Ştefan, COVID-19 Soft Law 1; Weiß, Pandemic.



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## *2. Different forms of EU soft law: originators and addressees*

### 2.1. Introduction

As we have seen, EU soft law is of ever increasing importance. In the words of the French *Conseil d'État*, it has developed into a 'véritable méthode de gouvernance' of the EU.[446] In the following, an introductory account of EU soft law shall be given, thereby taking the actors concerned as a parameter, that is to say, with a view to its originators and its addressees. As was indicated above, EU soft law is not only adopted by the institutions but also by its bodies, offices and agencies and even – organisationally speaking – non-EU bodies. Conversely, the addressees of EU soft law acts are not only the MS and the citizens/undertakings of the EU, but may be EU institutions or bodies themselves, or even third countries. Through this approach, the multifaceted, 'far from homogeneous'[447] nature of EU soft law will become apparent – not only in terms of the actors concerned (of which different groups shall be built), but, due to the examples provided and merely as a collateral effect, also in terms of the different shape EU soft law may take and, in connection therewith, of the different purposes EU soft law may serve.

Eventually, the large body of EU output which neither qualifies as law nor as soft law shall be contoured. This is to acknowledge that besides the conceptual antipodes law and soft law there exists a third category of acts which is of eminent importance for everyday administration as well.[448]

### 2.2. Originators

#### 2.2.1. On the question of assignment

The number of creators of EU soft law is quite high, certainly higher than the number of creators of EU law. Most illustrative of this multiplicity of actors involved in the creation of EU soft law is the existence of about 40 European agencies, only some of which have the power to adopt legally

446 Conseil d'État, Droit souple 28.
447 Senden, Soft Law 23.
448 See also II.2.3. above.



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binding acts, but the majority of which may adopt soft law.[449] In an attempt to do away with this institutional opaqueness of the creation of EU soft law, its originators shall be divided in three groups: 1) the EU's institutions, 2) its bodies, offices and agencies, and 3) MS and non-EU bodies. With standard acts of EU secondary law, eg a Regulation adopted by the EP and the Council or a Commission decision, their assignment to creator(s) – namely the respective institution(s) (eg in the context of an action for annulment) or the EU (eg in the context of its non-contractual liability[450]) – is a comparatively easy task. In places, this task can be more challenging, for example where a body is empowered to take action *on behalf* of another body to which it does not belong. It is then – legally speaking – the represented body to which the action is normally to be assigned.

In accordance with this institutional assignment, the act at issue regularly can also be allocated to a certain body of law. For example, a Regulation of the EP and the Council constitutes EU law. Also in this context there may be cases where an allocation is more challenging than that. This is the case where bodies from different States or organisations are involved in a certain action; for example, where three States conclude an agreement on the establishment of a power plant in the border region of these three States. States normally cooperate with each other on the basis and by means of public international law. However, a closer look at the agreement may reveal that it shall be subject to the national law of one of the States. It then qualifies as a contract under that respective national law, not under public international law.[451] Sometimes the different actors and legal orders involved become so much intertwined that it would be difficult to assign the act at issue to either side. What is more, in such cases an assignation often is of limited value, as, failing to adequately graps the underlying complexity, it hardly provides for orientation. This is because actors from other levels may still be involved on a subordinate scale, and they may be bound by their respective law, etc.

A good example is the European Financial Stability Facility (EFSF).[452] It is a legal person under Luxembourgish law, established by the Euro-MS.

449 See Chiti, Agencies, in particular 97–100 and 102–106.

450 For the bodies, offices and agencies see eg Ruffert, Art. 340 AEUV, para 8. For the special rule applying to the ECB – which qualifies as institution of the EU and has legal personality – see Article 340 para 3 TFEU.

451 See examples provided by Schermers/Blokker, Institutional Law, § 45.

452 For the following information on the EFSF see Megliani, Sovereign Debt 585 ff. The EFSF which serves as an example here to illustrate the problems underlying the



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The EFSF's tasks are subject to a framework agreement concluded between the EFSF and the Euro-MS, which is subject to English law. Disputes between Euro-MS under this agreement are subject to the jurisdiction of the CJEU, disputes between the EFSF and one or more Euro-MS shall be subject to the jurisdiction of the national courts of Luxembourg. The EFSF concludes agreements on loans and other financial instruments to the benefit of one Euro-MS. These agreements are again concluded under English law, subject to the jurisdiction of the courts of Luxembourg. The payment obligations of the EFSF set out in these agreements are subject to compliance of the beneficiary MS with a Memorandum of Understanding (MoU), an agreement concluded between the beneficiary MS on the one hand and the other Euro-MS on the other hand. This agreement is negotiated and concluded, on behalf of the other Euro-MS, by the Commission. When acting in this capacity, the Commission is again bound by EU law, in particular the Charter of Fundamental Rights of the European Union (CFR). The mechanism as a whole cannot be assigned to one level, neither institutionally nor in terms of the applicable law. Such an allocation should be attempted only at a micro-level, that is to say with regard to the single acts involved. But even if an allocation is eventually made, because institutionally or in terms of the applicable law the respective indicators qualitatively outweigh elements pointing to other bodies or legal orders, this allocation – as announced above – may be of limited value, because it cannot do away with the named deviating elements. It is still required to consider additional (subordinate) influences which institutionally or in terms of the applicable law belong to other levels.

These principal considerations on the merits as well as on the pitfalls of assigning an act to an institution and to a legal order are meaningful not only in the context of law, but as well in the context of soft law. They should, therefore, be borne in mind also when addressing, in the following sub-chapters, the originators of EU soft law.

assignment of acts to a certain body and/or legal order, shall be considered in more detail under 2.2.4.1. below.



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### 2.2.2. The EU's institutions

The institutions as listed in Article 13 para 1 TEU all have the power – in general or only in specific cases[453] – to adopt soft law. This is explicitly expressed in Article 288 para 1 TFEU – although the respective competence is not thereby conferred – with regard to recommendations and opinions.

The European Council, to begin with, is *qua* the role accorded to it by the Treaties, literally destined to adopt soft law acts. In charge of providing the EU 'with the necessary impetus for its development' and of defining 'the general political directions and priorities thereof', but at the same time lacking 'legislative functions',[454] soft law appears to be an adequate form of expression for this institution. In practice, the European Council mostly adopts conclusions, resolutions or declarations in order to fulfil its remit. Its conclusions are adopted during each summit.[455] They may have an annex containing resolutions, declarations, reports, etc of the European Council.[456] While the European Council's conclusions, resolutions and declarations may and often do contain soft law provisions – mostly addressed to the Commission and the EU legislator, but also eg to the European Central Bank (ECB), or to the MS (or its ministers) – this assumption needs to be verified case by case. In particular, the requests to other actors uttered therein need to be concrete enough to actually have a concrete steering function.[457] The conclusions most of the time also contain other parts in which the European Council – 'without establishing concrete rules or measures' – 'stresses, recalls, notes, agrees, considers, underlines, emphasises, recognises, welcomes, appreciates, etc'.[458] The comparatively large quantity of soft law acts of the European Council shall not belie the fact that the European Council disposes of important hard law powers,

453 The possibilities of the CJEU to adopt soft law, for example, are relatively limited; see eg Nettesheim, Art. 13 EUV, para 85; see also below.

454 Article 15 para 1 TEU.

455 For a list of all European Council conclusions since 1975 see <http://www.consilium.europa.eu/en/european-council/conclusions/> accessed 28 March 2023.

456 See eg Conclusions of the Presidency of the Luxembourg European Council, 12–13 December 1997.

457 See Senden, Soft Law 194 f. The 'call[ing] on the Commission and the Member States to implement swiftly the priority projects' as laid down in Conclusions EUCO 1/16 of the European Council meeting (18 and 19 February 2016) 3, for example, does not reach the required level of concreteness.

458 Senden, Soft Law 194; see also Senden, Balance 82.



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eg regarding the election of its President,[459] its Rules of Procedure,[460] the number of Commissioners[461] or the composition of the European Parliament[462].[463]

The Council adopts a wide range of different soft law acts, in particular recommendations,[464] declarations, resolutions[465] or guidelines, the adoption of some of which are specifically laid down in the Treaties (see 3.5.2.2. below). Generally, these acts are more specific and more detailed than the European Council's (soft law) output.[466] They may be addressed in particular to the MS and the Commission, but also eg to the European Parliament.[467] Where soft law provisions are incorporated in a piece of legislation they still qualify as soft law, even though formally they are part of a legislative act.[468]

The European Parliament adopts recommendations, usually together with the Council.[469] Otherwise it makes use in particular of resolutions which cover subjects as diverse as 'European conscience and totalitaria-

459 See eg Decision (EU) 2022/492 of the European Council, based on Article 15 para 5 TEU.

460 See eg Decision 2009/882/EU of the European Council, based on Article 235 para 3 TFEU.

461 See eg Decision 2013/272/EU of the European Council, based on Article 17 para 5 TEU.

462 See eg Decision 2013/312/EU of the European Council, based on Article 14 para 2 TEU.

463 Consider also the power to amend Part Three of the TFEU according to the simplified revision procedure (Article 48 para 6 TEU).

464 See in particular the Council's general power to adopt recommendations under Article 292 TFEU.

465 For the specific purpose of Council resolutions see Cannizzaro/Rebasti, Soft law 221 f.

466 See Senden, Soft Law 176, with regard to Council recommendations.

467 Eg Article 319 para 1 TFEU.

468 See eg Article 2 of Council Decision 1999/468/EC. The criteria for the choice of procedural methods for the adoption of implementing measures laid down therein are, according to Recital 5, intended to be non-binding; see also case C-378/00 *Commission v European Parliament*, para 6.

469 For the exceptional issuance of a recommendation by the Parliament on its own see Article 36 para 2 TEU.



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nism'[470], the avoidance of food waste[471] or the situation in Ukraine[472]. These resolutions are regularly addressed to the Council and the Commission, but – as was the case with the resolution on European conscience and totalitarianism – may also be addressed eg to the parliaments of the MS, the governments and parliaments of the candidate countries, the governments and parliaments of the countries associated with the EU, and the governments and parliaments of the members of the Council of Europe. Generally, these resolutions, which often have a foreign policy thrust, if at all, aim at behavioural steering at a very high level of abstraction, and hence in the majority of cases – for lack of concreteness[473] – cannot be called soft law.[474] Against this background, it is to be understood that the CJEU acknowledges a comprehensive power of the EP to adopt resolutions: 'What is more, it must be emphasised that the powers of the Governments of the Member States in the matter do not affect the right inherent in the Parliament to discuss any question concerning the Communities, to adopt resolutions on such questions and to invite the Governments to act'.[475]

The Commission shall render recommendations and opinions according to the Treaties in a number of cases.[476] They are addressed in particular to the Council, the European Parliament[477] (opinions[478]) and the MS[479]

470 European Parliament resolution of 2 April 2009 on European conscience and totalitarianism.

471 European Parliament resolution of 19 January 2012 on how to avoid food wastage: strategies for a more efficient food chain in the EU.

472 European Parliament resolution of 6 February 2014 on the situation in Ukraine; European Parliament resolution of 1 March 2022 on the Russian aggression against Ukraine.

473 For the minimum degree of determination of soft law see II.2.1.2. above.

474 See Wittinger, Europarat 143; see also joined cases C-72/10 and C-77/10 *Costa*, para 74, with further references: 'The principle of legal certainty requires, moreover, that rules of law be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings'.

475 Case 230/81 *Luxembourg v European Parliament*, para 39.

476 See in particular the Commission's general power to adopt recommendations under Article 292 TFEU. On the dominant role of the Commission in this context see also Nettesheim, Art. 288 AEUV, para 203.

477 See eg Framework Agreement on relations between the European Parliament and the European Commission (2010), OJ L304/47, paras 21, 37 f.

478 See Senden, Soft Law 162 f.

479 See eg Commission Opinion on the Rule of Law in Poland and the Rule of Law Framework (of Article 7 TEU) <http://europa.eu/rapid/press-release_MEMO-16-2017_en.htm> accessed 28 March 2023; Commission Recommendation regarding the rule of law in Poland, C(2016) 5703 final.



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(recommendations, opinions). In practice, the Commission adopts further acts which may constitute in their entirety or at least contain soft law, in particular the so-called Communications.[480] Communications are a 'recht schillerndes und facettenreiches Phänomen'[481] [rather chatoyant and multi-faceted phenomenon] and may serve a variety of (at times overlapping) purposes – informative, explanatory,[482] preparatory (eg Green and White Papers) or concretising (eg Communications rendered in the context of competition and State aid law) purposes. Like with the other institutions, bodies, offices or agencies, also the Commission's legally non-binding output may have a merely internal scope[483] (eg so-called 'rules of conduct'[484]).

The ECB shall be consulted, and hence may adopt an opinion, with regard to all proposed Union acts and proposals for regulation on the national level '[w]ithin the areas falling within its responsibilities'.[485] In addition to that, it adopts recommendations without specified addressees, eg on payment transactions[486] and, within the Single Supervisory Mechanism (SSM), recommendations in the field of banking supervision addressed to financial institutions and to national supervisors.[487] Most of the time these acts contain soft law.

Also the CJEU and the Court of Auditors may render output which qualifies as soft law. As regards the CJEU, mention should be made of the Opinions which may be rendered by the Advocate General in proceedings before the CJEU.[488] The Opinion shall support (and is intended to influence) the Court in the decision-making process and it is legally non-

480 These acts may also be named differently, eg 'guidelines', 'notices', 'codes', 'policy frameworks'; see H Adam, Mitteilungen 3; Senden, Soft Law 162; Snyder, Effectiveness 33; Raschauer, Leitlinien.

481 Brohm, Mitteilungen 25.

482 See eg case C-501/15P *European Union Intellectual Property Office v Cactus*, para 40.

483 See Pampel, Rechtsnatur 89; see also Hofmann/Rowe/Türk, Administrative Law 572, who consider Commission-internal rules 'always binding, but logically one cannot there speak of an *externally* binding effect' (emphasis in original).

484 Case 148/73 *Louwage*, 12.

485 Article 282 para 5 TFEU.

486 Eg the ECB Recommendations for the security of internet payments and of mobile payments (both adopted in 2013).

487 Eg the ECB Recommendation on dividend distribution policies, ECB/2019/1.

488 Since the Advocates General institutionally belong to the Court (Article 252 TFEU), it is justified to also assign their opinions to the Court – in spite of the recognition of the incumbents and their respective output as individual/distinct in the literary debate; see eg Karpenstein, Art. 252 AEUV, paras 16 f.



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binding.[489] The Court in its judgements often[490] follows the Opinions (with regard to its result or its reasoning, or both[491]), but in places also deviates, sometimes considerably, from them. As another soft law act, the Court has adopted 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings'.[492] The jurisdictional output of the Court, however, is always binding – a non-binding jurisdiction would 'change the nature of the function of the Court of Justice'.[493] The Court of Auditors examines the accounts of all revenue and expenditure of the Union and principally of all bodies, offices or agencies set up by the Union. An annual report is forwarded to the EU institutions and published in the Official Journal of the European Union (OJ).[494] Apart from an account of the implementation of the respective budget, these reports regularly include conclusions/recommendations to which the addressees may respond. It is in particular these recommendations which regularly constitute soft law. This applies also to the Court of Auditor's special reports.[495] The measures taken notably by the Commission in response to recommendations uttered earlier are included in the annual report. In

489 See, *ex multis*, Hackspiel, Art. 252 AEUV, para 12; for the soft law quality of these opinions see also 3.5.2.5. below.

490 See Pirrung, Gerichtshof, who speaks – as a rule of thumb – of the Court following the AG in 80 % of the cases; see also de Búrca, Court 23 (fn 121), with further references; with regard to annulment procedures, it is argued that the Court is 67 % more likely to annul (parts of) an act when the AG so suggests: Arrebola/Mauricio/Jiménez Portilla, Analysis.
In general, a distinction is to be made between cases which can build on established case law and cases raising new questions of law. With regard to the latter, apparently the Court is less likely to follow the AG's suggestions.

491 Cases in which the Opinion of the AG had a particularly strong influence on the Court's decision are, eg, the cases C-200/02 *Zhu*, explicit reference in para 20, or C-224/01 *Köbler*, explicit reference in para 48; see more generally Haglund, Advocate General; see also Arrebola/Mauricio/Jiménez Portilla, Analysis 1.

492 For a discussion of the Court's competence to adopt these recommendations see 3.3.2.2. below.

493 See Opinion 1/91 *EEA I*, paras 59–62, in particular para 61.

494 Article 287 para 4 TFEU. Note that there is also a number of specific annual reports on the annual financial audits of the EU's agencies, joint undertakings and other decentralised bodies; see eg <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did={B72375E3-B0E0-467A-AB50-55536ACAC4DE}> accessed 28 March 2023.

495 See eg the Special Report 'Single Resolution Board: Work on a challenging Banking Union task started, but still a long way to go' (No 23, 2017).



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addition to that, the Court of Auditors renders observations or requests opinions on matters of accounting, eg in legislative processes.[496]

### 2.2.3. The EU's bodies, offices and agencies

Apart from the institutions, also the bodies, offices and agencies of the EU in many instances adopt soft law acts.[497] This soft law output is manifold. Suffice it to illustrate the variety of acts by selected examples. The European Medicines Agency (EMA) provides guidelines on different aspects of medicinal products for human use, for example quality or clinical efficacy and safety.[498] They are mainly addressed to applicants for and holders of a market authorisation for medicinal products. The former, in their applications, need to justify deviations from these guidelines.[499] The European Aviation Safety Agency (EASA), to take another example, publishes so-called certification specifications, soft law rules on different aspects of aviation safety which are first and foremost addressed to those applying for a certification.[500] Also the 'Acceptable Means of Compliance' through which the EASA concretises EU aviation law adopted by the legislator or the Commission ought to be mentioned in this context.[501] Within the category of EU bodies, offices and agencies fall also the Economic and Social Committee and the Committee of the Regions, two advisory bodies provided for in the Treaties.[502] These two bodies shall submit opinions to the EP, the Council or the Commission when requested to do so or on their own initiative, in particular during legislative or other decision-making procedures.[503] Yet another example of an EU body, office or agency adopting soft law is the

496 Eg Court of Auditors, Opinion 2/2001 on the proposal to recast the Financial Regulation.

497 See Rocca/Eliantonio, Soft Law, *inter alia* pointing out the fact that 20 European agencies have explicit soft law powers (page 6); with regard to the varied soft law output of European agencies see Senden/van den Brink, Checks 42 ff.

498 See Fleischfresser, Europäisierung, in particular para 31.

499 <http://www.ema.europa.eu/ema/index.jsp?curl=pages/regulation/general/general_content_000081.jsp> accessed 28 March 2023.

500 See Riedel, Gemeinschaftszulassung, in particular 116 f; Simoncini, Regulation 81 ff.

501 <https://www.easa.europa.eu/document-library/agency-rules-overview> accessed 28 March 2023.

502 Articles 300 ff TFEU.

503 Article 304 para 1 and Article 307 TFEU.



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European Ombudsman.[504] According to the pertinent EP decision, the Ombudsman shall 'help to uncover maladministration in the activities of the Community institutions and bodies [...] and *make recommendations with a view to putting an end to it*' (emphasis added).[505] The *de facto* power of the Ombudsman's soft output is underlined by *Craig* and *de Búrca* who claim that the Ombudsman's office is 'increasingly seen as a source of administrative norms rather than simply a mediation facility for individual complaints'.[506]

In this context, also bodies established by international agreements concluded between the EU and third parties, in particular third countries, ought to be mentioned. Examples are the Cooperation Council established by Partnership and Cooperation Agreements or the Association Council and the Association Committee established by Association Agreements, which may adopt recommendations relating to the implementation of their respective founding agreements.[507] International agreements concluded by the EU are not only part of public international law, but also part of the *acquis communautaire*.[508] Bodies established by them could be qualified as EU bodies. In the perspective of the other party to the agreement – regularly a third country, however, this body constitutes a body set up only by (bilateral) public international law. Therefore also the (soft) output of these bodies has a dichotomic character.

504 Stressing the (merely) soft character of the Ombudsman's output: Order in case T-103/99 *Cantine Sociali Venete*, paras 48–50; see also case C-234/02P *European Ombudsman*, para 57.

505 Article 2 para 1 of EP Decision 94/262/ECSC, EC, Euratom, as amended; see Bonnor, Ombudsman.

506 Craig/de Búrca, EU Law 85; for a possible move towards hard law see Saurer, Verwaltungsrecht 190 f.

507 See eg Article 78 of the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part (1999), with regard to the Cooperation Council; Articles 78 ff of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (2000), with regard to the Association Council and the Association Committee.

508 See Article 216 para 2 TFEU; this is also settled case law (also eg for mixed association agreements): see eg case 12/86 *Demirel*, para 7, with a further reference.



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### 2.2.4. MS and non-EU bodies

#### 2.2.4.1. Acts relating to different legal orders

In addition to the institutions, bodies, offices and agencies of the EU, there are also bodies which organisationally do not belong to the Union but may nevertheless adopt acts belonging to the EU legal order, or at least contribute to their adoption.[509] This applies to EU soft law[510] as well as to EU law and is possible either due to an express authorisation granted by EU law or, according to some, due to a strong organisational and substantial proximity to the EU and its affairs.[511] With regard to the latter, *Wellens* and *Borchardt*, in an early account of Community soft law, said: 'The more closely the act corresponds to the realisation of the objectives or to the institutional structure of the EEC Treaty, the more the act acquires a community character'.[512] For the qualification of an act as EU law or at least partly EU law, this organisational and substantial proximity must be of a certain intensity, and is not reached already where EU institutions 'may play a certain role' in the context of the creation of the act at issue.[513] Conversely, the participation of non-EU actors in the creation of an act does not as such prevent its qualification as EU (soft) law.

Taking a more systematic approach, in the context of the assignation of an act to a legal order in my view the first point of reference ought to be the body uttering the norm, that is to say the body creating the act in accordance with its competences. With *agreed* (soft) law these are normally the bodies which shall be committed (softly) by the act.[514] Other points of reference – eg contributors or the persons affected by the act (if they are not at the same time the official norm-creators anyway) – may be relevant, as well, but only at a secondary level. While the assignation of an act to

509 See eg Article 76 lit b or Article 173 para 2 TFEU.

510 See the example of the Code of Conduct for Mediators described by Korkea-aho, Soft Law 282.

511 For the principal impossibility of (private) non-EU actors creating *administrative* EU law see Hofmann/Rowe/Türk, Administrative Law 588.

512 Wellens/Borchardt, Soft Law 304.

513 See joined cases C-8–10/15P *Ledra*, para 54; Opinion of AG *Wahl* in these joined cases, para 53.

514 The parties to soft agreements, according to the principle *pacta sunt servanda*, have to benevolently examine whether or not they intend to follow it; see Lorenzmeier, Völkerrecht 76. With regard to agreed soft law more generally Knauff, Regelungsverbund 373–376; see also Georgieva, Soft Law 236 f.



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one (exceptionally: two) legal order(s) is certainly important for systematic reasons, it is to be acknowledged that in cases of doubt it is not only the heading – 'act of public international law', 'act of Union law', or 'hybrid act' – that matters, but it is in particular the consequences following from this qualification in the specific case, ie the effects of the involved legal orders, eg in terms of a certain fundamental rights standard to be met. These concrete consequences need to be examined individually in each case.[515] Generalisations are thus to be handled with care.

There is a number of 'cases of doubt', that is to say of (soft law or legal) acts which have a strong proximity to different legal orders. For example: An act *of the MS* – even if concluded in the course of a meeting of the Council or the European Council[516] – *prima facie* appears to be public international law,[517] not EU law.[518] AG *Jacobs* describes these acts as having a 'hybrid character', stressing that 'decisions of the Member States meeting

515 For the multi-faceted manifestations of 'intergovernmentalism' and the related typology see Hinarejos, Crisis 87.

516 See eg the decision of the Heads of State or Government, meeting within the European Council, annexed to the Conclusions EUCO 1/16 of the European Council meeting (18 and 19 February 2016); see also the recommendation of the Euro-MS according to Article 140 para 2 subpara 2 TFEU, Article 34 TEU (pre-Lisbon) or Article 220 TEEC; referring to the acts based on the two latter provisions as 'conventions': Bast/Heesen, Community, para 3. For the various institutional settings in which the MS took and partly still take 'decisions' see Everling, Wirkung 142 (and 135 f for the meaning of such 'decisions' in the earlier history of the EEC); for an early account of the varying views in literature and practice (with regard to agreements concluded between MS) see Schwartz, Übereinkommen 556 ff; for pertinent Court cases see, eg, joined cases C-59/18 and C-182/18 *Italy v Council*, paras 100–105; with regard to the Eurogroup see joined cases C-105/15P to C-109/15P *Mallis*, para 61; joined cases C-597/18P, C-598/18P, C-603/18P and C-604/18P *Chrysostomides*, para 87.

517 That does not necessarily mean that they cannot be considered or even interpreted by the CJEU according to its peculiar methods of interpretation; see Everling, Wirkung 147; for the interpretation of only EU-related law by the CJEU see also case C-53/96 *Hermès*, para 28; joined cases C-300/98 and C-392/98 *Dior*, para 35.

518 See Senden, Soft Law 56–58, with further references; critically: Kadelbach, Art. 5 EUV, para 14; Ruffert, Art. 288 AEUV, para 107; Tridimas, Indeterminacy 57. The Court held that acts of the Representatives of the Governments of the MS may be camouflaged acts of the Council; joined cases C-181/91 and C-248/91 *European Parliament v Council*, paras 14 and 25. Thereby it challenged the assumption that it actually had been the MS themselves concluding the act, and qualified the act as a Council act ('an almost metaphysical distinction', as *Brown* notes), but it does not seem to exclude in principle the possibility of the MS adopting an act themselves while meeting in the Council; see Brown, Case Law 1355.



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in Council do not form part of the Community legal order in the strict sense, but are nevertheless part of the acquis communautaire'.[519] The Court has expressed its willingness to consider such acts to be EU law where in terms of objectives and institutional setting they display strong ties to the EU.[520] In other cases – like that of the 'EU-Turkey agreement' on refugees – the Court eventually refused the EU law quality of the act at issue, explaining that 'the term "EU" must be understood in this journalistic context as referring to the Heads of State or Government of the Member States of the European Union'.[521]

As was mentioned above, the adoption of EU (soft) law by bodies organisationally not belonging to the EU is possible due to an authorisation granted according to EU law or due to a strong organisational and substantial proximity to the EU and its affairs. While the cases mentioned above are examples of the latter scenario, an (historical) example of non-EU bodies adopting EU soft law *qua* authorisation are the Committees of European Banking Supervisors (CEBS), of European Insurance and Occupational Pensions Supervisors (CEIOPS) and of European Securities Regulators (CESR). They were composed of representatives of the respective national supervisory authorities and succeeded by today's European Financial Market Supervisory Authorities (ESAs). To these committees, organised as legal persons according to English, German, and French respectively, private law,

519 Opinion of AG *Jacobs* in joined cases C-181/91 and C-248/91 *European Parliament v Council*, para 18.

520 Case 38/69 *Commission v Italy*, para 11: '[A] measure which is in the nature of a Community decision on the basis of its objective and of the institutional framework within which it has been drawn up cannot be described as "international agreement"'. More generally speaking, the Court seems to consider the substance of the act at issue, rather than its form: '[I]t is not enough', it held, 'that an act should be described as a "decision of the Member States" for it to be excluded from review', but a substantial assessment is required to find out whether it is an act of the EU or of the MS; joined cases C-181/91 and C-248/91 *European Parliament v Council*, para 14. Note that the Court also held that the Eurogroup 'cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union within the meaning of Article 263 TFEU'; joined cases C-105/15P to C-109/15P *Mallis*, para 61. For the different interpretative approaches in such cases of doubt see Everling, Wirkung 153; for EU soft law adopted by the MS see also Peters/Pagotto, Soft Law 18.

521 Case T-192/16 *NF*, paras 57 f; on the underlying question see also case C-11/05 *Friesland Coberco*, paras 37 f.



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the Commission[522] delegated[523] the power to 'contribute to the common and uniform implementation and consistent application of Community legislation by issuing guidelines, recommendations and standards'[524] and to address opinions to the Commission and to the national supervisory authorities.[525] They were thereby functionally acting as EU bodies.[526] In this example, it was the legal form of the delegates which was private. Their respective output, however, was still decided upon by an assembly of public authority representatives.

A different phenomenon was described as '[p]rivate involvement in EU governance'.[527] The actors addressed here are not only formally but also substantially (that is to say: regarding their professional background) *private* actors. According to the Inter-institutional Agreement on better law-making of 2003,[528] private actors may merely participate in EU rule-making in the form of co-regulation,[529] or apply self-regulation which will not result in EU (soft) law. Co-regulation is applied in particular in the fields of standardisation (see II.2.2.3. above) and social policy, and is a procedure aimed at pooling expertise in EU law-making.[530] Self-regulation is to do with agreements among private actors, often – but not necessarily – enacted at

522 Commission Decisions 2004/5/EC, 2004/6/EC and 2001/527/EC; these acts were – in the course of the reform of the *Lamfalussy* procedure in 2009 – replaced by Commission Decisions 2009/77–79/EC; see also Weismann, Agencies 93–97.

523 For the delegation of EU powers to private bodies see eg Pawlik, Meroni-Doktrin 147 f.

524 Article 3 of Commission Decisions 2009/77–79/EC; see also Ottow, Architecture 128.

525 Article 12 and Article 4 para 1 lit b of Commission Decisions 2009/77–79/EC.

526 Also organisationally they were considered to be connected to the EU administration; see European Ombudsman, case 2497/2010/FOR, confirming the Ombudsman's competence to deal with complaints about the CEBS' alleged maladministration (para 10).

527 Hofmann/Rowe/Türk, Administrative Law 328; in the context of EU soft law see eg van Rijsbergen, Legitimacy 124 ff, with regard to soft law adopted by the ESMA.

528 European Parliament, Council and Commission, Interinstitutional Agreement on better law-making (2003/C 321/01) [not to be confused by the same-titled Agreement of 2016 (OJ L123/1)].

529 For the varying definitions of co-regulation see references in Verbruggen, Co-Regulation 428–430.

530 See Hofmann/Rowe/Türk, Administrative Law 605 ff; see also Köndgen, Rechtsquellen, paras 67–70, with examples; for the long history of co-regulation in E(E)C/EU law (starting in the mid-80s) see Verbruggen, Co-Regulation 426 f.



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the legislative or other initiative of the EU institutions.[531] Such agreements may relate to and result in EU (soft) law, though.[532] For example: The European Automobile Manufacturers Association (ACEA) has agreed with its Korean and Japanese pendants to reduce $CO_2$ emissions, based on the requirements laid down in Directive 98/70/EC. This agreement has led to three recommendations in which the Commission recommends to these associations to reduce their $CO_2$ emissions in accordance with pertinent EU law. Compliance with their respective commitment is monitored by the Commission.[533]

#### 2.2.4.2. Incursus: The Memoranda of Understanding concluded under the so-called umbrellas (rescue measures to protect the Eurozone)

##### 2.2.4.2.1. Contextualisation in between EU law and public international law

A specific case of 'acts relating to different legal orders' are the MoU concluded within the framework of the various European umbrellas set up in reaction to the State debt crisis in the Eurozone. Here the contested questions

531 See European Parliament, Council and Commission, Interinstitutional Agreement on better law-making (2003/C 321/01) para 22; for example, an agreement of companies such as Apple, Facebook or Microsoft to ensure children's safe use of the internet; <https://www.reuters.com/article/internet-eu-bullying-idUSLA36235620090210> accessed 28 March 2023; see also the second MoU on the future common charging solution for smartphones, concluded by major telecommunications firms, which includes a reporting duty *vis-à-vis* the Commission; or the Commission's strengthened 'Code of Practice on Disinformation' with its 34 signatories; <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3664> accessed 28 March 2023; on voluntary cooperation between public and private actors in relation to (self-)regulation more generally see Héritier/Eckert, Modes; for a similar mechanism see case T-135/96 *UEAPME*, para 9, relating to a framework agreement concluded by management and labour organisations which is envisaged to be adopted by the Council as a legislative act.

532 See Schwarze, Soft Law 234 f, with a further reference.

533 Commission Recommendations 1999/125/EC, 2000/303/EC and 2000/304/EC. This example is taken from Hofmann/Rowe/Türk, Administrative Law 620. In another case, concerning the safety of pedestrians, voluntary agreements demanded by the Commission and signed by the car industry were considered inappropriate by the EP: '[T]he Union could not abandon its legislative powers to third parties when the protection of citizens was at stake'. Subsequently, an according Directive was adopted; see Commission, Report 'Better Lawmaking 2003', COM(2003) 770 final, 26 f.



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to which legal order they (rather) belong and whether or not they qualify as soft law shall be examined.[534] These umbrellas have granted financial assistance to ailing Euro-MS in order to allow them to service their debts and to thereby improve their credit-worthiness.[535] This assistance has been 'strictly conditional' and has, for that purpose, been combined with MoU concluded between the beneficiary MS and the respective facility providing financial assistance (with loans constituting the standard form of financial assistance) to ensure that the MS takes the (presumably) necessary reform measures in order to increase its income and to cut on expenses respectively (so-called austerity measures[536])[537]. The MoU, as norms agreed upon between MS and the loan-providing facility, are not self-executing and therefore do not directly affect individuals.[538] Only the national implementing measures do. While in an early phase of the State debt crisis MS provided bilateral (conditional) loans to other MS in trouble,[539] here we shall concentrate on the MoU concluded in the context of financial assistance granted by the European Financial Stabilisation Mechanism (EFSM), the EFSF and the European Stability Mechanism (ESM) via financial assistance facility agreements.

The EFSM was created by Council Regulation 407/2010 which was based on Article 122 para 2 TFEU, hence it clearly belonged to the EU legal order. The MoU concluded under the EFSM between the Commission and the beneficiary State shall be 'detailing the general economic policy conditions laid down by the Council' and shall be communicated to the European

534 With regard to further acts of a dubitable legal quality, adopted by EU institutions in the course of the Euro-crisis, see Beukers, Changes 96; for the *letter of intent* which – in the context of the MoU – results from the negotiations between the beneficiary MS and the IMF see Torsten Müller, Troika 266; for an account of MoU concluded by the ECB see Karatzia/Konstadinides, Nature 450–453.

535 For other important purposes see, with regard to the ESM, Schwarz, Memorandum of Misunderstanding 415 f. Apart from that, the umbrellas (in particular the ESM) were also aimed at stabilising the Eurozone as a whole.

536 For decisions of national (constitutional) courts adopted in the context of (national) austerity measures see eg the decisions of the Portuguese constitutional court discussed in: Canotilho/Violante/Lanceiro, Austerity.

537 For the legal framework of austerity measures more generally see Repasi, Protection 1136.

538 See Repasi, Protection 1137 f, drawing a comparison to directives.

539 Also the bilateral loans provided to Greece – the predecessor instrument of the umbrellas – were combined with a prescription of austerity measures; see Olivares-Caminal, Architecture 4; Kilpatrick, Bailouts 398; see also case T-541/10 *ADEDY*, paras 12–19.



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Parliament and to the Council.[540] Hence the decision to grant financial assistance, also laying down the general economic policy conditions, under this regime is taken by the Council, upon a proposal from the Commission.[541] The MoU is concretising these general economic policy conditions (*argumentum* 'detailing'). The EFSM which has granted loans in three cases – namely for Ireland, for Portugal and for Greece (short-term assistance) – was operating in coordination with the International Monetary Fund (IMF), which in these cases provided loans as well.[542] In spite of this coordination with the IMF as an international organisation, the EFSM, and also the acts based on Council Regulation 407/2010, are clearly EU law measures.

The EFSF was established as a *société anonyme* incorporated in Luxembourg, the shareholders of which were the Euro-MS. The operation of the EFSF is subject to a private law agreement between it and its shareholders (the Euro-MS; EFSF Framework Agreement).[543] The close links to EU law and EU institutions established by this agreement do not alter its private law nature. According to this agreement, the Commission shall, upon request by a Euro-MS for a Financial Assistance Facility Agreement, and in liaison with the ECB and the IMF, negotiate an MoU with the prospective beneficiary State.[544] The MoU shall be in accordance with a Council decision adopted, upon a Commission proposal, pursuant to Article 136 para 1 TFEU, and it shall, upon approval by the Eurogroup Working Group, be signed by the Commission on behalf of the EFSF and by the beneficiary MS. The Financial Assistance Facility Agreement, which shall be compatible with the MoU, shall eventually be signed by the EFSF upon

540 Article 3 para 5 of Regulation 407/2010.

541 Article 3 paras 2 f of Regulation 407/2010.

542 For other (partly) international organisations providing financial assistance and for the conditionality they apply (or do not apply) see Wirth, Assistance 220 f; for the World Bank's approach see Boisson de Chazournes, Guidance 289 f.

543 See EFSF Framework Agreement between the Euro-MS and the EFSF <https://www.sv.uio.no/arena/english/people/guest-researchers/agustinm/crisis-documents-2012/14-efsf-frameworkagreement-consolidated-8sep11.pdf> accessed 28 March 2023. This agreement shall be governed by and shall be construed in accordance with English law; 16. (1) of the EFSF Framework Agreement between the Euro-MS and the EFSF.

544 For the IMF's role in the 'Troika' and in setting conditionality requirements see Christopherson/Bergthaler, IMF, paras 31.65 – 31.70.



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unanimous approval by all Euro-MS and by the beneficiary MS.[545] That also under this regime it is the Commission (on behalf of the Euro-MS, not of the EFSF[546]) which concludes the MoU with the beneficiary MS seems to be effected by the EFSF Framework Agreement, not by EU law. However, the mandate of the Commission to negotiate and to conclude, on behalf of the Euro-MS (and conditional upon approval by the Eurogroup Working Group[547]), an MoU cannot be conferred by a measure of private law (such as the Framework Agreement). After all, the subject of an MoU are in particular matters of public authority, namely issues like how the beneficiary State will adapt its pension law, its unemployment law, the enforcement of its tax law, etc. Therefore it seems appropriate to qualify the mandating of the Commission – even if formally contained in the EFSF Framework Agreement[548] – as a unilateral act of the Euro-MS adopted, for lack of a legal basis in EU law, within the realm of public international law.[549] Since it is matters relating to public authority which are addressed, and since there is no appropriate legal basis in EU law, also the MoU in this case is to be qualified as a measure of public international law.[550] In

545 See 2. (1) (a) of the EFSF Framework Agreement between the Euro-MS and the EFSF.

546 See Recital 2 and 2. (1) (a) of the EFSF Framework Agreement between the Euro-MS and the EFSF; misleadingly: Recital 4 of the Master Financial Assistance Facility Agreement between the EFSF, Ireland and the Central Bank of Ireland.

547 2. (1) (a) of the EFSF Framework Agreement between the Euro-MS and the EFSF.

548 Arguments in favour and against the *de facto* public international law character of this agreement are contained in: Deutscher Bundestag, 'Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Manuel Sarrazin, Marieluise Beck (Bremen), Volker Beck (Köln), weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN' (2010) Drucksache 17/2569, 1–6.

549 For the agreement of all MS (decision of the representatives of the governments of the 27 MS) which is necessary for making use of the Commission in that way see Cover Note 9614/10 of the Council of 10 May 2010; for this requirement as set out in the Court's case law see references in Repasi, Freiräume 57.

550 See 16. (1) of the EFSF Framework Agreement between the Euro-MS and the EFSF, according to which the Framework Agreement itself and 'any *non-contractual* obligations arising out of or in connection with it shall be governed by and shall be construed in accordance with English law' (emphasis added). That the Commission is not empowered to conclude international agreements under EU law does not prevent an according empowerment by means of public international law; with regard to the Commission's lack of power to conclude international agreements under then Community law see case C-327/91 *France v Commission*, in particular para 41; note also the discussion with regard to (binding) administrative agreements: Ott/Vos/Coman-Kund, Agencies 97 f; see also Wengler, Rechtsvertrag 196.



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spite of this qualification, the MoU are in some respects related to the EU and its law: For example, the loans granted under the EFSF (in the case of Ireland and Portugal) – specified in an agreement concluded under English law[551] between the EFSF and the beneficiary State (and its central bank) which makes the provision of the loans conditional upon compliance with the MoU[552] – have been made 'subject to the (EU) EFSM legal regime and sources'.[553]

We shall now turn to the MoU concluded in the context of the ESM by the Commission (with the ECB's and the IMF's participation[554]) on the one hand, and a Euro-MS (and its central bank, respectively) on the other hand. Like under the EFSF, the Commission is not competent to conclude the MoU on the basis of EU law, but – *on behalf of the ESM*[555] – on the basis of the (international) ESM-Treaty (and *in consistency with* EU law[556]),[557] and subject to approval by the ESM.[558] At first there shall be a decision of the ESM Board of Governors to grant, in principle, financial assistance to the (presumptive) beneficiary Euro-MS on the basis of an MoU, to be negotiated by the Commission (in liaison with the ECB and, if possible, together with the IMF).[559] In parallel, a financial assistance facility agreement on the financial terms and conditions and the choice of instru-

551 In the case of Ireland, see 14. (1) of the Master Financial Assistance Facility Agreement between the EFSF, Ireland and the Central Bank of Ireland.

552 In the case of Ireland, see Recital 4 of the Master Financial Assistance Facility Agreement between the EFSF, Ireland and the Central Bank of Ireland.

553 Kilpatrick, Bailouts 401, with further references.

554 The IMF is concluding a (very similar) MoU with the benficiary country itself. Due to a considerable overlap, the two MoU form one *corpus* of rules; see Kämmerer, Memorandum of Understanding 74.

555 See Article 5 para 6 lit g and Article 13 para 3 of the ESM-Treaty; see also joined cases C-8–10/15P *Ledra*, para 51; Opinion of AG *Wahl* in these joined cases, paras 100 f.

556 For the difference between 'consistency' and 'compliance' see Opinion of AG *Wahl* in joined cases C-8–10/15P *Ledra*, para 73.

557 See Order of the General Court in case T-289/13 *Ledra*, paras 44–46; joined cases C-105/15P to C-109/15P *Mallis*, para 53, both with reference to the CJEU's *Pringle* decision.

558 Article 13 para 5 of the ESM-Treaty; see also Schwarz, Memorandum of Misunderstanding 420.

559 See Article 13 paras 2 f of the ESM-Treaty. For the (draft) MoU and the involvement of the Commission, the Eurogroup and the ESM see also joined cases C-8–10/15P *Ledra*, paras 14 ff.



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ments[560] shall be prepared by the ESM Managing Director and adopted by the Board of Governors.[561] Eventually, the MoU, consistent with EU law, including any opinion, warning, recommendation or decision addressed to the beneficiary MS, is signed by the Commission on behalf of the ESM on the one hand and by the beneficiary MS, on the other hand.[562] The Board of Directors shall approve the financial assistance facility agreement and, where applicable, the disbursement of the first tranche of the assistance.[563]

The ESM as the core actor in this context is a legal person established according to public international law.[564] It is the ESM which is bound by its financial agreements, not the EU. With regard to the involvement of the ECB, the following can be said: As a legal person, the ECB is not an organ of the legal person EU, but legally speaking acting for itself.[565] Nevertheless, as an institution of the EU[566] the ECB is vested with EU public authority. In the given context, however, the ECB – like the Commission – is empowered to act on the basis of the ESM-Treaty, not on the basis of the EU Treaties.[567] The fact that these roles are to be exercised *in accordance with* EU law does not change this. Rather, it is a consequence of the MS' and the EU institutions' being bound by EU law also when acting in the field of public

560 For the most important instrument, the loan, see also the ESM Guideline on Loans <https://www.esm.europa.eu/sites/default/files/esm_guideline_on_loans.pdf> accessed 28 March 2023.

561 Article 13 para 3 of the ESM-Treaty.

562 Article 13 paras 4 f of the ESM-Treaty; for complementary (EU law) measures such as the macroeconomic adjustment programmes see Repasi, Protection 1125 f and 1137 f. For the example of Greece see Council Implementing Decision 2015/1411, in particular Recitals 7–9; for the example of Cyprus see European Commission, 'The Economic Adjustment Programme for Cyprus' (2013) 149 European Economy. Occasional Papers, para 57.

563 Article 13 para 5 of the ESM-Treaty.

564 See the distinction made by *de Witte* between 'executive agreements', 'complementary agreements' and 'autonomous agreements' concluded between the MS. According to this classification, the ESM appears to be an autonomous agreement.

565 See Dörr, Art. 263 AEUV, para 18. Also an international legal personality of the ECB is accepted: Ott/Vos/Coman-Kund, Agencies 94.

566 On the hermaphrodite role of the ECB under the Lisbon Treaty see Sáinz de Vicuña, Status 301–304.

567 See Article 5 para 6 lit g and Article 13 para 3 of the ESM-Treaty; see also case C-370/12 *Pringle*, para 158; joined cases C-8–10/15P *Ledra*, para 52; joined cases C-597/18P, C-598/18P, C-603/18P and C-604/18P *Chrysostomides*, para 131; Craig, Pringle 280.



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international law.[568] That the ECB and the Commission (and also the IMF, for that matter) merely provide an input to the negotiations and do not exert any formal decision-making power indeed relativises the (formal) influence of these institutions.[569]

Against the background of these findings, it is argued here that the MoU concluded under the ESM – like the ones concluded under the EFSF – clearly belong to the realm of public[570] international law.[571] That the 'borrowing' of EU institutions applied in case of the EFSF and the ESM has raised questions as to its legality is uncontested, but shall not be dwelled on here.[572] Also the question whether the involvement of EU institutions causes the applicability of the CFR via its Article 51 (with regard to the MoU) – which was plausibly argued by *Kilpatrick*[573] and meanwhile confirmed by the Court in the *Ledra* case[574] – shall not be considered here in more detail.

568 See Article 13 para 3 of the ESM-Treaty; see also page 3 of the Memorandum of Understanding on the working relations between the European Commission and the European Stability Mechanism.

569 See case C-370/12 *Pringle*, para 161; note the competent (economic and monetary affairs) Commissioner's and the ECB-President's facultative participation in the meetings of the Board of Governors of the ESM as observers, though (Article 5 para 3 of the ESM-Treaty); see also Opinion of AG *Wahl* in joined cases C-8–10/15P *Ledra*, para 42. Critically with a view to the ECB's independence in this context: Opinion of AG *Cruz Villalón* in case C-62/14 *Gauweiler*, paras 143–151; see also Torsten Müller, Troika 269; differently: joined cases C-105/15P to C-109/15P *Mallis*, in particular para 57.

570 Pointing at the differences between the loan agreements ('public law agreements') at issue and contracts on the delivery of goods or coordination of a project: Kilpatrick, Bailouts 407 f.

571 See case T-293/13 *Theophilou*, para 46; joined cases C-8–10/15P *Ledra*, para 67; see also Fischer-Lescano, Austeritätspolitik 36; Repasi, Protection 1124. This also seems to be the view of the (other) EU institutions: European Parliament, Report on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, A7–0149/2014, para 109. That the EP would *wish* the MoU to be placed within the EU law framework, in particular in order to ensure the applicability of the CFR, is a different issue.

572 See eg Craig, Pringle; Fischer-Lescano/Oberndorfer, Fiskalpakt; Peers, Form.

573 See Kilpatrick, Bailouts 404 f. See the Explanations relating to the Charter of Fundamental Rights (2007/C 303/02) which suggest – the wording of this provision being unclear in this respect – that the limitation 'when they are implementing Union law' of Article 51 para 1 only applies to the MS, but does not apply to the EU institutions and bodies; see also Schwarz, Memorandum of Misunderstanding 397–400 and 418–421.

574 Joined cases C-8–10/15P *Ledra*, para 67.



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2.2.4.2.2. On the question of legal bindingness

As regards the substance of the MoU concluded under the umbrellas, it is dubitable whether or not they constitute soft law. The title 'Memorandum of Understanding' suggests, in accordance with international practice, legal non-bindingness.[575] From the appearance of the concrete memoranda, however, no general conclusion can be drawn as to their legal quality. Comparatively 'hard' wording ('the Government will by [month/year]';[576] 'the Government commits to'), the partly very high precision of the rules[577] and the strong relationship between financial assistance and compliance with the MoU ('conditionality'[578]), is contrasted with an apparent lack of a classical enforcement regime. The monitoring set in place, however strict it may be, is a standard means of soft 'enforcement'.[579] While legally binding rules may (exceptionally) lack enforceability, an existing legal enforcement mechanism certainly gives proof of the legal quality of the underlying obligation. In the given case, namely that of financial assistance received

575 See Kämmerer, Memorandum of Understanding 75; Kilpatrick, Bailouts 409 f, with further references; Wengler, Rechtsvertrag 194.

576 For the legal bindingness this verb suggests see Knauff, Regelungsverbund 290; differently: case C-233/02 *France v Commission*, para 43, contrasting 'will' with the more compelling 'shall'. However, there are also many weaker expressions available than 'will': eg 'should strive for', 'intends to', 'should commit to'; see Opinion of AG *Tesauro* in case C-57/95 *France v Commission*, para 16.

577 A high level of detail (weakly) points in the direction of legal bindingness; see also case 108/83 *Luxembourg v European Parliament*, para 23. In the context of the MoU see eg the part on tax policy reforms in the MoU concluded between the ESM and the Hellenic Republic and the Bank of Greece of 19 August 2015, 7–9; see also <https://www.imf.org/external/np/loi/2013/irl/060313.pdf> accessed 23 March 2023, pages 22 ff; Torsten Müller, Troika 274–278. Closer scrutiny of their text shows that some (actually few) provisions are drafted more widely, so as to leave a certain leeway for the beneficiary State.

578 Article 13 para 3 of the ESM-Treaty. For the wide range of requirements this conditionality may in fact encompass see Schwarz, Memorandum of Misunderstanding 396 f. In *Pringle*, the Court seems to have elevated strict conditionality to a general requirement of financial assistance; case C-370/12 *Pringle*, paras 136 f; see also Ioannidis, Conditionality 62 f. For the role of conditionality in the context of EU funds: Bieber/Maiani, Enforcement 1076 ff; see also Harlow/Rawlings, Process 47; for conditionality in the context of compliance with EU law more generally see Andersen, Enforcement 181 ff; Ioannidis, Members 489.

579 Monitoring tasks are, pursuant to Article 13 para 7 of the ESM-Treaty, exercised by the Commission, the ECB, but also by the IMF as 'technical assistance'; see eg IMF, Country Report No 14/59 (February 2014) 2 <http://www.imf.org/external/pubs/ft/scr/2014/cr1459.pdf> accessed 28 March 2023.



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from the EFSM/EFSF/ESM, when exploring the 'coerciveness' of the mechanism the legal quality of the respective MoU seems to be of secondary importance.[580] Since compliance with the conditions laid down in the MoU by the beneficiary MS is – according to the respective financial assistance facility agreement which refers to the MoU[581] – mandatory for the grant of financial assistance,[582] there is a strong incentive to comply.[583] Where the beneficiary MS do not comply, they face the severe (but only) consequence of being refused (further) financial assistance.[584] The MS concerned have to weigh – for themselves – the advantages and costs of compliance and non-compliance, respectively.[585] Mere incentives to comply do not form a means of 'legal enforcement', but speak in favour of soft law. On the other hand, the benefits at issue here are not a prize or a subsidy anybody who meets certain predefined requirements can apply for. Rather, they constitute an aid which is calculated and granted upon an individual request.

The conditionality is not set for one specific point in time, but policy objectives are laid down or agreed upon in the MoU which should be reached in the course of an extended period of time. Both the examination of the achievements and, upon a positive result of this examination, the payment of the aid (tranches) are sequenced over a couple of years. These settings cater for a strong synallagmatic relationship between the umbrella at issue and the respective beneficiary. It makes the umbrella's power to refuse payment of the next tranche come very close to a power to punish

580 See also Beckers, Juridification 576; Knauff, Regelungsverbund 278 f and 339; for the granting of loans by the World Bank see ibid 280 f; similarly: Repasi, Protection 1124.

581 For the legal technique of referencing see, in the context of private regulation, II.2.2.3. above.

582 For the ECB's reference to this conditionality in its monetary policy as a further incentive for compliance see eg <http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 28 March 2023.

583 With regard to financial incentives as a means of ensuring compliance see H Adam, Mitteilungen 124 f; Gil Ibáñez, Supervision 288; Knauff, Regelungsverbund 339; with regard to incentives as alternatives to enforcement traditionally understood: Commission, Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, COM(2005) 59 final, para 7.1.

584 For similar scenarios in the context of public law agreements in national law: Bauer/Kretschmer, Dogmatik 254.

585 Addressing the same dynamics in the context of EU neighbourhood policy: Vianello, Approach 554 f.



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non-compliance.[586] The fact that an MoU ought to be consistent with (the pertinent) EU law[587] is a neutral requirement (it neither speaks in favour of nor against its qualification as a soft law instrument) since a legal order, in our case: the EFSF/the ESM, may require consistency with alien rules even for soft law. Neither does the interpretative authority of the CJEU point in either direction.[588] The neutral wording of the MoU *in dubio*[589] speaks in favour of their qualification as law and the particularly strict mode in which the 'incentives' are applied appears to underpin this qualification, both in case of the EFSM (where the MoU qualifies as EU measure) and in the cases of the EFSF and the ESM (where the MoU belongs to public international law).[590]

The ambivalence of the legal quality of MoU is 'made use of' by different actors in different ways: The IMF perceives its Memoranda of Economic

586 See Wirth, Assistance 227 f, who accords 'loan covenants' – conditionality contained in loan agreements of the World Bank – a legal status 'similar to that of treaties'. He points to their enforceability, emphasising that 'the Bank could suspend further disbursements, which are customarily made in phases or "tranches"'. Whether enforcement happens in practice is a different story; see ibid 228 f; for the preferability, in *Wirth's* view, of the terms 'mandatory' and 'enforceability' (as compared to 'binding') in this context, see ibid 231.

587 Recital 2 of the EFSF Framework Agreement between the Euro-MS and the EFSF <https://www.sv.uio.no/arena/english/people/guest-researchers/agustinm/crisis-documents-2012/14-efsf-frameworkagreement-consolidated-8sep11.pdf> accessed 28 March 2023; Article 13 para 3 subpara 2 of the ESM-Treaty (which arguably limits its call for compliance to a mere 'consisten[cy] with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned'); for similar compliance requirements (eg with international environmental agreements) for projects financially supported by the World Bank see Wirth, Assistance 232.

588 See Article 38 para 3 of the ESM-Treaty in conjunction with para 2, according to which the CJEU shall decide on any dispute between members of the ESM or between them and the ESM 'in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty'. First, it is not clear whether the MoU fall within the CJEU's scope ('decisions adopted by the ESM'; see below). But even if they do, this does not necessarily mean that they are hard law. After all, the Court, in particular according to the preliminary reference procedure, may authoritatively interpret/examine legally non-binding acts (of EU law), as well; see 6.3. below.

589 For the 'presumption of legal force' proposed by *Klabbers* see II.1.1.1. above.

590 See Opinion of AG *Wahl* in joined cases C-8–10/15P *Ledra*, para 109 (*argumentum* 'binds'); see Fabbrini, Euro-Crisis 111; Fischer-Lescano, Human Rights 32 ff; Torsten Müller, Troika 270 f; differently: A Aust, Treaty 48–50; Repasi, Protection 1124; ambivalently: Kilpatrick, Bailouts 412 f.



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and Financial Policies and its Technical Memoranda of Understanding, which – in the given context – are closely linked to the respective MoU concluded under the EFSM, the EFSF or the ESM,[591] as non-binding instruments[592] – a view which eg the Irish Supreme Court seems to support. On the contrary, the Latvian or the Portuguese Constitutional Court, in the perspective of their respective constitution, qualify them as legal obligations.[593] The Greek Plenary Assembly, to take another example, did not qualify the first MoU with Greece as an international convention according to the Greek Constitution and therefore denied the necessity of its ratification by a law.[594]

While it was said above that the (lack of) legal quality of the MoU – due to the strict compliance mechanism attached – does not affect its 'coerciveness' and, against this background, is of secondary importance,[595] with regard to the available remedies the question of legal bindingness is highly important. The ESM-Treaty, as special agreement according to Article 273 TFEU, empowers the CJEU to decide – after the Board of Governors – on 'any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with [the ESM-Treaty]'.[596] While it is not clear whether the term 'decision' as used in the ESM-Treaty only encompasses legally binding acts or also eg the guidelines addressed in Article 22 para 1 of the ESM-Treaty,[597] in view of the above-mentioned presumption of legal force

591 For the relationship between the ESM-MoU and the IMF-MoU see Mönning, Staatensanierungsverwaltungsrecht 206.

592 See Poulou, Grundrechte 147 f.

593 See O'Donovan, Way 52 f; Fischer-Lescano, Austeritätspolitik 35.

594 See Tsakiri, Protection 18; for further (different) qualifications see Poulou, Grundrechte 147 f; for similar motives in the case of the USA and the Paris Agreement 2015 see Bodansky, Character 149 f.

595 For this argument see also, in different contexts, Haas, Hypotheses 23; Wengler, Rechtsvertrag 195.

596 Article 37 paras 2 f of the ESM-Treaty.

597 We cannot – without further consideration – take over the terminology of Article 288 TFEU here, because the ESM-Treaty contains no reference or only a mere hint to that effect. In fact, the preceding passage in Article 37 para 2 of the ESM-Treaty – 'any dispute arising between an ESM Member and the ESM' (on the interpretation and application of the ESM-Treaty) – rather suggests a broad understanding of the Court's (and the Board of Governors', respectively) powers.



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the MoU can be considered a 'decision adopted by the ESM'.[598] That means that Euro-MS can request a decision of the Court (after a decision of the Board of Governors) on the interpretation/application of certain provisions of an MoU. Individuals or undertakings are not entitled to apply to the Court under the ESM-Treaty. Since the MoU does not qualify as EU law, it may not be reviewed by the Court under Article 267 TFEU[599] or Article 263 (para 4) TFEU, either. But even if it did, the latter route would be barred due to the fact that individuals and undertakings are regularly not directly (and individually) concerned by the MoU, but – if at all – only by the national reform measures adopted to implement it. They may be granted standing before the Court on the basis of an action for damages against the EU (non-contractual liability), though. This is because no direct (and individual) concern is required under these proceedings. Rather, and apart from the other requirements, it is sufficient that a *Schutznorm* – a norm protecting the interests of individuals[600] – has been violated by the EU. This would be the case, for example, where the Commission – in negotiating the MoU – violates a right enshrined in the CFR.[601]

Summing up, while the MoU concluded under the EFSM qualify as EU law,[602] the MoU concluded under the EFSF/ESM are officially agreed upon

598 More concretely: by the Commission for the ESM, with the approval of the Board of Governors.

599 See Tuominen, Mechanisms 102 f, with references to the Court's case law.

600 See eg case C-152/88 *Sofrimport*, para 26; for the term *Schutznorm* and many references to the Court's case law see Steiner, Haftung 162 ff.

601 The Commission, according to Article 17 para 1 TEU and according to Articles 13 paras 3 f of the ESM-Treaty, has to comply with Union law even when acting outside the EU legal order; see joined cases C-8–10/15P *Ledra*, para 67; joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Chrysostomides*, para 132. While the Court has not addressed this issue here, when it comes to the required causal link between the damage and the EU action concerned arguably the legal bindingness of the measure at issue is only of subordinate importance. The *de facto* 'coerciveness' of the measure – in our case: the MoU – seems to be sufficient because it strongly pushes for its actual implementation by the beneficiary MS, and that means: the occurrence of the damage. This assumption is supported by the fact that not only legal, but also factual measures may evoke a claim for damages under Article 340 para 2 TFEU; see Gellermann, Art. 340 AEUV, para 16; Jacob/Kottmann, Art. 340 AEUV, para 73; Ruffert, Art. 340 AEUV, para 27, each with references to the Court's case law.

602 For the reviewability of MoU concluded under the EFSM and alternative EU programmes under the preliminary reference procedure see case C-258/14 *Florescu*. In this case, with regard to an MoU adopted in the context of the Article 143 TFEU-procedure, the Court remained ambivalent. It held that it be 'mandatory',



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by the EFSF/ESM and the beneficiary MS (its central bank and possibly financial funds, respectively) and hence are instruments of public international law. From an EU (EFSM) or public international law (EFSF/ESM) perspective, the MoU at least *in dubio* is to be qualified as law. In a national (constitutional) view the qualification may be more clear, though different from constitution to constitution. The fact that the beneficiary State and the other participating States of the EFSF/ESM (not: the EFSF/ESM itself) are all members of the EU, the call for consistency with pertinent EU law, and the involvement of EU institutions in the negotiation of the MoU, causes 'strong links'[603] of these acts of public international law to EU law,[604] having lead to the term '*Unionsersatzrecht*' for the EFSF and ESM founding acts, and for the measures based upon them.

The purpose of this incursus was to exemplify the challenges which may emerge when we are asked to assign an act to EU law or a different legal order, and when it comes to distinguishing soft law from law in practice. Moreover, it was shown that where there is a strong dependence of one partner (which is called upon to meet certain conditions) to an agreement on the 'delivery' by the other partner, for example where the provision of financial benefits to prevent a State's failure in exchange for national reforms is at issue, the question of whether or not the conditionality provisions are legally binding is sidelined.

### 2.3. Addressees

The addressees of EU soft law so far have been touched upon here and there. Now they shall be looked at more systematically. The term 'addressee' in this context designates the actor (including natural or legal persons as well as entities without legal personality) the behaviour of which shall be steered by a soft law act. In essence, four groups of addressees can be

but relativised its effects in the same sentence (para 41); for the ambiguity of this particular statement of the Court see Dermine/Markakis, Bailouts 657 f.

603 Opinion of AG *Wahl* in joined cases C-8–10/15P *Ledra*, para 51, with respect to the ESM.

604 For the fact that mutual cross-referencing of EU law and public international law as such cannot lead to an incorporation of an act of public international law into EU law resulting in the CJEU's jurisdiction, see case C-366/10 *Air Transport Association*, para 63, with a further reference; see also Grundmann, Inter-Instrumental-Interpretation 926–928.



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distinguished: the originator-internal addressees, the internal addressees, the external addressees, and the EU-external addressees. While categorising different groups of addressees is worthwhile for systematic reasons, in selected cases the determination of the 'intended or apparent' addressees in practice may turn out to be difficult or even impossible.[605]

Originator-internal (or intra-institutional) addressees are those which form part of the creator of an EU soft law act, ie the staff. An example for a soft law act directed to originator-internal addressees is the Antitrust Manual of Procedures adopted by the Commission's Directorate-General (DG) Competition which clearly sets out that it is 'an internal working tool intended to give practical guidance to staff on how to conduct an investigation applying Articles 101 and 102 TFEU' which 'does not contain binding instructions for staff, and the procedures set out in it may have to be adapted to the circumstances of the case at hand'.[606] That also other persons – in this case eg competition lawyers who want to know in detail how the Commission performs its investigations – may find these acts useful as a piece of information and may adapt their own or their clients' actions accordingly, ie that the acts may also have an external effect,[607] does not alter the fact that those addressed and hence those (softly) obliged by it in principle are originator-internal persons.[608] A publication of such acts to a broader audience, in particular online, may, however, indicate that also an

605 See Hofmann/Rowe/Türk, Administrative Law 571.

606 Commission, Antitrust Manual of Procedures. Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (November 2019) <https://op.europa.eu/en/publication-detail/-/publication/d7d7e463-ac51-11ea-bb7a-01aa75ed71a1> accessed 28 March 2023.

607 See Senden, Soft Law 315 f, with further references; for the necessity of such intra-institutional soft law see Kovács/Tóth/Forgác, Effects 61; addressing the tension between formal addressee and '*de facto* addressee' with regard to soft law and other acts adopted in the context of EU foreign and neighbourhood policy: Vianello, Approach 553 f.

608 Stressing this double effect of 'internal' soft law in the context of State aid policy: Aldestam, Soft Law 15, with a further reference; see also Hofmann/Rowe/Türk, Administrative Law 567, who stress the 'indirect external effect' Commission guidelines may have 'through the application of the principles of legal certainty, the protection of legitimate expectations and equal treatment'; doubtfully: Cannizzaro/Rebasti, Soft law 229 f; for a 'measure of internal organization' which nevertheless has 'legal effects vis-à-vis third parties' see case C-58/94 *Netherlands v Council*, para 38, with further references.



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(EU-)internal/external steering effect is intended by the originator (here: the Commission).[609]

Internal addressees shall encompass institutions, bodies, offices or agencies of the EU other than the originator (more precisely: its staff). They are at issue eg in case of an opinion of the Economic and Social Committee which is sent to the Commission, or of an opinion of the European Ombudsman sent to a European agency (against which an EU citizen has launched a complaint). This category of acts could be said to belong to the group of inter-institutional soft law acts in a wide sense.[610] Inter-institutional acts in a narrow sense are generally understood as acts agreed upon by two or more institutions (or bodies, offices, or agencies of the EU), ie on a bi- or multilateral level.[611] These agreements, if not intended to be binding, form soft law with internal addressees (namely: the creators of the agreement).[612]

External addressees are persons or entities affiliated with the EU which are not, at the same time, internal addressees; in particular: MS, MS authorities,[613] EU citizens and legal persons seated in the EU (but not belonging to its administration; eg undertakings). Examples for EU soft law acts directed to external addressees are the recommendation of the European Banking Authority (EBA) which is sent to the banking supervisory

609 See case T-496/11 *United Kingdom v European Central Bank*, paras 33 f with regard to a publication 'outside the author itself'; for a communication which has not left 'the internal sphere of th[e] administration' see case C-619/19 *Baden-Württemberg*, para 52. The Commission's Rules of Procedure in their Article 17 para 4 provide for the publication of Commission acts in the OJ. This general rule may have to be teleologically 'reduced' in places, eg for the sake of data protection; with regard to the reasoned opinion addressed to a MS at the outset of a Treaty infringement procedure see Senden, Soft Law 189.

610 See Hummer, Interorganvereinbarungen 91 ff, with further references.

611 See also Stöbener de Mora, Institutionelles; with regard to agreed-upon soft law see Knauff, Regelungsverbund 373–376; see also case C-25/94 *Commission v Council*, para 49.

612 See Article 295 TFEU, according to which inter-institutional agreements between the EP, the Council and the Commission can be concluded 'which may be of a binding nature'. This means that they may as well be (agreed to be) of a non-binding nature; for the practical effects inter-institutional agreements may have on the competences of the institutions involved see Klamert, Pragmatik 148 f.

613 For the adoption of acts *vis-à-vis* national authorities, not 'the MS' see Schütze, Rome 1418 f; the different conceptions of the term 'Member State' in EU law are exemplified if we compare Article 258 TFEU (broad conception) and Article 263 para 2 TFEU (narrow conception); with regard to the latter provision see also V.3.6. below.



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authority in a certain MS or the Commission's so-called *de minimis* notice (designated as 'Communication')[614] in the field of competition law which does not mention any specific addressees, but *de facto* is first and foremost directed to undertakings within the meaning of Article 101 TFEU and to national competition authorities.[615]

EU-external addressees are actors which do not belong to the EU, eg third countries or international organisations. An example for an act addressed to them is the Memorandum of Understanding on reinforcing the EU-China IP Dialogue Mechanism concluded between the EU and China.[616]

### 2.4. Legally non-binding acts other than soft law

The output of bodies vested with public authority is not bound to be either law or soft law. There is a number of acts (normally) without regulatory content, that is to say without containing a command or with no linkage to a command. They are addressed to actors both within and outside the respective administration: press releases, circulars, surveys, scientific information, certain letters and e-mails, etc.[617] More generally, this issue was addressed under II.2.3. above. Here we shall broach it specifically in the context of the EU. The distinction between EU soft law and other legally non-binding acts is relevant because these two categories of acts are different both in terms of requirements and effects. The requirements for a legal basis are more demanding in case of soft law than in case of other legally non-binding acts. Moreover, soft law requires an enhanced degree of determination for its (linkage to) commands so as to give concrete

614 For the lack of any difference between 'communications' and 'notices' see Senden, Soft Law 142 f. Also the principal difference between 'notices' and 'guidelines', if any, is by far not clear: <https://competition-policy.ec.europa.eu/mergers/legislation/notices-and-guidelines_en> accessed 28 March 2023.

615 Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), 2014/C 291/01; see also the Opinion of AG *van Gerven* in case C-234/89 *Delimitis*, para 22 (with regard to the predecessor notice): 'the individuals for whom it is intended'.

616 <http://europa.eu/rapid/press-release_IP-15-5279_en.htm> accessed 28 March 2023.

617 See also examples addressed by van Schagen, Regulation; for the potential ambivalence of a press release of the Commission and the UEFA see case C-117/91 *Bosman*, para 14.



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guidance for the addressee's behaviour, whereas in other acts also mere objectives or vague wishes may be uttered. They may as well contain mere information. In terms of effects, it is to be stressed that only soft law contains rules vested with public authority. This will result in more specific steering effects on its addressees than with other non-binding acts.

For other legally non-binding acts it is mostly its content which may (not) be convincing and thus exert (only limited) steering effects. The topic to which the content of the act is dedicated is irrelevant for the categorisation. The scientific finding that a certain substance used in convenient meals significantly enhances the risk of cancer for their consumers may be highly important and demand immediate action on the part of the food safety authorities in charge, but it does not qualify as soft law. On the other hand, an institution-internal guideline on how to use e-mail signatures for professional correspondence may be of limited importance, but it is normative and hence – depending on its legal (non-)bindingness – qualifies as law or soft law. The distinction between soft law and other legally non-binding acts is also reflected upon, to some extent at least, in the EU's publications regime. The EU itself on its EUR-Lex webpage up until recently has applied a three-partite classification of 'EU legislation': 'binding legal instruments', 'non-binding instruments',[618] 'other instruments'. Meanwhile, it distinguishes only between 'legally binding' and 'non-binding' 'legal acts'.[619]

For most of the 'other' output it is, for lack of a command, difficult to confound it with soft law, let alone law. In a few cases a doubt may remain, though.[620] Due to the relative informality of EU soft law it may be difficult sometimes to distinguish it from mere utterances of opinions. The latter opinions only deserve closer scrutiny as potential soft law where

618 Note that Article 297 TFEU does not lay down publicity requirements for EU soft law; Knauff, Regelungsverbund 423 f; see also Opinion of AG *La Pergola* in case C-4/96 *NIFPO*, para 56.

619 <https://eur-lex.europa.eu/collection/eu-law/legislation/recent.html>; see also the EU's inter-institutional style guide, containing provisions on the structure of the OJ: <http://publications.europa.eu/code/en/en-000500.htm> both accessed 28 March 2023.

620 See eg the DG Competition Staff Working Document, 'The Application of State Aid Rules to Government Guarantee Schemes covering Bank Debt to be issued after 30 June 2010' which appears to be merely summarising the Commission's new approach (as laid down in particular in the Commission's relevant Communications), but which also, eg on its page 7, lays down new rules (qualifying as soft law); see also Opinion of AG *Tesauro* in case C-57/95 *France v Commission*, para 17.



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they stem from an actor which is vested by EU law with public authority (as reflected eg in an explicit competence to adopt EU soft law). Where no such authority is provided for, eg in case of an NGO proposing a certain policy approach to the Commission,[621] the question of whether or not this could be EU soft law does not even occur. But also where actors abstractly competent to adopt EU soft law, mainly these are EU institutions, bodies, offices and agencies (see 2.2. above), express their views, these utterances do not necessarily qualify as EU soft law. Even though public bodies, and hence also EU bodies (in a broader sense), are not protected by the freedom of expression as a fundamental right,[622] they may principally express their respective view to each other in a field materially falling within their respective scope of action. This follows from Article 13 para 2 TEU (second sentence: 'The institutions shall practice mutual sincere cooperation'), and is explicitly laid down with regard to the relationship between the EP, the Council and the Commission in Article 295 TFEU which provides, explicitly only since the Treaty of Lisbon,[623] that these three institutions 'shall consult each other and [...] make arrangements for their cooperation'.[624] To assume that all utterances made in the context of such cooperation/consultation need to qualify as soft law would mean to deprive soft law of its specific character. Institutions and bodies of the EU in places need to communicate with each other in an atmosphere of informality, that is to say in expressions other than legal and soft law acts. The provisions mentioned above neither require that each expression in the course of such cooperation/consultation shall be uttered in the form of soft law, nor do they grant a general competence to adopt soft law to the EU bodies at issue.

The ordinary legislative procedure may serve to illustrate the distinction between soft law and other non-binding acts. The EP's position at first reading is an act which is addressed ('communicated') to the Council. It constitutes the final position of this institution at the time of its being launched, and it may (possibly) be accepted by the Council the way it is

621 See in this context Article 11 para 1 TEU, providing that the institutions shall allow 'citizens and representative associations' to 'make known and publicly exchange their views in all areas of Union action'.

622 See eg S Augsberg, Art. 11 GRC, para 10; Jarass, Charta, para 19 of Art 11.

623 See Klamert, Pragmatik 148.

624 Article 295 TFEU is connected to Article 13 para 2 (second sentence) TEU, but goes beyond that; see Gellermann, Art. 295 AEUV, para 1; Kluth, Art. 295 AEUV, para 1; Voet van Vormizeele, Art. 295 AEUV, para 2.



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(Article 294 para 4 TFEU). It is the expression of the wish of the EP that the Council agrees to this position and thereby makes its content a legal act. It is one act in a procedure (potentially) containing a number of different acts which are all dedicated to creating a legally binding (more concretely: a legislative) act. In that sense, it does not stand alone but is regularly part of a line of different acts which – in a macro-perspective – serve the same aim, that is to create a legislative act. In a micro-perspective, however, it serves a more specific aim, namely to convince the Council to elevate, by the approval of this institution, the draft norms contained therein to a legislative act. Therefore, in my view and irrespective of its being a special case *qua* being embedded in a whole procedure intended to lead to the adoption of a legislative act, it qualifies as a soft law act. That the Council may as well (partly) disagree with the EP and adopt its own position is not in contradiction to this qualification. Rather, it is a ramification of its legal non-bindingness. While being legally non-binding for others, the EP's position does entail legal effects: The Council cannot proceed without having received the EP's position; furthermore, Article 294 TFEU implicitly requires the Council to consider the EP's position (*argumentum* 'approves'/'not approve'), a duty which addressees of EU soft law often have (see 4.2. below); the EP is bound[625] by its position to the extent that the Council can, without further ado (in particular: without asking the EP for its view once more), accept its position, thereby making it a legislative act. Once the Council has approved the EP's position or has adopted its own (different) position, the EP's position – that follows from the system set up by Article 294 TFEU and hence from primary law – ceases to contain a demand, as then it is procedurally impossible to be followed. This is because it has already been followed by the Council or because the Council has decided otherwise, as the case may be. This constitutes a procedural restriction of the soft law effects of the EP's position. For similar reasons, also the EP's view at second reading and the Council's position at first and its view at second reading, respectively, qualify as soft law. The informal discussions, negotiations and other exchanges of views between representatives of the EP and the Council, but also the Commission, taking place in between these more formal steps the TFEU provides, for lack of the above characteristics do not entail soft law acts.

625 For the bindingness of EU soft law upon its respective creator (self-bindingness) see 4.2.2.2.4. and 4.2.3.2.3. below.



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The fact that an act merely serves the purpose of initiating or continuing a process and loses its importance, or untechnically speaking: 'evaporates', once this purpose has been fulfilled,[626] does not *per se* speak against soft law.[627] This is why also the Commission proposal according to Article 293 TFEU may be qualified as an act of soft law. It is not the rules proposed therein which have a (soft) normative effect (because, if eventually adopted in the form of law, they will have different addressees), but the suggested adoption of the proposal by its addressee(s) as a legislative act. It constitutes the Commission's view on what a legislative act regulating (parts of) a certain policy field shall look like, and it does so with a certain finality (even if the Commission may again alter or withdraw the proposal).[628] The legal effects the proposal entails are: In most cases the legislator may not act without such a proposal; where the Council, pursuant to the Treaties, acts on such a proposal, it may normally amend it only by a unanimous decision[629]; it can be approved by the legislator and thereby, without further ado (see above), be transformed into a legislative act. Once the legislative act at issue is adopted, the Commission proposal no longer has this effect.[630]

626 See Schoo, Art. 294 AEUV, paras 38 f.

627 Addressing *travaux préparatoires* as a special case: Rosas, Soft Law 309: 'These can be seen as tools of interpretation which are so directly linked to the adoption of legally binding texts that it seems best to award them separate attention'.

628 For the underlying purpose of this competence see Krajewski/Rösslein, Art. 293 AEUV, paras 15–17.

629 Article 293 para 1 TFEU. Note the limits to this power: The Council may not 'depart from the subject matter of the proposal [or] alter its objective', as this would 'deprive [the Commission proposal] of its *raison d'être*' (emphasis in original); case C-24/20 *Commission v Council*, paras 93 f, with further references.

630 EUR-Lex even states that in this case its validity has ended; see eg <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52012PC0064> accessed 28 March 2023; for the non-binding acts adopted in preparation of a legislative proposal see van Schagen, Regulation 597.



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## 3. The legal bases of soft law

### 3.1. Preliminary remarks: the meaning of Article 288 TFEU for EU soft law

#### 3.1.1. The difference between recommendations and opinions

The list of legal acts laid down in Article 288 TFEU mentions two legal acts[631] with 'no binding force'[632]: recommendations and opinions (whose scope of addressees is not limited in this provision in any way). The fact that their non-bindingness is stressed allows us to conclude that both of them may have normative content, meaning that they may contain or be related to a command. Where an act does not have any normative content, the question of its legal (non-)bindingness does not arise in the first place. That Article 288 TFEU lists two categories of non-binding acts suggests that they are different from each other.[633] But in which way do these two types of acts differ from each other?[634] The (legally non-binding) normativity of a recommendation – in an exclusively semantic view – appears to be stronger than that of a mere opinion.[635] Etymologically, there is a nexus between the term 'command' and the term 'recommendation'.[636] Recommendations often (not always) dispose of general application.[637] An opinion

631 This qualification as a legal act in the terminology of the Treaties is in contrast to the national legal orders of most MS and to the international legal order, respectively; *von* Bogdandy/Bast/Arndt, Handlungsformen 114. However, from the terminological elevation of soft law to a source of law as such no specific legal effects can be deduced.

632 It is clear that only the legal bindingness is addressed here; other legal effects are not thereby excluded; see Knauff, Regelungsverbund 301. Arguing that a 'comply or explain' mechanism excludes the qualification of the act as recommendation or opinion within the meaning of Article 288 TFEU: Wörner, Verhaltenssteuerungsformen 228.

633 At the level of international law, no such dual distinction between a 'recommendation' and an 'opinion' seems to apply; see Schermers/Blokker, Institutional Law, § 1217, with regard to further designations such as 'advice' or 'resolution'.

634 Apparently suggesting that there is no difference in substance: Opinion of AG *Tesauro* in case C-303/90 *France v Commission*, para 20: '[…] the measure in question is no more than a recommendation, an opinion addressed to Member States […]'.

635 Recommendations, it was said, allow their creators 'to make their views known and to suggest a line of action'; <https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en> 28 March 2023; see also Braams, Koordinierung 152; Schwarze, Soft Law 235.

636 Walter, Soft Law 25.

637 Cannizzaro/Rebasti, Soft law 221.



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is uttered for its addressee to take notice of it – it allows its creator 'to make a statement'.[638] It was remarked that the adoption of a recommendation reflects the respective body's own 'Entschlusskraft' [determination],[639] whereas opinions constitute a reaction to another body's initiative,[640] that is another bodies utterance. In practice this holds true for most opinions. However, concluding from the wording of certain competence clauses[641] it cannot be excluded that an opinion is submitted in complete detachment of other acts.

*Von Bogdandy*, *Arndt* and *Bast* conceptualise recommendations as '*non-binding directives*' (emphasis in original), which may (voluntarily) be transposed by the MS.[642] With regard to Commission recommendations and opinions *Hofmann*, *Rowe* and *Türk* express that they 'assist [their respective addressee] to evaluate a situation or circumstance and to take appropriate action', but generally they also describe (idealtypical) recommendations as 'active' (initiating) and opinions as 'reactive' (responding).[643] *Senden* contends (with a view to administrative practice) that a recommendation 'is primarily used as a tool or instrument to coordinate or to bring national policies and objectives closer together, without proceeding (yet) to the legislative harmonisation level'.[644] Due to this (soft) regulatory character also with regard to their outward appearance they often resemble acts of secondary law.[645] It was also said that with recommendations EU bodies

638 <https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en> 28 March 2023.

639 See Geismann, Art. 288 AEUV, para 63; Nettesheim, Art. 288 AEUV, para 201; Ruffert, Art. 288 AEUV, para 98. *Virally*, with regard to recommendations adopted on the level of public international law, similarly expresses that they imply 'une invitation à adopter un comportement déterminé, action ou abstention'; Virally, Valeur 68.

640 See Bieber/Epiney/Haag/Kotzur, Europäische Union 211; Härtel, Rechtsetzung 272, with further references; Nettesheim, Art. 288 AEUV, para 201.

641 See, as one example, Article 304 para 1 TFEU, stipulating the Economic and Social Committee's competence to 'issue an opinion on its own initiative *in cases in which it considers such action appropriate*' (emphasis added).

642 Von Bogdandy/Arndt/Bast, Instruments 112 f. For the fact that directives may contain broad provisions which have an effect similar to soft law see Trubek/Trubek, Governance 551, emphasising the coexistance in one directive (here: the EU Water Framework Directive, ie Directive 2000/60/EC) of broad guidance and detailed, binding rules ('hybridity').

643 Hofmann/Rowe/Türk, Administrative Law 545 f.

644 Senden, Soft Law 179.

645 See Knauff, Regelungsverbund 302.



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provide their solution to a specific problem and suggest its application,[646] whereas an opinion primarily contains the legal view of the creator, but does not suggest a specific action of the addressee.[647] The author would suppose that also the transmission of the legal view of an EU body, eg the Commission under Article 258 TFEU, may suggest compliance with this view by the addressee, ie a specific action.[648] Opinions are normally not used as alternatives to secondary law,[649] and are generally less homogenous as regards appearance and content than recommendations. However, selected examples can be named in which very similar acts adopted by two different bodies are called 'recommendation' in one case, and 'opinion' in the other.[650]

A systematic interpretation reveals a tendency that recommendations (eg of the Commission), if addressed to another institution (eg the Council), are regularly envisaged as a procedural requirement for further (soft law or legal) action.[651] The addressee is free not to act, that is to say not to follow the recommendation, though. In these cases recommendations meet a purpose which is comparable to that of proposals. On the contrary, opinions are often asked for ('invited') by their potential recipients. The actor asked is then free to adopt an opinion. In other cases EU bodies are free to adopt opinions on their own initiative.[652] The systematic approach applied here is only rudimentary. Having assessed the legal bases for the adoption of recommendations and opinions contained in the Treaties (see 3.4. and 3.5. below), we shall revisit the distinction between recommendations and opinions and examine whether new findings have arisen from this assessment (see 3.9. below).

646 See also case C-370/07 *Commission v Council*, para 42; case T-496/11 *United Kingdom v European Central Bank*, para 32.

647 See Knauff, Regelungsverbund 302 and 304.

648 See also Knauff, Regelungsverbund 304 f. Opinions are uttered in order to be heard: 'Jede Meinung hat Anspruch, entweder mit Schweigen aufgenommen oder wirksam widerlegt zu werden' (*Franz von Holtzendorff*); unspecifically referring to the difference of a Commission opinion under Article 258 TFEU as compared to other Commission opinions: Hofmann/Rowe/Türk, Administrative Law 548.

649 See Senden, Soft Law 188.

650 See the example of the ESMA and the Commission given at 3.4.6. below.

651 Eg Article 121 paras 2 and 4, Article 126 paras 7 and 13, Article 144 paras 2 f or Article 207 para 3 TFEU.

652 Eg Article 282 para 5, Article 304 para 1, Article 307 paras 1 and 4 TFEU.



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### 3.1.2. Is there a *numerus clausus* of EU soft law acts?

The difference between EU law and EU soft law – like in the case of law and soft law more generally – is established by scrutinising the act and its context (see II.2.1.2. above).[653] But also within the realm of EU soft law different acts can be perceived.[654] In practice EU soft law acts do not only occur under the titles 'recommendation' and 'opinion' respectively, but they bear many different names – an 'unsystematic, indeed unpredictable, nomenclature'[655] – such as 'Communication', 'Resolution', 'Guidelines', 'Questions and answers' ('Q&A'),[656] 'Vademecum' or 'Standards'.[657] This does not *per se* contradict the assumption that Article 288 TFEU contains an exhaustive list, a (very short) catalogue of EU soft law acts[658] (see also 3.6. below); neither does the *prima facie* more differentiated terminology applied elsewhere in the Treaties, in particular 'conclusions' (eg in Article 135 or Article 148 TFEU) or 'guidelines' (eg in Article 121[659], Article 148 or

653 See Opinion of AG *Kokott* in case C-226/11 *Expedia*, paras 26 ff, with reference to the three indicators 'wording', 'purpose' and 'context'; see also Hofmann/Rowe/Türk, Administrative Law 552, with further references.

654 For the diversification of the legally non-binding output of public actors on a global level ('global governance') see Goldmann, Perspective 61.

655 Hofmann/Rowe/Türk, Administrative Law 537; for the many (partly: soft law) acts adopted as part of EU external action under different names see Vianello, Approach 551.

656 Sometimes also referred to as 'Frequently Asked Questions'; see also Commission, 'Enforcing EU law for a Europe that delivers', COM(2022) 518 final, 10 f.

657 See, for further examples, Majone, Agencies 269; van Rijsbergen/Rogge, Changes, with regard to the ESAs; see also von Bogdandy/Arndt/Bast, Instruments 114, assuming that the Commission is 'eager to reserve opinions [as opposed to the other acts just mentioned] for specific and, probably, important measures'.

658 Refusing the lament of those claiming there to be a '"proliferation of instruments" [Laeken Declaration on the future of the European Union (2001) 4] […], implying an uncontrolled and dangerous multiplication of instruments' also in the field of legally binding instruments (after the Treaty of Nice and in the run-up to the draft Constitutional Treaty): von Bogdandy/Arndt/Bast, Instruments 91 f: 'The structure of the legal instruments is complex and only partially determined by the Treaties, but it is not chaotic'.

659 Article 121 para 2 TFEU mentions the 'broad guidelines of the economic policies of the Member States and of the Union' which are briefly referred to as 'broad economic policy guidelines' (see Article 139 para 2 lit a TFEU).



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Article 156 TFEU).[660] 'What's in a name?', one is tempted to ask.[661] Since the terms recommendation and opinion are sufficiently broad, not least because the Treaties fail to flesh them out (see 3.1.1. above), all these acts could be assigned to either group. Thus, the *numerus clausus* claim uttered with regard to Article 288 TFEU (limited to recommendations and opinions[662]) could be upheld.[663] A Communication regularly contains a certain (legal)

660 The Commission even has referred to its non-binding comments as 'decision' which the then Court of First Instance considered irrelevant in case T-295/06 *Base*, para 97.

661 For examples in the CJEU's case law: case 147/83 *Binderer*, para 11: 'the choice of form cannot alter the nature of a measure'. In *Grimaldi* the Court has explicitly extended this finding to the case of legally binding and legally non-binding acts; case C-322/88 *Grimaldi*, para 14; joined cases C-463/10P and C-475/10P *Deutsche Post*, para 58, in which the CJEU qualified a 'request' of the Commission as a decision; stressing the 'more formal status' of a request: Opinion of AG *Geelhoed* in case C-304/02 *Commission v France*, para 22; case T-671/15 *E-Control*, para 83: '[T]he fact […] that the contested opinion contains a "decision" […] does not bind this Court in its assessment for the purposes of determining whether the contested opinion is an act that is capable of forming the subject matter of an action for the purposes of Article 263 TFEU'. Conversely, acts whose name does not suggest that they have a normative character may contain soft law provisions: case T-190/00 *Regione Siciliana*, para 100, with reference to a Commission report containing guidelines; with regard to a 'letter' turning out to be a legally binding decision: joined cases 7/56 and 3–7/57 *Algera*, 54 f; similarly: joined cases C-189, 202, 205, 208 and 213/02P *Dansk Rørindustri*, para 211; case C-526/14 *Kotnik*, para 45.
For accounts of this diversity in the literature see Knauff, Regelungsverbund 320 for the partly interchangeable denomination of soft law acts of the Commission; Cosma/Whish, Soft Law 25 f with regard to the field of competition law; Pampel, Rechtsnatur 33 f; von Bogdandy/Arndt/Bast, Instruments 120 for the example of a legally non-binding 'directive'; von Graevenitz, Mitteilungen 169 f for 'recommendations' and, in particular, 'opinions' which do not contain a behaviour-steering element concrete enough to (non-legally) commit somebody else.

662 With regard to the legally binding acts contained in Article 288 TFEU the exhaustiveness of the latter provision is – especially with a view to the acts adopted in the fields of CFSP and JHA – contested; see Geismann, Art. 288 AEUV, paras 22–24; Nettesheim, Art. 288 AEUV, para 217; Ruffert, Art. 288 AEUV, para 111. At least with regard to other policy fields the Court seems to uphold the *numerus clauses* of acts *of law* mentioned in Article 288 TFEU; see eg case C-106/14 *FCD*, para 28, with a further reference: 'It is a document drawn up by the ECHA and is not among the legal acts of the European Union referred to in Article 288 TFEU; accordingly it cannot be of a legally binding nature'.

663 See Haratsch/Koenig/Pechstein, Europarecht, paras 395 f; Meijers Committee, Note 2; at least pointing in that direction: Opinion of AG *Darmon* in joined cases 166 and 220/86 *Irish Cement*, para 24.



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opinion of the Commission,[664] a Memorandum of Understanding concluded between two institutions could be qualified as a joint decision or a joint recommendation, as the case may be, a Resolution, eg of the European Council, could be understood as recommendation or opinion (regularly drafted in broad terms[665]),[666] Guidelines give guidance on how to proceed on a certain matter and hence could be called recommendations,[667] etc.[668]

With regard to Article 263 para 1 TFEU, the following is to be noted: This provision excludes recommendations and opinions of the Council, the Commission, and the ECB. These acts therefore cannot be annulled by the Court. With regard to the EP, the European Council, and bodies, offices or agencies of the Union, the *lex citata* includes all acts 'intended to produce legal effects *vis-à-vis* third parties'. Thereby the Treaty seems to acknowledge that the latter bodies may adopt legally non-binding acts other than recommendations and opinions – and that would mean: that the Treaties principally allow for such other acts to be adopted. Therefore, the wording of Article 263 para 1 TFEU speaks against the *numerus clausus* argument. In judicial practice the Court does not make a difference between the exclusion of 'recommendations and opinions' on the one hand, and the inclusion only of 'acts intended to produce legal effects *vis-à-vis* third parties', on the other hand.[669] It held that 'an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects'.[670]

664 Describing Communications as '"verwaltungsvollzugsbezogene" Empfehlung' [recommendation concerning administrative execution]: Brohm, Mitteilungen 67.

665 As in case of international agreements, this broadness is regularly required to keep all of the participating (Member) States on board; see Dawson, Governance 405.

666 For the EP's own view that its resolutions constitute '"opinions" or recommendations': case 230/81 *Luxembourg v European Parliament*, 269. The Court itself is not explicit on this question (eg para 39).

667 See also case C-911/19 *FBF*, paras 42–45. On the legal bindingness of guidelines of the ECB issued under Article 12.1 of the ESCB/ECB-Statute see Hofmann/Rowe/Türk, Administrative Law 548.

668 This is reflected in the Commission's combination of the terms 'recommendation' on the one hand and 'rules of conduct', 'guidelines' etc, on the other hand; see Senden, Soft Law 162 and 173 f, with further references.

669 See eg case T-154/10 *France v Commission*, paras 37 f, with further references. Remarkably, the wording of Article 265 TFEU excludes only recommendations and opinions, and only with regard to actions filed by natural or legal persons; see W Cremer, Art. 265 AEUV, para 6; Dörr, Art. 265 AEUV, para 14.

670 Case C-114/12 *Commission v Council*, para 39, with further references; see also case T-496/11 *United Kingdom v European Central Bank*, para 32.



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This interpretation does away with the differentiated wording of Article 263 para 1 TFEU, and it acknowledges the existence of EU soft law beyond recommendations and opinions (even for the Council, the Commission and the ECB) – by excluding it from judicial review (see also 6.2. below).

Also apart from the Court, the institutions do not appear to have applied the *numerus clausus* concept. This is reflected in their publication policy. As *von Bogdandy*, *Bast* and *Arndt* have noted in 2002, the Commission, for example, has published (most) recommendations and opinions in the L-series (Legislation; originally: *legislatio*) of the OJ, whereas other soft law acts were published in the C-series (Information and Notices; originally: *communicatio*).[671] Today the L-series contains four headings, the C-series five.[672] Certain Council, Commission or ECB recommendations are published in L II (non-legislative acts),[673] whereas other recommendations of these institutions and EP recommendations for the attention of the Council are published in C I (resolutions, recommendations and opinions).[674] ECB recommendations adopted in accordance with Article 129 or Article 219 TFEU are published in C III (preparatory acts).[675] Opinions are published either in C I (if non-compulsory opinions) or in C III (if compulsory

671 See von Bogdandy/Bast/Arndt, Handlungsformen 118; see case C-226/11 *Expedia*, according to which 'the "C" series of the *Official Journal of the European Union* […], by contrast with the "L" series of the Official Journal, is not intended for the publication of legally binding measures, but only of information, recommendations and opinions concerning the European Union' (para 30); see also case T-721/14 *Belgium v Commission*, para 40; similarly: Opinion of AG *Kokott* of 6 September 2012 in this case, para 32; cautious as regards the explanatory power of the publication series in which an act appears: von Graevenitz, Mitteilungen 170; Senden, Soft Law 101. For the meaning of publication in the OJ more generally: Sarmiento, Soft Law 275.

672 See Council, Comments on the Council's Rules of Procedure (2022) 101 f.

673 See <http://publications.europa.eu/code/en/en-110203.htm> accessed 28 March 2023. That publications in the L-series are not necessarily intended to have legal effects was confirmed by the Court in case T-721/14 *Belgium v Commission*, para 39.

674 See <http://publications.europa.eu/code/en/en-110303.htm> accessed 28 March 2023. For Commission recommendations addressed to only one or a small number of addressee(s) this may be different; see Senden, Soft Law 173. With regard to the C-series more generally see case C-428/14 *DHL*, para 34; case C-410/09 *Polska Telefonia*, para 35; for the less strict distinction applied with regard to rules published on the respective institution's website see von Graevenitz, Verrechtlichung 76.

675 See <http://publications.europa.eu/code/en/en-130800-tab.htm> accessed 28 March 2023.



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opinions). Guidelines are published in L II,[676] resolutions in C I.[677] Commission communications are regularly published in the category C II (information).[678] White Papers of the Commission are sometimes published in the C-series, sometimes they are not published in the OJ. Green Papers of the Commission – which contain soft law rules even less often than White Papers – are regularly not published in the OJ.[679] This practice is coined by the EU's Publications Office and by the institutions.[680]

Overall, a *numerus clausus* conception of Article 288 TFEU with regard to soft law acts seems to be feasible, but it is not in compliance with what already early legal scholarship[681] and administrative practice[682] suggest: namely, a more diversified morphology of EU soft law, extending the number of categories of EU soft law beyond recommendations and opinions. Also the European Convention in 2002 argued in favour of a certain flexibility in this respect.[683] Eventually, though, Article 288 TFEU and its predecessors have never been adapted to the rank growth of non-binding acts in practice. This may lead one to assume that the MS have approved of a limitation of non-binding acts to two categories.

676 See <http://publications.europa.eu/code/en/en-110200.htm> accessed 28 March 2023.

677 See <http://publications.europa.eu/code/en/en-110303.htm> accessed 28 March 2023.

678 Critically: Schweda, Principles, para 30.

679 For the character and purpose of Green Papers see Senden, Soft Law 124–126.

680 With regard, for example, to the Council's publication preferences see Council, Comments on the Council's Rules of Procedure (2022) 101-104. Critically of the inconsistency of the soft law publication regime: Eliantonio, Soft Law 497, with a further reference; see della Cananea, Administration 63, with regard to the Commission's soft law in the field of State aid policy; for the – related – translation regime of EU soft law see case C-410/09 *Polska Telefonia*, in particular para 37.

681 See Braams, Koordinierung 156; Gärditz, Unionsrecht, para 56; Ştefan, Soft Law 11; see also the references in von Bogdandy/Arndt/Bast, Instruments 96 (fn 17).

682 See Turgis, Communications 52, with further references.

683 See European Convention, Report of 29 November 2002 from the Chairman of the Working Group IX on Simplification, CONV 424/02, 6 f; for legally binding acts see ibid 4–6. Also the history of the Treaty of Lisbon in the context of the revision of the list of legal acts now contained in Article 288 TFEU does not allow for the conclusion that the Masters of the Treaties intended to limit the number of soft law acts available; see Schwarze, Soft Law 247 f.



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## 3.2. The applicability of the principle of conferred powers

### 3.2.1. Introduction

With institutions, bodies, offices and agencies of the EU rendering a variety of soft law acts, the question arises on which legal foundation these acts are adopted. 'Unlike international soft law,' *Cannizzaro* and *Rebasti* argue, 'European soft law does not operate in a normative vacuum but rather within the framework of the Treaties'.[684] While the Treaties leave it 'obscure how soft law is to be anchored in the Community legal system',[685] this observation cannot lead to the conclusion that the question of competence for the adoption of EU soft law does not deserve further consideration.

It could be argued that soft law, *qua* being legally non-binding, cannot possibly violate EU law, which is why compliance with the latter – and as a consequence this also means: with the competence order of the EU – is not required.[686] However, this assumption is to be refused.[687] Due to its potentially strong steering effects, soft law may very well interfere with the

684 Cannizzaro/Rebasti, Soft law 231; note also the words of Knauff, Regelungsverbund 296: 'gleichsam "natürliche" Daseinsberechtigung' [quasi 'natural' right to exist] of soft law in public international law as opposed to the EU legal order; see also Schermers/Blokker, Institutional Law, § 1218: 'All international organisations are empowered to issue recommendations'. Insisting on the applicability of the principle of attributed powers also with regard to international soft law: Sands/Klein, Bowett's Law, para 11–054; von Bogdandy, Principles 1933.

685 Senden, Soft Law 24.

686 See references in Senden/van den Brink, Checks 21.

687 See case 230/81 *Luxembourg v European Parliament*, para 30, stressing the importance of the respective 'content and observance of the rules on competence'; see also case C-42/99 *Queijo Eru*, para 20, with regard to the requirement that EU soft law be in accordance with EU law; Opinion of the Legal Service of the Council on the Commission's Communication on a new EU Framework to strengthen the Rule of Law, 10296/14, paras 18 f. Only exceptionally may soft law deviate from secondary law, and arguably only were it does not thereby impose obligations: see eg case T-87/05 *EDP*, paras 161–163; also the non-adoption of EU soft law can violate EU law, as is suggested by Article 265 para 1 TFEU which – deducing *e contrario* from its para 3 – allows the institutions and the MS to bring before the Court any failure to act (including the failure to adopt a legally non-binding act) on the part of an(other) institution; also the Court's Opinion in case 2/13 *ECHR II*, paras 196–200, is to be considered, in which it stresses the risk for the EU's autonomy of requests of national courts for (non-binding) advisory opinions from the European Court of Human Rights. For the non-bindingness of these advisory opinions see also <https://www.echr.coe.int/Documents/Press_Q_A_Advisory_opinion_ENG.PDF> accessed 28 March 2023.



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competences of the MS or of EU actors[688] (and, as regards the rights of individual actors, also with fundamental rights[689]).

The EU's competences are subject to the principle of conferral.[690] Whether this principle also applies to the EU's soft law powers will be examined in the subsequent sub-chapters. When talking about competences in this context, conceptually we have to distinguish between first the EU's competence to adopt soft law acts (competence of the Union; in German-speaking scholarship referred to as *Verbandskompetenz*), second the originator's general/specific power to adopt certain EU soft law acts (competence of the EU actor at issue; *Organkompetenz*[691]), and third the legal basis for the concrete soft law act (substantive legal basis).

While in practice it is possible that two or all of the three parts of the legal foundation – *Verbandskompetenz*, *Organkompetenz* and substantive legal basis – fall within one legal provision,[692] for the sake of theoretical clarity they should be kept separate. *Verbandskompetenz* and *Organkompetenz* must be laid down in primary law,[693] if only implicitly, whereas the legal basis for a concrete soft law act can also be provided for in acts based on the Treaties (secondary law).

### 3.2.2. The principle of conferral – an interpretation of the relevant terms

The principle of conferral is the core principle on the distribution of powers between the EU and its MS.[694] The starting point for answering the question whether or not it applies also to soft law powers is therefore an interpretation of Article 5 para 2 TEU. According to this provision, the EU shall 'act only within the limits conferred upon it […] in the Treaties' (*Verbandskompetenz*). This also applies to the *Organkompetenz*: Each insti-

688 See also Andone/Greco, Burden 88–90; Kadelbach, Art. 5 EUV, para 12; Wörner, Verhaltenssteuerungsformen 280 f, with further references.

689 See eg Fischer-Lescano, Austeritätspolitik 37 ff.

690 Article 5 para 1 TEU reads: 'The limits of Union competences are governed by the principle of conferral'. For the roots of this principle in public international law see Engström, Powers 45 ff.

691 For the wide understanding of this term see eg Nettesheim, Art. 13 EUV, paras 7 f.

692 A specific *Organkompetenz* and the substantive legal basis of an act always fall within one provision, see eg Article 36 para 2 TEU.

693 See Nettesheim, Art. 13 EUV, para 85.

694 For the different functions of the principle of conferral see Senden, Soft Law 291, with references to the literature.



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tution, body, office or agency can act only 1) if an according competence is conferred on the EU, and 2) 'within the limits of the powers conferred on it [the institution, body, office or agency] in the Treaties' (Article 13 para 2 TEU[695]).[696] In this context, the Court has unequivocally held that 'the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review'.[697]

The term 'competence' is very general. Its verbal interpretation does not suggest in any way that only the possibility to adopt legally binding acts shall be subsumed under the term.[698] Also from a systematic point of view, 'competences' within the meaning of the Treaties seem to be more than just the possibility to adopt legally binding acts.[699] The main argument in favour of such a systematic interpretation is Article 292 TFEU, a remainder

695 While Article 13 para 2 TEU refers only to 'institutions', a wide reading of this term so as to include bodies, offices and agencies ought to be applied. The Masters of the Treaties – the MS – have certainly not intended to exclude these other EU actors from this conditionality of powers; in a similar vein: Nettesheim, Art. 13 EUV, paras 7 f.

696 See Streinz, Art. 5 EUV, para 8. The fact that the wording of Article 249 TEC ('In order to carry out their task and in accordance with the provisions of this Treaty [...]') in its successor provision, Article 288 TFEU, has been changed ('To exercise the Union's competences, the institutions shall adopt [...]') does not relativise the principle of conferral. The term 'competences' in Article 288 TFEU, correctly understood, means 'powers laid down in the Treaties'. In this respect the meaning has not changed as a consequence of the Lisbon reform. The new wording, however, indicates more clearly than its predecessor provision that there shall be no *Verbandskompetenz* which is not covered by an according *Organkompetenz* (*argumentum* 'exercise the Union's competences' as opposed to 'their task'); pointing in a different direction: case C-16/16P *Belgium v Commission*, para 26.

697 Case 45/86 *Commission v Council*, para 11; see also case C-70/88 *European Parliament v Council*, para 9. The Court has acknowledged that the legislator 'legitimately' may have doubts as regards the appropriateness of a certain competence clause; case 8/73 *Hauptzollamt Bremerhaven*, paras 4–6.

698 For the comparatively wide meaning of the term 'competence' in EU law see Braams, Koordinierung 218 ff; see also Nettesheim, Art. 288 AEUV, para 200; Senden, Soft Law 319 f; Schroeder, Art. 288 AEUV, paras 129 and 132; von Bogdandy/Bast, Competences 232 ff; against this view: Bieber, Art. 7 EG, para 55; Biervert, Mißbrauch 89 f; Nicolaysen, Gemeinschaftsrecht 60; Kraußer, Prinzip 88 and 94.

699 While Article 2 para 2 TFEU – with regard to exclusive and shared powers of the EU – stresses the competence to adopt legally binding acts, it is to be noted that also coordinating powers of the EU – which do not necessarily entail the power to adopt legally binding acts (see Articles 5 f TFEU) – are a competence category of their own.



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of Article I-35 of the (draft) Constitutional Treaty: The explicit vesting of the Council and the Commission[700] with the competence to adopt recommendations in Article 292 TFEU serves as a strong argument in favour of the applicability of the principle of conferral in the context of soft law powers,[701] especially if it is contrasted with the more limited power of the ECB to adopt recommendations only 'in the specific cases provided for in the Treaties'.[702] While the former constitutes a general empowerment to adopt recommendations, the latter emphasises that with regard to the ECB no such general empowerment applies.[703] It is not perceivable why the TFEU would expressly mention these powers in a separate provision, thereby apparently distinguishing between the Council and the Commission on the one hand, and the ECB on the other hand, if it did not intend to grant the respective powers to the Council and the Commission (as regards the ECB, admittedly, the provision has a merely declaratory character).[704] Article 292 TFEU generally indicates the applicability and importance of the principle of conferral in the context of the power to adopt recommendations, but it does not comprehensively regulate this power for all EU institutions,

700 The Commission's general power to adopt recommendations conforms to Article 211 (second indent) TEC; with regard to the predecessor of Article 211 TEC, Article 155 TEEC, its conferral of powers on the Commission was clearly confirmed by the Court in case T-113/89 *Nefarma*, para 79; case C-303/90 *France v Commission*, para 30; differently: Nettesheim, Art. 292 AEUV, para 5.

701 See European Parliament, 'Better Regulation and the Improvement of EU Regulatory Environment. Institutional and Legal Implications of the Use of "Soft Law" Instruments', Note of March 2007, PE 378.290, 10 f. That Article 292 TFEU is a competence clause (not a declaratory provision) is, at least implicitly, confirmed in case T-721/14 *Belgium v Commission*, para 20.

702 See Gellermann, Art. 292 AEUV, paras 2 f; Ruffert, Art. 292 AEUV, para 2; see also Nettesheim, Art. 292 AEUV, paras 1–4 and 7, doubting the qualification of Article 292 TFEU as a competence clause, but addressing the question of whether or not the principle of conferral applies in the context of recommendations.

703 See Geismann, Art. 292 AEUV, para 3; Gellermann, Art. 292 AEUV, paras 3 and 5; Ruffert, Art. 292 AEUV, para 2. For the ECB's far-reaching power to adopt opinions see Article 127 para 4 TFEU.

704 Neither is the argument convincing that Article 292 TFEU must be declaratory (in its entirety) due to its specific location in the Treaties. It is true that the respective Treaty section is entitled 'The legal acts of the Union' and that Article 288 TFEU only lists the most common acts of EU law, but does not grant the power to adopt them. Other provisions of this Section do grant powers, though: Articles 290 and 291 TFEU, for example, grant the power to confer certain powers, mainly to the Commission; see also Hofmann/Rowe/Türk, Administrative Law 237. Thus, it is by no means non-system that Article 292 TFEU grants powers.



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bodies, offices and agencies. Thus, it cannot be held to have exclusionary effect in the sense that it excludes the power to adopt recommendations of other institutions, bodies, offices or agencies.[705]

Apart from Article 292 TFEU, there are further provisions which may shed light on the applicability of Article 5 para 2 TEU to soft law powers. Article 7 TFEU, for example, very broadly – ie not distinguishing between the power to adopt EU law and the power to adopt EU soft law – stipulates that the EU 'shall ensure consistency between its policies and activities […] in accordance with the principle of conferral of powers'. According to Article 2 para 5 TFEU, a further point of reference, 'in certain areas and under the conditions laid down in the Treaties, the Union shall have the competence to carry out actions to support, coordinate or supplement the actions of the Member States […]'. We can assume that supporting, coordinating and supplementing MS' actions may take place (also,[706] or even mainly) by means of adopting legally non-binding acts.[707] These non-binding acts do not necessarily need to be soft law acts (for non-normative acts like reports, registers or work programmes in the EU context see 2.4. above), but they may *as well* be soft law acts. This is reflected eg in the provision of the OMC for some of these supporting, coordinating and supplementing competences, for example Article 148 (Employment), Article 153 (Social policy) and Article 173 para 2 TFEU (Industry). If the competence to adopt non-binding acts were not affected by the principle of conferral, why would the Masters of the Treaties have expressly provided for such delegation of power?[708] It could be argued that the cited provisions are about regulating the procedure of support, coordination and supplementation, not about granting the – already existing – power to adopt EU soft law. However, the wording of the respective provisions does not in any way support this argument. Rather, it does not principally differ from the – uncontested – granting of the power to adopt legally binding acts: It stipulates that the institutions 'shall' or 'may' adopt legally non-binding acts just like, to take examples, Article 18 TFEU provides that they 'may' or Article 114 TFEU prescribes that they 'shall' adopt legislation. The Articles providing for OMC do not say, for example, that the institutions shall make use of their power to adopt legally non-binding acts in this or that way – which

705 See Dickschen, Empfehlungen 27 f.
706 The second sentence of the *lex citata* refers to 'legally binding acts of the Union'.
707 See Tallberg, Paths 615.
708 See also Kadelbach, Art. 5 EUV, paras 8.



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would at least suggest that the powers at issue already exist.[709] What is more: The use of the term 'competences' in Article 2 para 5 TFEU – which, in this provision at least, clearly encompasses the power to adopt soft law – supports the view that the principle of conferral, which itself refers to 'competences', is applicable also with regard to EU soft law powers.[710] This is repeated in Article 6 TFEU, listing the concrete policies which fall within this competence category. Also here the term 'competences' is to be understood as including the adoption of soft measures.[711]

The pendant, as it were, of the term 'competences' in Article 5 TEU is the term 'powers' in Article 13 para 2 TEU. Both terms – *competences* and *powers* – are broad and imprecise. Like in case of the term 'competence', a certain 'power' can, also in a genuinely legal understanding, entitle to actions of many different categories: the power to rule, to adopt, to propose, to coordinate, etc. In general, it seems that in the Treaties' terminology competences are assigned to the EU (or remain with the MS), whereas powers are assigned to the institutions, bodies, offices or agencies of the EU. In places, however, these words are used as synonyms – both in the Treaties[712] and even more so in legal literature.[713] The principle of conferral according to Article 5 TEU – the EU's particular principle of legality –

709 That in other fields a competence on the part of the Commission to engage in OMC may be implied is a different issue (which is not principally contested here); see Bast, Art. 5 EUV, para 48a.

710 It is true that the Treaties do not always apply the term 'competences' in exactly the same way. With 'fields of competence' (Article 127 para 4 and Article 160 TFEU) the TFEU refers to the *Organkompetenzen* of institutions (ECB, Council), the term 'spheres of competence' (eg Article 191 para 4 or Article 211 TFEU) is intended to describe the EU's set of powers and the MS' powers. Obviously in an entirely different meaning, namely as 'personal/professional capacity', the term competence is to be understood when it is used to describe the qualities required for a certain post: 'general competence' (Article 17 para 3 TEU), 'recognised competence' (Article 255 para 2 TFEU). It is evident that here another kind of competence is referred to.

711 See Nettesheim, Art. 6 AEUV, para 16.

712 See Article 348 TFEU, speaking of MS' powers, Article 14 TFEU which refers to the 'powers' of the Union and the MS, or Article 207 para 6 TFEU which addresses the institutions' 'competences'; see also Bradley, Legislating 104.

713 See references in Goldmann, Gewalt 495 f. Pursuant to search queries on www.curia.europa.eu, in (the English version of the) case law of the CJEU the word competence (as applied in this context) seems to be in regular use only since the late 80s. Before that the term 'powers' ('Community powers') was much more common, the term 'competences' being used only sparingly. Also the TEEC in (the English translation of) its original version used this *terminus technicus* only in its Article 173 ('lack of competence').



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is equally referred to as 'principle of conferred *powers*'[714] or 'principle of conferral of *powers*'[715] (emphases added).

That good arguments speak in favour of generally including the capacity to adopt soft law acts in the term 'power' shall be exemplified as follows: Article 130 TFEU *inter alia* prescribes the independence of the ECB. The provision says that when exercising 'the powers […] conferred upon [it] by the Treaties', it shall neither seek nor take instructions from any body. The TFEU in its Article 132 specifies that the ECB shall 'make recommendations and deliver opinions'. It would run counter to the objective of the ECB's independence[716] to apply Article 130 only with regard to the ECB's power to adopt legally binding acts. In order to apply this provision also with regard to the making of recommendations and the delivery of opinions, they ought to be subsumed under the term 'powers'. Article 130 TFEU illustrates the broad understanding of the term 'powers' as used in the Treaties, in particular that it may also include the possibility to adopt legally non-binding acts.[717] A similar understanding seems to be applied by the CJEU, eg when dwelling on the Commission's 'express conferral of the power to adopt acts with no binding force'.[718] While these examples do not actually give proof of the applicability of the principle of conferral with respect to soft law powers, they do suggest a wide scope of the term, so as to include the power to adopt soft law acts.

Another, more pragmatic argument brought forward in favour of applying the principle of conferral to the adoption of soft law is the following. Its exclusion could lead to the institutions, and – to a more limited extent – also bodies, offices and agencies having recourse to soft law increasingly, thereby extending their scope of action 'softly' and by stealth – at the cost of the MS or of other EU actors.[719] *Peters* argues that '*ultra vires*-soft

714 See eg Goucha Soares, Principle.

715 Article 7 TFEU.

716 For the different dimensions of the ECB's independence see Repasi, Limits 7.

717 Coming to the same result: Senden, Balance 88.

718 Case T-113/89 *Nefarma*, para 79; see also case C-370/12 *Pringle*, para 113, in which the Court refers to the Council's power to adopt recommendations under Article 126 paras 7 f TFEU.

719 See also D Lehmkuhl, Government 157, with regard to competition law. For the famous phrase 'integration by stealth' see Majone, Dilemmas. Sceptically also Gold, Soft International Law 443, who remarks in this context: 'It is easy to be too condescending toward soft law'; see also Dawson, Waves 212; Simoncini, Regulation 20; Ştefan, Developments 882, with further references. For this phenomenon in public international law see Friedrich, Soft law 386: 'mission creep' by international



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law can […] in practical terms pave the way to a formal extension of the competences'.[720] She exemplifies this by the environmental policy, research and technological development, culture and public health matters which, on the then Community level, had long been addressed by means of legally non-binding measures (including soft law), before pertinent competences were introduced in primary law by the Single European Act (SEA) and the Treaty of Maastricht, respectively.[721] These cases illustrate the strong steering effects of soft law.[722] In view of these effects which are sometimes very similar to those of law, applying a sustainable competence regime with respect to soft law powers is necessary in order to protect its effectiveness (*effet utile*).[723] Otherwise – that is to say: where no or only an overly lax regime on soft law powers is applied – the risk of soft law being abused as a substitute of legal rules (for which there is no competence) would be significant. In spite of the increasing importance and the sometimes remarkably strong steering effects of EU soft law, a number of scholars negate the applicability of the principle of conferral in this context.[724]

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organisations making increasing use of soft law; with regard to recommendations see Kotzur, Art. 292 AEUV, para 2.

720 Peters, Typology 420.

721 See Peters, Typology 423, with further references.

722 For the possibility that soft law 'erober[t]' [conquers] new fields of EU action see von Bogdandy/Bast/Arndt, Handlungsformen 117; see also Opinion of AG *Sharpston* in case C-660/13 *Council v Commission*, para 62, who – on the question of whether an action against a non-binding agreement concluded by the Commission without an according authorisation by the Council is admissible under Article 263 TFEU – explained that '[a]ctions under Article 263 TFEU can be brought on grounds of, *inter alia*, lack of competence. Regardless of whether or not an act itself has legal effects, the fact that one institution has taken it whereas the Treaties give powers to do so to another institution means that the act of taking the decision has legal effects (by usurping the powers of the second institution). In the present case, applying that method would mean that where the Commission has taken a decision whereas, based on the substance of the pleas, the Treaties provide that this decision fell within the powers of the Council, the challenged act of the Commission has legal effects within the meaning of Article 263 TFEU'.

723 See European Parliament, Resolution of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments, 2007/2028(INI), recitals I and L; Van Vooren/Wessel, Relations 37; confirming the applicability of the principle of conferral in an adapted form: Senden/van den Brink, Checks 22; see also Opinion of AG *Bobek* in case C-16/16P *Belgium v Commission*, paras 93–95, also with regard to the EU's institutional balance and – related to the former – to the separation of powers within the EU.

724 See eg Biervert, Mißbrauch 89 f, with a further reference; Calliess, Art. 5 EUV, para 9; Eekhoff, Verbundaufsicht 176 (fn 246), with a further reference; Rossi, Soft



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A mediating understanding of the EU's competence regime with regard to EU soft law would suggest that soft law powers can be affirmed where the EU has (any) competence in the policy field at issue – at least *in dubio*, that is to say where the Treaties do not contain a clear indication to the contrary. In other words: A soft law competence can be assumed, unless it follows (explicitly or implicitly) from the Treaties that in a certain case there shall be no such competence. As we shall see in the next sub-chapter, some judgements of the Court seem to follow this approach.

### 3.2.3. The case law of the CJEU

Let us now take a look at the pertinent case law of the CJEU. The Court in general has made clear early on that EU soft law is subordinate to EU law,[725] hence basically also to fundamental EU principles such as the principle of conferral. In its famous *Grimaldi* judgement the Court held, at first sight, quite differently: 'Recommendations [...] are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules'.[726] However, the fact that soft law may be adopted for lack of a competence to adopt binding rules logically does not allow for the conclusion that *therefore* no competence is required for the adoption of soft law. The Court later on has explicitly

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Law 15-17; see also references by Kadelbach, Art. 5 EUV, para 12 and by Knauff, Regelungsverbund 405; see also the considerations of Griller, Übertragung 155–158, uttered in a slightly different context, but worthwhile also here. For those confirming the applicability of the principle of conferral in the context of soft law powers see Braams, Koordinierung 136–138, with many further references; see also Raschauer, Leitlinien 38; Ruffert, Art. 288 AEUV, para 99, with regard to recommendations and opinions, and with further references; apparently in favour (with regard to soft international commitments): Viterbo, Arena 216 f.

725 See case 43/75 *Defrenne*, para 57; case 59/75 *Pubblico Ministero*, para 21, both stressing that the time-scale laid down in a resolution may not modify the pertinent time-scale prescribed in a Treaty provision. With regard to secondary law explicitly: case 149/73 *Witt*, para 3; see also joined cases 69–70/76 *Dittmeyer*, para 4; case 798/79 *Hauptzollamt Köln-Rheinau*, paras 11 f; case 190/82 *Blomefield*, para 21 (with regard to internal soft law); case 310/85 *Deufil*, par 22; case C-266/90 *Soba*, para 19; case C-35/93 *Develop Dr. Eisbein*, para 21; case C-226/94 *Albigeois*, para 21; case T-9/92 *Peugeot*, para 44; for an example of soft law deviating from law (in the field of climate protection regulation) see J Scott, Limbo 336.

726 Case C-322/88 *Grimaldi*, para 13; with regard to this passage see Opinion of AG *Tesauro* in case C-325/91 *France v Commission*, para 22.



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refused an all-encompassing competence to adopt soft law on the part of the institutions: '[T]he fact that a measure such as the Guidelines is not binding is [not] sufficient to confer on [the Commission] the competence to adopt it. Determining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty [...] be duly taken into account'.[727] With regard to the Commission's competence to lay down detailed rules by means of a soft law act, eg in the field of State aid or competition law, the Court held that 'in the exercise of the powers conferred on it by Articles 87 EC and 88 EC, the Commission may adopt guidelines designed to indicate how it intends, under those articles, to exercise its discretion in regard to new aid or in regard to existing systems of aid'.[728] With regard to a similar act, it held that the Commission adopted it 'in accordance with the powers thus vested in it by Article [107 – after Lisbon] et seq. of the Treaty'.[729] As a preliminary result, we can state that the Court for the adoption of an EU soft law act deems necessary the existence of an appropriate competence.

This finding still does not answer the question whether the Court – with regard to soft law powers – follows a positive approach, the principle of conferral, or a negative (or: *in dubio*) approach, according to which the respective power is to be confirmed if primary law does not contain indicators to the contrary (see 3.2.2. above).[730] Both approaches require

727 Case C-233/02 *France v Commission*, para 40, with regard to (non-binding) guidelines negotiated between the Commission and the United States Trade Representative and the Department of Commerce; similarly: case C-660/13 *Council v Commission*, para 43. With regard to the relationship between the principle of conferred powers and the duty to maintain the Treaties' institutional balance see Senden, Soft Law 74–76; see also case T-327/13 *Mallis*, para 43; case C-62/14 *Gauweiler*, para 12, in which the Court negates its own power to adopt a purely advisory act in an Article 267 TFEU procedure: 'the Court does not have jurisdiction to provide [...] answers which are purely advisory'. As authoritative interpreter of EU law, the Court plays a special role in the EU. Hence it does not come as a surprise that it considers its rulings binding.

728 Case C-242/00 *Germany v Commission*, para 27; similar in case C-526/14 *Kotnik*, para 39; see also Opinion of AG *Léger* in case C-382/99 *Netherlands v Commission*, para 47, in which the Commission's power to adopt guidelines in the field of State aid law is deduced from the principle of good administration; stressing the self-limiting effect of such acts, but at the same time highly critical of the Commission practice at issue here: Cannizzaro/Rebasti, Soft law 226–229.

729 Case C-169/95 *Spain v Commission*, para 19; see also case T-149/95 *Ducros*, para 61, with references to further case law.

730 Unclear also in case C-16/16P *Belgium v Commission*, paras 12 and 28, in which the claimant argues that the recommendation at issue is challengeable under Article 263



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a competence to adopt soft law. It is the method by which they come to confirm or refuse a competence in which they differ from each other. In general, it is more difficult to confirm a positive competence than to find no rule to the contrary. The Court's reference to the division of powers and the institutional balance established by the Treaty in the case *France v Commission* cited above, in my view, is at least to be qualified as a hint at the applicability of the principle of conferral.[731] In the *Nefarma* case, the Court has referred to the 'express conferral of the power to adopt acts with no binding force' in what is now Article 292 TFEU, deducing therefrom that voluntary compliance with these measures is 'an essential element in the achievement of the goals of the Treaty'.[732] While not being an express confirmation of the applicability of the principle of conferral, the Court's approach in these cases rather speaks in favour of its applicability than against it.

Admittedly, there are also cases more or less vaguely hinting in a different direction.[733] In the case *Commission v McBride* and others it held 'that the requirement for legal certainty means that the binding nature of any act intended to have legal effects must be derived from a provision of EU law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis'.[734] The Court also assumed that the indication of legal bases may create, on the part of the addressee, the impression that the act is legally binding.[735] This indicates that the *referral to* a legal basis, not the legal basis itself, may not be required in case of a soft law act.

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TFEU for violation of – *inter alia* – the principle of conferral, to which the Court only generally replies that 'it is not therefore sufficient that an institution adopts a recommendation which allegedly disregards certain principles or procedural rules in order for that recommendation to be amenable to an action for annulment, although it does not produce binding legal effects'.

731 Even more determined: Van Vooren/Wessel, Relations 38, who deduce from that passage that '[t]he application of the principles of conferral (Article 5 TEU) and institutional balance (Article 13 TEU) continue to apply and must be respected'.

732 Case T-113/89 *Nefarma*, para 79.

733 Case T-320/09 *Planet AE*, para 57, with further references; case C-501/11P *Schindler*, para 68, where the Court, with regard to Commission Guidelines on the method of setting fines in competition law, generously said: 'No provision of the Treaties prohibits an institution from adopting such rules of practice'. This seems to constitute the negative or *in dubio* approach referred to above.

734 Case C-361/14P *Commission v McBride*, paras 47.

735 Case T-496/11 *United Kingdom v European Central Bank*, para 47; see also case C-687/15 *Commission v Council*, para 54.



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All in all, the Court's case law, for lack of a uniform line of argumentation on the issue of soft law powers, remains unclear. We can only deduce that the Court demands an according competence for the adoption of soft law, and that – when it comes to the method by means of which this competence is to be established – it does not outright refuse the application of the principle of conferral.

### 3.2.4. Résumé

Following this verbal, systematic and teleological interpretation of Article 5 TEU and Article 13 para 2 TEU respectively, and having considered the relevant case law of the Court, it appears that EU law requires an according competence for the adoption of EU soft law. As regards the required characteristics of this competence – positive competence (positive approach) or no rule to the contrary (negative or *in dubio* approach) – we may argue as follows: Given, first, that the principle of conferral is the legal foundation of the EU's activity and, second, that it does not explicitly exclude soft law acts (which are provided for in many provisions throughout the Treaties) from its scope and, third, given that neither the Treaties nor the Court's case law expressly confirm a negative or *in dubio* approach, the better reasons speak in favour of the applicability of the principle of conferral.[736]

In practice, the originators of EU soft law only sometimes indicate the legal basis for their soft law acts (within the acts themselves).[737] This may be interpreted as a preference for the negative or *in dubio* approach, or simply as reflecting a lack of awareness of the underlying problem.[738]

736 See eg von Alemann, Einordnung 124. See Senden, Soft Law 294 f and 479 f, arguing in favour of applying to soft law 'one or more of [the] other functions' of the principle of conferred powers, but not its requiring 'the establishment of a legal basis in the Treaty or in secondary legislation', with a view to 'ensuring that the [respective EU body] acts within the boundaries of the powers and tasks assigned to it'; see also Council, Comments on the Council's Rules of Procedure (2022) 100 f.

737 See Andone/Greco, Burden 89. See also the exemplary list of soft law acts adopted by the Commission in Meijers Committee, Note 4 f. As one of the rare exceptions see Article 18 para 2 of Council Regulation 1/2003 in which the legislator insists on the indication of the legal basis also for a 'simple request for information' (as opposed to a decision according to para 3), apparently a soft law act of the Commission; see Lenaerts/Maselis/Gutman, Procedural Law 275 f.

738 See also Andone/Greco, Burden 89 f, who assert that 'not mentioning the legal basis on which the recommendations have been enacted amounts to an evasion of the



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We can broadly conclude that any Union action, be it binding or not, must rest on a competence conferred upon the EU and must be in compliance with EU primary – and possibly secondary – law more generally, since otherwise it would infringe upon the competences of the MS or the powers of the respective other EU actors, the protection of which is the main purpose of the principle of conferral. In view of the unclear case law of the Court, and in particular in view of an administrative practice which seems to be inattentive to this question, some doubts remain. In the subsequent chapters the competence clauses for the adoption of soft law acts are examined in more detail. With a comprehensive account of the pertinent structure of the Treaties at hand, we shall revisit our preliminary result – that the principle of conferral applies also to EU soft law powers (see 3.9. above).

## 3.3. Special features of the EU's competence regime

### 3.3.1. The implied powers doctrine and powers implied in competence clauses

As was set out above, the principle of conferral is the central legal reference point when it comes to delimiting the EU's and its institutions', bodies', offices' and agencies' competences. It is coined by the rather permissive case law of the CJEU, which is often based on *effet utile* considerations.[739] The implied powers doctrine allows, under certain conditions, for a particularly extensive interpretation (or even: development of law[740]) of competence clauses. It may be somehow at odds with the principle of conferral,[741] but it constitutes – pursuant to the Court's case law – an established part of the

burden of proof: the Commission should argue that it has a power as conferred in the Treaties, but instead falls sometimes short of doing so'.

739 See Calliess, Art. 5 EUV, para 18; Schima, Art. 5 EUV, para 17. For the localisation of the *effet utile* both in the field of interpretation and actual development of law (often referred to in its German translation: *Rechtsfortbildung*) see Potacs, Auslegung 92–95; for the CJEU's general openness to legal developments see summary in Pechstein/Drechsler, Auslegung, paras 56–61.

740 For this term (*Rechtsfortbildung*) see the preceding fn and, more generally, Larenz/Canaris, Methodenlehre 191 ff.

741 This tension is explicitly acknowledged in case T-143/06 *MTZ*, para 47, with further references; case T-496/11 *United Kingdom v European Central Bank*, para 105.



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EU's competence regime.[742] Hence both approaches have to be applied in combination, if need be. Already in one of its earliest judgements, the Court held that 'it is possible […] to apply a rule of interpretation, according to which the rules laid down by […] a law presuppose the rules without which that […] law would have no meaning or could not be reasonably or usefully applied'.[743]

The concept of implied powers allegedly stems from early 19th century case law of the US Supreme Court[744] and has become an established interpretative tool in national jurisdictions as well as in international case law.[745] The ICJ, for example, in its Advisory Opinion in the famous *Count Bernadotte* case held that the UN 'must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties'.[746] This passage suggests that essential powers can be implied to the UN-Charter as a whole, not (only) to express powers. Judge *Hackworth* in its Dissenting Opinion favoured a stricter approach, arguing that '[t]here can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It has to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed

742 In favour of a harmonious conception of the co-existence of the principle of conferral and the implied powers doctrine: Bast, Art. 5 EUV, para 21; see also case 2/94 *ECHR*, para 29: '[…] where no specific provisions of the Treaty *confer* on the Community institutions express or *implied powers* to act' (emphasis added); similarly with regard to the principle of attribution in public international law: Friedrich, Soft law 382 f.

743 Case 8/55 *FEDECHAR*, 299. Here the Court seems to qualify implied powers as following from legal interpretation, not as a development of law. See references to other legal authorities referring to this principle, which allegedly is a 'Selbstverständlichkeit' [matter of course] in: Nicolaysen, Theorie 131 f and 134. *Stadlmeier* contends that the CJEU already in the *FEDECHAR* case has applied the resulting powers doctrine. The Court's finding reasonably could have been based on different legal arguments (in particular the competence-based implied powers doctrine), though. Also later the Court has referred to the *FEDECHAR* case in the context of competence-accessory implied powers; see arguments and references in Stadlmeier, Implied Powers 376 f; differently: Senden, Soft Law 71 (fn 43).

744 See Stadlmeier, Implied Powers 354 f, with further references.

745 For the German and the international legal order see Kruse, Implied powers; pointing at the importance not only of the implied powers doctrine but also of customs in order to legitimise powers going beyond (express) attribution: Friedrich, Soft law 387.

746 *Reparation for injuries*, ICJ Reports 1949, 174, 182.



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cannot be freely implied. Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted. No necessity for the exercise of the power here in question has been shown to exist'. He criticised the ICJ's 'generosity': 'The results of this liberality of judicial construction transcend, by far, anything to be found in the Charter, as well as any known purpose entertained by the drafters of the Charter'[747].[748]

This disagreement reflects the two categories in which implied powers scholarly can be divided, namely competence-accessory implied powers and objective-accessory implied powers (or resulting powers[749]).[750] Coming back to the case of the EU, we can state the following: Implied powers of the first kind, that is competence-accessory implied powers, can be assumed where the Union and its bodies respectively, has/have a related express competence (regularly in the Treaties). Only on the basis of this competence additional powers can be implied which are 'necessary' for exercising this competence. Implied powers of the second kind – objective-accessory implied powers or resulting powers – can be assumed ('implied') already if the political objectives of the Treaties so 'require'.[751]

The CJEU has been cautious in applying the unorthodox and highly problematic interpretative tool called resulting powers doctrine, especially in the context of internal competences.[752] While this approach principally could be in accordance with the CJEU's *effet utile* doctrine,[753] the competences which could – due to the EU's broad scope of objectives – possibly

747 Dissenting Opinion by Judge *Hackworth* in *Reparation for injuries*, ICJ Reports 1949, 198 f.

748 It appears that the ICJ has taken a more restrictive approach in later case law; see eg *Nuclear Weapons*, ICJ Reports 1996, para 21; see also Klabbers, Introduction 80.

749 See Nicolaysen, Theorie 140, who arguably applies a slightly wider understanding of the term 'resulting powers'.

750 On this established differentiation see Stadlmeier, Implied Powers 361 f, with further references.

751 See Stadlmeier, Implied Powers 376.

752 In the context of external competences the Court has taken a more permissive approach, which today is reflected upon in Article 216 para 1 (second alternative) TFEU. Article 216 para 1 TFEU – together with Article 3 para 2 TFEU – is to be understood as a codification of the up to then case law; see also Nowak/Masuhr, EU only 203 f. However, also in other fields the Court exceptionally refers to the resulting powers doctrine. The rhetoric applied in case T-240/04 *France v Commission*, para 36, with many further references, for example, suggests that it is the 'objectives of the Treaties' which matter.

753 See Šadl, Role 33 ff.



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be implied via this deduction of means from ends appears to be limitless.[754] Thus, this approach would create too strong a tension with the principle of conferral. Since the Treaty of Rome, the Treaties have contained a provision which allows for an objective-based extension of competences by the legislator, namely the so-called 'flexibility clause'. Under the Lisbon regime this provision is contained in Article 352 TFEU, which says: 'If action by the Union should prove *necessary*, within the framework of the policies defined in the Treaties, *to attain one of the objectives set out in the Treaties*, and the Treaties have not provided the necessary powers' (emphases added), the Council (with the consent of the Parliament) shall unanimously adopt the 'appropriate measures'.[755] As opposed to the resulting powers doctrine which essentially is a (very extensive) form of interpretation (or rather: a development of law beyond legal interpretation), Article 352 TFEU allows for an extension of the EU's *Verbands-* and *Organkompetenzen* under consideration of the political objectives *by the legislator*, which ensures democratic legitimacy and, above all, legal certainty.

With the resulting powers doctrine being applied by the CJEU only very restrictively,[756] and for obvious lack of a legal act based on Article 352 TFEU which may serve as a general legal basis for the adoption of soft law acts, it is the competence-accessory implied powers doctrine which remains to be discussed in the context of the power to adopt soft law acts.

The case law of the CJEU on competence-accessory implied powers shows that the Court so far has implied correspondent/complementary competences as regards both internal and external competences. The CJEU's dogma in this context is: '[W]hen an article of the Treaty confers a specific task on an institution, it must be accepted, if that provision is not to

754 See also Senden, Soft Law 313, with further references.

755 For the limits of the flexibility clause see eg case 2/94 *ECHR*, paras 30 and 35; for the term 'appropriate measures' in the context of Article 108 para 1 TFEU see Opinion of AG *Darmon* in joined cases 166 and 220/86 *Irish Cement*, para 24.

756 When stating that what is now Article 352 TFEU may apply only if there is no corresponding express or implied competence, it seems to confirm that objective-based competences may only be created on the basis of Article 352 (and not implied by the Court); see case 2/94 *ECHR*, para 29: '[The flexibility clause] is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty'; see also case C-166/07 *European Parliament v Council*, para 41; see also case C-295/90 *European Parliament v Council*, para 20.



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be rendered wholly ineffective, that it confers on that institution necessarily and per se the powers which are indispensable in order to carry out that task'.[757] Along this line of argumentation, the Court in its case law implied the competence of the High Authority of the European Coal and Steel Community (ECSC) to recover overpayments ('necessary corollary') to the competence to make equalisation payments;[758] the competence of the Commission to require the MS to notify certain information to its competence (duty) to arrange consultations between the MS and the Commission;[759] the competence of the European Economic Community (EEC) to enter into international agreements to a legislative competence of the EEC in the same field.[760] On the contrary, the Court refused to confirm implementing powers of the Commission by means of comparison with other (in this respect more explicit) Treaty provisions and the Treaty's 'general structure' – arguably also for lack of necessity.[761]

Whilst the acknowledgement of certain implied powers by the CJEU allegedly is 'exceptional',[762] it is nevertheless an important asset when identifying *Verbandskompetenz* as well as *Organkompetenz*. With the much clearer competence regime after the Lisbon Treaty the importance of the

757 See eg case T-496/11 *United Kingdom v European Central Bank*, para 104, with further references. Similarly already joined cases 281, 283, 284, 285 and 287/85 *Germany v Commission*, para 28. For cases not applying this wording see case 242/87 *Commission v Council*, in particular paras 12 f; case C-106/96 *United Kingdom v Commission*, para 19.

758 See joined cases 4–13/59 *Mannesmann*, 130 f.

759 See joined cases 281, 283, 284, 285 and 287/85 *Germany v Commission*, para 28.

760 For the case law on implied powers allowing the Community to conclude international agreements see case 22/70 *Commission v Council*, para 28; for the early follow-up cases see references in Cremona, Relations 433–435; see Klamert, Loyalty 73–75, with regard to the role the legal notion of loyalty played in this case, and 105 f, with regard to its effects and the Court's rationale to affirm implied powers here; for the exclusion of reverse implied powers, that is to deduce internal competences from external competences of the EU, in the case of the Common Commercial Policy see Article 207 para 6 TFEU; see also Streinz, Europarecht (10th edn) para 1271.

761 See case 25/59 *Netherlands v High Authority*, 371 f; case 20/59 *Italy v High Authority*, 335–338.

762 See case T-240/04 *France v Commission*, para 37; case T-143/06 *MTZ*, para 47; case T-496/11 *United Kingdom v European Central Bank*, para 105.



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implied powers doctrine arguably has decreased, but not lost its importance entirely.[763]

But may implied powers also be used to 'determine' a legal basis for soft law acts which cannot be based on an express Treaty competence? Since implied powers assumed by the Court are annexed to a certain competence (accessoriness), they may not serve as a *general* legal basis for the adoption of soft law, but – if at all – be relevant when identifying specific competences of the EU and its bodies, respectively.[764] On the presumption that the principle of conferral applies to soft law powers, it appears reasonable to apply the CJEU's complementary implied powers doctrine also in this context. The then Court of First Instance in case T-240/04 *France v Commission* suggests so when – in the context of implied powers – it generally states: 'Not only the substantial provisions, but also the form and *binding nature* of the regulation, must fulfil that condition of necessity' (emphasis added).[765] In the following paragraph, it expresses: 'To consider that the Commission was implicitly empowered to adopt the contested regulation, it is necessary, not only that the Commission could adopt measures organising details of procedure for the examination of investment projects that are communicated to it [...], but also that it requires the adoption of those measures in the form of a regulation, binding in its entirety and directly applicable in all Member States'.[766] If the bindingness of a measure must be necessary in order for the competence to adopt such measure to be implied to an express competence, we may conclude *e contrario* that also (mere) soft law measures may be deemed necessary.

Since its necessity (for the effective exercise of an express competence) is the core condition for a competence to be implied, it requires special attention. The predominance of this criterion in practice boils down the question whether or not competences can be implied to the question: necessary or not? In that sense, the examples of competences implied by the Court in its case law reflect necessary competences, competences not implied were deemed 'not necessary'. The Court assigns to this term the meaning it has in everyday language. An interpretation as strict indispensability today

763 See Borchardt, Grundlagen, para 481; see also case C-600/14 *Germany v Council*, para 45. For the long-lasting claim for a more precise competence regime of the EU see eg Steindorff, Grenzen 26 ff.

764 See Knauff, Regelungsverbund 402–404, with many further references.

765 Case T-240/04 *France v Commission*, para 38.

766 Case T-240/04 *France v Commission*, para 39.



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does not seem to be intended by the Court[767] and such a high threshold would be impossible to apply in each and every case, simply for lack of data. Instead, the Court assumes a considerable leeway in assessing whether or not a certain competence is necessary.[768] In terms of importance and malleability, the term 'necessity' as used in the context of implied powers is comparable to the 'necessity to reach the aim' which forms the final step of the scheme for the evaluation of eg fundamental rights infringements (proportionality test[769]). Applying this margin of appreciation, the Court has, for example, considered necessary the competence of the Commission to 'adopt guidelines requiring compliance, not only with criteria pertaining exclusively to competition policy, but also with those applicable in relation to the common fisheries policy, even if the Council had not expressly authorised it to do so'[770] and considered not necessary the recommendation to suspend investment projects for organising the communication, examination and discussion procedure for certain investment projects.[771]

With regard to the Commission's power to adopt 'interpretative and decisional instruments'[772] (eg the Commission's communications in the field of State aid law) in the literature it is argued – and in the CJEU's case law it was decided – that it should be implied in the executive powers of the Commission in the respective field.[773] This is to say that where the Commission has to apply a certain provision it may explicate in a soft law act how it interprets this provision,[774] or announce a shift in its interpretation resulting in a new legal situation.[775] The European Parliament (politically) affirms this practice in the interest of legal certainty, but in this context also

767 For the change of the Court's wording from 'indispensable' to 'necessary' and for an interpretation of this change in parlance see Chamon, Agencies 141.

768 Also the term 'necessary powers' in Article 352 TFEU allows for a wide discretion of the legislator; see Rossi, Art. 352 AEUV, paras 51–53.

769 See eg Ehlers, Principles, paras 48 f, with further references.

770 Case C-311/94 *IJssel-Vliet*, para 34.

771 See case T-240/04 *France v Commission*, para 41.

772 Senden, Soft Law 138; see also Braams, Koordinierung 154 f.

773 See Nettesheim, Art. 291 AEUV, para 27; see also references in Senden, Soft Law 313–318; critically in the context of State aid (soft) law: Cini, Soft law approach 200 f; with regard to interpretative Commission communications more generally see Hofmann/Rowe/Türk, Administrative Law 552–555; Turgis, Communications 51.

774 See case C-146/91 *KYDEP*, para 30; case C-169/95 *Spain v Commission*, para 19; case C-387/97 *Commission v Greece*, para 84; see also case T-374/04 *Germany v Commission*, para 110.

775 See Ştefan, Soft Law 62 f, with references to case law.



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warns of 'ambiguous and pernicious' instruments leading to an 'inadmissible extension of law-making by soft law'.[776] According to the Court, the Commission needs to have a specific executive power in the respective field, though. The mere possibility that it may make the violation of a certain provision subject to a Treaty infringement procedure – which could apply to nearly any rule of EU law – does not appear to be sufficient,[777] also against the background of Article 290 and Article 291 TFEU. From the benevolent case law allowing for soft powers of the Commission implied in (hard) decision-making power, the *principal* possibility of implying soft powers also to the (hard) powers of other institutions, bodies, offices or agencies of the EU can be deduced.[778] On the whole, arguably the power to adopt a soft law measure is more likely to be 'necessary' and hence to be implied than the power to adopt hard law measures (in addition to those to which they should be implied), as it appears to be less intrusive to other bodies' and the MS' competences, and therefore also more likely to be in accordance with the principle of subsidiarity.[779]

776 European Parliament, Resolution on institutional and legal implications of the use of 'soft law' instruments, 2007/2028(INI), para A and para 10. The EP further asserts that '[s]oft law tends to create a public perception of a "super-bureaucracy" without democratic legitimacy, not just remote from citizens, but actually hostile to them, and willing to reach accommodations with powerful lobbies which are neither transparent, nor comprehensible to citizens' (para Y). In its view, 'the distinction between *dura lex/mollis lex*, being conceptually aberrant, should not be accepted or recognised' (para B); see also Senden/van den Brink, Checks 16; for earlier criticism of the EP see Senden/Prechal, Differentiation 181; Ştefan, Soft Law 21; see also Résolution du Parlement européen du 8 mai 1969, sur les actes de la collectivité des États membres de la Communauté ainsi que les actes du Conseil non prévus par les traités adoptée à la suite du rapport fait au nom de la Commission juridique par M. Burger, C63/18 (1969), in which the EP took an (early) critical account of the adoption of Community acts not provided for in the Treaty, in particular by the Council; for the EU institutions' view on soft law more generally see Frykman/Mörth, Soft Law 155.

777 See case C-146/91 *KYDEP*, para 30: *argumentum* 'in the context of its collaboration with the national authorities'.

778 See Senden, Soft Law 480, referring to a Council competence to adopt recommendations which may be implied in its decision-making power according to Article 202 para 2 TEC.

779 See Knauff, Regelungsverbund 411 f; Senden, Soft Law 179 f and 206 f; see also V.3.4.2. below.



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### 3.3.2. *Argumentum a maiore ad minus*

#### 3.3.2.1. The *argumentum a maiore ad minus* in EU law

When analysing the competence to adopt soft law, the question arises whether or not the competence to adopt law regularly implies a competence to adopt a (content-wise comparable) soft law act directed to the same addressees. In a regime based on the rule of law, considering a legally non-binding act a weaker form of exercising power (a *minus*, as it were), this deduction *a maiore ad minus* seems to be viable.[780] This is because a non-binding act principally allows for a lawful deviation from the demanded behaviour. This approach may be applied whenever in a certain case further reaching powers undoubtedly exist. We may illustrate this with an example from the field of public international law: Apart from the peace-making measures explicitly laid down in Articles 39 ff of the UN-Charter, also the adoption of mere peace-keeping measures is deemed lawful. That the adoption of the latter, something *less* than peace-making measures, is in accordance with the UN-Charter is argued *a maiore ad minus*.[781] This interpretative tool, in principle, has been accepted also by the CJEU.[782]

The *argumentum a maiore ad minus* applied in the context of competences is to be perceived as a sub-category of the implied powers doctrine.[783] It implies powers, not primarily under consideration of the criterion of necessity, but with regard to the *amount* of existing powers. These existing powers may imply the competence to apply less intrusive means. The consideration to adopt the least intrusive act available in order to set in place a certain policy is a general quest which, in the context of EU law and to the extent it benefits the MS' room for manoeuvre, may be deduced from the principle of subsidiarity.[784] After all, such action facilitates an important

780 See also Nettesheim, Art. 292 AEUV, para 7.

781 See Lorenzmeier, Völkerrecht 100.

782 See eg case T-469/07 *Philips*, paras 71 and 85.

783 Traditionally, the *argumentum a maiore ad minus* is understood as an analogy-like tool; see Larenz/Canaris, Methodenlehre 208. Since the Court perceives implied powers as a method of interpretation, consequently it must also qualify the *argumentum a maiore* that way. After all, it seems to be the least intrusive variant of the implied powers doctrine because it allows to imply powers only to (related) more far-reaching competences.

784 Note that this principle is guiding the *exercise of* competences, not the competences themselves; see Knauff, Regelungsverbund 411–415; Lienbacher, Art. 5 EUV, para 18; Raschauer, Leitlinien 34; Senden, Soft Law 90, each with further references;



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objective of the subsidiarity principle, that is to 'promote [...] local ownership over policies and regulation'.[785] Some also refer to the principle of proportionality in this context.[786] Also the European Council in 1992 has held that under the principle of proportionality '[n]on-binding measures such as recommendations should be preferred where appropriate'.[787] In my opinion, this view is to be refused. The principle of proportionality cannot be understood as suggesting the use of soft law as this would mean suggesting the disproportionality of law (in certain cases at least).[788] The rule of law, one of the core principles the EU legal order is based upon,[789] impedes a view according to which a legally binding act is disproportionate *qua* being legally binding.[790] The act may be unlawful (even: *ultra vires*) because higher-ranking law prescribes the adoption of a legally non-binding act, but that is a different scenario. It is the content of a legal act or its classification (eg a Regulation instead of a Directive) which may render it disproportionate, not its legally binding character.[791] Also the express reference to the requirement of a 'satisfactory achievement of the objective of the measure' and in particular 'the need for effective enforcement' in para 6 of the (old) Protocol (No 30) on the application of the principles of subsidiarity and proportionality annexed to the TEC (1997) may be brought forward against the view that the principle of proportionality suggested the use of EU soft law instead of law.[792]

Generally, the application of the *a maiore ad minus* approach in the given context seems to be plausible. Also the CJEU in its *Grimaldi* judgement held that recommendations 'are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt

similarly, but in the context of the principle of proportionality: Schima, Art. 5 EUV, para 73.

785 Stoa, Subsidiarity 31.

786 See Hetmeier, Art. 296 AEUV, para 2.

787 Conclusions of the Presidency of the Edinburgh European Council, 11–12 December 1992, SN 456/1/92 REV 1, 21.

788 Unclear: case C-643/15 *Slovakia and Hungary v Council*, paras 245 f.

789 See Article 2 TEU; see also eg case 294/83 *Les Verts*, para 23.

790 See Schmidt-Aßmann, Verwaltungsrecht 350, with further references; Knauff, Regelungsverbund 412 f (fn 88); differently: Senden, Soft Law 90, with a further reference; Senden, Rulemaking 64.

791 The reference to the principle of proportionality in Article 296 para 1 TFEU does not contradict such an interpretation.

792 That this old Protocol may be relevant for fleshing out the principle of proportionality even today is confirmed eg by Calliess, Art. 296 AEUV, para 7.



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binding measures or *when they consider that it is not appropriate*[793] *to adopt more mandatory rules*'[794] (emphasis added). But there are certainly limits to this approach. One impediment could be Article 296 para 1 TFEU. It provides that '[w]here the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis'.[795] *E contrario* it could be concluded that where the type of act to be adopted *is* specified for a concrete case, the institutions do not have the choice to opt for other acts, not even soft law acts.[796] In this context, the Court held: 'The fact that an institution of the European Union derogates from the legal form laid down by the Treaties constitutes an infringement of essential procedural requirements that is such as to require the annulment of the act concerned, since that derogation is likely to create uncertainty as to the nature of that act or as to the procedure to be followed for its adoption, thereby undermining legal certainty'.[797] *Prima vista*, this speaks against a general application of the *argumentum a maiore ad minus* in our context. As regards the personal scope of Article 296 para 1 TFEU, it is to be assumed that it does not only address 'the institutions' *stricto sensu*, but that it also applies to bodies, offices and agencies. Such a wide understanding is underpinned by the title of the Treaty section under which Article 296 falls: 'Procedures for the adoption of acts and other provisions'.[798]

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793 The question is whether mandatory rules would be 'appropriate', not whether they would be 'proportionate'. The principle of proportionality can, as opined above, not command the use of soft law instead of law. The Court in *Grimaldi* arguably is not referring to the proportionality principle here. Although the principle had been applied by the CJEU even before its explicit incorporation in the TEC and the new TEU (with the Treaty of Maastricht), eg the German ('*kein Anlaß* zu einer zwingenderen Regelung'; emphasis added), French ('*il n'y a pas lieu* d'édicter des règles plus contraignantes'; emphasis added) and Spanish ('*no es oportuno* dictar disposiciones más vinculantes'; emphasis added) versions of this judgement suggest that 'appropriate' is meant in a more general way, pointing at the discretion the institutions have when acting under (then) Community law.

794 Case C-322/88 *Grimaldi*, para 13.

795 This selection needs to be taken with care, not arbitrarily. It is the 'necessary' act which is to be taken; see joined cases 8–11/66 *Cimenteries*, 92.

796 See also Senden, Soft Law 327; critically, but on the basis of a now out-dated version of the Treaties: von Bogdandy/Bast/Arndt, Handlungsformen 115; comparing the Nice and the Lisbon versions of this provision: de Witte, Instruments 96 f.

797 Case C-687/15 *Commission v Council*, para 44.

798 This is also argued by some in the case eg of Article 288; see Nettesheim, Art. 288 AEUV, para 72; against such an inclusive view (still with regard to Article 249 TEC): Vogt, Entscheidung 24 f; see also 3.4.2. below.



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The exclusion of the *argumentum a maiore ad minus* is made explicit eg in the case of Article 296 para 3 TFEU, which states[799] that the EP and the Council '[w]hen considering draft legislative acts' may not adopt 'acts not provided for by the relevant legislative procedure in the area in question'. This means that acts other than legislative acts[800] may not be concluded in a *legislative* procedure.[801] In the following sub-chapter, we shall examine practically highly important Treaty provisions containing competences of EU actors with a view to whether soft law powers may be implied to them, arguing (mainly) *a maiore ad minus*.

### 3.3.2.2. The (lack of an) *argumentum a maiore* (law) *ad minus* (soft law) in selected Treaty provisions

The first provision which shall be discussed here is Article 294 TFEU. In my view, Article 296 para 3 TFEU does not exclude the adoption of soft law acts pursuant to the procedure laid down in Article 294 TFEU when it is clear from the beginning (and proposed by the Commission) that no (draft) legislative act is negotiated (see in more detail 3.4.3. below). This argument is underpinned by Article 292 TFEU which suggests that the Council may adopt recommendations also where eg a special legislative procedure is prescribed: *argumentum* 'It shall act unanimously in those areas in which unanimity is required for the adoption of a Union act'.[802] If by analogy we apply this finding to the ordinary legislative procedure, the adoption of soft law seems to be allowed also under Article 294 TFEU. The analogous application could, however, be refused with reference to the general power of the Council to adopt recommendations which the EP – the second legislator in the ordinary legislative procedure – lacks. Thus, it could be argued that there is no regulatory gap. Whether the Council would then, in view of its competence granted under Article 292 TFEU, be entitled to adopt a recommendation on its own in areas in which the

799 On the merely declaratory character of Article 296 para 3 TFEU see Krajewski/Rösslein, Art. 296 AEUV, para 52.

800 See definition in Article 289 para 3 TFEU.

801 See Geismann, Art. 296 AEUV, para 5; Krajewski/Rösslein, Art. 296 AEUV, para 52; Vcelouch, Art. 296 AEUV, para 77. Differently: Schoo, Art. 296 AEUV, para 6, arguing that this provision merely repeats the principle of conferral.

802 For the risks this competence entails (with a view to the draft Constitutional Treaty): von Bogdandy/Arndt/Bast, Instruments 114.



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ordinary legislative procedure is applicable, is unclear. In terms of one of the aims of the Treaty of Lisbon, that is to promote the role of the EP, this would certainly be an odd result. In practice, the EP and the Council have adopted eg recommendations[803] in the course of the co-decision procedure (since the Treaty of Lisbon called 'ordinary legislative procedure').[804]

But it is not always the *argumentum a maiore* which brings to light a competence to adopt soft law where a pertinent competence to adopt hard law is provided for. A material competence to be examined here is Article 106 para 3 TFEU. Here the Commission's task to 'ensure the application of the provisions of this Article' is coupled with its power to 'where necessary, address appropriate directives or decisions to Member States'. The words 'where necessary' indicate that also less intrusive means may be taken, eg the adoption of soft law addressed to the MS.[805] In this case there does not seem to be a regulatory gap, as already the wording hints at a soft law power. When Article 105 para 1 TFEU stipulates that the Commission 'shall ensure the application of the principles laid down in Articles 101 and 102' and, in case of an infringement, 'shall propose appropriate measures to bring it to an end', this leaves open the question of which measures the Commission ought to take.[806] Para 2, according to which the Commission shall record the infringement in a reasoned decision '[i]f the infringement is not brought to an end', however, suggests that the Commission should try with less intensive means before. Such less intensive means certainly include soft law measures. Here the Commission's competence to adopt soft law can be deduced *e contrario*: Where a decision constitutes the *ultima ratio*, in principle any less intensive measures may be taken before that. In this context, only soft law acts are available as less intensive measures. Also in this case the (mere) interpretation of the provision results in the confirmation of a soft law power. Thus, there is no room for the application of the *argumentum a maiore ad minus*.

Another example is Article 114 para 1 TFEU. This provision allows the European Parliament and the Council, 'acting in accordance with the ordi-

803 See eg Recommendation of the European Parliament and of the Council of 10 July 2001 on mobility within the Community for students, persons undergoing training, volunteers, teachers, and trainers, OJ 2001 L 215/30.

804 For these questions see 3.4.3.1. below.

805 Only *prima facie* speaking against this view: case T-116/89 *Prodifarma*, paras 81 f.

806 *Senden* calls this an '"in-between" legal basis', as it obliges to act, but does not determine in which form; Senden, Soft Law 327 f and 337 (with regard to the principle of effectiveness).



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nary legislative procedure', to 'adopt the measures for the approximation of the [laws of the MS] which have as their object the establishment and functioning of the internal market'. While the malleable term 'measure' speaks in favour of discretion as regards the choice of form,[807] and while the prescribed compliance with the ordinary legislative procedure can, after what was said above, *a maiore ad minus* also be performed in order to adopt a soft law act (as long as it is not negotiated as 'legislative' act), it seems that the purpose of Article 114 TFEU, the approximation of laws, can hardly be reached by non-binding acts.[808] In spite of these apparent restrictions, the CJEU held that the European Parliament and the Council may, by means of a legislative act, set up a new body entrusted with the power to adopt soft law measures in order to facilitate an approximation of laws.[809] So while the legislator arguably may not itself adopt soft law measures based on Article 114 para 1 TFEU, it may on this basis, confer this power upon the Commission.[810]

This seemingly odd result could be justified by considering the distribution of powers among the EU institutions: The EP and the Council have the power to adopt suitable, generally applicable, measures. In order to reach the aim of approximation, they must be legally binding (here: legislative) measures. The Commission and – to a limited extent – the Council or European agencies are in charge of executing legislation, that is to say to ensure compliance with its rules. This task may also be fulfilled by means of the adoption of soft law, be it individual or general in application. This soft law can ensure that the existing legislative rules (approximating the laws of the MS) are correctly applied. It is a consequence of the principal

807 See case C-217/04 *United Kingdom v European Parliament/Council*, para 43; see also Biervert, Mißbrauch 104 f; Knauff, Regelungsverbund 413, with regard to the principally 'neutral' term 'measure'; Tietje, Art. 114 AEUV, para 115.

808 See Articles 289 para 1 and 296 para 3 TFEU; see also case C-376/98 *Germany v European Parliament*, para 83; case C-58/08 *Vodafone*, para 35: '[T]he authors of the Treaty intended to confer on the Community *legislature* a discretion' (emphasis added); unclear: M Schröder, Art. 114 AEUV, para 57; Korte, Art. 114 AEUV, paras 74–76.

809 Case C-217/04 *United Kingdom v European Parliament/Council*, para 44; see also para 28, in which the European Parliament expressly and *in eventu* argues that implied powers conferred by what is now Article 114 TFEU allow it, together with the Council, to create an agency (vested with the power to adopt soft law); see references by Weismann, Agencies 64 (fn 388).

810 See Goldmann, Gewalt 501, who refuses to qualify such a scenario as 'delegation'; pointing to this problem in a different context: Steiblyté, Delegation 69.



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distribution of powers between the institutions – the EU's institutional balance – that the EU's executive branch is exercising powers different from those of its legislative branch. Therefore, to take an important example, it is the Commission (or, exceptionally,[811] the Council in an executive capacity) which must be vested with implementing powers according to Article 291 para 2 TFEU, where uniform conditions for implementing legally binding acts are needed. The legislator is competent to regulate within the respective policy field and also to provide for the related powers of the executive, but it may not exercise itself the executive (implementing) powers just mentioned. Therefore we can conclude that primary law provides for a distribution of powers between the institutions, according to which the legislator may vest primarily the Commission (or European agencies[812]) with powers it may not exercise itself.[813]

Another question is whether the power to adopt legally binding (executive) acts implies the power to adopt soft law acts. In this context, the two main general provisions in the TFEU are Articles 290 and 291 which allow for the delegation of the power to adopt delegated/implementing acts. While the *telos* ('supplement or amend […] elements of the legislative act') of Article 290 TFEU clearly exclude legally non-binding acts, Article 291 para 1 TFEU non-specifically refers to 'implementing powers'. The latter acts may have a general-abstract or an individual-concrete scope.[814] The wording of Article 291 para 2 TFEU allows for a reading, according to which these powers also encompass the power to adopt legally non-binding acts.[815] In the literature such a wide interpretation is largely affirmed.[816] Un-

811 For the Council's general restrictions, pursuant to the Court, on reserving the powers to implement for itself see case 16/88 *Commission v Council*, para 10; case C-257/01 *Commission v Council*, para 51.

812 See Opinion of AG *Kokott* in case C-217/04 *United Kingdom v European Parliament/Council*, fn 30, in which she refers to implied powers in the context of European agencies and the competences now contained in Article 114 TFEU.

813 See also Schütze, Rome 1398.

814 See Bast, Hierarchy 161; Ilgner, Durchführung 276, with further references.

815 Regulation 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers only refers to 'draft implementing acts' and hence as well leaves open the question whether or not it shall apply only to legally binding acts. For practical examples of soft law acts adopted in the course of comitology procedures see J Scott, Limbo 347.

816 In favour of an inclusive interpretation: Nettesheim, Art. 291 AEUV, para 27; Ruffert, Art. 288 AEUV, para 11; F Schmidt, Art. 291 AEUV, para 15; Senden/van den Brink, Checks 38; unclear: Kröll, Artikel 290 und 291 AEUV 205 f; see also von Bogdan-



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der the (unofficial) predecessor provisions of Article 291 (and Article 290) TFEU – Article 202 (third indent) and Article 211 (fourth indent) TEC, which would also have allowed for such a wide interpretation – purportedly hardly any legally non-binding acts were adopted.[817] Assuming a certain continuity of Article 291 TFEU, this (historical) practice is an argument against the possibility to delegate to the Commission (or the Council) the power to adopt legally non-binding acts under Article 291 TFEU.

Implementing powers shall enable the Commission (the Council) to set 'uniform conditions for implementing legally binding Union acts'. A need for uniform conditions may be given where there are considerable differences in the national law which is adopted/applied in the implementation of the act.[818] It can be doubted that there are cases in which legally non-binding acts would be suited best to serve the aim of *unifying* (ie not merely 'coordinating') the conditions for implementation, as allowing for the possibility to (lawfully) deviate – however effective the respective soft law measures may be expected to be – does not serve the aim of unification.[819] These doubts also apply in a situation where the Commission (or the Council), within the ambit of its implementing powers, adopts recommendations not on the basis of its respective implementing powers (*lex specialis*), but on the basis of its general competence to adopt recommendations pursuant to Article 292 TFEU (*lex generalis*; for that competence clause see in more detail 3.4.3. below).

The Court in principle seems to allow for the adoption of general-abstract soft law as an expression of implementing powers.[820] If this is ac-

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dy/Bast/Arndt, Handlungsformen 115; emphasising the similarity as 'funktionelles Pendant' [also referred to as 'funktionales Pendant'; functional pendant] of the ESAs' guidelines and recommendations as compared to acts pursuant to Articles 290 and 291 TFEU, but emphasising that when ESA guidelines and recommendations are adopted the procedural requirements of these provisions are not met: Wörner, Verhaltenssteuerungsformen 233 ff; against the inclusion of soft law acts: Craig, Comitology 199; Möstl, Rechtsetzungen 1082.

817 See Ilgner, Durchführung 29.

818 See Kröll, Artikel 290 und 921 AEUV 205.

819 In its earlier case law the Court seems to have argued that way: case 74/69 *Hauptzollamt Bremen-Freihafen*, para 9; see also Eliantonio, Soft Law 497, with a further reference; but see case C-35/93 *Develop Dr. Eisbein*, para 21; case C-259/97 *Clees*, para 12; case C-396/02 *DFDS*, para 28, each with regard to the Explanatory Notes to the nomenclature of the Customs Cooperation Council; for a similar discussion in the context of harmonisation see 5.1. below.

820 Case C-355/10 *European Parliament v Council*, paras 80–82. Even though the Court eventually qualifies the rules at isse as 'intended to produce binding legal effects',



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cepted, then also the principal lawfulness of adopting individual-concrete legally binding measures on the basis of Article 291 TFEU (see above) must be extended to (individualised) soft law acts.

One of the rare recommendations of the CJEU – and this shall form our last example here – is its output called 'Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings' (2019). These recommendations contain 'practical guidance', among other things, on the national court's or tribunal's decision to make a reference, on the communication with the CJEU, and on urgent references.[821] While the recommendations do not explicitly refer to a legal basis for their adoption, in para 2 it is stated that they are intended 'to clarify the provisions of the rules of procedure' of the CJEU which are, in particular, based on Article 19 TEU and Article 253 TFEU. While the former provision remains silent on that issue, Article 253 TFEU expressly states that the Court shall establish its Rules of Procedure. It could be argued that the Court's competence to provide soft guidance on preliminary reference procedures (which are regulated in Part III of its Rules of Procedure) can – *a maiore ad minus* – be deduced from its competence to adopt Rules of Procedure. In the view of some, the Rules of Procedure of the CJEU constitute internal law,[822] following which the *argumentum a maiore* cannot convincingly be applied to deduce the power to adopt external soft law (for the distinction between internal and external soft law see 3.3.3.1. below). While soft law is a *minus* as compared to a legally binding act, externality constitutes a *maius* over a merely internal act. In my view, the Court's Rules of Procedure are not entirely internal, but some provisions are intended to and actually have a strong external radiance, in particular those concerning party rights, and also those concerning references for a preliminary ruling (Articles 93 ff *leg cit*). On the basis of this assumption, the deduction of the Court's power to render the said recommendations *a maiore ad minus* appears to be legally flawless.

An alternative legal solution could be to deduce the Court's soft law power at issue, again *a maiore ad minus*, from its power to decide in a legally

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it appears to approve of the possibility to adopt implementing soft law; in the affirmative also Gärditz, Unionsrecht, para 14.

821 Note that the predecessor recommendations from 2012 in their para I.6. were more explicit in terms of their non-bindingness ('in no way binding') and its purposes ('to supplement […] the Rules of Procedure').

822 See Senden, Soft Law 53.



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binding way on preliminary references – not only substantially,[823] but also eg as regards their admissibility. Exceptionally, the Court may even – in the course of a preliminary reference procedure initiated in different national procedures, in particular in the context of State liability proceedings, or in the course of a Treaty infringement procedure – come to declare unlawful the omission (withdrawal) of a preliminary reference by a national court or tribunal.[824] It is to be noted, though, that the Court is allowed, under Article 267 TFEU, to answer questions related to individual cases, but not to rule in a general-abstract way. This situation is comparable to the Commission's adoption of general-abstract soft law in order to facilitate its (individual-concrete) execution of State aid policy – in which case, as was set out under 3.2.3. above, the Court refused claims of unlawfulness.

### 3.3.3. Internal soft law

#### 3.3.3.1. The phenomenon of internal soft law

So far we have mainly dealt with external EU soft law, which shall – due to its eminent importance – stay in the foreground in this work. In this sub-chapter, however, special attention shall be drawn to *internal* EU soft law. Literally no modern bureaucracy of a certain size, be it based on the rule of law or not, can forgo the possibility to harmonise its decision-making practice by internal (soft) regulation.[825] Internal acts may be adopted at different levels of the internal hierarchy of an EU body, eg the Commission. Whereas 'decisions of principle'[826] can only be adopted by the college of Commissioners or, exceptionally, by the competent Commissioner alone, the adoption of management or administrative measures may be delegated to the competent Directors-General and Heads of Department.[827] These measures can also take the form of soft law.

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823 Note, however, that the Court has refused its competence to adopt a legally non-binding reply to a *concrete* preliminary reference request by a national court or tribunal; case C-62/14 *Gauweiler*, para 12, with a further reference.

824 See case C-224/01 *Köbler*, paras 117 f.

825 See Rawlings, Soft law 217 ff, also pointing at the downside of an overboarding use of (internal) soft law; for an example of national – German – internal soft law, its theoretical classification and its application in practice see Arndt, Sinn 54–60.

826 Case 5/85 *AKZO*, para 37.

827 See overview in Article 4 of the Rules of Procedure of the Commission, C(2000) 3614, and the provisions referred to therein. For an example of a 'management



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While external soft law is mainly addressed to persons external to the originator(s), internal soft law is *meant* for internal use only. However, the fact that an act is internal does not mean that it may not have, indirectly, also some external effects. The application of an internal act regularly *affects* external actors in one or the other way.[828] Sometimes classic internal acts, like rules of procedure, may even contain provisions which are addressed not only to the officials of its originator but also to third parties, thereby developing an external dimension, eg provisions concretising the rights of parties to an administrative procedure.[829] Therefore, *prima facie* internal soft law may move, as *Rawlings* has put it, 'along an[] axis, from internal operational advice to guidance for the regulated and the public'.[830] The (external) publication of these acts hints at a broader than a merely internal audience.[831] Internal soft law acts – belonging to the 'interne Verwaltung' [internal administration][832] – regularly provide for an internal procedure, eg with regard to applications for access to documents according to Regulation 1049/2001.[833] Some of these instruments are 'governing the exercise of the discretion conferred on the Commission' (or other EU bodies).[834] Often they merely summarise the approach to be taken by the body's staff and hence recapitulate, or restate, the respective EU law (including its case law).[835] If (parts of) these documents entirely lack any normative content,

measure' see case 5/85 *AKZO*, para 38; see also Eekhoff, Verbundaufsicht 123; Röhl, Entscheidung 340, both with references to further case law.

828 See H Adam, Mitteilungen 155; Goldmann, Gewalt 364 f; Hofmann/Rowe/Türk, Administrative Law 97, 538 and 550; Senden, Soft Law 315 f, with further references.

829 For the example of the CJEU's Rules of Procedure see 3.3.2.2. above. For the officials as addressees of such acts on the one hand, and market participants who are only exceptionally directly addressed, but for whom these acts are of pivotal importance and who largely comply with them, on the other hand see Arndt, Sinn 56–60.

830 Rawlings, Soft law 224; see also case T-339/04 *France Télécom*, para 83.

831 In the context of the World Bank's 'internal' guidance see Boisson de Chazournes, Guidance 284.

832 Priebe, Aufgaben 75.

833 Note, however, that (possibly in addition to that) also a legally binding act with an also external scope may be adopted: see eg Decision of the Steering Committee of the Research Executive Agency on the Implementation of Regulation (EC) N° 1049/2001 of the European Parliament and the Council regarding Public Access to Documents REA/SC(2008)4 rev.1; see also Schwarze, Soft Law 244 f.

834 Senden, Balance 89, with reference to the pertinent case law (on staff matters).

835 For the effect such 'summaries' may have see Georgieva, Soft Law 244; Knauff, Regelungsverbund 325 f; Ştefan, Soft Law 101 f (see also 103, with regard to the Court's reference to such acts), each with further references; for the importance of such restatements see Jansen, Methoden 48; even confirming a *quasi*-normative



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they cannot be called soft law (descriptive acts or parts of acts).[836] Where additional 'fine-tuning' is provided – in the sense that an autonomous administrative practice, of course on the basis of and (regularly[837]) in accordance with the relevant rules, is laid down in a legally non-binding way – the soft law character of such an act (or part of it) can be affirmed (prescriptive acts or parts of acts).[838] Where internal rules turn out to be (general) instructions proper, they are legally binding upon their addressees and hence cannot be called soft law.[839] Where the 'explanation' provided in such rules goes beyond the regulatory content of the underlying act, the Court has to annul this 'explanation' – thereby at least implicitly confirming its legal effects.[840] In practice, it can be very difficult to determine whether a *prima facie* rule actually is a rule or whether it is merely the repetition of a rule laid down elsewhere – or whether it contains elements of both.[841] Some

character of such acts: Meier, Mitteilung 1307; for the factual compliance with these 'communications' see Köndgen, Rechtsquellen, para 64.

836 See eg para 44 of the internal Antitrust Manual of Procedures of the Commission DG Competition (November 2019) <https://op.europa.eu/en/publication-detail/-/publication/d7d7e463-ac51-11ea-bb7a-01aa75ed71a1> accessed 28 March 2023; see also della Cananea, Administration 69; Hofmann/Rowe/Türk, Administrative Law 539 f; for the Court's approach see case C-362/08P *Hilfsfonds*, para 34, with further references.

837 For the Commission's 'proposal' of a legal understanding deviating from that of the Court see the example of Commission Communication 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', 2009/C 45/02; for a critique of this Guidance see Gormsen, Commission.

838 See Raschauer, Verhaltenssteuerungen 699; Weigt, Rechtsetzung 49, with regard to the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives. An action for annulment against this Communication was later declared inadmissible by the then Court of First Instance; case T-258/06 *Germany v Commission*.

839 See Hofmann/Rowe/Türk, Administrative Law 572; for the effect of instructions see also 4.2.3.1.

840 See case C-366/88 *France v Commission*, paras 23 f; critically pointing at the possibility of expanding regulation by soft law: Korkea-aho, Soft Law 276.

841 For the frequent overlap between summary and actual (soft) rule-making see Senden, Soft Law 140 f; see also case T-81/97 *Regione Toscana*, para 22. The problem of repetition of norms has raised the attention of the legislator. With regard to Regulations 1093–1095/2010, the legislator introduced a new provision, Article 16 para 2a, obliging the ESAs in the following way: 'Guidelines and recommendations shall not merely refer to, or reproduce, elements of legislative acts. Before issuing a new guideline or recommendation, the Authority shall first review existing guidelines and recommendations, in order to avoid any duplication'.



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of these (soft) internal rules are published online,[842] but many of them are not.

While it was said that soft law may entail a self-obligation (upon its originator),[843] the addressees of soft law cannot be legally bound. The self-obliging potential of *internal* soft law requires some further considerations. This effect requires a certain publicity of the act at issue, ie some external outreach. If no person outside the body at issue can become aware of the rules, their trust in the actual application of these rules cannot possibly be disappointed. It is the originator which addresses the soft law rules to its staff. As addressees, the staff cannot be legally bound directly by this soft law. Where internal rules are – failing publication – not accessible to third parties, deviance from them, for lack of information, cannot possibly be invoked by the latter. In case of such truly internal soft law, the staff (as addressees) are not bound by it, but the originator is bound to the extent that it may not – eg in disciplinary proceedings – reproach one of its officials with having complied with the act at issue (eg because it has later turned out to be unlawful).[844] To the extent the internal soft law act has an external outreach, the originator may be obliged to comply with its soft law *vis-à-vis* a third party. The staff are then obliged to comply

842 Eg the Internal Guidelines on the new impact assessment procedure developed for the Commission services <http://ec.europa.eu/governance/docs/comm_impact_en.pdf>, or the internal Antitrust Manual of Procedures of the Commission DG Competition (November 2019) <https://op.europa.eu/en/publication-detail/-/publication/d7d7e463-ac51-11ea-bb7a-01aa75ed71a1>, both accessed 28 March 2023. The Manual is characterised as an 'internal working tool intended to give practical guidance to staff on how to conduct an investigation applying Articles 101 and 102 TFEU'. It 'does not contain binding instructions for staff'. In the context of the publication of EU soft law, *Snyder* has coined the term 'regulation by publication': Snyder, Practice 2; for the meaning of the publication of norms in legal history see Jansen, Methoden 37 f; with regard to EU State aid law see Schweda, Principles, para 30.

843 See 4.2.3.1. below. However, such self-obligation can also be excluded; see the Commission's *Handbook on Implementation of the Services Directive* – which explicitly excludes binding effects on the Commission (page 1) – as an example <https://fve.org/cms/wp-content/uploads/handbook-on-the-impl-of-the-Services-Directive_en.pdf> accessed 28 March 2023; for the Court's case law see case T-185/05 *Italy v Commission*, para 47; see also Pampel, Rechtsnatur 55–64; von Graevenitz, Mitteilungen 172, both with further references; for the self-obliging effect of soft law in public international law see Schermers/Blokker, Institutional Law, §§ 1241 and 1261.

844 For the invocation of illegality by members of staff themselves see case C-171/00P *Libéros*, para 35.



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with the (affected parts of the) act indirectly, due to their acting on behalf of their employer and due to their duty to consider, when doing their job, the obligations of their employer.[845] Consequentially, an 'unmotivated' deviation from such soft law act by the staff (legally acting on behalf of the originator) may be qualified as an infringement of legitimate expectations or the principle of equal treatment.[846]

#### 3.3.3.2. The competence to adopt internal soft law

The EU's *Verbandskompetenz* to organise itself, ie in particular to change its current internal organisation in a certain way, is subject to the principle of conferred powers.[847] In general, this applies also to the respective *Organkompetenz*. An institution, body, office or agency of the EU may organise itself on the basis of an express competence, eg the Council's competence to 'decide on the organisation of [its] General Secretariat' (Article 240 para 2, second sentence TFEU), the Commission's (President's) competences to adopt its Rules of Procedure 'so as to ensure that both it and its departments operate' (Article 249 para 1 TFEU), to 'lay down guidelines within which the Commission is to work'[848] and to 'decide on the internal organisation of the Commission' (Article 17 para 6 lit a and b TEU), or the competence of the Management Board of the EASA to adopt its (the Board's) Rules of Procedure (Article 98 para 2 lit j of Regulation 2018/1139).[849] That the CJEU refers to the power of 'the Bureau [of the

845 See Article 11 para 1 of the Staff Regulations of EU Officials, according to which an official shall 'carry out the duties assigned to him objectively, impartially and in keeping with his *duty of loyalty* to the Communities' (emphasis added); for the case that soft law, internally, conveys 'internal administrative instructions under the principle of hierarchy' see Arroyo Jiménez, Bindingness 30 f.

846 See Hofmann/Rowe/Türk, Administrative Law 542; see also 4.2.3.2.3. below.

847 See Streinz, Art. 13 EUV, para 28.

848 See Hofmann/Rowe/Türk, Administrative Law 565, according to whom this provision covers 'a wide range of internal organizational measures'.

849 See Priebe, Entscheidungsbefugnisse 88, according to whom the competence to adopt Rules of Procedure only allows for a regulation of issues internal to the respective administration; see – on the contrary – the widely-drafted Article 20 of the Commission's Rules of Procedure, according to which '[t]he Commission may, in special cases, set up specific structures to deal with particular matters and shall determine their responsibilities and method of operation'; for the competence of European agencies to adopt their respective rules of procedure see Orator, Möglichkeiten 408 f.



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General Assembly, the predecessor of the EP] […] to organise its Secretariat as it wishes and in the interests of the service, and […] [to its acting] in the full exercise of its powers in abolishing a post which it considered unnecessary'[850] without mentioning an express Treaty base speaks in favour of a generally broad discretion of EU institutions, bodies, offices and agencies as concerns their respective self-organisation.[851] The Court's judgement in the *Macevicius* case points in a similar direction when it stresses the principal 'freedom of the Community institutions to organise their internal work in the best interests of the service'.[852] The Court in the above and other cases remains silent on the question of legal basis.[853] An explanation for this would be that it applies the implied powers doctrine in these cases (see 3.3.1. above). The Assembly's/European Parliament's[854] right to self-organisation, for example, could be perceived as power implied to its (express) right to adopt its own Rules of Procedure according to Article 25 TECSC (in the *Kergall* case) and Article 142 TEEC (in the *Macevicius* case), respectively. This approach seems to be confirmed by the later case law of the Court.[855]

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850 Case 1/55 *Kergall*, para 7 lit b.

851 See joined cases C-237/11 and C-238/11 *France v European Parliament*, para 42, with regard to the duty of other actors to respect this discretion; see also case C-301/02P *Tralli*, para 39, with regard to institutions and bodies established under primary law, and para 42 with reference to para 34 of the judgement in case C-409/02P *Pflugradt*. In the latter judgement the Court stated that the ECB is 'a Community body, entrusted with public interest responsibilities and authorised to lay down, by regulation, provisions applicable to its staff'. In *Tralli*, the Court converted this into the following legal deduction: '[A] Community body entrusted with public interest responsibilities *is* authorised to lay down, by regulation, provisions applicable to its staff' (emphasis added); see also Hummer, Interorganvereinbarungen 85.

852 Case 66/75 *Macevicius*, para 17.

853 Without reference to a specific competence clause, the CJEU has furthermore confirmed the Court of Auditors' right to lay down 'in a general internal decision rules governing the exercise of the discretion which it has under the Staff Regulations'; case 146/84 *De Santis*, para 11; see also case C-443/97 *Spain v Commission*, para 31, with regard to the Commission; similarly, and with further references, case T-2/90 *Ferreira de Freitas*, para 61; case T-185/05 *Italy v Commission*, para 45, both with regard to the Commission; see also Gärditz, Unionsrecht, para 57, with further references.

854 Up until the Treaty of Maastricht, the Treaty name was 'Assembly'. However, starting already in the 50s, the Assembly referred to itself as 'European Parliament', and so have done – to an increasing extent – the other institutions, the MS etc.

855 See eg case 230/81 *Luxembourg* v *European Parliament*, para 38. In this case the Court bases the EP's right to determine its internal organisation on its express Treaty competence to adopt its Rules of Procedure; confirmed in case 149/85 *Wybot*,



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In view of this wide discretion on the way in which self-organisation takes place,[856] the power to adopt (soft) internal guidelines on the interpretation of applicable legal provisions or on internal procedures – which are also forms of (internal) self-organisation – can be implied to the general right eg of Commissioners to give instructions to the departments assigned to them (which is laid down in the Commission's Rules of Procedure)[857] and of superior officials to give instructions to subordinates according to the Staff Regulations.[858] The power to give binding instructions encompasses, arguing *a maiore ad minus*, also the – less intrusive – power to adopt (general) soft law instructions,[859] such as the above mentioned Antitrust Manual of Procedures of the Commission.[860]

In conclusion, we can say that the competence requirements for the adoption of internal soft law are not principally different from those for the adoption of external soft law. It appears, however, that with the right to self-organisation EU bodies dispose of a general right to regulate their internal organisation, *a maiore ad minus* also by means of soft law, and hence finding a competence to adopt internal soft law regularly is less demanding than searching for a competence to adopt external soft law.

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para 16; see also joined cases C-237/11 and C-238/11 *France v European Parliament*, para 42, in which the Court stresses 'the Parliament's power to determine its own internal organisation'; see also the case law referred to by H Hofmann, Rule-Making 162 f; see Nettesheim, Art. 13 EUV, para 67, who acknowledges an *unwritten* power of self-organisation where an explicit competence is lacking in primary/secondary law.

856 Similarly: Hofmann/Rowe/Türk, Administrative Law 538 f; critically: ibid 543 f.

857 Article 16 para 2 of the Rules of Procedure of the Commission.

858 Article 21 para 2 of Regulation 31 (EEC), 11 (EAEC) (Staff Regulations of Officials and the Conditions of Employment of Other Servants of the EEC and the EAEC).

859 See Hofmann/Rowe/Türk, Administrative Law 542.

860 The legislator appears to share this view when in Council Regulation 139/2004 (EC Merger Regulation) it mentions the need for the Commission to 'publish guidance' – in my view a clear reference to soft law – only in its Recitals (namely Recitals 28 f), without at the same time conferring an according competence.



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## 3.4. General competence clauses in the Treaties

### 3.4.1. Introduction

Recommendations and opinions are the two (potential[861]) EU soft law acts laid down in the Treaties' catalogue of legal acts, ie Article 288 TFEU. In this sub-chapter, general competence clauses to adopt either recommendations or opinions shall be addressed. Competences to adopt EU soft law bearing other names than 'recommendation' or 'opinion' are dealt with under 3.6. below. A general competence here is understood as a competence which is not limited to concrete (specific) situations ('special competences'), but which applies across the board. As to be expected in a legal regime based on the rule of law, general competences are not limitless, though, but subject to varying restrictions. In view of this, the term 'general competence' is not to be understood as all-encompassing, but as 'general competence subject to limitations'. The 'special competences' to adopt recommendations or opinions are subject to sub-chapter 3.5. below.

In the following, the *prima facie* general competence clauses Article 288 TFEU, Article 292 TFEU, Article 127 para 4 and Article 132 para 1 (third indent) TFEU, and various Treaty provisions empowering committees shall be analysed, also with a view to their (potential) limits (3.4.6. below).

### 3.4.2. Article 288 TFEU – a general competence clause?

When talking about *prima facie* general competences of EU institutions, bodies, offices or agencies to adopt soft law, we ought to have a closer look at Article 288 TFEU which lays down the 'legal acts of the Union' which its 'institutions shall adopt'. Its predecessor, Article 249 TEC, began with the words: '[i]n order to carry out their task and in accordance with the provisions of this Treaty'. In Article 288 TFEU this wording is replaced by: '[t]o exercise the Union's competences'. This is interpreted as a way to expressly include the second Treaty, the TEU, and the competences provided for therein.[862] Moreover, emphasis is laid on the Union's *Verbandskompetenz*, rather than on the competences of the single institutions. This is to indicate

861 As was noted under 3.1.1. above, acts bearing either of these names do not necessarily contain (soft) norms.

862 See Geismann, Art. 288 AEUV, para 16; Nettesheim, Art. 288 AEUV, para 3; see also Biervert, Art. 288 AEUV, paras 2 f.



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that all the competences of the EU shall be exercised by the institutions, a mismatch of competences and tasks[863] being excluded. Article 288 TFEU cannot be regarded as a competence clause, though.[864] It neither provides a legal competence of the EU as a legal person (*Verbandskompetenz*) nor of any of its bodies (*Organkompetenz*) to adopt certain legal acts. It rather has a (non-exhaustive[865]) declaratory and systematising character and, in addition to that, fleshes out Article 296 para 1 TFEU which grants discretion to the institutions: where they have an unspecific competence to act, they can choose the most appropriate type of act (in accordance in particular with the principle of proportionality).[866] From Article 288 TFEU, a body's power to adopt a certain act can only be deduced in conjunction with a (substantive) competence clause (*argumentum* '[t]o exercise the Union's competences'). Thereby Article 288 TFEU may also have to be teleologically reduced, for instance in order to explain why the Court does not have a power to adopt directives.

Article 288 TFEU in its para 1 stipulates that 'the institutions' of the EU shall 'adopt regulations, directives, decisions, recommendations and opinions'. The institutions of the EU are taxatively enumerated in Article 13 para 1 TEU. The question is whether also here the term 'institutions' is to be understood widely so as to encompass bodies, offices and agencies of the EU, as well.[867] In view of the long-lasting practice to equip, mostly by means of secondary law, other EU bodies than institutions with the power to adopt (certain[868]) acts listed in Article 288,[869] it is to be affirmed.[870] In conclusion, we can state that this provision lists – in a non-exhaustive way – the acts (some or all of) which may in principle be adopted, in accordance

863 See Articles 2 f TEC (Nice); see also Nettesheim, Art. 288 AEUV, para 3.

864 See Nettesheim, Art. 288 AEUV, para 15; Ruffert, Art. 288 AEUV, para 6; Schroeder, Art. 288 AEUV, para 10; Senden, Soft Law 295.

865 For further, so-called *sui generis* acts in EU law see de Witte, Instruments 81–83 (Nice) and 100–102 (Lisbon); Pampel, Rechtsnatur 85–90; Ruffert, Art. 288 AEUV, paras 100 ff.

866 See Ruffert, Art. 288 AEUV, para 15; see also case C-322/88 *Grimaldi*, para 13.

867 See 3.2.2. above.

868 Bodies, offices and agencies cannot be entrusted with the power to adopt *all* of the acts mentioned in Article 288 TFEU. Especially their (partial) empowerment to adopt acts with a general-abstract scope ('rule-making') is highly contested; for this debate see Weismann, Agencies 34 f, with further references.

869 This is acknowledged also elsewhere in primary law: eg Articles 267 lit b and 277 TFEU.

870 Applying such an inclusive understanding as well: Fischer-Appelt, Agenturen 118 f; Schroeder, Art. 288 AEUV, para 14.



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with other primary law, by the institutions, bodies, offices and agencies of the EU, and that it cannot be qualified as a competence clause.

### 3.4.3. Article 292 TFEU

#### 3.4.3.1. The power to adopt recommendations of the Council and of the Council and the EP, respectively

The first sentence of Article 292 TFEU reads: 'The Council shall adopt recommendations'. This means a general competence of the Council to adopt acts belonging to one important category of EU soft law, namely recommendations.[871] The two subsequent sentences also regard the Council's competence to adopt recommendations. These are general procedural requirements which are mentioned in Article 292 TFEU in order to clarify that they apply also to the adoption of Council recommendations, namely the requirements of a Commission proposal or the requirement of unanimity[872] in the Council.[873] These procedural rules also have a competence impact in that they suggest – in spite of the more liberal wording – that the Council may, according to Article 292 TFEU,[874] adopt recommendations only in the field of the Council's responsibilities.[875] The requirements for the degree of determination of competence clauses which may be deduced from the principle of conferred powers and the rule of law, respectively, are comparatively low to the extent that they concern the adoption of soft law.[876] Affirming a competence to adopt soft law beyond the actors' responsibilities laid down in the Treaties would run counter to the principle of conferred powers, though.[877] It is to be noted, as well, that Article 292

871 Against an extension of this competence to all kinds of soft law acts: Wörner, Verhaltenssteuerungsformen 282.

872 For lack of an explicit rule, the Council decides by qualified majority (Article 16 para 3 TFEU). This applies also to recommendations. The Council's decision-making by simple majority, under primary law, does not seem to play a role in the context of recommendations.

873 For examples in the Treaties see Ruffert, Art. 292 AEUV, para 3.

874 Elsewhere in the Treaties the Council may be granted a specific power to adopt recommendations; see eg Article 319 para 1 TFEU; see also Nettesheim, Art. 292 AEUV, para 14, with further examples.

875 See also Geismann, Art. 292 AEUV, para 2 with further references.

876 See Braams, Koordinierung 194 f, with further references.

877 Too wide an understanding of the Council's and, with a view to Article 292 TFEU (last sentence), the Commission's competence to adopt recommendations would



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TFEU does not as such exclude the possibility of the mentioned institutions or other EU bodies disposing of soft law powers on other legal bases (no exclusionary effect).[878]

The Council may adopt recommendations where it is competent to act in an unspecified way (eg 'the Council shall adopt measures […]').[879] This is clear from the wording of Article 292 in conjunction with Article 296 para 1 TFEU. In addition to that, the Council may – concluding *a maiore ad minus* – in principle adopt recommendations where it has the power to adopt law. For *Nettesheim*, where the Treaties do not provide for a specific competence to do so, the Council's power to adopt (external) recommendations seems to be limited to cases in which the Council ought to act according to the ordinary or a special legislative procedure.[880] This, he argues, follows from sentences two and three of Article 292. In my view, the wording of Article 292 does not exclude other cases[881] – after all, it generally demands compliance with procedural requirements 'where the Treaties [so] provide'. In practice, the author would agree, though, that it is mainly competence clauses providing for legislative procedures which are applicable in this context, namely special legislative procedures (for the ordinary legislative procedure see below). In most cases in which the Council may act other than according to a (special) legislative procedure, a recommendation appears to be inadequate.[882] One exception is Article 46 para 6 TEU, pursuant to which '[t]he decisions and recommendations of the Council within the framework of permanent structured cooperation, other than those provided for in paragraphs 2 to 5, shall be adopted by unanimity'. Article 46 in its other paragraphs only mentions Council decisions to be adopted in a procedure other than a legislative procedure, but does not mention any

distort the allocation of powers to the different actors of the EU and hence would also jeopardise the orderly application of the principle of mutual sincere cooperation between the institutions, bodies, offices and agencies of the EU (see 3.4.6. below).

878 See Dickschen, Empfehlungen 26–28.

879 Eg in Article 322 para 2 or in Article 331 para 1 TFEU. See eg the Council Recommendation on a Quality Framework for Traineeships, 2014/C 88/01, which is expressly based on Article 292 TFEU in conjunction with Articles 153 and 166 TFEU.

880 See Nettesheim, Art. 292 AEUV, para 9.

881 See also Biervert, Art. 292 AEUV, para 2.

882 See eg Articles 155 para 2 or 207 para 4 subpara 2 TFEU, according to which the Council shall conclude agreements, or Article 108 para 2 subpara 3 TFEU, according to which the Council shall decide upon a concrete case.



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(specific) recommendations the Council may adopt; neither does Article 42 para 6 TEU which refers to this permanent structured cooperation. Against this background, it can be concluded that Article 46 para 6 TEU is to be read in conjunction with Article 292 TFEU, with the result that the Council under Article 46 TEU may adopt recommendations whenever it is competent to adopt decisions. This view is also compatible with Article 3 of the pertinent Protocol on permanent structured cooperation, according to which the assessments of the European Defence Agency (EDA) 'may serve as a basis for Council recommendations and decisions adopted in accordance with Article 46 [TEU]'.[883]

As regards the competence to act according to the ordinary legislative procedure, on the basis of which acts are adopted jointly by the Council and the European Parliament, we need to clarify whether the EP has a competence to adopt recommendations in the first place. From Article 292 TFEU such a competence of the EP cannot be deduced. Following *e contrario* from this provision (which also empowers the Commission and at least refers to the powers of the ECB), it could even be argued that the EP shall not have a general power to adopt recommendations. However, this argument does not appear to be convincing for the following reasons. The Court has confirmed a 'right inherent in the Parliament to discuss any question concerning the Communities, to adopt resolutions on such questions and to invite the Governments to act'.[884] It is dubitable, however, whether the Court here was referring to concrete rule-making by means of soft law or whether it alluded to more broadly drafted expressions of opinion (the typical content of resolutions) which – for lack of determination or for an outright lack of normativity – most of the time do not qualify as soft law (see II.2.1.2. above). In view of the subordinate, largely only consultative role the EP played in EEC decision-making at the time the quoted judgement was rendered (ie in 1983),[885] it is more likely that the Court had in mind the latter kind of acts. While this judgement does not seem to confirm the EP's power to adopt recommendations, it is to be emphasised that the EP today, apart from the Council, is the most important legislative body of the EU, legislation being the highest-ranking and most far-reaching nor-

883 Protocol No 10 on permanent structured cooperation established by Article 42 of the Treaty on European Union.

884 Case 230/81 *Luxembourg v European Parliament*, para 39.

885 For the only gradual empowerment of the EP since the 70s see Hix/Høyland, Empowerment 172 f.



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mative output conferred under the regime of the EU Treaties.[886] Excluding the EP here would also mean impeding the Council from adopting recommendations following the procedure laid down in Article 294 TFEU (the 'ordinary legislative procedure'). On the contrary, allowing the Council to adopt recommendations on its own regarding a question which the EP and the Council have the power to legislate on, would constitute an unlawful ousting of the EP and its legislative power.[887] It should also be mentioned – as a piece of information on rule-making in practice – that in the past the Council and the EP have adopted a number of recommendations according to Article 294 TFEU (and its predecessors).[888]

On the basis of the above legal considerations, the author concludes that also in case of the EP a competence to adopt recommendations may be deduced *a maiore ad minus* from its ordinary legislative competences. This applies where the act to be adopted is specified and, even more so, where this is not the case.[889] In other words: Where the EP (together with the Council) is allowed to adopt law following the ordinary legislative procedure, it may – *ceteris paribus*, in particular that means: together with the Council, on a proposal from the Commission and by meeting the respective majority requirements[890] – also adopt less, namely non-law (more specifically: a recommendation). For the Council the applicability of the procedural requirements is clear because it is explicitly obliged by Article 292 TFEU, but – *per analogiam*[891] – also the EP has to apply the

886 The MS' competence to amend this regime, ie to adopt primary law, is superior, it is true. However, it is not conferred by the Treaties but roots in public international law and is only specified in Article 48 TEU.

887 For the risks of the adoption of soft law ousting law-making competences in the EU legal order see Brunessen, Effets 29.

888 See eg the Recommendation of 18 June 2009 on the establishment of a European Quality Assurance Reference Framework for Vocational Education and Training, 2009/C 155/01.

889 Note that also then the acts available to the EP and the Council – strictly speaking – are limited to legislative acts, namely regulations, directives and decisions (*argumentum* 'ordinary *legislative* procedure'; Article 289 paras 1 f TFEU). This is why also in these cases the *argumentum a maiore ad minus* needs to be applied in order to confirm the legislators' soft law power; sceptically with regard to this practice: Härtel, Rechtsetzung 274.

890 See Article 11 paras 4 f of the Council's Rules of Procedure; also in the EP's Rules of Procedure a specific rule for the vote on recommendations is missing.

891 Note that Article 292 TFEU is applied *per analogiam* only with regard to the procedural requirements, not to create the EP's power to adopt recommendations in the first place.



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process underlying the 'ordinary legislative procedure'. A draft legislative act may not – in the course of a legislative procedure – be transformed into a (draft) soft law act (see Article 296 para 3 TFEU). This provision prohibits the adoption of other than legislative acts following a *legislative* procedure. Arguably, it is the determination 'legislative' which Article 296 para 3 – for reasons of clarity – intends to prevent in the context of the adoption of acts other than legislative acts, not the procedure as such.[892] Where it is clear from the beginning (eg from the Commission adopting its proposal) that the intended final output is a legally non-binding act, the procedure laid down in Article 294 TFEU may be applied.

Even where it is stipulated that the European Parliament and the Council shall adopt a specified act according to the ordinary legislative procedure (for example a directive according to Article 50 para 1 TFEU), in principle the EP and the Council may also adopt a recommendation on this basis. Sometimes the Treaties make it clear, however, that no legally non-binding acts shall be adopted on the basis of a certain competence. In Article 165 para 4 TFEU (first indent), for example, the adoption of 'incentive measures' by the EP and the Council *in the ordinary legislative procedure* is provided for. Its second indent allows for the Council to adopt recommendations. This makes it clear that, unlike under the pre-Lisbon regime,[893] the EP and the Council shall not adopt legally non-binding acts under Article 165 para 4 TFEU,[894] but that only the Council shall adopt recommendations (which, arguing *e silentio legis*, shall not contain incentive measures, though). Also where the Council is competent to adopt a specified act in the course of a special legislative procedure, it may not adopt a soft law act where this clearly goes against the purpose of the respective provision; see eg Article 86 para 1 TFEU, according to which the Council, 'by means of

892 See Gellermann, Art. 296 AEUV, para 18, with reference to European Convention, Report of 29 November 2002 from the Chairman of the Working Group IX on Simplification, CONV 424/02, 6 f; see also Council, Comments on the Council's Rules of Procedure (2022) 100; with regard to the respective provision in the Constitutional Treaty see Senden, Soft Law 481 f.

893 See eg Recommendation 2006/962/EC of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning which is based ('in particular') on Article 149 para 4 and Article 150 para 4 TEC; for the discussion on the non-bindingness of such incentive measures prior to the Lisbon Treaty see Niedobitek, Art. 165 AEUV, paras 59 f, with further references.

894 See reference to the CJEU's case law in Blanke, Art. 165 AEUV, para 100. Differently: Rosas, Soft Law 311; see also Simm, Art. 165 AEUV, para 24, with further references.



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regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust'.

The confirmation of a general competence of the EP to adopt recommendations under the ordinary legislative procedure was mainly due to the Council's involvement in this procedure and the Council's firm and express soft law power laid down in Article 292 TFEU. As regards the legislative powers of the EP outside the ordinary legislative procedure (which are scarce anyway[895]), for lack of a link to the Council no *general* power to adopt recommendations can be deduced (indirectly) from Article 292 TFEU. This does not exclude the confirmation of an according competence *a maiore ad minus* in a concrete case (see 3.3.2.1. above).

#### 3.4.3.2. The power to adopt recommendations of the Commission and of the ECB, respectively

In its last sentence Article 292 TFEU stipulates that the Commission shall adopt recommendations and that the ECB shall do so 'in the specific cases provided for in the Treaties'. The Commission thereby is vested with a comprehensive competence to adopt recommendations.[896] This reflects the legal situation under the TEC,[897] according to which the Commission could 'formulate recommendations […] on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary'.[898] Where both the Commission and the Council (or the Council together with the EP) have the power to adopt recommendations on a certain issue,

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895 See, for example, Article 223 para 2 and Article 228 para 4 TFEU which both provide for the EP's power to adopt regulations in the course of a special legislative procedure.

896 Note that under Article 211 (2nd indent) TEC (Nice) the Commission was vested with a comprehensive power not only to adopt recommendations, but also opinions; note that Belgium in case C-16/16P Belgium v Commission, para 19, argued that the Commission, in addition to 'the procedural legal basis' of Article 292 TFEU, would also require a material competence for the adoption of a recommendation. This argumentation was not taken up by the Court. For the meaning of Article 17 TEU for the Commission's competence to adopt soft law of all sort see Georgieva, Soft Law 226 f; see also case C-660/13 *Council v Commission*.

897 See Gellermann, Art. 292 AEUV, para 5; Hofmann/Rowe/Türk, Administrative Law 547.

898 Article 211 (2nd indent) TEC (Nice). Under the Nice regime, the Commission's competence did not extend into the former second and third pillar of the EU, though; see Nettesheim, Art. 292 AEUV, para 14.



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political considerations may be determinative for either option.[899] Like the Council, the Commission – in spite of the wording of Article 292 – does not dispose of an all-encompassing power to adopt recommendations. Rather, its power to adopt recommendations is limited to its (wide) field of responsibilities[900] and furthermore may be restricted by specific Treaty provisions.[901] In other words: The Commission may adopt recommendations if and to the extent to which this is not implicitly or explicitly barred by the Treaties, the outer limit of the Commission's power being the EU's *Verbandskompetenz*. With regard to the quorum and the majority required for the adoption of a Commission recommendation, the general decision-making rules apply.[902]

The ECB, on the contrary, according to Article 292 TFEU may adopt recommendations only in the specific cases in which the Treaties provide for this competence.[903] As regards the ECB, Article 292 TFEU cannot be considered as providing for a competence. In the given context, it merely states a legal matter of course: that the ECB may exercise its competence (to adopt recommendations) where the Treaties so provide. This constitutes a reflection in particular of Article 132 para 1 (3rd indent) TFEU, according to which the ECB shall '[i]n order to carry out the tasks entrusted to the [European System of Central Banks; ESCB]' and 'in accordance with' the Treaties and the Statute of the ESCB and the ECB 'make recommenda-

899 See Commission Proposal COM(2008) 179 final, 7, according to which the Commission opted for proposing a Recommendation of the EP and the Council instead of adopting a Recommendation itself for the following reasons: 'A Commission Recommendation would be a statement of Commission views, but neither the Member States nor the European Parliament would be involved in its formulation and it would not generate the political commitment needed to ensure implementation at the national level, which is crucial to successful European cooperation in this area. Use of a Commission Recommendation would carry the risk of being seen as a development which runs counter to subsidiarity'.

900 See Merli, Art. 292 AEUV, para 15; Nettesheim, Art. 292 AEUV, para 13. For an example of a Commission soft law act which went beyond what the legislator intended as the scope of its policy see Weigt, Rechtsetzung 49.

901 See eg Article 24 para 1 subpara 2 TEU for the (limited) role of the Commission in the area of CFSP; see also Merli, Art. 292 AEUV, para 15.

902 See Article 250 TFEU and Articles 7 f of the Commission's Rules of Procedure, C(2000) 3614, as amended.

903 Critically as regards the misleading wording of Article 292 TFEU: Nettesheim, Art. 292 AEUV, para 5.



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tions'.[904] As regards the quorum and the majority required for the adoption of an ECB recommendation, the institution's general decision-making rules apply.[905]

### 3.4.4. Article 127 para 4 and Article 132 para 1 (3rd indent) TFEU

The ECB's competence to adopt opinions seems to be more encompassing than its competence to adopt recommendations. According to Article 127 para 4, the ECB 'may submit opinions to the appropriate Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence'.[906] This is – with a different wording[907] – also laid down in Article 282 para 5 TFEU: 'Within the areas falling within its responsibilities, the [ECB] [...] may give an opinion' on 'all proposed Union acts, and all proposals for regulation at national level'.[908] Thus, the ECB has an extensive right to address opinions not only to other EU bodies, but also to national authorities.[909] This right is limited by the ECB's fields of competence, in which 'by virtue of the high degree of expertise

904 See also the repetitive Article 34 para 1 (3rd indent) of the Statute of the ESCB and of the ECB.

905 See Article 10 of the Statute of the ESCB and of the ECB; Article 4 of the ECB's Rules of Procedure, ECB/2004/2, as amended.

906 See also the repetitive Article 4 lit b of the Statute of the ESCB and of the ECB; negating the soft law quality of these opinions: Knauff, Regelungsverbund 304.

907 The wording of Article 282 para 5 goes back to the draft of the Constitutional Treaty and has not been adapted. The intended scope therefore seems to be the same as that of Article 127 para 4 TFEU; see Griller, Art. 127 AEUV, para 64, with a further reference.

908 For the material scope see Griller, Art. 127 AEUV, paras 65–67; see case C-11/00 *Commission v European Central Bank*, paras 110 f, with reference to the scope of the duties to consult the ECB (a counterpart to its right to adopt opinions) under the predecessor provision of Article 127 para 4 TFEU, Article 105 para 4 TEC. The scope of these consultation rights was and now (under the TFEU) is the same – 'in its fields of competence' – as that of the ECB's right to adopt opinions.

909 For the respective duty of the national authorities to consult the ECB see Article 127 para 4 (2nd indent) TFEU; Council Decision 98/415/EC on the consultation of the European Central Bank by national authorities regarding draft legislative provisions, which was based on the predecessors of Articles 127 para 4 and 129 para 4 TFEU; see also ECB/Eurosystem, Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions (October 2015) <https://www.ecb.europa.eu/pub/pdf/other/consultationguide201510.en.pdf> accessed 28 March 2023.



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that it enjoys, [it] is particularly well placed to play a useful role'[910] in the respective decision-making processes. This is not the case in 'an area in which the ECB has not been assigned any specific tasks', even if it would be affected by the decision to be adopted.[911] However, it may – arguably due to the close inter-relation between monetary and economic policy[912] and hence due to the ECB's expertise also in this field – encompass measures falling within the realm of economic policy.[913] Asked to provide an opinion in a field in which it does not have sufficient expertise, in light of Article 127 para 4 TFEU the ECB has to refuse to provide an opinion.

Article 132 para 1 (3rd indent) TFEU lists the competences of the ECB.[914] While Article 288 TFEU lists the legal acts to be adopted by the institutions '[t]o exercise the Union's competences', Article 132 para 1 TFEU is more specific in this respect: 'In order to carry out the tasks entrusted to the ESCB, the European Central Bank shall, in accordance with the provisions of the Treaties and under the conditions laid down in the [E(S)CB-Statute] […] make recommendations and deliver opinions'. As regards the ECB's power to adopt recommendations, the meaning of Article 132 para 1 TFEU does not go beyond that of Article 292 TFEU. As regards the ECB's power to adopt opinions, Article 127 para 4 TFEU is certainly the more pertinent (general) provision.

910 Case C-11/00 *Commission v European Central Bank*, para 110.

911 Case C-11/00 *Commission v European Central Bank*, para 111; for the opinions launched by the ECB in the preparation of the Constitutional Treaty, and the Treaty of Lisbon respectively, see Sáinz de Vicuña, Status 299–301.

912 For this inter-relation see eg Thiele, Akteur.

913 See case C-370/12 *Pringle*, para 61, according to which a *facultative* consultation of the ECB is not unlawful; for the supporting role the ECB/Eurosystem has in economic policy see in particular Article 127 para 1 TFEU.

914 It is largely affirmed that this provision actually confers competences which, in my view, is not entirely clear. If it were a competence-conferring norm, its second case (opinions) would still, as compared to Article 127 para 4 TFEU, be *lex generalis* – *argumentum* 'in accordance with the provisions of the Treaties and under the conditions laid down in the [E(S)CB-Statute]'. It would therefore be derogated by Article 127 para 4 TFEU; for the similarity to Article 288 TFEU see Griller, Art. 132 AEUV, para 1; for its competence-conferring character see also Häde, Art. 132 AEUV, para 1; Wutscher, Art. 132 AEUV, paras 1 f.



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### 3.4.5. Opinions of committees

The EU disposes of a large number of committees of various form and different fields of expertise.[915] Their assessments feed into different decision-making processes within the EU legal order. In the majority of procedures, the committees' respective output is not binding,[916] but regularly has an influence on the final decision, the degree of which is varying.[917] Here we shall take a look at provisions laid down in the Treaties, according to which few of these committees dispose of an – at least *prima facie* – general competence to adopt opinions.

At first we address the Political and Security Committee (PSC) which, according to Article 38 TEU, shall 'monitor the international situation in the areas covered by the [Common Foreign and Security Policy; CFSP] and contribute to the definition of policies by delivering opinions'. These opinions shall be addressed to the Council at its request or at the request of the High Representative for Foreign Affairs and Security Policy, or on the PSC's own initiative. The PSC shall furthermore monitor the implementation of agreed policies (without prejudice to the powers of the High Representative). Apart from entirely non-normative PSC output this monitoring may entail, arguably also in this specific role it may adopt soft law in the form of opinions.[918] Also its tasks referred to in Article 38 para 2 TEU (exercising the political control and strategic direction of crisis management operations according to Article 43 TEU) may include the power to adopt soft law in the form of opinions. However, the exercise of these tasks is subject to concretisation by the Council.[919] A true decision-making power of the PSC is

915 For a categorisation of the variety of EU committees see Harcourt, Governance 10.

916 For an exception see the status of opinions of the comitology committees in the examination procedure; see 3.7.2.1. below.

917 See case C-11/05 *Friesland Coberco*, para 39; see also C-572/18P *thyssenkrupp*.

918 The wording 'monitor the international situation in the areas covered by the [CFSP]' of Article 38 para 1 TEU (first sentence) is wide enough to also cover the monitoring of the implementation of agreed policies. Therefore the power to adopt opinions extends to the latter task; for the similarity of these tasks see also Marquardt/Gaedtke, Art. 38 EUV, para 4.

919 Article 43 para 2 TEU; see eg (meanwhile repealed) Council Decision (CFSP) 2015/778, in which the Committee was vested with different decision-making powers (Articles 6 para 1 and 9 para 5).



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subject to (in practice regularly granted)[920] authorisation by the Council.[921] This power generally – *a maiore ad minus* – may imply the power to adopt soft law, in particular: to adopt recommendations.[922] Whether this can actually be affirmed in a certain situation needs to be assessed case by case, taking into account in particular teleological considerations. The power to take 'relevant decisions on the setting-up of a [committee]',[923] for example, cannot reasonably be exercised by adopting a recommendation.

Another soft law competence of a committee which may be called 'general' in that it is not limited to concrete (specified) situations,[924] is laid down in Article 134 para 2 TFEU. This provision vests the Economic and Financial Committee (EFC) with the power to deliver opinions to the Council or to the Commission at their respective request, or on its own initiative. Listed as one of the Committee's tasks[925] – *pari passu* with other tasks – in Article 134 para 2 TFEU, it cannot be assumed that the power to submit opinions on its own initiative may only be used when exercising the other tasks, eg keeping under review the economic and financial situation of the MS and of the EU (2nd indent *leg cit*); this is to be concluded *a fortiori*, as the other tasks partly go together with a specific tool (explicitly: report in the 2nd and 4th indent, also in para 4 *leg cit*; implicitly: draft/opinion in the 3rd indent). It can be assumed, however, that the Committee's competence to adopt opinions is limited, apart from the EU's broad *Verbandskompetenz*, by the EFC's – admittedly wide – scope of responsibilities which is hinted at in Article 134 para 1 TFEU.[926] In this provision the Committee's *raison d'être* is formulated as the promotion of

920 See Marquardt/Gaedtke, Art. 38 EUV, para 7; see also H-J Cremer, Art. 38 EUV, para 6; references by Terhechte, Art. 38 EUV, para 4.

921 Article 38 para 3 TEU.

922 For the resemblance between recommendations and secondary law see 3.1.1. above.

923 See Article 9 para 5 of (meanwhile repealed) Council Decision (CFSP) 2015/778.

924 In specified situations soft law powers of the EFC are laid down in Article 126 para 4 TFEU (opinion) and in Articles 143 para 1 and 144 para 3 TFEU (right to be consulted, which equals a right to render an opinion upon request).

925 Whether the adoption of soft law is named 'task' or 'competence'/'power' depends on the perspective (which may also be influenced by the wording of the relevant provision; see Article 134 para 2, 1st indent, TFEU). The task to adopt a soft law act certainly always also entails the respective competence. On the other hand: Whether a competence to adopt a soft law act ought to be used in a certain situation is to be examined with a view to the respective actor's tasks.

926 See Palm, Art. 134 AEUV, para 15; similarly, with reference to the Statute of the EFC, Wutscher, Art. 134 AEUV, para 8.



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the 'coordination of the policies of Member States to the full extent needed for the functioning of the internal market' (within which field it shall focus on economic and financial issues[927]). Where the EFC launches an opinion in order to contribute to the preparation of the work of the Council or in exercising other advisory and preparatory tasks assigned to it by the Council in accordance with Article 134 para 2 (3rd indent in conjunction with 1st indent), it is furthermore limited ('without prejudice to') by the tasks of the Committee of Permanent Representatives (COREPER) and of the Council's General Secretariat according to Article 240 TFEU.

Article 150 TFEU lays down that the Council shall establish an Employment Committee with advisory status 'to promote coordination between Member States on employment and labour market policies'. One of the tasks of the Employment Committee is to formulate opinions at the request of the Council or the Commission, or on its own initiative.[928] This general competence is, similar to the case of the EFC, limited by the EU's *Verbandskompetenz*, the Employment Committee's (wide) scope of responsibilities – the promotion of the coordination on employment and labour market policies between MS – and both the COREPER's and the tasks of the Council's General Secretariat according to Article 240 TFEU.[929]

The legal situation is similar in case of the Social Protection Committee (SPC). According to Article 160 TFEU, it has 'advisory status' and shall 'promote cooperation on social protection policies between Member States and with the Commission' – again a relatively wide scope which can work only as a blurry (material) limit to the SPC's soft law power. It may formulate opinions at the request of the Council or the Commission, or on its own initiative. The SPC may also 'undertake other work within its fields of

927 The Council Decision 2012/245/EU on a revision of the Statutes of the Economic and Financial Committee specifies the Committee's powers with the exemplary list ('may, inter alia') enshrined in Article 2 of the Statutes annexed to the Decision. According to Article 3 of the Statutes, the Committee shall be guided by the 'general interests of the Union'. This can be interpreted as suggesting that the Committee shall not adopt opinions beyond its expertise, as this would not be in the interest of the EU.

928 Article 150 (2nd indent) TFEU. That also the second task mentioned in the 2nd indent, namely the contribution to the preparation of the Council proceedings referred to in Article 148, implies the power to adopt an opinion is underpinned by Article 148 para 4: 'having received the views of the Employment Committee'; see Simon, Art. 150 AEUV, para 6.

929 See Simon, Art. 150 AEUV, para 5.



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competence'.[930] The EU's *Verbandskompetenz*, the tasks of the COREPER and of the Council's General Secretariat again form further limits to this power.

The Economic and Social Committee (ESC) and the Committee of the Regions (CoR) are dealt with in the TFEU under the heading 'The Union's advisory bodies'. Among the EU's committees the ESC and the CoR have a distinguished position.[931] Also their high (maximum) number of members – 350 each[932] – contributes to an enhanced legitimacy of their output. The ESC shall be consulted by the EP, the Council or the Commission where the Treaties so provide (obligatory consultation)[933] and otherwise where they consider it appropriate (facultative consultation). An obligatory consultation shall not be replaced by a merely facultative consultation.[934] Conversely, the ESC may address an opinion (together with a record of the proceedings[935]) to these institutions on its own initiative where it considers this appropriate.[936] The EP, the Council or the Commission may set a time limit of not less than one month within which the ESC shall render its opinion (both in case of an obligatory or a facultative consultation[937]), otherwise the institutions may proceed in the respective decision-making process. These rules apply, *mutatis mutandis*, also to the CoR.[938] With regard to the facultative consultation of the CoR which shall take place, as in the case of the ESC, whenever the named institutions consider it appropriate, the Treaty emphasises the cases concerning cross-border cooperation.[939] Another peculiarity of the CoR is that it is to be informed by the named

930 In this 'other work' the SPC may not go beyond its consultative role; see Benecke, Art. 160 AEUV, para 2.

931 See Blanke, Art. 300 AEUV, para 5.

932 This maximum currently is exploited neither by the ESC nor by the CoR; see <http://www.eesc.europa.eu/?i=portal.en.about-the-committee> and <https://cor.europa.eu/en/about/
Pages/default.aspx>, both accessed 28 March 2023.

933 For the Treaty Articles providing for such an obligatory consultation see Jaeckel, Art. 304 AEUV, para 9.

934 See, with regard to the EP's right to be consulted, case C-316/91 *European Parliament v Council*, paras 16 f, with references to further case law.

935 This includes in particular information on the turnout of the vote; Brinker, Art. 304 AEUV, para 12, with references to the ESC's Rules of Procedure.

936 Article 304 paras 1 and 3 TFEU.

937 See Jaeckel, Art. 304 AEUV, para 22.

938 Article 307 TFEU; for a list of the Treaty Articles providing for an obligatory consultation see Blanke, Art. 307 AEUV, para 4.

939 Article 307 para 1 TFEU.



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institutions when they have requested an opinion from the ESC.[940] Where the CoR then 'considers that specific regional interests are involved', it may render an opinion on this issue, as well (accessory consultation).[941] While this information may be important for the CoR, the collateral 'entitlement' is redundant (and hence only declaratory), as the CoR according to Article 307 para 4 TFEU is granted a comprehensive right to address *sua sponte* an opinion to the EP, the Council and the Commission.

The ESC and the CoR have a general right to render opinions to the EP, the Council and the Commission. Apart from the *Verbandskompetenz*, there are no explicit legal limits to the material scope of the opinions, as the scope of the committees' tasks is not specified. It can be concluded from their respective names and composition, and from the case law of the CJEU,[942] however, that they shall focus on economic and social questions and, respectively, on questions regarding the EU's regions. Leaving questions of legal competence apart, the following statement may be appropriate: Where the committees move within their respective field of expertise, their opinions arguably reach high levels of factual authority – which is essential for bodies limited to render legally non-binding measures.

### 3.4.6. Limits to a 'general' competence to adopt soft law

Having examined the (general) competence clauses for the adoption of recommendations and opinions, and having addressed some of the potential restrictions to the scope of these competence clauses, the question arises whether more generally the soft law power of an EU body may conflict with the competence of another EU body to regulate in the same policy field. The assumption that also a soft law act may interfere with other bodies' competences cannot be countered by referring to the fact that soft law acts are – *qua* being legally non-binding – ousted by legal acts anyway. This would mean a strong underrating of the factual steering effects of soft

940 That there is no such duty to inform in case of the ESC issuing an opinion on its own initiative is clear from the wording (*argumentum* 'is consulted'); see also Blanke, Art. 307 AEUV, para 8.

941 Article 307 para 3 TFEU; critically: Blanke, Art. 307 AEUV, para 8; Hönle, Art. 307 AEUV, paras 10–13.

942 With regard to the ESC see joined cases C-281, 283–285, 287/85 *Germany v Commission*, para 38: The ESC 'is to advise the Council and Commission on the solutions to be adopted with regard to practical problems of an economic and social nature and to deliver opinions based on its specific competence and knowledge'.



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law – rules do not merely steer human behaviour, '[r]ules [also] influence norms, rules facilitate coordination, and rules create differentiation and status orders'[943] – and of the challenges to legal certainty such a normative conflict may entail. It would furthermore relativise the purpose of the EU's competence regime. What is more: Soft law may not only interfere with other bodies' hard law power, but also with their respective power to adopt *soft* law. Which competence prevails in a certain case is to be examined by applying legal methodology (eg the principle *lex specialis derogat legi generali*).[944] A conflict may also be dissolved by considering the actual tasks of the bodies at issue. Where – in the context of soft law – a cleavage between competences and tasks exists, more generally the following can be said: Where an EU body is competent to adopt soft law acts (eg opinions) in general, but – in a specific case – does not have the task (responsibility) to interfere, it shall not make use of its competence.[945] In this context, it is said that the actor *can* do more than it *shall*.[946]

An example for an interference with another EU body's competence can be found in State aid law in which the Commission has adopted a number of guidelines,[947] notices, codes, etc.[948] Under Article 109 TFEU, the Council may, on a proposal from the Commission and after consulting the EP, make 'any appropriate regulations for the application of Articles 107 and 108'.[949] This regulatory competence of two institutions in one policy field – 'concurrent powers' – holds the problem of parallel rule-making.[950] While the Court did not consider this a problem in terms of the principle of 'institutional equilibrium',[951] arguably also because in this case there was

943 Ahrne/Brunsson, Soft Regulation 187.

944 See Senden, Soft Law 481, arguing that a specific legal basis for the adoption of a Council recommendation prevents the Commission from making use of its general competence to adopt recommendations according to Article 211 para 2 TEC.

945 See Ruffert, Zuständigkeitsgrenzen 161 ff, with regard to the international level.

946 On this phenomenon in public law more generally see Brandt, Umweltaufklärung 88–90.

947 For Commission guidelines in general see Hofmann/Rowe/Türk, Administrative Law 548–551.

948 For these and further designations see H Hofmann, Rule-Making 158.

949 For how the Council made use of its competence see Koenig/Paul, Art. 109 AEUV, paras 4 f; for the political difficulties of Council State aid legislation up until 2000 see Cini, Soft Law 8: '[T]he absence of state aid legislation led [...] to the construction of a body of informal Commission rules which served as a substitute for "hard" legislation'; see also Cini, Soft law approach 200 f; Ştefan, Soft Law 48 and 53 f.

950 See Senden, Balance 91 f.

951 See joined cases T-132/96 and T-143/96 *Sachsen/Volkswagen*, para 241.



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no relevant (countervailing) Council act,[952] it was made clear, by AG *Wahl*, that these soft law acts cannot be considered 'binding – not even *de facto* – on pain of eluding the legislative procedure set out in the FEU Treaty'. Were the Commission's measures binding, he adds with reference to the Court's case law,[953] they 'would be null and void'.[954]

The duty of each EU body to consider the competences of its peers roots in the principle of mutual sincere cooperation, as laid down in Article 13 para 2 TEU. Accordingly, an EU body when acting 'in turn must have regard to the power' of other EU bodies.[955] This applies irrespective of whether the action is legally binding or not.

Such duty of mutual sincere cooperation may be concretised by secondary law: Where the ESMA, to take an example, deems a competent supervisory authority in a MS to have breached pertinent Union law, it may address a recommendation to the respective authority, thereby 'setting out the action necessary to comply with Union law'.[956] Where the authority addressed has not complied with Union law as laid down in the recommendation within one month from its receipt, the Commission 'may, after having been informed by the [ESMA] or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law'.[957] According to Regulation 1095/2010 this procedure may be further extended, but this is of no relevance in the given context. What is relevant is that here the principle of mutual sincere cooperation arguably restricts the Commission's power to adopt soft law. In that sense, the Commission should abstain from adopting a reasoned opinion according to Article 258 TFEU to the MS of the respective competent supervisory authority, once the ESMA has addressed a recommendation to the national authority according to the above procedure. Rather, it should

952 On the very limited use the Council makes of its competence according to Article 109 TFEU see von Wallenberg/Schütte, Art. 109 AEUV, paras 1 f.

953 See eg case C-57/95 *France v Commission*.

954 Opinion of AG *Wahl* in case C-526/14 *Kotnik*, paras 36–38. A legal act invalidated (by the Court) that way loses its legal quality, ie it ceases to legally exist, and therefore – on a normative level – ranks lower than soft law.

955 See case 230/81 *Luxembourg v European Parliament*, para 38; case C-65/93 *European Parliament v Council*, para 27; case C-94/00 *Roquette Frères*, para 31; case C-73/14 *Council v Commission*, para 61, with further references; for the connection between inter-institutional loyalty and the EU's institutional balance see Klamert, Loyalty 28.

956 Article 17 para 3 subpara 1 of Regulation 1095/2010.

957 Article 17 para 4 subpara 1 of Regulation 1095/2010.



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follow the procedure initiated by the ESMA and adopt, where necessary, a formal opinion according to Article 17 para 4 subpara 1 of Regulation 1095/2010. The Commission, beyond doubt, is competent to adopt a reasoned opinion based on Article 258 TFEU, but it would have to initiate a new procedure aiming at ensuring MS' compliance with EU law and would thereby diminish the thrust of the ESMA's action – and it would do so without a compelling, or only a sensible reason. After all, both procedures have essentially the same aim – MS' compliance with EU law – and the Commission has a role to play also in the Article 17-procedure. Therefore, the principle of mutual sincere cooperation suggests that the Commission should follow the path of Article 17 already trodden by the ESMA instead of initiating a separate procedure aiming at the same result.[958]

A further limit to the adoption of soft law is that an according competence (eg established *a maiore ad minus*) may not be used in order to *circumvent* the adoption of legal norms provided for in a competence clause[959] or where this would constitute an explicit disregard of the tasks of the actors involved. A circumvention would be at issue where a recommendation, regulating only the basics, leaving (important) details for the MS to be decided (a 'soft directive', as it were), is adopted instead of the required

958 Note that only Article 17 para 6 of Regulation 1095/2010 – according to which the ESMA may, its own and the Commission's subsequent soft law measures being unsuccessful, address a binding decision directly to a financial market participant – is explicitly '[w]ithout prejudice to the powers of the Commission under Article 258 TFEU', so as to dispel the impression that the ESMA's competence ousts the Commission's role as guardian of the Treaties in this respect. With regard to the preceding steps of the procedure this question is – according to the letter of the law – left open. It could be argued that since Article 258 TFEU constitutes primary law, it is clear that the competences of the Commission laid down in this provision cannot be reduced by an act of secondary law, here: the ESMA-Regulation. But if the relevant provisions of Regulation 1095/2010 are understood as a concretisation of what the principle of sincere cooperation demands anyway, the conflicting rules would have equal rank. *Storr* suggests that if the national authority has failed to comply with the Commission's formal opinion, apart from the ESMA decision directly addressed to the financial market participant, the Commission may initiate a Treaty infringement procedure; Storr, Agenturen 81 f.

959 See Senden, Soft Law 327 f, with regard to '"obligating" legal bases' which oblige the legislator to actually *legislate*; see, with regard to Commission recommendations, Andone/Greco, Burden 92; from the European Parliament's perspective: European Parliament (Committee on Legal Affairs), Working Document on institutional and legal implications of the use of 'soft law' instruments (14 February 2007), PE 384.581v02–00, 6; with regard to public international law see Bodansky, Character 145.



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decision (eg in case of Article 155 para 2 TFEU).[960] Thereby the prohibition to adopt a directive (*argumentum* 'decision') would be circumvented by a recommendation (in this case functioning like a directive).[961] While the power to adopt a recommendation on the basis of Article 155 TFEU may in principle be deduced *a maiore ad minus*, the directive-like shape of the recommendation[962] suggests a circumvention of one of the objectives of Article 155 TFEU, namely a definitive implementation of the agreements concluded between management and labour according to Article 155 para 1 TFEU.[963]

Where the legislator is required to act in a legally binding way and it is clear that a legally non-binding act would not serve the purpose of the respective norm, the adoption of a soft law act would be in disregard of the respective tasks. Article 24 TFEU may serve as an example. According to this provision, the Council and the European Parliament shall adopt regulations in accordance with the ordinary legislative procedure to lay down the procedures and conditions required for a citizens' initiative.[964] A soft law act instead of a regulation would definitely not serve the purpose of Article 24 TFEU; it would run counter to the aim of legal certainty which is imperative especially in this case. It could be argued that here the legislator lacks a soft law competence in the first place, because – for the reasons just mentioned – the *argumentum a maiore ad minus* is not valid.

More generally, the excessive adoption of recommendations by the EP and the Council on a proposal from the Commission in the course of the

960 See Senden, Soft Law 489. For a circumvention disclosed by the Court see joined cases 8–11/66 *Cimenteries*, 92; see also Alberti, Evolution 647, with regard to the ECB's powers; critically with regard to 'legislative or administrative activism' by means of soft law: Christianos, Effectiveness 329; for the unlawfulness of 'evading a procedure specifically prescribed by the Treaty' ('misuse of power' in Article 263 para 2 TFEU) see case C-180/96 *United Kingdom v Commission*, para 64, with a further reference.

961 See case T-258/06 *Germany v Commission*, para 28; case C-687/15 *Commission v Council*, paras 40–44, with further references; see also more generally Opinion of AG *Bobek* in case C-16/16P *Belgium v Commission*, para 93: 'What is perhaps the greatest strength of recommendations may also then be the greatest danger. They could be used as more than just tools for advancing policies that are politically (lack of consensus) or legally (no specific powers to that effect) gridlocked. They could also potentially be used as a tool to circumvent the same legislative processes'; critically as well: Arnull, Recommendations 617.

962 For the term 'directive-like recommendation' see also Láncos, Facets 24 f.

963 See also Hesse, Art. 155 AEUV, paras 17 f; Rebhahn, Art. 155 AEUV, para 5.

964 See also Article 11 para 4 TEU.



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procedure laid down in Article 294 TFEU would qualify as a disregard of the tasks of these institutions. It may appear opportune in selected cases in which, for political reasons, the respective majorities for legislative acts cannot be achieved, but it must remain the exception. Where it is difficult to find majorities for certain legislative projects, in general they should be amended accordingly, or – where this is not possible for whichever reason – they should simply fail. A replacement of the legislative activity of the EP and of the Council on a large scale would constitute an unlawful contempt of the principal legislative task of these institutions as generally laid down in Article 14 para 1 TEU ('exercise legislative […] functions').[965]

A historical case is the (attempted) harmonisation of the maximum blood alcohol content for drivers of motorised vehicles. After an according Commission proposal sent to the Council in 1988 failed for reasons of subsidiarity concerns,[966] the Commission in 2001 essentially adopted the proposal as a recommendation.[967] In view of the extended time span between the failure of the proposal and the adoption of the recommendation – 13 years – and in view of the Commission's acknowledgement of the MS' subsidiarity concerns,[968] it can be doubted that the latter actually constitutes a circumvention of a legislative procedure. Still, the (other) reasons why the Commission has adopted the recommendation are evident, as well: the negative experiences with the legislative procedure in the past and the little chance of an outcome that is satisfying for the Commission in a new procedure.[969] The Commission adopted a recommendation in spite

965 Note the words of AG *Bobek* in case C-911/19 *FBF*, who demands sufficient judicial review of soft law, as otherwise there would be 'a further spread of "crypto-legislation" in the form of soft law in the Union. […] EU bodies are able, through soft law, to create parallel sets of rules which bypass the legislative process and which might have an impact on institutional balance' (para 89).

966 Commission, Proposal for a Council Directive relating to the maximum permitted blood alcohol concentration for vehicle drivers, COM(88) 707 final.

967 Commission, Recommendation of 17 January 2001 on the maximum permitted blood alcohol content (BAC) for drivers of motorised vehicles, 2001/C 48/02. For the effectiveness of this recommendation compare the BACs provided for in the MS in 2001 (as listed in the recommendation) with those from 2016; <http://etsc.eu/blood-alcohol-content-bac-drink-driving-limits-across-europe/> accessed 28 March 2023.

968 See Commission, Recommendation of 17 January 2001 on the maximum permitted blood alcohol content (BAC) for drivers of motorised vehicles, 2001/C 48/02, 1.1.4.

969 Critically with regard to 'parallel means of legislation', namely Council declarations: Opinion of AG *Darmon* in case C-292/89 *Antonissen*, para 26; see also: Senden, Soft Law 28.



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of the request of the EP's Transport Committee of 1999 to renew its proposal.[970] In a similar case – a legislative proposal failed and was followed by a Commission Communication with essentially the same content[971] – the Court, considering the parallels between these two documents, held the Communication to be legally binding, and annulled it for lack of the Commission's competence.[972]

The CJEU gave an example in this context which is related to the Court itself. In a preliminary ruling procedure it refused to provide its interpretation of a legal act, since this interpretation would – due to the

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Less problematic is certainly the reverse order: a recommendation setting the scene and presenting a certain set of rules, which is then – some years later and, for example, for lack of effectiveness or in order to actually create legal claims for EU citizens after MS have got accustomed to the common rules – followed by proposal and subsequently a legislative act to that effect; see eg Commission Recommendation of 22 December 1986 concerning the introduction of deposit-guarantee schemes in the Community, 87/63/EEC, which was followed by Directive 94/19/EC, adopted upon a proposal of the Commission. The reason for this 'hardening' of the rules was that the Recommendation 'has not fully achieved the desired result' (Recital of Directive 94/19/EC). This Directive was later replaced by Directive 2014/49/EU.
Sometimes the Commission in the respective soft law act even 'threatens' to propose a legislative act in case compliance with the former is dissatisfactory; see eg Recital 12 of Commission Recommendation of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder, 97/489/EC.

970 See Commission, Recommendation of 17 January 2001 on the maximum permitted blood alcohol content (BAC) for drivers of motorised vehicles, 2001/C 48/02, 1.1.4.

971 The Commission Communication on an internal market for pension funds, 94/C 360/08, was adopted shortly after an according proposal for a directive failed ('Regrettably, the Commission has felt itself obliged to withdraw its proposal because of a deadlock in the negotiations with Member States in the Council'; 1.4. of the Communication); for similar examples see Gundel, Rechtsschutz 595 (fn 8).

972 See case C-57/95 *France v Commission*, paras 12 and 25. AG *Tesauro* in para 17 of his Opinion in this case criticised the Commission's behaviour as 'camouflaging the proposal for directive as a communication'; this political matter and its judicial aftermath are considered in detail by C Adam, Politics 25–28. See also case C-325/85 *Ireland v Commission*, paras 16 ff, in which the Court considers the illegality of Commission decisions (based on its proposals) attempting to fill the decisional vacuum left by the Council – which, for political reasons, was unable to act; see also other cases cited by Schmidt/Schmitt von Sydow, Art. 17 EUV, para 70 (fn 99); see also Brohm, Mitteilungen 198. For a case in which the Court refused to annul a Communication for lack of new rules see case T-258/06 *Germany v Commission*, in particular para 162; for the 'Maulkorbfunktion' [muzzle function] the action underlying this case was intended to have with regard to Commission action: U Stelkens, Rechtsetzungen 408.



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inapplicability of this act in the national procedure – not be binding on the referring (national) court: 'It cannot be accepted that the replies given by the Court to the courts of the contracting States are to be purely advisory and without binding effect'.[973]

## 3.5. Special competence clauses in the Treaties

### 3.5.1. Introduction

Having considered the general competence clauses for the adoption of recommendations and opinions in the Treaties, we shall now take a look at specific competence clauses, allowing for the adoption of recommendations and opinions eg in the course of certain decision-making procedures. An analysis of these special competence clauses shall allow for a more comprehensive view on the conferral of soft law powers by means of EU primary law. For each institution, the purpose of the respective soft law powers shall be categorised as either 'support of decision-making/rule-making', 'initiation of (soft) decision-making/rule-making', or 'soft decision-making/rule-making'. The term 'rule' is to be understood in a non-specific way as generally applicable norms, eg provisions of international agreements directly applicable in the EU/the MS. With regard to the competences to adopt recommendations and opinions of bodies, offices and agencies laid down in primary law (see 3.5.3.1. below), due to their scarcity such a categorisation does not seem to be worthwhile. It is not the purpose of this chapter to explicate the respective competence clauses in a comprehensive, commentary-like fashion, but to highlight and discuss the adoption of recommendations and opinions – the two main (potential) expressions of soft law, as listed in Article 288 TFEU – set out therein. A few words on the respective provision as such may be necessary, though, in order to put the concrete recommendation/opinion in context. Primary law competences to adopt soft law acts other than recommendations and opinions, such as proposals, requests or initiatives,[974] shall be presented and analysed collectively under 3.6. below.

973 Case C-346/93 *Kleinwort Benson*, paras 23 f; more recently referred to in case C-62/14 *Gauweiler*, para 12.

974 Exceptionally, ie where they are to be mentioned in the context of the adoption of recommendations/opinions on the basis of a specific competence clause, also these



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Furthermore, it is to be noted upfront that also provisions not expressly mentioning the power to adopt a 'recommendation' or an 'opinion' *may* disclose – at a 'second look', as it were – a competence to adopt either of these soft law acts. The Treaties contain provisions in which they allow EU bodies, in particular the institutions, to take 'the necessary measures',[975] 'incentive measures'[976] or simply 'measures',[977] to 'provide incentives and support',[978] to 'support and strengthen'[979] or to 'facilitate'[980]. The list of such malleable competences and/or tasks could be further extended. These terms in their literal understanding (verbal interpretation) may all be read to contain a soft law power.[981] Often it is the procedure to be applied – regularly: the ordinary or a special legislative procedure – which indicates that these measures are envisaged as legislative (ie legally binding) acts.[982] Where no such procedure is provided for, the question whether or not a soft law power is to be confirmed for the respective body can only be answered after further analysis, namely systematical, teleological and – where the information available so allows – historical interpretation. With regard to the competence of the standing committee according to Article 71 TFEU ('internal security' of the Council), for example, its power to 'facilitate coordination' is read as including the power to adopt recommendations.[983] Article 156 TFEU, to take another example, explains itself what it understands with the Commission's power to 'encourage cooperation' and to 'facilitate the coordination', respectively, between MS and their actions, respectively: *inter alia* the delivery of opinions. With Article 165 para 4 (1st indent) TFEU, on the contrary, an interpretation of the Article in its entirety discloses that no soft law power is conferred (see 3.4.3.1. above).

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acts shall be taken into account: eg the proposals and their effects according to Article 293 TFEU.

975 Eg Article 189 para 2, Article 197 para 2, Article 215 para 1, Article 325 para 4 TFEU.

976 Eg Article 19 para 2, Article 149, Article 165 para 4 (1st indent) TFEU.

977 Eg Article 5 paras 1 and 2 (see also Article 121), Article 21 para 3, Article 214 para 3 TFEU.

978 Article 79 para 4 TFEU.

979 Article 85 para 1, Article 88 para 1 TFEU.

980 Eg Article 71, Article 156 TFEU.

981 See von Bogdandy/Arndt/Bast, Instruments 112; see also Classen, Art. 166 AEUV, para 42, with regard to the term 'measures'; Senden, Soft Law 327 f, with regard to such '"enabling" legal bases'.

982 In such cases still implied soft powers may be affirmed (see 3.3.1. above).

983 See Breitenmoser/Weyeneth, Art. 71 AEUV, para 14; Röben, Art. 71 AEUV, para 6; only referring to opinions: Dannecker, Art. 71 AEUV, para 5.



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Further *general* remarks on the meaning of the phrases addressed above cannot be made, but a concrete analysis of these terms and their respective meanings – and in particular of whether they include soft law powers – is to be undertaken case by case.[984]

### 3.5.2. Institutions

#### 3.5.2.1. Commission

##### 3.5.2.1.1. Support of decision-making/rule-making

According to the Treaties, the Commission contributes to the adoption of EU soft law in various ways. One of these ways is laid down in Article 223 para 2 TFEU. While para 1 *leg cit* is the legal basis for regulating the EP elections procedure, para 2 empowers the EP to adopt regulations on its own initiative on the 'regulations and general conditions governing the performance of the duties of its Members'.[985] It shall do so in the course of a special legislative procedure after seeking an opinion from the Commission and with the consent of the Council. While the Commission is free to adopt or not to adopt an opinion[986] (*argumentum* 'seeking') and, where the Commission in fact has delivered an opinion, the EP is free to follow or not to follow it, the EP has to ask for an opinion by all means. The same applies, *mutatis mutandis*, to Article 228 para 4 TFEU, according to which the EP shall lay down the regulations and general conditions governing the performance of the duties of the European Ombudsman 'after seeking an opinion from the Commission and with the consent of the Council'.[987]

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984 See Hofmann/Rowe/Türk, Administrative Law 549, with further examples and referring to the respective unclear wording.

985 See in particular Decision 2005/684/EC, Euratom of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament.

986 Note that the German version of this provision allows for an *Anhörung* of the Commission, not for a *Stellungnahme* (which is the translation of the word 'opinion' as used in Article 288 TFEU). In other language versions of the TFEU ('avis' in French, 'dictamen' in Spanish) the same term is used in both provisions. This indicates that also Article 223 para 2 TFEU is referring to an opinion within the meaning of Article 288 TFEU, which may – the term *Anhörung* so suggests – also be delivered orally by the Commission. The oral delivery of an EU soft law act is exceptional, but not excluded in principle.

987 Note that in this – as compared to Article 223 – similarly worded provision the term *Stellungnahme* (corresponding to Article 288 TFEU) is used in the German version.



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Also in the ordinary legislative procedure the Commission, apart from its initiating proposal, has means at its hands to influence the procedure. The Commission may render an opinion on the amendments (possibly) suggested by the EP at first and/or at second reading, and/or by the Council at first reading.[988] While the EP is not legally bound by these opinions, the Council's quorum is raised to unanimity if it intends to adopt amendments on which the Commission has delivered a negative opinion;[989] where the opinion is positive, a qualified majority in the Council suffices. Against this background, also the question whether or not the EP considers the Commission's position (uttered in the proposal or in an opinion) is likely to have a significant influence on the course of the legislative proceedings at issue. The unanimity requirement in the Council is the procedural perpetuation, as it were, of Article 293 para 1 TFEU, according to which the Council, when acting on a proposal from the Commission, generally may amend it only by unanimous action.[990] In the ordinary legislative procedure this rule does not apply in the conciliation phase.[991] Where exceptionally it is not the Commission initiating the ordinary legislative procedure, but a group of MS, the ECB or the CJEU, a negative opinion of the Commission does not change the majority requirements in the Council.[992]

Another instance of the Commission's soft law power in the context of rule-making is its competence to give, in the context of the request of a group of MS to establish enhanced cooperation between themselves within the framework of CFSP, its opinion 'in particular on whether the enhanced cooperation proposed is consistent with other Union policies'. This opinion shall be forwarded to the EP 'for information'.[993] Where enhanced cooperation is proposed in other policy fields, the Commission may submit a proposal to the Council to that effect.[994] It may, via this measure, bring in its views on the project. It is also free not to submit a proposal at all when informing the MS of the reasons for not doing so.[995]

According to Article 19 para 2 of the Statute of the European Investment Bank (EIB), the Commission shall submit an opinion on applications to

988 Article 294 paras 6, 7c and 9 TFEU; see graph in Schütze, Constitutional Law 172.
989 Article 294 para 9 TFEU.
990 See Krajewski/Rösslein, Art. 294 AEUV, para 55.
991 Article 293 para 1 TFEU, with references to further exceptions.
992 Article 294 para 15 subpara 1 TFEU.
993 Article 329 para 2 TFEU.
994 Article 329 para 1 subpara 1 TFEU.
995 Article 329 para 1 subpara 1 TFEU.



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the EIB for an investment made by a MS or by an undertaking. Where the Commission delivers an unfavourable opinion, it is legally non-binding, but the Board of Directors – the competent decision-making body of the EIB – may only grant the financial means at issue by unanimous decision (instead of the majority according to Article 10 para 2 of the Statute), the director nominated by the Commission abstaining.[996] The effect of a negative Commission opinion on decision-making by the Board of Directors is equivalent to that on decision-making by the Council in the ordinary legislative procedure (see above). Also the Management Committee of the EIB shall deliver an opinion (see 3.5.3.1. below).

#### 3.5.2.1.2. Initiation of (soft) decision-making/rule-making

In the field of economic policy coordination, the Commission plays an important role in initiating soft regulation by the Council. According to Article 121 para 2 TFEU, the Council shall formulate a draft for the broad economic policy guidelines (BEPG) of the MS and of the EU on a recommendation by the Commission. In practice, the Commission regularly submits a draft recommendation to the Council for discussion on the basis of a report by the EFC.[997] Eventually, and considering the discussion, the Commission issues a (revised) recommendation for draft BEPG which is then handled by the (European) Council in accordance with Article 121 para 2 subparas 2 f TFEU.

Where the economic policies of a MS do not comply with its respective BEPG or where they risk 'jeopardising the proper functioning of [EMU]', the Commission may address a warning to the MS concerned.[998] The

996 Article 19 para 6 of the Statute of the EIB.

997 See Häde, Art. 121 AEUV, para 3.

998 Article 121 para 4 TFEU; for the legal irrelevance of such a warning see Kempen, Art. 121 AEUV, para 22; see, however, Bandilla, Art. 121 AEUV, para 28, who classifies the Commission's warning as a 'recommendation', but stresses that the Commission with this tool cannot demand more from the MS addressed than that it takes the 'notwendigen Maßnahmen' [necessary measures]. It is reserved to the Council to give more detailed advice. In that sense, it is doubtful whether the Commission's warnings reach the degree of concreteness required for a soft law act in the first place (see II.2.1.2. above); for the regularly stricter wording of warnings as compared to recommendations (in the context of national law) see Feik, Verwaltungskommunikation 427; for administrative warnings, and the different content they may display (also: merely factual statements) more generally see ibid 28 f.



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Council may address the 'necessary recommendations' to the respective MS on a recommendation from the Commission.[999] The Council has a discretion as to whether or not it launches recommendations (*argumentum* 'may'),[1000] but if it decides in the affirmative a Commission recommendation is required first. The Council may make its recommendations public on a proposal from the Commission. Since the Council cannot act under para 4 without an according recommendation/proposal by the Commission, Article 135 TFEU provides that in case of the Commission's inaction the Council or a MS may request the Commission to make a recommendation or a proposal, respectively. The Commission is not bound by this request,[1001] but shall examine it and submit its conclusions to the Council without delay.[1002]

With regard to the excessive deficit procedure according to Article 126 TFEU, the Commission shall address an opinion to a MS where it considers that an excessive deficit in this MS exists or may occur. It shall inform the Council accordingly.[1003] With this opinion, the 'politische Entscheidung' [political decision] to open an excessive deficit procedure is taken.[1004] That this opinion is a requirement for the Council's decision (taken upon a Commission proposal) according to para 6, can be deduced from the order of paragraphs which – in Article 126 – suggests a chronological order of actions. That the Council decides upon a Commission proposal – under the predecessor provision in the TEC (Nice) it decided upon a Commission recommendation[1005] – means that it may now deviate from

999 For the example of Ireland's pro-cyclical fiscal policies see Hodson/Maher, Soft law 804. The Treaty leaves it open whether the Council recommendations are an alternative to the Commission warning or whether they may (or can only) be adopted in addition to the warning. Article 6 para 2 subpara 2 of Council Regulation 1466/97 provides that the Council shall adopt its recommendations 'within 1 month of the date of adoption of the warning'. This suggests that a Commission warning is a necessary procedural requirement for the (subsequent) adoption of Council recommendations.

1000 See Häde, Art. 121 AEUV, para 13; Thomas Müller, Art. 121 AEUV, para 35.

1001 See Kempen, Art. 121 AEUV, para 21; Zahradnik, Art. 135 AEUV, para 3.

1002 Article 135 (2nd sentence) TFEU.

1003 Article 126 para 5 TFEU; for the – as compared to the standard infringement procedure under EU law, namely the Treaty infringement procedure – subordinate role of the Commission see Gil Ibáñez, Supervision 109.

1004 Häde, Art. 126 AEUV, para 37.

1005 See Seidel, Economic and Monetary Union 34.



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the Commission's suggestion only by unanimous decision.[1006] Where the Council has taken a decision determining the existence of an excessive deficit, it shall, on a recommendation from the Commission, but without being bound by it,[1007] adopt recommendations addressed to the respective MS with the aim to remedy the excessive deficit.[1008] These recommendations may be made public by the Council, again upon a recommendation by the Commission,[1009] according to para 8. Also where the Council decides to give notice to an inactive MS according to para 9, where it decides to apply or intensify measures according to para 11 or where it abrogates decisions or recommendations referred to in paras 6 to 9 and 11, it shall act only upon a recommendation from the Commission.[1010] Once adopted, the Council is not entitled to amend the recommendations without a 'fresh recommendation' from the Commission.[1011] Also with regard to Article 126 (except for para 14), Article 135 TFEU applies: The Council or a MS may request the (up to then inactive) Commission to make a recommendation or a proposal, respectively (see above).

Article 143 TFEU deals with the scenario that a non-euro MS – a MS 'with a derogation' – is, for certain reasons, in difficulties or is seriously threatened with difficulties as regards its balance of payments. Where these difficulties 'are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy', the Commission shall investigate the position of the respective MS and the actions taken or to be taken by it. Where necessary, the Commission shall recommend to the MS which measures to take. This recommendation – as a piece of soft law – is neither legally binding upon the MS nor is it a

1006 Article 293 para 1 TFEU; see Häde, Wirtschafts- und Währungsunion 203. The increased authority of Commission proposals is also highlighted by the fact that the requirements for a qualified majority in the Council are lower when it decides upon a Commission proposal: see Article 238 paras 2 f TFEU. It is due to this difference between proposal and recommendation that the latter was described as a 'abgeschwächte Variante des Initiativmonopols der Kommission' [lessened form of the Commission's monopoly of initiative]; Simon, Art. 148 AEUV, para 19.

1007 See case C-27/04 *Commission v Council*, para 91.

1008 Article 126 para 7 TFEU.

1009 Article 126 para 13 subpara 1 TFEU. According to Article 121 para 4 TFEU, a Commission *proposal* is required for the publication of Council recommendations.

1010 Article 126 para 13 subpara 1 TFEU.

1011 Case C-27/04 *Commission v Council*, para 92, with regard to the predecessor provision of Article 126 para 7 TFEU. This finding can also be applied to other cases in which the Council decides/recommends upon a Commission recommendation.



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requirement for the MS to act.[1012] However, as subpara 2 *leg cit* suggests, compliance by the MS addressed with the Commission recommendation, if it has adopted it at all,[1013] is required – *argumentum* '[i]f […] the measures suggested by the Commission do not prove sufficient' – for the Commission to be allowed to recommend to the Council the granting of mutual assistance and appropriate methods therefor.[1014] The Council again may grant mutual assistance only upon a recommendation by the Commission (*argumentum* 'mutual assistance recommended by the Commission' in para 3 *leg cit*).[1015] It may as well refuse to grant mutual assistance. The Commission recommendation, in other words, is a requirement for Council action, but does not prevent the Council from omitting to act, ie from not granting mutual assistance.

Where a sudden crisis in the balance of payments occurs and the Council does not immediately decide to grant mutual assistance, a non-euro MS may take the necessary protective measures as a precaution, of which the Commission and the other MS shall be informed.[1016] Also in this case the Commission may recommend to the Council to grant mutual assistance according to Article 143 TFEU (see above). As well upon a Commission recommendation, the Council may decide that the MS concerned shall amend, suspend or abolish the protective measures taken.[1017] Here again the

1012 See Bandilla, Art. 143 AEUV, para 13. This power of the Commission is rather a soft decision-making/rule-making power, a category of powers which is addressed under 3.5.2.1.3. below. Here it is mentioned as well only for the sake of contextualisation.

1013 Where further MS measures would not be sufficient or where, after an examination pursuant to subpara 1, there are no (further) adequate measures available, the Commission may immediately (in the first case: after hearing the EFC) recommend mutual assistance to the Council; see Häde, Art. 143 AEUV, para 6.

1014 See Council Regulation 332/2002. A Commission proposal for a new regulation, COM(2012) 336 final/2, did not succeed.

1015 For the MoU to be concluded between the Commission and the MS concerned in this case, and for the practical experiences with Article 143 TFEU see Flynn, Article 143 TFEU, paras 3 f; Dermine/Markakis, Bailouts.

1016 Article 144 paras 1 f TFEU.

1017 Article 144 para 3 TFEU. Since the MS's protective measures must be limited to what is 'strictly necessary to remedy the sudden difficulties' (Article 144 para 1 TFEU), the protective measures become undue once the Council has decided to grant mutual assistance, because it thereby does away with the strict necessity of the protective measures. Nevertheless, provision is made for an explicit procedure for the Council to request the MS concerned to amend, suspend or abolish these measures. This is because the Council may apply para 3 without having granted



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recommendation is a requirement for the Council to act, but the Council is also free not to act.

According to Article 148 para 4 TFEU, the Council, upon a recommendation by the Commission, may make recommendations to MS with a view to facilitating compliance of their employment policies with the Council's guidelines for employment.[1018] The wording 'if it considers it appropriate' emphasises the Council's discretion, but even without this phrase it would be clear that the Council may, in spite of the Commission recommendation, decide not to act.[1019]

Another policy field in which the Commission disposes of soft law power to initiate a decision-making/rule-making process is the Common Commercial Policy (CCP). The opening of negotiations of agreements in this policy field with third countries or international organisations shall be authorised by the Council upon a recommendation by the Commission.[1020] This is in compliance with Article 218 TFEU, according to which the Commission or, where the agreement envisaged relates at least principally to CFSP, the High Representative of the Union for Foreign Affairs and Security Policy shall submit recommendations to the Council, which shall then authorise[1021] the opening of negotiations and nominate either of them as Union negotiator or the head of the Union's negotiating team.[1022] Special provisions apply in the context of agreements concerning monetary or foreign exchange regime matters. The Council, on a recommendation from the Commission (and only the Commission[1023]), shall decide the arrangements for the negotiation and for the conclusion of such agreements.[1024] It

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mutual assistance before; see Bandilla, Art. 144 AEUV, paras 11 f; Häde, Art. 144 AEUV, para 2.

1018 For the EU's traditionally weak, but – due to the intersection with many other policy fields – meaningful competence in the field of employment policy see Garben, Article 148 TFEU, para 2.

1019 See Simon, Art. 148 AEUV, para 19.

1020 Article 207 para 3 TFEU.

1021 With regard to earlier (pre-Lisbon) Council practice, according to which it mandated the Commission by mere conclusions or in the minutes of its meetings see Lorenzmeier, Art. 218 AEUV, para 25a.

1022 Article 218 para 3 TFEU. The Union negotiator may either be the Commission or the High Representative. Where the envisaged agreement affects the competences of both, they build a negotiating team with the more concerned of them being its head; see Schmalenbach, Art. 218 AEUV, para 10; see also Kaddous, Role 213.

1023 See Palm, Art. 219 AEUV, para 55.

1024 Article 219 para 3 TFEU.



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does not necessarily have to negotiate itself, but may as well delegate this competence.[1025] The conclusion of formal agreements on an exchange-rate system for the euro in relation to the currencies of third States, and the adoption, adjustment or abandonment of the central rates of the euro within an exchange-rate system may all be done only by the Council – on a recommendation from the Commission (or the ECB).[1026] In the absence of exchange-rate systems in relation to third State currencies the Council, on a recommendation from the Commission (or the ECB), may formulate general orientations for exchange-rate policy in relation to these currencies.[1027] Also with regard to Article 219 TFEU, the Council or a MS may request the Commission to make a recommendation.[1028]

The Commission may also initiate the amendment of a selected part of the Statute of the ESCB and of the ECB. According to Article 40 para 2 of the Statute, the voting modalities for the Governing Council of the ECB as laid down in Article 10 para 2 *leg cit* may be amended by a unanimous decision of the European Council and subsequent approval by all MS, either on a recommendation of the ECB or on a recommendation of the Commission.

#### 3.5.2.1.3. Soft decision-making/rule-making

The Commission's soft rule-making power is reflected, for example, in Article 60 TFEU. The liberalisation of services beyond the respective directives, in MS in which the general economic situation and the situation of the respective economic sector so permit, shall be facilitated by Commission recommendations addressed to these MS. These recommendations are legally non-binding, but have – in conjunction with the MS' obligation to 'endeavour to undertake the [further] liberalisation of services' laid down in Article 60 para 1 – a strong factual authority.[1029] However, the significance

1025 See Häde, Art. 219 AEUV, para 14; Kempen, Art. 219 AEUV, para 12; arguing in favour even of the possibility to delegate the competence to conclude such agreements: Palm, Art. 219 AEUV, para 56, with a further reference.

1026 Article 219 para 1 TFEU: The unanimity requirement (subpara 1) and the endeavour to reach a consensus consistent with the objective of price stability (subpara 2) required for a Council decision do not seem to leave any room for delegations.

1027 Article 219 para 2 TFEU.

1028 Article 135 TFEU.

1029 See Müller-Graff, Art. 60 AEUV, para 3.



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of Article 60 in practice is, due to the direct applicability of Articles 56 f TFEU, remarkably low.[1030]

Another example is taken from transport policy. According to Article 97 TFEU, MS shall endeavour to reduce progressively the costs charged by a carrier in respect of the crossing of frontiers and in addition to the transport rates. In order to facilitate that reduction, the Commission shall address recommendations to the MS. To date the Commission has not adopted any such recommendations. While, similar to Article 60, the obligation of the MS may increase the effectiveness of (potential) Commission recommendations, at the same time it is to be noted that the wording of this provision is vague ('reasonable level', 'taking [...] into account', 'reduce [...] progressively') and leaves the MS with a considerable latitude.[1031]

Where a MS intends to adopt or amend a measure which may cause a distortion of the conditions of competition in the internal market within the meaning of Article 116 TFEU,[1032] it shall consult the Commission which shall recommend to the MS concerned measures appropriate to avoid the distortion in question.[1033] In case of non-compliance with the recommendation, other MS shall not be required according to Article 116 to amend their own provisions in order to eliminate such distortion. Where the MS concerned by ignoring the recommendation causes distortion detrimental only to itself, Article 116 shall not apply.[1034] Where the above distortion has already materialised (*argumentum* 'is distorting'), the Commission shall, in accordance with Article 116 para 1, consult the MS concerned.[1035] The practical relevance of Articles 116 f TFEU is low.[1036]

In the situation described in Article 143 para 1 TFEU – that a non-euro MS is in or seriously threatened with difficulties as regards its balance of payments and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the CCP – the Commission shall investigate the position of that MS and, as a form of soft decision-making, address a recommendation to it, setting out the

1030 For the (now: historical) relevance prior to the end of the transitional period by 1 January 1970 see Randelzhofer/Forsthoff, Art. 60 AEUV, paras 1 f.
1031 See Rusche/Kotthaus, Art. 97 AEUV, paras 3 f.
1032 In addition to that, it is required that the distortion 'needs to be eliminated'; see Article 116 para 1 TFEU.
1033 Article 117 para 1 TFEU.
1034 Article 117 para 2 TFEU.
1035 For the legislative action that may follow see Article 116 para 2 TFEU.
1036 See Korte, Art. 117 AEUV, para 14.



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measures to be taken. For the granting of mutual assistance by the Council see 3.5.2.1.2. above.

Also in the field of social policy, the Commission, according to Article 156 TFEU, shall – in its facilitation of the coordination of MS action in all social policy fields mentioned in the respective chapter of the TFEU – deliver opinions after consulting the ESC.[1037]

Also in the Treaty infringement procedure the Commission disposes of soft decision-making powers. Where the Commission considers that a MS has failed to comply with an obligation under the Treaties it shall, after an informal procedure and after giving the MS concerned – by means of a so-called warning letter – the opportunity to submit its observations,[1038] deliver a reasoned opinion.[1039] Where this opinion is not complied with, the Commission may bring the case before the CJEU.[1040] Until the Court actually hears the case, the Commission may, without explanation, 'withdraw or stop proceedings at any time'.[1041] Where a MS considers that another

1037 Note that the CJEU affirmed that the Commission may also issue binding measures based on one of the predecessors of Article 156, namely Article 118 TEEC (Rome). It argued that Article 118 TEEC is to be read in conjunction with Article 117 TEEC (now: Article 151 TFEU) and that the approximation of provisions mentioned here 'gives the Commission the task of promoting close cooperation between Member States in the social field'; joined cases 281, 283 to 285 and 287/85 *Germany v Commission*, paras 11–13; see also Declaration 31 on Article 156 of the Treaty on the Functioning of the European Union in which the MS stress the 'complementary nature' of the EU measures laid down in this provision, but in which no explicit reference to this Court decision is made.

1038 See W Cremer, Art. 258 AEUV, para 6.

1039 For the reasoning requirements for reasoned opinions see case C-223/96 *Commission v France*, para 12: 'coherent and detailed statement'. It is questionable whether from the fact that this opinion is called 'reasoned opinion' enhanced reasoning requirements as compared to other opinions can be deduced. According to Article 296 para 2 TFEU, all legal acts shall 'state the reasons on which they are based'. According to the Court's case law the purpose of the reasoning of (individual-concrete) acts is 'to enable the Court to review the legality of the decision and to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested'; case C-199/99P *Corus*, para 145, with further references. While Article 263 TFEU does not allow for the review of a true soft law act, there are possibilities to reach judicial review also in this context (see 6.2. below). In addition to that, it must be stressed that a sound reasoning may increase the factual authority of any act, which is particularly important for soft law acts.

1040 Article 258 para 2 TFEU.

1041 See Smith, Evolution 352.



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MS is in breach of its obligations under the Treaties it may bring the case before the CJEU. Before doing so, however, it shall contact the Commission which may, after each of the MS concerned was given the chance to make submissions to the Commission, deliver a reasoned opinion. Where the Commission has not delivered an opinion within three months after the matter was brought before it, the MS itself may bring the matter before the CJEU.

One more competence of the Commission is to be mentioned under the heading 'Soft decision-making/rule-making', namely the Commission's power to adopt recommendations under Protocol No 31 of the Treaties. This Protocol is about the tariff preferences for certain petroleum products resulting from the association of the Netherlands Antilles with the EU. Pursuant to its Article 7, the Commission shall recommend administrative conditions, according to which – *inter alia* – the MS shall provide the Commission with the information necessary for the implementation of this Protocol.

#### 3.5.2.2. Council

##### 3.5.2.2.1. Support of decision-making

The Council's role as supporter of decision-making procedures by means of soft law is less comprehensive in the Treaties than that of the Commission. Nevertheless, there are examples of procedures in which the Council contributes to decision-making by means of a soft law act. According to Article 140 para 2 TFEU, the Council shall, on a proposal from the Commission, decide which non-euro MS fulfils the necessary conditions to join the Eurozone,[1042] and abrogate the derogations of the MS concerned. The Council shall act having received, within six months of receipt of the Commission proposal, a recommendation to decide in a certain way. This recommendation shall be adopted by the Council members constituting, untechnically speaking, the Eurogroup,[1043] by a qualified majority of their

1042 For these conditions see Article 140 para 1 TFEU.

1043 See Protocol No 14 ('On the Euro Group') and Article 137 TFEU, respectively; see Palm, Art. 140 AEUV, para 13; note the Court's judgement in joined cases C-105/15P to C-109/15P *Mallis*, in which it held that 'the Eurogroup cannot be equated with a configuration of the Council or be classified as a body, office or



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votes. Since they act chronologically after a Commission proposal, but not procedurally *on* a Commission proposal, and since they cannot in this case be called 'the Council', they are not, according to Article 293 para 1 TFEU, in any way bound by the Commission proposal.[1044] Nevertheless, the supportive role exercised by the euro-MS here shall – due to the institutional proximity – be listed under the heading 'Council'. Since the Council then still decides 'on a proposal from the Commission', it may deviate from it only by unanimity (Article 293 para 1 TFEU). A formal refusal of the proposal is not subject to the unanimity requirement, though.[1045]

#### 3.5.2.2.2. Initiation of decision-making

In the field of EU external action the European Council shall adopt decisions on the strategic interests and objectives of the Union on the basis of the principles and objectives set out in Article 21 TEU.[1046] To that end, the Council shall adopt a recommendation with the required majority (in CFSP matters principally that is unanimity, otherwise principally qualified majority[1047]), upon which the European Council shall unanimously adopt its decision. In this context, the High Representative (for the area of CFSP) and the Commission (for other areas of external action) may submit joint[1048] proposals to the Council.[1049] The Council recommendation is not a necessary requirement for the European Council to adopt its decision. The latter may as well decide on its own.[1050] Where the Council has adopted

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agency of the European Union within the meaning of Article 263 TFEU' (para 61); see also joined cases C-597/18P, C-598/18P, C-603/18P and C-604/18P *Chrysostomides*, para 87.

1044 See also Häde, Art. 140 AEUV, para 44.

1045 See Krajewski/Rösslein, Art. 293 AEUV, para 8, with further references and emphasising the practical irrelevance of this case.

1046 Article 22 para 1 TFEU. That no legislative acts may be adopted under the CFSP is expressly laid down in Article 31 para 1 (last sentence) TEU.

1047 See H-J Cremer, Art. 22 EUV, para 11; Kaufmann-Bühler, Art. 22 EUV, para 7.

1048 For the joint action of the Commission and the High Representative in the field of EU external action more generally see Ramopoulos/Wouters, Landscape 20, with examples <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp151-160/wp156-ramopoulos-wouters.pdf> accessed 28 March 2023; for the general regime of the initiation of decision-making in CFSP see Article 30 TEU.

1049 Article 22 para 2 TFEU.

1050 See Kaufmann-Bühler, Art. 22 EUV, para 7; Marquardt/Gaedtke, Art. 22, para 6.



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a recommendation, the European Council shall not be bound, but shall retain the flexibility which is characteristic of this institution.[1051]

The Council's participation laid down in Article 283 TFEU concerns the selection and appointment of the members of the Executive Board of the ECB. According to para 2 *leg cit*,[1052] they shall be appointed by the European Council with a qualified majority from among persons 'of recognised standing and professional experience in monetary or banking matters' on a recommendation from the Council, after it has consulted the EP and the Governing Council of the ECB.[1053]

Also in budgetary matters the Council initiates, with its recommendation, a decision, namely the decision of the EP to give a discharge to the Commission in respect of the implementation of the budget.[1054] While the recommendation is legally not binding upon the EP, the Commission shall 'take all appropriate steps' to act on, among other acts, the comments[1055] accompanying the recommendations on discharge adopted by the Council and, at the request of the EP or the Council, report on the measures taken in this context.[1056]

#### 3.5.2.2.3. Soft decision-making/rule-making

The Council disposes of a soft rule-making competence in the framework of Article 7 TEU, laying down the procedure against a MS (about to) breaching the values referred to in Article 2 TEU: human dignity, freedom, democracy, etc. Under this 'last resort'[1057] regime the Council may, follow-

1051 See Kaufmann-Bühler, Art. 22 EUV, para 7; with regard to the European Council's role in EU external relations: Wouters/Coppens/De Meester, Relations 149 f.

1052 See Article 11 para 2 of the Statute of the ESCB and of the ECB, referring to Article 283 para 2 TFEU.

1053 For the required 'common accord' in the European Council under the TEC and its merits see Endler, Zentralbank 425–430.

1054 Not only the Council's recommendation, also the EP's decision not to give a discharge to the Commission lacks legal consequences; see Waldhoff, Art. 319 AEUV, para 3.

1055 On these comments see Niedobitek, Art. 319 AEUV, para 19.

1056 Article 319 para 3 TFEU; on documents accompanying soft law instruments more generally see Coman-Kund/Andone, Instruments 188.

1057 Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication), COM(2014) 158 final/2, 6. For the original version of Article 7 TEU pursuant to the Treaty of Amsterdam see Pernice, Constitutionalism 735–738.



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ing the procedure laid down in para 1 *leg cit*, determine that there is a 'clear risk of a serious breach'[1058] of these values by a MS. Before that, the Council shall, however, hear the respective MS and it may address recommendations to it in order to remedy the situation upfront.[1059] These recommendations shall be adopted in accordance with the same procedure as that provided for the determination of a risk of a breach of values. Hence recommendations shall be proposed, thereby providing the reasons, by one-third of the MS, the EP or the Commission, and shall be adopted by the Council with a four-fifths majority of its members after obtaining the consent of the EP.[1060] While the recommendations are legally non-binding,[1061] they dispose of high political authority.[1062] The procedure pursuant to Article 7 TEU, although initiated by the Commission and the EP, respectively, in the case of Poland and Hungary, has not been advanced so far.[1063] The literature in particular on the Council's competence to adopt recommendations under Article 7 TEU is scarce.[1064]

1058 For this term see Commission, Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 7 f.

1059 On the political risks of such recommendations see Voet van Vormizeele, Art. 7 EUV, para 8; see also Commission, Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 7.

1060 The EP's consent is not redundant in case it has itself proposed the recommendation; after all, the Council may have drafted its recommendations differently. For the exclusion of the MS concerned from the vote and from the calculation, and for the two-thirds majority of the votes cast required in the EP respectively, see Article 354 para 4 TFEU.

1061 See Ruffert, Art. 7 EUV, para 12, who qualifies these recommendations as recommendations within the meaning of Article 288 TFEU.

1062 See former President of the Commission *José Manuel Barroso* who laments the missing bridge between 'political persuasion and targeted infringement' on the one hand, and 'the nuclear option of Article 7 of the Treaty', Speech before the EP on 11 September 2013, Strasbourg <http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm> accessed 28 March 2023.

1063 See Kochenov, Article 7, 127. For the 'pre-Article 7 procedure' (*Viviane Reding*; <http://www.politico.eu/article/hungary-eu-news-article-7-vote-poland-rule-of-law/> accessed 28 March 2023) envisaged by the Commission see Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication), COM(2014) 158 final/2; see also Halmai, Possibility 4 f.

1064 See Schorkopf, Art. 7 EUV, paras 22–24, where these recommendations do not seem to be mentioned; in para 26 Council recommendations are referred to which may be adopted in conjunction with (not: prior to) the decision according to



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Article 121 TFEU provides for the power of the Council to adopt recommendations in two instances. According to para 2, the Council shall – on the basis of the European Council's conclusion on the draft BEPG submitted by the Council – adopt a recommendation setting out these broad guidelines and shall inform the EP thereof. The conclusion of the European Council does not require a full approval, but the European Council may suggest certain amendments.[1065] While the BEPG are referred to as guidelines, in fact they constitute – according to the explicit wording of the TFEU – a recommendation.[1066] With regard to the parts of the BEPG which only concern the Euro area generally, non-euro MS shall not vote in the Council.[1067] According to para 4 *leg cit*, where the economic policies of a MS are not consistent with the BEPG or where they risk jeopardising the proper functioning of the EMU, the Commission may address a warning to the MS concerned. At the same time, the Council may address the necessary recommendations to this MS.[1068] It shall do so upon a recommendation from the Commission.[1069] Where the Council adopts a recommendation in reaction to non-compliance by a MS with the BEPG, it has the character of a soft reaction to non-compliance with non-binding norms.

According to Article 126 para 7 TFEU, in the context of the excessive deficit procedure, where the Council determines that an excessive deficit exists, it shall, on a recommendation from the Commission, address recommendations to the MS concerned 'with a view to bringing that situation to an end within a given period'.[1070] Where there has been 'no effective action

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Article 7 para 1 TEU. For a brief account of these recommendations see Besselink, Bite 133 f.

1065 See Bandilla, Art. 121 AEUV, paras 11 f; Hattenberger, Art. 121 AEUV, para 10, with further references.

1066 *Argumentum* 'the Council shall adopt a recommendation setting out these broad guidelines' (Article 121 para 2 TFEU). This example could be brought forward in favour of the argument that Article 288 TFEU provides a *numerus clausus* of legal acts, and that acts named otherwise – in particular in the realm of soft law – may be assigned to one of the five 'legal acts' set out therein; see 3.1.2. above.

1067 Article 139 para 2 lit a TFEU; see also Article 136 para 1 TFEU.

1068 On the rare use the Council makes of this power see Schulte, Art. 121 AEUV, paras 49 f.

1069 On a *proposal* from the Commission the Council may decide to make its recommendations public. For the suspended voting rights for non-euro MS in case of recommendations made *vis-à-vis* members of the Eurozone see Article 139 para 4 lit a TFEU.

1070 For the Council's discretion to deviate from the Commission's recommendation see case C-27/04 *Commission v Council*, para 80.



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in response' to this recommendation on the part of the MS, the Council may publish its recommendations.[1071] While these recommendations are legally non-binding themselves, their purpose – to reach a sound treasury – coincides with the obligation of MS to 'avoid excessive government deficits' (Article 126 para 1 TFEU).[1072]

According to Article 148 para 4 TFEU, the Council shall examine the implementation of the employment policies of the MS in view of the Council's guidelines for employment,[1073] the result of negotiations also referred to as OMC.[1074] In this context, it may, on a recommendation from the Commission, make recommendations to MS. A joint annual report which the Council and the Commission shall, on the basis of the results of that examination, submit to the European Council may be perceived as a follow-up measure which does not constitute a sanction, but increases awareness also of non-compliance (with the guidelines for employment, but possibly also with the Council recommendations) by certain MS.[1075]

Further competences of the Council to adopt recommendations are laid down in Articles 165 para 4, 166 para 4 (education, vocational training, youth and sport), 167 para 5 (culture), 168 para 6 (public health) TFEU. In these cases the Council *shall* (according to Article 168 para 6: *may*) adopt recommendations on a proposal from the Commission. These recommendations have a (soft) decision-making/rule-making purpose.[1076]

### 3.5.2.3. European Council – soft rule-making

In the field of Common Security and Defence Policy (CSDP), the European Council may decide on the progressive framing of a common Union

1071 Article 126 para 8 TFEU.

1072 See Häde, Aussetzung 758, with regard to case C-27/04 *Commission v Council*.

1073 For the legal qualification of these guidelines outside the framework of Article 288 TFEU see Knauff, Regelungsverbund 311.

1074 See Article 148 para 2 TFEU; see also Garben, Article 148 TFEU, para 1.

1075 On the 'Gruppendruck' [peer pressure] and the '"politisch-psychologische" Wirkung' [politico-psychological effect] these recommendations may entail see Steinle, Beschäftigungspolitik 371; for the multi-step peer review procedure applied by the ESMA as another example see van Rijsbergen, Legitimacy 228 ff; for the largely positive perception of peer review on the part of the MS in general see Dawson, Soft Law 15.

1076 Suggesting a 'besonderen Stellenwert' [particular importance] of this measure in the given context: Niedobitek, Art. 165 AEUV, para 62.



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defence policy. It shall in this case recommend to the MS the adoption 'of such a decision in accordance with their respective constitutional requirements'.[1077] In the literature, this is seen as the 'ratification' of a *de facto* simplified Treaty revision procedure.[1078] The recommendation is a mere hint at the necessity of 'ratification' at the national level. The bindingness of this recommendation is unclear, and arguably is to be examined case by case, so as to ensure certain flexibility (also for the MS) in CSDP.[1079]

#### 3.5.2.4. European Parliament – support of decision-making/rule-making

In the field of CFSP, the EP may not only address questions,[1080] but may also make recommendations to the Council and to the High Representative. These recommendations are regularly contained in the EP's resolutions.[1081]

In the context of international agreements concluded, for one part, by the EU, the EP may have a right to be consulted.[1082] In this case, the EP shall deliver its opinion, within an appropriate time limit set by the Council or otherwise, in accordance with the principle of sincere cooperation,[1083] within a reasonable time. The Council which shall conclude the respective agreement has to consider the opinion. Where the EP does not deliver an opinion in due time, the Council shall proceed. In case of agreements relating exclusively to the CFSP no involvement of the EP is provided for.[1084]

1077 Article 42 para 2 subpara 1 TEU.
1078 H-J Cremer, Art. 42 EUV, para 10; Marquardt/Gaedtke, Art. 42 EUV, para 7.
1079 See Isak, Art. 42 EUV, para 69; Kaufmann-Bühler, Art. 42 EUV, paras 27 f.
1080 This right to pose questions entails a duty of those addressed to respond accordingly; see H-J Cremer, Art. 36 EUV, para 9.
1081 See Marquardt/Gaedtke, Art. 42 EUV, para 6, also with regard to the follow-up measures of the Council.
1082 The EP shall be consulted in case of international agreements other than those for the conclusion of which the EP's consent is required; Article 218 para 6 lit a and b TFEU.
1083 See case C-65/93 *European Parliament v Council*, para 23.
1084 Article 218 para 6 TFEU.



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#### 3.5.2.5. Court of Justice of the European Union (and its components) – support and initiation of and actual (soft) decision-making/rule-making?

Article 218 para 11 TFEU provides for the possibility for a MS, the EP, the Council or the Commission to request from the CJEU an opinion on whether an international agreement envisaged by the EU is compatible with the Treaties.[1085] Thereby the MS or the named institutions may clarify *ex ante* – where 'purpose and broad outline of the agreement' are clear: even before negotiations are taken up[1086] – whether or not the agreement to be concluded is in accordance with primary law.[1087] The opinion of the Court is legally binding in the sense that where it is adverse, the agreement 'may not enter into force unless it is amended or the Treaties are revised'.[1088] This makes it clear that the Court's opinion here is not to be qualified as an opinion within the meaning of Article 288 TFEU, but as an opinion *sui generis*. This is palpable when having a look at the German version of the TFEU in which – unlike eg in the French, the Italian or the Spanish version – different terms are used for these two kinds of output: *Gutachten* (Article 218 para 11 TFEU) and *Stellungnahme* (Article 288 TFEU). Thus, the Court's opinion according to Article 218 para 11 TFEU does not require further analysis in this context, as it is clear that a legally binding effect on those involved in the negotiation/conclusion of the agreement at issue is intended.

Also the 'unanimous opinion of the Judges and Advocates-General of the Court of Justice' referred to in Article 6 para 1 of Protocol No 3 on the Statute of the CJEU does not count as an opinion according to Article 288 TFEU. The 'unanimous opinion' rather is an expression of the quota required for a decision of the Court to deprive a judge/AG of his/her office or of his/her right to a pension or other benefits in its stead, namely: unanimity of all judges and AG of the CJEU apart from the judge/AG[1089]

1085 That means that requesting an opinion from the Court under Article 218 para 11 TFEU is not obligatory; see Lenaerts/Maselis/Gutman, Procedural Law 555.

1086 Opinion 1/03 *Lugano Convention*, para 111, with references to further case law.

1087 For the comprehensive scope of judicial review in this context see Lorenzmeier, Art. 218 AEUV, paras 72 and 75.

1088 Article 218 para 11 TFEU.

1089 Article 8 of the Statute of the CJEU.



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concerned. This is again underpinned when having a look at other language versions of the provision.[1090]

The following example is (partly) of historical importance only, as the former Civil Service Tribunal was dissolved on 1 September 2016.[1091] In Article 3 para 2 of Annex I of the Statute of the CJEU, dealing with the Civil Service Tribunal (now repealed by Article 2 para 3 of Regulation 2016/1192), reference is made to a recommendation by the CJEU, upon which the Council should lay down the conditions and the arrangements governing the submission and processing of applications for the position of a judge of the Civil Service Tribunal. In the context of this procedure a committee of seven former judges of the Court of Justice/General Court or (other) lawyers of recognised competence was established, the membership and operating rules of which were determined by the Council upon a recommendation by the President of the Court of Justice. This exemplifies the influence the Court has/had when its own affairs are/were regulated. The Council was not legally bound by the recommendations, but – stemming from the Court, the highest judicial authority of the EU, and concerning in the first place a part of the Court, namely the Civil Service Tribunal[1092] – these recommendations arguably carried a high degree of authority.

The committee provided an opinion on the candidates' suitability to perform the duties of a judge of the Civil Service Tribunal and proposed at least twice as many candidates as there were judges to be appointed, namely those with the 'most suitable high-level experience'.[1093] Here arguably the Council was – *de facto*, not legally – bound by the committee's opinion,[1094] which is an opinion according to Article 288 TFEU.[1095] This

1090 German: *Stellungnahme* (Article 288 TFEU) – *Urteil* (Protocol No 3); French: *avis* – *jugement*; Italian: *parere* – *giudizio*; for the authenticity of all official language versions of an act of EU law, and the potential need for comparison, see case C-561/19 *Consorzio Italian Management*, paras 42-44; for the dismissal of AG *Sharpston* in the context of *Brexit* see Kochenov/Butler, Independence.

1091 For the (political) background to this transformation see <http://curia.europa.eu/jcms/jcms/T5_5230/en/> accessed 28 March 2023.

1092 The Civil Service Tribunal was attached to the General Court; see Lenaerts/Maselis/Gutman, Procedural Law 34.

1093 Article 3 para 4 of the Annex to the Statute of the CJEU.

1094 This is also expressed by the manual on the *Civil Service Tribunal* (2014) issued by the CJEU's press and information department which at page 2 says that the Council appointed the judges 'on the proposal of the committee'.

1095 This follows also from other language versions of Article 3 para 4 of the Annex to the Statute of the CJEU: *Stellungnahme*, *avis*, *parere*.



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was a result of the committee's authoritative composition, also in terms of independence.[1096] The fact that the committee had to name twice as many candidates as there were posts (which means that the Council could – within a certain frame – choose) made the opinion's factual bindingness appear less compelling. It could be argued that the committee did not form part of the CJEU and that hence its opinion is to be listed below under the heading 'EU-external actors' (3.5.3.2.). However, due to the institutional (and also personal) proximity to the CJEU this committee had, its consideration in the context of the CJEU (and its components) appears appropriate.

A similar procedure is applied – and to that extent the above remarks are not only of historical interest – for the selection of the judges of the Court of Justice and the General Court, respectively.[1097] Also here the opinion of the panel bears a high authority. So far MS, in spite of numerous negative votes, have always followed the panel's opinions.[1098] However, since the MS can nominate the candidates – with no possibility for candidates to submit direct applications, as was the case with the Civil Service Tribunal – the MS' influence on the selection of judges is much stronger.[1099]

Another instance of legally non-binding output issued by (a member of) the CJEU[1100] are the submissions delivered by the AG.[1101] The submissions are also referred to as Opinion[1102] or View,[1103] sometimes also as propos-

1096 It ought to be mentioned, however, that the committee has close links to the Council in terms of appointment, secretarial support and finances; see above and the Annex to Council Decision 2005/49/EC, Euratom concerning the operating rules of the committee provided for in Article 3(3) of Annex I to the Statute of the CJEU.

1097 See Article 255 TFEU and Council Decision 2021/2232 on the composition of the current panel.

1098 See Seventh Activity Report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union (2022) 9 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/2022.2597-qcar22002enn_002.pdf> accessed 28 March 2023.

1099 Critically: Burgstaller, Art. 255 AEUV, paras 11–13, with further references.

1100 For the AG' forming part of the CJEU in spite of the wording of Article 252 TFEU see Jacobs, Advocates General 18, with further references; Lenz, Amt 721.

1101 Article 252 TFEU; Article 20 para 4 of the Statute of the CJEU; see para 5 *leg cit* for cases in which the AG shall not deliver submissions. For further tasks of the AG see eg Hackspiel, Art. 252 AEUV, para 9.

1102 This is the name which the written submissions regularly bear.

1103 Eg: View of AG *Tizzano* in case C-27/04 *Commission v Council*; View of AG *Kokott* in case C-370/12 *Pringle*.



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al.[1104] The AG ought to 'assist' the judges.[1105] They may convince the Court as a result of their legal argumentation,[1106] but they cannot bind the Court in any way.[1107] In *Jacobs'* words: '[U]nlike a judgment, the Opinion does not decide the case, even provisionally: its purpose, according to the Treaties, is to assist the Court in the performance of its task'.[1108] Or, as *Léger*, another AG, has put it: 'The Advocate General is impartial, independent, influential, yet at no point does the AG usurp the most fundamental judicial prerogative of deciding cases. No matter how eloquent, how persuasive an Opinion may be, it may be disregarded for, after all, Judges are grown-ups capable of making up their own minds'.[1109] While the AG seeks to influence the Court with his/her Opinion, an according duty to consider[1110] on the part of the Court is not provided for and arguably would be incompatible with the Court's independence and its authoritative answering of legal

1104 See Lenaerts/Maselis/Gutman, Procedural Law 776.

1105 Articles 19 TEU and 252 TFEU; with regard to the General Court see Article 254 para 1 TFEU; see also Article 49 para 2 of the Statute of the CJEU, according to which – in the context of procedures before the General Court – the 'reasoned submissions on certain cases […] [shall] assist the General Court in the performance of its task'. This relationship of assistance is also reflected in Declaration 38 attached to the Treaties, according to which the Court may request an increase in the number of AG by three. The Court has actually done so which lead the Council to increase, by its Decision 2013/336, the number of AG to nine by 1 July 2013 and to eleven by 7 October 2015. That the term 'assist' is used here cannot alter or relativise the AG' impartiality and independence (also from judges and other AG); Article 252 TFEU; see also Lenz, Amt 721.

1106 For further purposes of the AG' submissions see Jacobs, Advocates General 19–22.

1107 See Lenz, Amt 723; Tridimas, Role 1350. The words of the Court in its Order in case C-17/98 *Emesa Sugar*, para 15, are misleading: 'The Advocate General thus *takes part*, publicly and individually, *in the process by which the Court reaches its judgment*, and therefore in *carrying out the judicial function* entrusted to it' (emphasis added); with reference to this statement: Schilling, Recht 402.

1108 Jacobs, Advocates General 18; see also Lenz, Amt 723; Thienel, Organisation 87. That the AG' Opinions are sometimes seen as a compensation for the – often – lacking second instance before the CJEU is not to be understood as suggesting any binding force of the Opinion, but as embracing the larger variety of legal opinions/ideas which the activity of AG may bring about; see Hackspiel, Art. 252 AEUV, para 13, with further references; Tridimas, Role 1365.

1109 Léger, Law 8.

1110 The lack of a respective duty cannot change the fact that the Court normally does consider the Opinion of the AG; see Bengoetxea/MacCormick/Moral Soriano, Integration 51. Whether this consideration can be deduced from the judgement (explicitly or at least implicitly) is a different issue; on the (changing) referencing practice of the CJEU see Lenz, Amt 723.



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questions.[1111] That the Court is obliged (Article 296 TFEU and Article 36 of the Statute of the CJEU) to provide a comprehensible reasoning for its decisions – and that it may thereby also take *into account* the arguments brought forward in the AG's Opinion[1112] (if only to rebut them[1113]) – is a different issue.[1114]

In conclusion, it is to be noted that Opinions of AG qualify as soft law, because they – according to their role as laid down in the Treaties – present a certain legal solution, as the final legal view of the AG, of a case and thereby are designed to have a steering effect. The actual strength of this effect hardly follows from the general authority of the act, but the AG's Opinion – stemming from a monocratic organ, a highly personalised act – may be (and regularly is) influential on the judgement only due to the persuasive power of its individual arguments. Therefore the effects are highly volatile. They necessarily vary from Opinion to Opinion, from case to case. The (varying) steering effect the Opinions of the AG have is entrenched in primary law and hence it does not conflict with the independence of the CJEU which is, as well, laid down in primary law. The fact that the Court may not follow an Opinion in a certain case does not constitute a contradiction to the assisting role of the AG's submissions, it does not even relativise them. Also arguments which the Court decides to refuse may assist the Court in its work, in that also (explicitly or implicitly) refused legal arguments may increase the credibility/quality of the judgement. Thereby the AG contribute to 'ensur[ing] that in the interpretation and application of the Treaty, the law is observed'.[1115] Also apart from the proposed legal solution

1111 This lack of formal impact on the Court's decision is also reflected in the fact that parties do not have a right to respond to the AG's Opinion; see Lenaerts/Maselis/Gutman, Procedural Law 776, with reference to the case law. Also with regard to national courts, (soft) unsolicited interferences by EU bodies are generally considered problematic; see eg the Commission opinion rendered – upon request by the national court – according to Article 29 of Council Regulation 2015/1589; for the capacity of soft law to pose a risk to the Court's independence see Peters, Soft law 41.

1112 For an empirical study of how often the Court has followed the Opinion of the AG see Tridimas, Role 1362–1365.

1113 Note, however, that disagreement with the AG's Opinion may be expressed by the Court in many ways, also by not mentioning it at all; see Tridimas, Role 1371–1373.

1114 For the importance of the Court's reasoning, and on the diverging views on it expressed in the literature, see in general Dawson, Court, on its 'reckonability' in particular 426 f; on its 'coherence' see Bengoetxea/MacCormick/Moral Soriano, Integration 64–81.

1115 Order in case C-17/98 *Emesa Sugar*, para 13.



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(ideally to new points of law[1116]), namely with regard to the condensed presentation of the facts of the case and the elaboration of relevant legal questions (to be solved by the Court), the Opinion does have a supporting function.[1117]

### 3.5.2.6. European Central Bank

#### 3.5.2.6.1. Support and initiation of rule-making

The ECB supports rule-making falling within its field of competence by providing its expertise on a large scale. This is reflected upon in particular in Article 127 para 4 TFEU. According to this provision, it shall be actively consulted, but it may also submit opinions to the relevant EU (and national) actors on its own motion.

The ECB may act as the initiator of a rule-making procedure. This is confirmed (but not laid down) in Articles 289 para 4 and 294 para 15 TFEU with regard to legislative acts. According to Article 129 para 3 TFEU, certain provisions of the Statute of the ESCB and of the ECB may, as an exception to the regular procedure required for the amendment of primary law, be amended by the EP and the Council according to the ordinary legislative procedure. They shall act either on a recommendation from the ECB and after consulting the Commission or on a proposal from the Commission and after consulting the ECB. Other provisions ('[c]omplementary legislation'[1118]) of the Statute may be amended by the Council on a proposal from the Commission and after consulting the EP and the ECB, or on a recommendation from the ECB and after consulting the EP and the Commission (Article 129 para 4 TFEU).[1119] The provisions of the Statute which may be amended in either of the two procedures concern 'technical' issues (sometimes of high relevance: eg Article 18 on open market and credit operations, Article 33 para 1 lit a on the allocation of net profits and losses of the ECB, or the sanctioning power of the ECB

1116 See Article 20 para 5 of the Statute of the CJEU; see also Lenaerts/Maselis/Gutman, Procedural Law 776.

1117 See Jacobs, Advocates General 21.

1118 Article 41 of the Statute of the ESCB and the ECB.

1119 See also Article 40 para 1 and Article 41 of the Statue of the ESCB and the ECB; for the reduction of safeguards for the ECB brought about by the Treaty of Lisbon see Häde, Art. 129 AEUV, para 5.



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under Article 34 para 3), not highly political issues such as the composition of the Governing Council or the calculation of the respective majorities required for decision-making. The latter is regulated by Article 10 para 2 of the Statute, which may be amended according to Article 40 para 2 of the Statute: by a unanimous decision of the European Council either on a recommendation by the ECB and after consulting the Commission and the EP, or on a recommendation by the Commission and after consulting the ECB and the EP. These amendments shall be approved by the MS in accordance with their respective constitutional requirements. In all these cases matters immediately concerning the ECB are at stake. Therefore the MS have provided for its competence to initiate the amendment of the respective rules. In this role, however, the ECB is not always on an equal footing with the Commission, since the Commission – according to Article 129 paras 3 f TFEU – may *propose* amendments, with the effect that the Council may, apart from the exceptions listed in Article 293 para 1 TFEU, only amend that proposal by a unanimous decision. While thereby at least formally the Commission has a stronger tool at hand (which is, with a view to other Treaty amendment procedures, and the ordinary legislative procedure respectively, systemically coherent[1120]), the ECB's recommendations still *de facto* bear considerable authority. In the amendment procedure laid down in Article 40 para 2 of the Statute, the Commission and the ECB may *both* initiate rule-making (only) by means of a recommendation.

Article 219 TFEU provides for a special procedure for the conclusion of formal agreements setting up exchange-rate systems for the euro in relation to the currencies of third States (see 3.5.2.1.2. above). In this context, the Council acts as the decision-maker, but may do so only on a recommendation by the ECB (or by the Commission after consulting the ECB). The Council shall 'endeavour to reach a consensus consistent with the objective of price stability',[1121] an objective the realisation of which is first and foremost the task of the ECB.[1122] The ECB's expertise with regard to this question is the reason why it is involved in the decision-making process here. The Council may, following the same procedure, adopt, adjust or abandon the central rates of the euro within the exchange-rate system. In the absence of an exchange-rate system in relation to certain third States the

1120 See in particular Article 48 paras 2 and 6 TEU, and Article 294 para 2 TFEU, respectively.
1121 Article 219 para 1 TFEU.
1122 See Article 127 para 1 TFEU.



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Council may, again following this procedure, formulate general orientations for the exchange-rate policy in relation to the respective currencies. Due to its relevant expertise, the ECB's viewpoints carry considerable weight.[1123]

According to Article 27 para 1 of the Statute of the ESCB and of the ECB, the Governing Council as the ECB's main decision-making organ shall recommend independent external auditors for the auditing of the ECB and the national central banks (NCBs). The Council shall approve these auditors. The Governing Council's recommendations here affect the E(S)CB's own management and their adoption is subject to pre-defined procedures.[1124] This suggests that the Governing Council's recommendations (or rather: the ECB's recommendations[1125]) here bear a high degree of authority.

### 3.5.2.6.2. Soft decision-making

The ECB (via its Governing Council) may also act as a soft decision-maker itself, namely according to Article 35 para 6 of the Statute of the ESCB and of the ECB in conjunction with Article 271 lit d TFEU.[1126] Where a NCB has, in the view of the ECB, failed to comply with its obligations under the Statute it shall 'deliver a reasoned opinion on the matter after giving the national central bank concerned the opportunity to submit its observations'. Where the NCB does not comply with this opinion within the period set by the ECB, the latter may bring the case before the CJEU. This procedure is a *lex specialis* of Article 258 TFEU.[1127] Where the Court determines that the NCB has violated obligations under the Statute, the

1123 Differentiated: Thiele, Operations, para 23.15, with further references.

1124 ECB/Eurosystem, Good Practices for the selection and mandate of External Auditors according to Article 27.1 of the ESCB/ECB Statute (2017).

1125 As an organ of the legal person ECB, the Governing Council acts for the ECB.

1126 For one of the rare applications of the procedure laid down in Article 14.2. of the Statute of the ESCB and of the ECB see the ECB's invocation of the Court in the case of the Governor of the Latvian central bank being barred from holding his office at this central bank and from exercising his functions as a member of the ECB's Governing Council; see ECB, Press Release of 6 April 2018 <https://www.ecb.europa.eu/press/pr/date/2018/html/ecb.pr180406.en.html> accessed 28 March 2023; see joined cases C-202/18 and C-238/18 *Ilmārs Rimšēvičs and European Central Bank v Republic of Latvia*, ECLI:EU:C:2019:139.

1127 This arguably follows from the NCBs' independence and the special role the ECB plays within the ESCB; see also ECB/Eurosystem, Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions (October 2015) 27 (fn 22).



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latter shall be required to take the necessary measures to comply with the Court's judgement.[1128] The ECB's reasoned opinion has the same effect as the Commission's reasoned opinion under Article 258 TFEU. For a more detailed analysis of the procedure see IV.2.1. below.

### 3.5.3. Other actors

#### 3.5.3.1. EU-internal actors

Not only the institutions, but also other EU bodies may adopt recommendations or opinions according to special competence clauses laid down in EU primary law. An example for this is the High Representative's competence to address a recommendation to the Council where the conclusion of an agreement between the EU and third countries or international organisations which exclusively or principally relates to the CFSP is envisaged. The Council shall then adopt a decision authorising the opening of negotiations (see 3.5.2.1.2. above).

In the context of enhanced cooperation according to Part Six, Title III of the TFEU, the High Representative shall submit an opinion, namely where MS wishing to establish enhanced cooperation within the framework of CFSP have addressed a respective request to the Council. Whereas the High Representative shall provide an opinion on whether the enhanced cooperation proposed is consistent with the EU's CFSP, the Commission shall give its opinion in particular on whether it is consistent with the other Union policies (see 3.5.2.1.1. above). The Commission may also utter its point of view on the consistency with the CFSP and on other issues, though (*argumentum* 'in particular').[1129] In that sense, the scope of issues possibly to be addressed by the Commission in its opinion is much wider than that of the High Representative. In terms of effects, however, no difference between the two opinions is intended by the Treaty.

According to Article 222 TFEU, the so-called solidarity clause, the Union and the MS shall act jointly in a spirit of solidarity if a MS is the object of a terrorist attack or the victim of a natural or man-made disaster. The arrangements for the implementation by the EU of the solidarity clause shall be laid down in a Council decision. The Council shall act on a joint

1128 Article 271 lit d TFEU.
1129 Article 329 para 2 TFEU; see Pechstein, Art. 329 AEUV, para 7.



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proposal by the Commission and the High Representative.[1130] In this context, and explicitly without prejudice to the preparatory work of COREPER, the Political and Security Committee and the Standing Committee on Operational Cooperation on Internal Security referred to in Article 71 TFEU shall – 'if necessary' – adopt joint opinions.[1131] The necessity of a joint opinion arguably is to be determined by the two committees.

According to Article 271 lit a TFEU, the EIB is vested with the powers of the Commission under Article 258 TFEU with regard to MS' (non-)compliance with their obligations under the Statute of the EIB.[1132] This provision which confers on the EIB the competence to adopt a reasoned opinion – an EU soft law act – is the pendant of Article 271 lit d TFEU, vesting 'guardian powers' according to Article 258 TFEU upon the ECB. What was said in this context *mutatis mutandis* applies here, as well – in particular the *lex specialis* argument[1133] (see 3.5.2.6.2. above).

The Statute of the EIB provides for soft law powers of the EIB, and its organs respectively, in a number of cases. The Management Committee, an organ of the EIB, shall, acting by a majority,[1134] submit an opinion on proposals for raising loans or granting of finance.[1135] Where the opinion

1130 See Council Decision 2014/415/EU on the arrangements for the implementation by the Union of the solidarity clause; for the respective joint proposal from the Commission and the High Representative – JOIN(2012) 39 final – see Blockmans, L'Union 125–132. Where the decision has defence implications, the Council shall furthermore act in accordance with Article 31 para 1 TEU.

1131 In Council Decision 2014/415/EU no reference is made to such a joint opinion which arguably means that no such opinion was delivered (see Article 296 para 2 TFEU). That the committees shall be involved also when the Council Decision based on Article 222 para 3 TFEU is amended is clear from the Treaty, but also explicated in Article 9 para 2 of this Decision.

1132 Note what the Court said with regard to the double nature of the EIB and the applicability of then Community law: 'The position of the Bank is therefore ambivalent inasmuch as it is characterized on the one hand by independence in the management of its affairs, in particular in the sphere of financial operations, and on the other hand by a close link with the Community as regards its objectives. It is entirely compatible with the ambivalent nature of the Bank that the provisions generally applicable to the taxation of staff at the Community level should also apply to the staff of the Bank'; case 85/86 *Commission v European Investment Bank*, para 30.

1133 See Karpenstein, Art. 271 AEUV, para 4.

1134 Article 11 para 4 of the Statute of the EIB.

1135 Article 19 para 4 of the Statute of the EIB. For the financing activity of the EIB in practice see Becker, Investitionsbank, 'II. Tätigkeiten'; for its activities in a historical perspective see Skiadas, Court 216 f.



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of the Management Committee is negative, the Board of Directors may grant the finance concerned only by unanimous decision.[1136] This opinion – adopted by and addressed to one of the organs of the EIB – is a body-internal soft law act with no (direct) body-external effect. Where both the Commission and the Management Committee have launched a negative opinion, the Board of Directors may not grant the finance concerned.[1137] Hence, in combination, two unfavourable opinions – legally non-binding individually – have a prohibitive effect. While it could be argued that, taken together, the two negative opinions are – against the express wording of Article 288 TFEU – legally binding, the fact that these effects are laid down in primary law, as well, boils down this conflict of norms to a *lex generalis-lex specialis* relationship, in which the *lex specialis* prevails within its scope of application.[1138]

The ordinary Treaty revision procedure according to Article 48 TEU provides for the Convention, composed of representatives of the national parliaments, of the Heads of State or Government of the MS, the EP and the Commission.[1139] This Convention shall examine the proposals for amendments and shall 'adopt by consensus a recommendation to a conference of representatives of the governments of the Member States'.[1140] This conference determines by common accord, after considering but not being legally bound by the recommendation of the Convention,[1141] the amendments to be made to the Treaties.[1142] Failure to reach consensus – and hence failure to adopt a recommendation – cannot prevent the MS from convening a conference of representatives of the governments of the MS, and hence from proceeding with the revision procedure.[1143] Is this recommendation EU soft law at all, or is it – for the MS act within the realm of public international law when amending the EU Treaties – public international soft law? While the EU Treaties are Treaties of public

1136 Article 19 para 5 of the Statute of the EIB.
1137 Article 19 para 7 of the Statute of the EIB.
1138 On the in principle equal rank of norms of EU primary law see H Hofmann, Normenhierarchien 84–86; for the problem of soft law acts contradicting each other: Dawson, Soft Law 7.
1139 For this Convention more generally see Klinger, Konvent.
1140 Article 48 para 3 TEU.
1141 See Meng, Art. 48 EUV, para 15.
1142 Article 48 para 4 TEU.
1143 See Meng, Art. 48 EUV, paras 9 f.



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international law,[1144] it is widely argued that the EU established by these Treaties constitutes a separate legal order.[1145] Therefore, when EU primary law specifies the procedure for its amendment this is, together with all the acts provided for in this procedure, to be considered EU law. Also the use of the Treaty terminology ('recommendation'; see Article 288 TFEU) supports the assumption that it shall be an act of EU law.[1146] Whether also the originator of this act, the Convention, can be considered an EU body is not apparent.[1147] Its composition is only relatively vaguely regulated by the TEU and its concrete composition is mainly for the MS to decide.[1148] The decision to convene (ie to temporarily establish) a Convention is taken by the President of the European Council upon a decision by the European Council. The dominance of the MS, the only temporary existence of the Convention and its single purpose to facilitate (or not to facilitate) a Treaty amendment cannot alter the fact that this procedure shall move within an inter-governmental part *of EU law*.[1149] Therefore also the Convention rather is to be qualified as an EU-internal actor. The consequence of this qualification is that the Convention in its action is limited to the powers accorded to it by the Treaties which boil down to the competence to adopt a recommendation. The Convention could not, for example, adopt a binding agreement according to EU law, even if the representatives assembled in the Convention would be authorised accordingly by their respective MS. Hence a deviation from the procedure laid down in Article 48 TEU on the basis of public international law does not appear to be lawfully possible.[1150] This does, of course, not affect its competence (and its task) to recommend the adoption of rules deviating from (current) EU law.

1144 See eg Griller, Constitution 24.

1145 See in particular case 26/62 *van Gend & Loos*, 12: 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights'.

1146 See Ohler, Art. 48 EUV, para 35.

1147 In the affirmative: Ohler, Art. 48 EUV, para 36; see also C Möllers, Gewalt 274 f.

1148 On the merely consultative purpose of the involvement of representatives of the EP and the Commission see Meng, Art. 48 EUV, para 10. The highly political issue of the concrete composition of the Convention is, according to *Ohler*, for the European Council as a whole (not: its President) to decide; see Ohler, Art. 48 EUV, para 35.

1149 See de Witte, International Law 268–270; referring to the mitigation of the inter-governemental character of this procedure due to the inclusion of the EP: Ohler, Art. 48 EUV, para 29.

1150 See case 43/75 *Defrenne*, paras 57 f.



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3.5.3.2. EU-external actors

Apart from EU-internal actors, there are a number of actors not institutionally belonging to the EU, which are nevertheless empowered by EU primary law to adopt soft law.

In the field of social policy, the Commission shall promote the consultation of 'management and labour' (also referred to as 'social partners') at Union level. Therefore the Commission shall, before submitting proposals in this field, consult management and labour on 'the possible direction of Union action'.[1151] If, after that consultation, the Commission considers Union action advisable, it shall again consult management and labour, this time on the content of the envisaged proposal. They shall address an opinion or – 'where appropriate' – a recommendation to the Commission.[1152] Management and labour – on a whole – are the representatives of the interests of their respective clientele. They may encompass chambers of commerce, trade unions and other interest groups. Their degree of institutional formality can, due to this variety of actors, not be determined. When selecting out of those parts of management and labour ('European social partners'), the Commission shall ensure that they are 'truly representative'.[1153] While social partners are not EU bodies, but only bodies referred to in EU law and – as 'European social partners' – selected by an EU institution, the Commission, they (ie the concrete group of actors in the concrete consultation procedure as composed according to the concrete selection by the Commission) are vested with the power to adopt opinions and recommendations, hence EU legal acts according to Article 288 TFEU.[1154]

1151 Article 154 para 2 TFEU.

1152 Article 154 para 3 TFEU. For the possibility of contractual relations between the EU and management and labour see Article 155 TFEU; see also Korkea-aho, Soft Law 284.

1153 Case T-135/96 *UEAPME*, para 89; for so-called 'representativeness studies' see Commission, A Practical Guide for European Social Partner Organisations and their National Affiliates (Vademecum, July 2017) 7 f; see also the 'List of consulted organisations' under Article 154 TFEU' as published (and updated) by the Commission at <http://ec.europa.eu/social/main.jsp?catId=329&langId=en> accessed 28 March 2023.

1154 It was certainly not necessary to vest the 'European social partners' with such a competence – after all, they could also express their views in other ways. The terminology 'opinion' and 'recommendation' in a Treaty provision speaks in favour of the assumption that it is the legal acts mentioned in Article 288 TFEU which are referred to.



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In practice, the social partners may also enter into negotiations with the Commission. Where they do produce a written document, it appears to be individual or joint opinions most of the time.[1155]

Article 302 TFEU refers to the composition of the ESC. The Council shall adopt the list of members drawn up in accordance with the proposals made by each MS. Prior to that, the Council shall consult the Commission, and it may also obtain the opinion of 'European bodies which are representative of the various economic and social actors and of civil society to which the Union's activities are of concern'. In practice, the Council very rarely makes use of this possibility.[1156] The opinion referred to in this consultation procedure is not a legal act according to Article 288 TFEU. Unlike in the case of the Commission's consultation of the 'European social partners', the 'European bodies' referred to here can be chosen *ad hoc* by the Council which is not in any way restricted (eg by a list of bodies set up in advance) and hence are even less homogenous than the former. This complete lack of institutionalisation and, even more so, the fact that the terminology used in other language versions[1157] does not reflect Article 288 TFEU, speak against EU soft law in this case.

Protocol No 1 on the role of national parliaments in the EU provides for the possibility of national parliaments to submit a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity.[1158] This competence is specified in Article 6 of Protocol No 2 on the application of the principles of subsidiarity and proportionality, according to which a national parliament or a chamber of it may, within eight weeks from the date of transmission of a draft legislative act in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on the act's non-compliance with the principle of subsidiarity.[1159] Where the draft legislative acts

1155 Commission, 'Consulting European social partners: Understanding how it works' (2011) 8 f <https://op.europa.eu/en/publication-detail/-/publication/5208f68c-3db1-405e-9b4a-51316aeacc03> accessed 28 March 2023.

1156 See Jaeckel, Art. 302 AEUV, para 17, with further references.

1157 The distinction made becomes clear when having a look eg at the German, French or Spanish version of Article 302 TFEU.

1158 Article 3 of Protocol No 1 on the role of national parliaments in the European Union.

1159 Article 3 para 1 of Protocol No 1 on the role of national parliaments in the European Union; Article 6 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.



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exceptionally originate from another entity, eg the ECB, the President of the Council shall forward the reasoned opinion to it. The EP, the Council, the Commission and possibly other originators of the draft act shall 'take account' of the reasoned opinions.[1160]

Each national parliament shall have two votes, in case of a bicameral parliament each chamber shall have one vote.[1161] Where the reasoned opinions stating non-compliance of a certain draft act represent at least one third[1162] of the votes allocated to the national parliaments, the Commission (or exceptionally another originator of the draft) has to review the act and to decide, thereby giving the reasons, to maintain, amend or withdraw the draft.[1163] Where, for a draft act initiating the ordinary legislative procedure, the reasoned opinions launched represent a simple majority of the allocated votes, the Commission has to review the act and may decide to maintain, amend or withdraw the draft. In the former case – maintenance of the act – the Commission has to justify in a reasoned opinion why it considers the act to be compatible with the principle of subsidiarity. If, by a majority of 55 percent of the members of the Council or a majority of the votes cast in the European Parliament, the legislator opines that the draft is not in compliance with the subsidiarity principle, it shall not be given further consideration.[1164] Hence in this case (ordinary legislative procedure) the effects of the opinion depend on whether the support it has got from among the group of its (potential) originators, the national parliaments that is, reaches the critical threshold of one third or of a simple majority of the allocated votes.

In the context of financing of undertakings or other public or private entities, Article 19 of the Statute of the EIB provides that they may apply for financing directly to the EIB. Applications may also be made through the Commission or through the MS on whose territory the investment will be

1160 Article 7 para 1 subpara 1 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.

1161 Article 7 para 1 subpara 2 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.

1162 Where the draft is based on Article 76 TFEU it shall be one quarter; Article 7 para 2 subpara 1 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.

1163 Article 7 para 2 subpara 2 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.

1164 Article 7 para 3 subpara 2 lit b of Protocol No 2 on the application of the principles of subsidiarity and proportionality.



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carried out. Where the application is not made through the MS concerned, it shall be asked to submit its opinion. Where the MS does not do so within two months, the EIB may assume that there is no objection to the respective investment.[1165] In this case, the Statute determines – similar to the case of the national parliaments' concerns about compatibility of an EU legislative act with the principle of subsidiarity, as discussed above – the form the MS' (and the Commission's) views shall take. In this procedure it is qualified as an opinion according to Article 288 TFEU.

As we have seen above, not every 'opinion' mentioned in the Treaties actually is an opinion within the meaning of Article 288 TFEU. Here is another example: According to Article 25 of the Statute of the CJEU, the Court may 'entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion'. The expert opinions referred to here are not opinions according to Article 288 TFEU. They are intended to clarify facts, not to set (soft) legal norms.[1166] Therefore they can be proven wrong,[1167] whereas (soft) legal norms can only be proven illegal. The Court may consider them as evidence of certain statements in the course of a judicial procedure.[1168] If and to the extent that scientific opinions of an EU body (eg the European Food Safety Authority EFSA) express a normative content (eg the sentence: 'The food ingredient shall not be certified for marketing') it constitutes – to that extent – soft law. Where it merely lists properties and risks of the ingredient at issue, as a piece of evidence it needs to be duly considered. Where the opinion *must* be rendered in the course of the underlying procedure, its adoption is to be considered as a procedural requirement, just as the adoption of a soft law act may be a procedural requirement. In that sense, the effects of soft law and expert opinions may in certain cases be very similar, both procedurally

1165 The same applies for the Commission, accordingly; see Article 19 para 2 of the Statute of the EIB.

1166 For the role of expert opinions in the context of individual-concrete administrative decisions in a democratic *Rechtsstaat* more generally see Nußberger, Sachverständigenwissen.

1167 In places, the legislator even addresses the case of expert opinions which differ from each other; see eg Article 59 paras 3 f of Regulation 726/2004.

1168 On the legal status of expert opinions – and the reasons for consideration – see Weismann, Agencies 71–74; see also Mills, Biotechnology 331 f, taking the example of the Codex Alimentarius Commission and its output; on the *quasi*-legal authority of scientific output in legal history see Jansen, Methoden 45 f.



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(requirement of adoption) and substantially (duty to consider[1169]; steering effect).[1170] This does not alter the fact that they are, qualitatively speaking, of a different kind (for the legally non-binding acts other than soft law see also 2.4. above).

### 3.6. Competences to adopt EU soft law other than recommendations and opinions

In the above sub-chapters emphasis was laid on recommendations and opinions as the two legally non-binding acts mentioned in the catalogue of 'legal acts of the Union' contained in Article 288 TFEU. In addition to that, however, there is a number of further soft law acts mentioned in the Treaties,[1171] and again further soft law acts not mentioned in the Treaties but used in EU administrative practice.[1172] In the following, these two issues – other soft law acts than those referred to in Article 288 TFEU 1) in the

1169 For the example of EMA committees' opinions and the 'detailed explanation of the reasons for the differences' the Commission has to provide in case its draft decision deviates therefrom see Article 10 para 1 of Regulation 726/2004. In practice, this has resulted in a mere 'rubber-stamping' on the part of the Commission; see Orator, Möglichkeiten 145; for the role of committee expertise in the then European Medicines Evaluation Agency more generally see Gehring/Krapohl, Regulation.

1170 This similarity is one aspect of the concept of 'öffentliche Gewalt' [public authority] as coined specifically by *Goldmann* and *von Bogdandy*; see in particular von Bogdandy/Goldmann, Ausübung; Goldmann, Gewalt.

1171 That soft law may not only be referred to, but also be contained in primary law is exemplified by the Explanations relating to the Charter of Fundamental Rights, OJ 2007/C 303/02, which – according to their self-description – 'do not as such have the status of law, [but which] are a valuable tool of interpretation intended to clarify the provisions of the Charter' and, pursuant to Article 52 para 7 CFR, 'shall be given due regard by the courts of the Union and of the Member States'; for the soft law character of the CFR itself until its entry into force as primary law on 1 December 2009 see Opinion of AG *Colomer* in case C-553/07 *College van burgemeester en wethouders van Rotterdam*, para 22 (fn 23); see also Knauff, Regelungsverbund 315–318, with many further references; Müller-Graff, Einführung 156; Ştefan, Soft Law 19 f, with further references; for another soft law act relating to the EU's fundamental rights see Commission Recommendation 2017/761 on the European Pillar of Social Rights, the substance of which is reflected upon in the Interinstitutional Proclamation on the European Pillar of Social Rights of the European Parliament, the Council, and the Commission, 2017/C 428/09.

1172 *Láncos* distinguishes recommendations and opinions – which she refers to as 'formal [soft law] measures' – from other soft law measures such as communications or white papers ('non-formal [soft law] measures'); Láncos, Facets 16 f.



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Treaties and 2) only in practice – shall be addressed exemplarily, that is to say with no claim for completeness.

Apart from recommendations and opinions, the Treaties mention further acts which are legally non-binding and also otherwise fulfil (or rather: *may* – in their concrete form in a specific case – fulfil) the criteria of EU soft law (see in particular II.1.3.4. above). These are eg guidelines,[1173] warnings[1174] or conclusions[1175]. While it is difficult to clearly define recommendations and opinions (see 3.1.1. above), it is even more difficult to assign a specific meaning to those acts which would allow us to clearly separate them from each other on the one hand, and from recommendations and opinions on the other hand. Rather, in terms of shape and general effects they appear to be very similar to each other. Proposals,[1176] which could be added to the above (non-exhaustive) enumeration, can be defined more closely. Already from their name it can be concluded that they aim at initiating a decision-making process in a wider sense. Applying a systematic interpretation, it becomes clear that it is the Commission,[1177] exceptionally together with the High Representative,[1178] and, above all on the basis of the TEU, the High Representative on its own, which are entitled to make proposals.[1179] Article 293 TFEU provides for specific effects of Commission proposals: Where the Council acts on a Commission proposal, it may amend this proposal – exceptions apart – only by acting unanimously (para 1)[1180]; as long as the Council has not acted, the Commission may amend its proposal at any time during the decision-making procedure in a wider sense (para 2). The similarity between proposals and recommendations – both acts suggest a

1173 Eg Article 25 lit a, Article 50 para 2 TEU; Articles 26, 156, 171 para 1 TFEU (in conjunction with Article 172 TFEU).

1174 Eg Articles 121 para 4, 168 para 1 TFEU.

1175 Eg Articles 135, 148 para 1 TFEU.

1176 Eg Articles 95 para 3, 103 para 1 TFEU: see also case C-301/03 *Italy v Commission*, paras 21 f with regard to the character of a proposal.

1177 Exceptionally: its President; Article 246 para 3 TFEU.

1178 Article 22 para 2 TEU; Article 215 para 1 TFEU.

1179 Generally: Article 30 para 1 TEU (according to this provision, also MS are entitled to submit proposals to the Council); Articles 27 para 3, 33 TEU; exceptionally also in the TFEU: eg Article 218 para 9; on the High Representative's role in this context see also Marquardt/Gaedtke, Art. 27 EUV, para 3.

1180 With regard to proposals issued by the High Representative, it is to be noted that in the field of CFSP – in which the High Representative is acting predominantly – most Council decisions shall be adopted unanimously anyway (Article 31 para 1 TEU).



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certain action – is underpinned by the fact that, eg according to Article 129 TFEU, the legislator may act on a proposal from the Commission or (alternatively) on a recommendation from the ECB.[1181] According to Article 281 TFEU, to take another example, the European Parliament and the Council shall act 'at the *request* of the [CJEU]' (emphasis added) or on a proposal from the Commission[1182] which suggests that also the request may be[1183] very similar to a proposal and hence to a recommendation.[1184]

1181 Article 129 paras 3 f TFEU. When the Treaty provides for legislative action either on a *recommendation* from the Commission or on a recommendation from the ECB, it is clear that in this case it intends to exclude the effects of a Commission *proposal* according to Article 293 TFEU (eg Article 219 para 1 TFEU). When considering the important role the Council shall play in the context of the creation of exchange-rate systems for the euro in relation to the currencies of third states, the reduction of Commission power seems to be plausible. What is more, with regard to a matter of monetary policy, it would seem inappropriate to assign to the Commission a more important role than to the ECB; see also Häde, Art. 219 AEUV, para 1.

1182 Similarly: Article 308 para 3 TFEU with regard to the EIB.

1183 See also Article 153 para 3 TFEU (*argumentum* 'may'). With other requests, however, it is to be assumed that they are legally binding and hence do not qualify as soft law; see eg Article 48 para 2 TFEU: Where a member of the Council requests the matter to be referred to the European Council, this seems to grant a right to this member – and hence the request must be considered legally binding. This is confirmed by the wording in which the consequences are laid down: 'the ordinary legislative procedure *shall* be suspended' (emphasis added) and 'the European Council *shall*' (emphasis added) choose between two alternatives of reaction. Also the competence of the European Council to request the Commission, according to lit a *leg cit*, to submit a new proposal is legally binding; arguably confirming the legal bindingness: Langer, Art. 48 AEUV, para 87. There are a number of other provisions in which a request for referral is provided for; eg Articles 82 para 3, 83 para 3, 86 para 1 subpara 2 TFEU. Also these requests are legally binding. As a general rule, it can be said that requests are legally binding where procedural action (in particular a referral) or action which is content-wise not predetermined (submission of a report, delivery of an opinion, undertaking of studies etc) is asked for. Where a content-wise predetermined action is asked for by means of a request, the request is rather legally non-binding: eg an increase of the number of AG by the Council at the request of the Court (Article 252 TFEU; *argumentum* 'may') or the dismissal of the European Ombudsman if he/she no longer fulfils the conditions required for the performance of his/her duties or if he/she is guilty of serious misconduct by the CJEU at the request of the EP (Article 228 para 2 subpara 2 TFEU; *argumentum* 'may'). Having a look at other language versions of the Treaties, the more differentiated terminology (the German version, for example, distinguishes between a by tendency legally binding *Antrag* and a by tendency legally non-binding *Ersuchen*) may be indicative; but it may as well be misleading: eg in the case of Article 319 para 3 TFEU in which the *Ersuchen* of the



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Also Article 296 para 2 TFEU generally stresses the similar character of proposals, initiatives, recommendations and requests,[1185] and so does – with regard to the latter three acts – Article 289 para 4 TFEU.

Apart from the – considering Article 288 TFEU a canon of EU legal acts – extra-canonical soft law acts mentioned (elsewhere) in the Treaties, eg the Council guidelines and conditions referred to in Article 26 para 3 TFEU,[1186] there are a number of (potential[1187]) EU soft law acts in practice which are not mentioned in the Treaties, such as communications,[1188] standards or codes of conduct[1189].[1190] These acts are adopted by all kinds of EU bodies in all kinds of policy fields. That they are not (expressly)

EP or the Council is certainly legally binding; see Niedobitek, Art. 319 AEUV, para 19. In case of a request based on secondary law, its qualification also depends on its form: see joined cases C-293/13P and C-294/13P *Del Monte*, para 183.

1184 For a recent request of the CJEU on the reform of the preliminary reference procedure see <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf> accessed 28 March 2023. A request may also be used in order to evoke a recommendation or a proposal; see Article 135 TFEU. That this provision, *inter alia*, refers to Article 140 para 1 TFEU, in which Commission reports are mentioned, but not recommendations or proposals, does not mean that reports are to be equated with recommendations/proposals, but rather that also these reports may be requested by the Council or a MS on the basis of Article 135 TFEU; see Häde, Art. 135 AEUV, para 5, with a further reference.

1185 See Calliess, Art. 296 AEUV, para 34. Opinions – in spite of their being listed in Article 296 para 2 TFEU, as well – have a slightly different character in that here the focus is laid on uttering one's point of view, and less on instigating certain action of others. These two purposes, however, may as well overlap (see 3.1.1. above).

1186 Critically as regards the exclusion of the EP and stressing the practical irrelevance of this provision: Korte, Art. 26 AEUV, para 42; sceptically as regards the intended self-binding effect of these acts: M Schröder, Art. 26 AEUV, paras 37 f.

1187 As was noted above (see II.2.1.2.), it may be that such acts lack any normative content and are limited, for example, to a mere summary of the relevant legal provisions. In this case, of course, the act does not constitute soft law and none of the scrutiny applied here is required. It may happen, though, that the provision of information complemented by a mere wish is understood as an (implicit) command to act; see the case T-193/04 *Tillack*, para 79. For the notion of 'regulation by information' see also Hofmann/Rowe/Türk, Administrative Law 551.

1188 Exceptionally (and inadequately so), communications may contain legally binding provisions; see case C-135/93 *Spain v Commission*, paras 3, 10, 18; for the exceptionality of these circumstances see case C-292/95 *Spain v Commission*, paras 28 ff; see also Aldestam, Soft Law 22 ff.

1189 Eg the Code of Conduct for business taxation (1997), adopted by the Council and the representatives of the governments of the MS meeting within it; see Gribnau, Code 67; for examples of codes of conduct in public international law see Bothe, Norms 81 f.



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mentioned in the Treaties does not *per se* mean that their adoption is unlawful. A comprehensive interpretation – or a (justifiable) development of law – of competence clauses may disclose a primary law power to adopt a certain soft law act (for soft law powers laid down in secondary law see 3.7. below). When examining whether or not a competence to adopt an extra-canonical soft law act not expressly mentioned in the Treaties exists, it is advisable to 'convert' – conceptionally at least – the respective soft law act into a soft law act the body at issue is expressly empowered to enact in primary law (if any). This may be in particular a recommendation or an opinion, and – in the case of the Commission – a proposal, respectively. Where this conversion is possible and an according competence (eg to adopt a recommendation) exists, the power to adopt the act at issue can be affirmed. Where this conversion is not possible, the interpretation of the relevant Treaty provisions may still reveal that the power to adopt the act at issue is actually conferred, but the interpretative 'exercise' is certainly more demanding then. The malleability of the terms 'recommendation' and 'opinion' makes it difficult to think of a soft law act which does not allow to be 'materially' assigned to ('converted into') either category, though.[1191] That these acts bear varying names, and may, if at all, be published in sections of the OJ different from those of 'regular' recommendations or opinions (or proposals) does not harm in the given context (see 3.1.2. above). It is their normative substance which matters. In these considerations again the *numerus clausus* concept shimmers through.

1190 As regards 'guidelines', it is to be noted that also the Treaties provide for their adoption, eg in Article 5 TFEU or – as was mentioned before – Article 26 para 3 TFEU. The guidelines of the Governing Council of the ECB are even considered to be legally binding for the ECB's Executive Board; see Article 12.1 of the Statute of the ESCB and of the ECB; see also C-355/10 *European Parliament v Council*, para 82, with regard to the binding effects of guidelines contained in Regulation 562/2006 (a meanwhile outdated version of the so-called 'Schengen Borders Code'). It follows that the term guidelines is used, in the context of EU law, both within and outside the Treaties, to describe both legally binding and legally non-binding rules.

1191 See Knauff, Regelungsverbund 372, emphasising the fact that new soft law acts in general conceptually resemble soft law acts already in being.



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## 3.7. Special competence clauses in EU secondary law and in public international law

### 3.7.1. Introduction

The focus of this chapter is the competences to adopt EU recommendations and opinions. In the preceding sub-chapters we took a look at the Treaty competences to adopt recommendations and opinions as well as Treaty competences to adopt extra-canonical soft law in practice. In order to supplement this view, we shall now address examples of cases where the Treaty competences to adopt recommendations and opinions are 'concretised' in secondary law on the one hand, and where soft law powers are granted to EU bodies in public international law, on the other hand.

The provision of soft law powers in EU secondary law must have a sufficient legal basis in primary law. Secondary law often sets out soft law powers of EU institutions, bodies, offices and agencies in the framework of certain procedures which are not explicitly mentioned in the Treaties. With the methodological toolkit referred to above, it is then to be examined whether or not the Treaties allow for the provision of these competences. Listing all relevant secondary legislation, let alone depict it, would not be a viable approach to address this phenomenon. Rather, two examples – namely Regulation 182/2011 (the so-called Comitology Regulation) and Council Regulation 168/2007 (the founding regulation of the Fundamental Rights Agency [FRA]) – shall be analysed with a view to the soft law powers they confer on comitology committees and the FRA, respectively. Thereby two important groups of actors not empowered in the Treaties – comitology committees and European agencies – shall be exemplarily addressed. In Part IV of this work, further examples of secondary law, vesting in particular the Commission and European agencies with soft law powers, shall be presented and analysed, and their legality shall be examined in particular under V.3. below.

Also public international law may serve as a source of EU soft law powers. The respective acts of public international law which are in places concluded by a number of MS and which often 'substitute'[1192] – for different reasons – EU law proper must not contradict EU primary law. Therefore also in this case the legality of soft law must be examined with a view to the Treaties. In this context, the example of the Treaty on Stability, Coordina-

1192 For the notion of '*Unionsersatzrecht*' see 2.2.4.2.2. above.



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tion and Governance in the Economic and Monetary Union (TSCG) shall be presented and analysed with a view to its making use of EU institutions and vesting them with, or rather: concretising, their respective EU soft law powers.

### 3.7.2. Special competence clauses in EU secondary law

#### 3.7.2.1. Regulation 182/2011

The Comitology Regulation vests committees composed of representatives of the MS' bureaucracies with the competence to adopt an opinion on a (draft) implementing act proposed by the Commission.[1193] Depending on the procedure to be applied, the opinions exert a different effect.[1194] In the 'official view'[1195] the Regulation provides for two procedures: the advisory and the examination procedure.[1196] Where the advisory procedure applies, the Commission shall take the 'utmost account' of the delivered opinion.[1197] Where the examination procedure applies, the opinion may have different effects. In case it is positive, the Commission may adopt the act. The same is true – with some exceptions[1198] – where no opinion is delivered. In case it is negative, the Commission shall not adopt the act.[1199] In this latter case the Commission may either submit to the committee an amended version of the draft or refer to the appeal committee.[1200] The appeal committee shall replace the appealed opinion by its own opinion. If it is positive or if no opinion is delivered, the Commission may adopt the act. If it is

1193 While it appears that MS can freely choose the persons who ought to represent them (Article 3 para 2 and Article 10 para 1 lit c of Regulation 182/2011), the usual practice seems to have been that MS send officials from their respective ministries rather than independent experts; see Egeberg/Trondal, Agencies 871, with a further reference.

1194 On the Commission's endeavour to convince the committees content-wise see F Schmidt, Art. 291 AEUV, para 39.

1195 Craig, Administrative Law 134.

1196 For the respective scope of these procedures see Article 2 of Regulation 182/2011; for the procedural variations see Craig, Administrative Law 135 f.

1197 Article 4 para 2 of Regulation 182/2011.

1198 See Article 5 para 4 of Regulation 182/2011.

1199 See Article 5 para 3 of Regulation 182/2011.

1200 See Article 5 para 3 of Regulation 182/2011; for the composition and practice of appeal committees see Volpato, Delegation, in particular 179-181.



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negative, the Commission shall not adopt the act.[1201] That these opinions constitute EU legal acts can be deduced from different characteristics of the comitology regime: 1) The committees' composition is laid down in the Regulation, even if not in much detail.[1202] Although mainly composed of MS' representatives, the committees are created and institutionally belong to the EU,[1203] more particularly they are attached to (but not actually part of) the Commission. This is exemplified by the fact that they are chaired by a Commission representative.[1204] 2) The opinions provided by the committees are not exclusively, not even predominantly factual ('objective') expert opinions, but they also have a normative ('political') thrust.[1205] The national bureaucrats in the committees dispose of relevant knowledge and experience, but they are embedded in a necessarily political (national) administration.[1206] 3) The legal effects of the committees' opinions are laid down in detail in EU law.

While the qualification of the committee opinion in the advisory procedure as EU soft law is clear,[1207] this is dubitable in case of the examination procedure. Since in the examination procedure negative opinions – leaving

1201 See Article 6 para 3 of Regulation 182/2011.

1202 See Article 3 para 2 of Regulation 182/2011.

1203 See Türk, Comitology 347 f; see also W Weiß, Verwaltungsverbund 52 f: 'europäische Exekutivstruktur' [European executive structure]. The wording 'control by Member States' in Article 291 para 3 TFEU is not to be understood institutionally, but substantially. In substance, it is the MS controlling the Commission under the comitology regime; for the alleged political dominance of EU institutions within comitology see Craig, Administrative Law 122–126, with further references; for the 'ultimately autonomous decision-making powers of the Member States': Everson/Joerges, Europeanisation 526.

1204 For the qualification of the committees see also case T-188/97 *Rothmans*, paras 56 ff, in which the then Court of First Instance concluded 'that, [at least] for the purposes of the Community rules on access to documents, "comitology" committees come under the Commission itself' (para 62).

1205 See case T-13/99 *Pfizer*, paras 283 and 285.

1206 On the fact that the committees do not have to provide the reasons for their opinions see Weismann, Agencies 73.

1207 See the qualification of the opinion of a comitology committee in an advisory procedure by AG *Alber* as binding in a 'relaxed manner' by which he means that the Commission 'could not simply disregard such an opinion but was obliged to provide reasons for any divergences from it': Opinion of AG *Alber* in case C-248/99P *France v Monsanto*, paras 133 f; see F Schmidt, Art. 291 AEUV, para 29, according to whom the opinion has the character of a recommendation – a statement which is slightly confusing, but which stresses the soft law quality of the committee opinion.



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the exceptional cases pursuant to Article 7 apart – prohibit the adoption of the respective act by the Commission, and positive opinions arguably oblige the Commission to adopt the act,[1208] the question arises whether opinions adopted in the examination procedure can be qualified as opinions according to Article 288 TFEU, which *per definitionem* 'shall have no binding force'. Unlike with the opinions of the Commission and the EIB's Management Committee which – if negative – in combination have a prohibitive effect according to Article 19 para 5 on the EIB-Statute (see 3.5.3.1. above), here the obligatory (prohibitive/requesting) effect is laid down in secondary law only. Non-compliance with Article 288 TFEU can therefore not be explained as a *lex specialis-lex generalis* relationship. The committees' opinions cannot be interpreted as an act of self-obligation of the Commission. As was mentioned above, the committees are attached to, but are not themselves (part of) 'the Commission'.[1209] What is more, the obligatory effect of opinions (in the examination procedure) is provided for by a Regulation adopted by the EP and the Council. Rather than as an act of self-obligation the kind of opinion addressed here is – due to its legal bindingness – to be qualified as an opinion *sui generis*. Conceptually, it lies somewhere between an opinion proper and a decision, because it is binding but obviously shall be excluded from the jurisdiction of the CJEU (*argumentum* 'opinion'). In case of Regulation 2023/1114 the situation is different: The legislator empowers ia the ECB to adopt binding 'opinions' (see eg Article 24 para 2), but suggests in Recital 46 that the Court may review them. This is reflected in the special legal remedy against negative opinions provided in Article 6 of Regulation 182/2011 (referral to appeal committee). Concerns with regard to Article 288 TFEU, which does not provide for such an act,[1210] and with regard to a distortion of the EU's institutional balance[1211] – a committee addresses a legally binding opinion *sui generis* to the Commission – can be countered by referring to Article

1208 *Argumentum* 'shall' in Article 5 para 2 of Regulation 182/2011.

1209 In view of the long-lasting political battle the Commission has fought against comitology, alleging an act of self-obligation by the Commission carries a certain absurdity; see Craig, Administrative Law 127, with further references.

1210 With regard to the 'deficien[cy]' of Article 249 TEC, the predecessor of Article 288 TFEU, see Senden, Soft Law 53.

1211 See in particular the case 25/70 *Einfuhr- und Vorratsstelle*; see Craig, Administrative Law 116 f, with references to the case law and, with regard to the Lisbon regime, 136 f; see Ponzano, Acts 140 f, with regard to improvements brought about by the Treaty of Lisbon.



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291 para 3 TFEU which expressly stipulates that the EP and the Council 'shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers'.[1212] From a purely literal perspective, this wording appears to be wide enough so as to encompass legally binding forms of control. The Court in a number of cases has confirmed the lawfulness of comitology and hence also of the binding effects of committee opinions in certain procedures.[1213]

In view of the fact that also prior to the Treaty of Lisbon comitology was regulated by means of secondary law, and in view of the fact that also in these respective legal acts comitology committees were vested with the power to adopt such opinions, it can be assumed that the Masters of the Treaties by adopting Article 291 TFEU intended to address not only the non-obliging opinions,[1214] but – due the apparent limitation of the Council's role in favour of 'control by Member States'[1215] – also the *sui generis* opinions. While the Treaty of Lisbon has created a new system of executive legal acts to be adopted by the Commission,[1216] with regard to implementing acts according to Article 291 TFEU comitology was intended to live on.[1217]

1212 See also Kröll, Artikel 290 und 291 AEUV 210 f.

1213 Note in particular the Court's decision in case 5/77 *Tedeschi*, para 55, with regard to the Commission's power 'to issue, in accordance [with the respective comitology procedure], any other measure which it considers appropriate' in case its (first) proposal evoked a negative committee opinion; for the 'astonishment in the legal literature' about this statement of the Court (which acknowledges but does not dwell on the crucial fact that also a new proposal by the Commission could not be adopted in case of a negative committee opinion): Bergström, Comitology 148 f.

1214 For the effects of (negative) committee opinions under earlier comitology regimes see eg Mensching, Komitologie-Beschluss.

1215 Compare the in this respect different wording of Article 202 (3rd indent) TEC on the one hand, and Article 291 para 3 TFEU on the other hand; see also Ilgner, Durchführung 242 f; critically: Craig, Administrative Law 136 f.

1216 See eg Ilgner, Durchführung 197 ff; see also Working Group IX on Simplification, Report CONV 424/02 (29 November 2002), which – as it turned out: wrongly so – announced that '*any* change would not come under the Treaty directly but under secondary legislation' (emphasis added).

1217 This is also reflected in the application of the old Comitology Decision (Council Decision 1999/468/EC, as amended in 2006) even after the Treaty of Lisbon entered into force (until the adoption of Council Regulation 182/2011); see Ruffert, Art. 291 AEUV, para 12, with further references.



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### 3.7.2.2. Council Regulation 168/2007

According to Article 4 para 1 lit d of the founding regulation of the FRA, it may 'formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the [MS] when implementing Union law, either on its own initiative or at the request of the [EP], the Council or the Commission'. In Recital 13 of the Regulation it is added that this shall take place 'without interference with the legislative and judicial procedures established in the Treaty'. FRA opinions on Commission proposals or positions of the legislator in the course of legislative procedures shall, however, only be adopted upon a request by the respective institution.[1218] The opinions of the FRA clearly are legally non-binding. It is to be noted that in the Treaties no explicit competence for the FRA, or other European agencies for that matter (with exception of the EDA[1219]), to adopt opinions is laid down.[1220] However, primary law – implicitly[1221] – acknowledges that there are or at least may be agencies with a power to adopt legal acts.[1222]

Regulation 168/2007 was based on the so-called flexibility clause, now Article 352 TFEU. Hence in this case the competence to adopt opinions of a European agency, the FRA, hardly seems problematic. It was acknowledged that the Treaties (then the TEU and the TEC) did not provide the respective competences, and – for this reason – the Regulation was based on Article 308 TEC (now: Article 352 TFEU).[1223] In that sense, Regulation 168/2007 is, in the opinion of the legislator, an 'appropriate measure' within the meaning of Article 352 TFEU.[1224]

Also apart from the FRA, European agencies are vested with soft law powers (some of which shall be addressed in Part IV of this work) – on

1218 Article 4 para 2 of Council Regulation 168/2007; see von Bogdandy/von Bernstorff, Agentur 155 f.

1219 Article 3 of Protocol No 10 on permanent structured cooperation established by Article 42 of the Treaty on European Union.

1220 For explicit competences other than to adopt opinions see Article 88 TFEU (Europol, Eurojust).

1221 For the lack of an explicit provision see case T-510/17 *Del Valle Ruíz*, para 207.

1222 See in particular Articles 263 para 1 and 267 para 1 lit b TFEU; also referred to by the CJEU in case C-270/12 *United Kingdom v European Parliament/Council*, para 80.

1223 For the merits of Article 352 TFEU as a legal basis of European agencies see Kirste, System 273 f.

1224 For the role of the predecessors of Article 352 TFEU as a legal basis for EU soft law see Senden, Soft Law 178 and 184.



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various legal bases.[1225] Since most European agencies are not empowered by primary law directly, but only through secondary law, the question of competence is, first, whether the EU actually disposes of the power its legislator intends to delegate to the agency at issue, and – in the affirmative – second, whether the legislator is allowed to delegate it according to the so-called *Meroni* doctrine.[1226]

While these questions are to be answered case by case, on a general scale the following can be remarked: Generally speaking, it is to be noted that the Court appears to be permissive as regards the competence of the legislator to vest a new EU body with the power to adopt an opinion. With regard to what is now Article 114 TFEU, it not only allowed for the creation of a new agency, but also for vesting it with the competence to adopt opinions,[1227] more recently even for creating an agency with (hard) regulatory powers.[1228] Here the *Meroni* case law on the delegation of powers also to EU administrative bodies comes into play.[1229] In my view, this case law should not only be applicable to the delegation of hard but also of soft law powers.[1230] This does not seem to be what a strict reading of *Meroni* suggests.[1231] The delegation of 'a discretionary power, implying a wide mar-

1225 For the legal bases of the founding acts of European agencies (which regularly also are the legal bases of the empowerment of these agencies) see table in: Griller/Orator, Everything 32 ff.

1226 For the case of a delegation of powers the legislator may not exercise itself see 3.3.2.2. above.

1227 See case C-217/04 *United Kingdom v European Parliament/Council*, para 64. The Court is unclear about the methodological foundation of its finding; with regard to the legal basis for the establishment of the agency at issue in this case, the ENISA, see Ohler, Gemeinschaftsagentur 374. See also case C-380/03 *Germany v Council*, para 42; case C-358/14 *Poland v European Parliament/Council*, para 37, both referring to the legislator's discretion under what is now Article 114 TFEU.

1228 See case C-270/12 *United Kingdom v European Parliament/Council*, paras 88 ff; joined cases C-584/20P and C-621/20P *Commission v Landesbank Baden-Württemberg and SRB*, paras 105 f; for the compliance of the SRB's powers with *Meroni* see also case T-481/17 *SFL*, paras 126–132.

1229 Exemplarily for the large amount of literature published on the *Meroni* doctrine: Pawlik, Meroni-Doktrin, and the references made in this book; Simoncini, Regulation 14 ff.

1230 Appraising *pro* and *contra*: van Rijsbergen, Enforceability 117; see also Busuioc, Rule-Making 123 and *passim*; Ştefan/Petri, Review 531 f, 549 and *passim*.

1231 See case C-270/12 *United Kingdom v European Parliament/Council*, paras 63–68 (with reference to the *Romano* case). However, also these passages do not outright exclude the application of the *Meroni* criteria to (the delegation of) soft law powers; more restrictive is case T-755/17 *Germany v ECHA*, para 139, in which the



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gin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy'[1232] or, in the wording of more recent case law, 'discretion which may, according to the use which is made of it, make it possible to take political decisions in the true sense, by substituting the choices of the delegator by those of the delegatee, and thus bring about an "actual transfer of responsibility"'[1233] may be somewhat less likely where only soft law powers are delegated. However, it is by far not improbable, and hence compliance with the *Meroni* limits ought to be scrutinised also in these cases.[1234] For example: The delegation of the power of the Commission to propose legislative acts to a different body would certainly distort the EU's institutional balance (which underlies the *Meroni* criteria) and thus be unlawful, even though the Commission's right to initiate legislative processes does not entail hard law powers.[1235] Whether the 'execution of actual economic policy' is possible by means of a soft law act is to be examined with a view to the concrete regulatory regime as a whole. The BEPG referred to in Article 121 TFEU (see 3.5.2.1.2. and 3.5.2.2.3. above), for example, are legally non-binding measures, but they 'lay down the scope and the direction of policy coordination of EU

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General Court held that 'a grant of powers to such an entity is compatible with the requirements of the Treaties, if it does not concern acts having the force of law *and* if the powers granted are precisely delineated and amenable to judicial review' (emphasis added). While the wording of this passage suggests that the *Meroni* criteria in principle are to be applied also to soft law powers (*argumentum* 'and'), the ensuing contradiction of this statement (judicial review of EU soft law) renders it more likely that the General Court intended to say 'or', making these two elements alternatives. If that is the understanding of the General Court, in my view this understanding is not supported by the in this respect more open judgement in the case C-270/12 mentioned above, to which the General Court expressly refers.

1232 Cases 9–10/56 *Meroni*, 152.

1233 Case C-718/18 *Commission v Germany*, para 131.

1234 Apparently in favour of the applicability of *Meroni*: Opinion of AG *Bobek* in case C-911/19 *FBF*, para 86; Colombo/Eliantonio, Standards 334 f (with regard to standards); see also Senden/van den Brink, Checks 65 and 84, pointing at the risk of the *Meroni* criteria being circumvented by soft law, denying their applicability with regard to soft law and recommending, *de lege ferenda*, their adaptation so as to apply also to soft law powers; similarly: Rocca/Eliantonio, Soft Law 6; against the applicability of *Meroni* (with regard to the ESAs' powers to adopt guidelines and recommendations): Dickschen, Empfehlungen 215.

1235 A Commission proposal is binding only to the extent that it determines the subject of the (to be adopted) act; see also II.2.3. above.



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Member States'[1236] and hence, due to their principal role in the procedure laid down in Article 121 TFEU,[1237] bring about the execution of economic policy. Even though it is clear that the BEPG are eventually 'recommended' by the Council directly on the basis of primary law, and hence the *Meroni* criteria, for lack of a delegation of powers *by* an EU body (on the basis of secondary law), are not applicable, this example illustrates that soft law may very well be a relevant instrument for the execution of economic policy.

### 3.7.3. Special competence clauses in public international law

Apart from primary and secondary EU law, EU bodies may also be vested with soft law powers on the basis of public international law. In order to exemplify this possibility, an act of public international law which shows a particularly strong proximity to EU law shall be drawn on: the TSCG.[1238] Article 7 of this Treaty provides that the MS of the Eurozone shall 'commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a [Eurozone MS] is in breach of the deficit criterion in the framework of an excessive deficit procedure' (unless a qualified majority of these MS is against it). In other words, the Eurozone MS are obliged to act in accordance/decide in favour of such a Commission proposal or recommendation, unless a qualified majority of the Eurozone MS votes against it.[1239] The Treaty does not, strictly speaking, *transfer* a soft law power upon the Commission, but it enhances the requirements for acting against the Commission's soft law by the MS of the Eurozone.

1236 European Parliament, 'Broad Economic Policy Guidelines and Employment Guidelines' (2015) 1 <http://www.europarl.europa.eu/RegData/etudes/ATAG/2015/542652/IPOL_ATA(2015)542652_EN.pdf> accessed 28 March 2023.

1237 See Schulte, Art. 121 AEUV, para 13.

1238 With regard to this proximity see Article 16 TSCG, according to which this Treaty materially shall be incorporated in EU law within five years of its entry into force; for the current – not at all promising – stage of implementation of this plan see <http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-economic-and-monetary-union/file-integration-of-the-fiscal-compact-into-secondary-eu-law> accessed 28 March 2023; for the political reasons that the TSCG has not been adopted in the form of EU law in the first place see Fischer-Lescano/Oberndorfer, Fiskalpakt 9 f; with regard to the relationship of complementation and/or proximity of public international law with EU law see decision of the German *Bundesverfassungsgericht* in case 2 BvE 4/11, para 100.

1239 With regard to this reverse qualified majority voting see Palmstorfer, Majority, in particular 192 f (with regard to the TSCG).



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Thereby it creates a power of the Commission which is stronger than that provided for in the EU Treaties.[1240]

The possibilities for EU bodies to be granted competences by public international law are limited. The 'lending' of EU institutions (*Organleihe*[1241]) by public international law regularly requires the approval of all MS,[1242] in case of an *Organleihe* against current primary law it requires a formal amendment of the EU Treaties.[1243] The TSCG originally was not approved by all MS (the UK and the Czech Republic did not sign it[1244]), let alone accompanied by a Treaty amendment.[1245] Substantially, the conferral of powers shall, in particular, 'not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties'[1246] – a requirement which it appears to be relatively easy to meet.[1247]

1240 That the conferral of a proper decision-making power by an act of public international law would be problematic is at least suggested by the Court; case C-370/12 *Pringle*, para 161. For a somewhat similar example in the ESM-Treaty see Article 13 para 3 subpara 2 *leg cit*, according to which the Commission shall only sign a MoU (on behalf of the ESM) where it is in compliance with EU law, 'including any opinion, warning, recommendation or decision addressed to the ESM Member concerned'. Again, the effects of EU soft law (here: on public international law) are strengthened by an act not belonging to the EU legal order; see also 2.2.4.2.1. above. Note that in case of non-compliance of a provision of the TSCG with Union law, its Article 2 para 2 provides that this provision shall not apply; sceptically with regard to legal certainty: Fischer-Lescano/Oberndorfer, Fiskalpakt 13.

1241 For an explanation of this term (in a different context) see van Hoek/Luchtman, Convention 494.

1242 See Opinion of AG *Jacobs* in joined cases C-181/91 and C-248/91 *European Parliament v Council*, para 13, also referring to the Commission's voluntariness; see also Craig, Pringle 268.

1243 On the obligatory character of Article 48 TEU see Ohler, Art. 48 EUV, para 26. For the argument that 'almost everything' in the TSCG could have been enacted pursuant to the Treaties see Craig, Pringle 276.

1244 The Czech Republic acceded to the TSCG in 2019 and the UK ceased to be a MS in 2020. Croatia joined the EU in 2013 and the TSCG in 2018.

1245 For an account of the in this respect critical approaches of the government and parliament respectively of the UK: House of Commons, Treaty 15–18; sceptically as regards the evasion of the requirement of agreement among all MS brought about by international treaties facilitating what is called 'differentiated integration': Peers, Form 40.

1246 Case C-370/12 *Pringle*, para 163.

1247 See Craig, Pringle 278.



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### 3.8. The effects of a lack of a legal basis

Having discussed the legal bases for EU soft law acts – in particular: recommendations and opinions – laid down in primary law, and selected examples of such legal bases laid down in secondary law and, exceptionally, in public international law respectively, we may now consider the consequences, if any, of a lack of an adequate legal basis for an EU soft law act.[1248] This issue, in practice, is handled with much leniency or – due to its (alleged) subordinate importance in the discussion about soft law – even ignorance, and it benefits from the Court's presumption of lawfulness which arguably also applies to EU soft law acts.[1249] These benevolent circumstances of answering the question whether there is a competence for the adoption of a certain soft law act should not be misunderstood as arbitrariness, though. It goes without saying that where EU law requires a legal basis for an act to be lawfully adopted, it must also provide for consequences where no such legal basis is available. While, procedurally speaking, the CJEU may not be called upon to review the legality of a (true) EU soft law act according to Article 263 TFEU, it has confirmed its competence to do so in a preliminary reference procedure. Furthermore it may, in the course of whichever procedure, incidentally evaluate such an act (for the judicial review of soft law see Chapter 6 below).

From a constitutional/administrative law perspective, the lack of an adequate legal basis leads to the voidness of the act at issue. Relative voidness and absolute voidness (nullity) are to be distinguished from each other.[1250] Relatively void acts of EU (soft) law apply 'until such time as they are annulled or withdrawn'.[1251] This would be the regular case for EU soft law lacking an adequate (at least implicit) legal basis.[1252] Where, however, exceptionally an act is 'tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order [it] must be trea-

1248 Briefly addressing the entailing questions: Goldmann, Gewalt 502 f.

1249 See case C-475/01 *Commission v Greece*, para 18, with further references.

1250 Differenty with regard to soft law: Müller/Scholz, Banken 488; for the exceptional case of an *ab initio* nullity of an act, in which case it does not exert legal effects, see Dörr, Art. 263 AEUV, para 38.

1251 Case C-137/92P *Commission v BASF*, para 48. With regard to the *ex tunc* effect of the Court's stating the nullity of an act in the course of a preliminary reference procedure see Müller/Scholz, Banken 489, with a further reference; with regard to an only partial annulment of apparent soft law see Pampel, Rechtsnatur 128 f.

1252 See also Eliantonio, Soft Law 498.



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ted as having no legal effect'.[1253] Such acts are absolutely void; legally they do not even start to exist. They are – in the form of soft law – non-existent, non-acts.[1254] For a soft law act this would mean that it does not entail those effects which the EU legal order usually provides for such act, that is to say it does not (softly) demand compliance, and not even consideration is required. The 'irregularity' referred to above must comprise severe mistakes[1255] in the creation of the presumptive soft law act which may be of a procedural or of a substantive kind.[1256]

On a whole, the procedural requirements for the adoption of EU soft law may be lower than those for the adoption of EU law, but they do – in varying complexity – exist. In terms of substance, the complete lack of a normative content may cause the presumptive soft law act to be absolutely void. But for this qualification to be made, it must be clear that the creator of the norm actually intended to create a soft law act and not, for example, a paper issued for informative purposes only.[1257] Due to the generally decreased procedural requirements for the creation of soft law, it is much more difficult to shed light on the intention of the creator of the act. This makes it harder to distinguish (intended) soft law from non-normative acts than to distinguish (intended) law from soft law or non-normative acts. Acts which, in the form of soft law, would be absolutely void, may easily be (re)interpreted as policy papers with no (intended) normative effect. This is why the absolute nullity of an EU soft law act – and, in connection therewith, the question whether it can then be reinterpreted as something else – is rather a theoretical problem.

Practically more relevant is the relative voidness of EU soft law. In the case of the halted excessive deficit procedures against Germany and France[1258] the Court, *inter alia*, declared Council recommendations unlaw-

1253 Case C-137/92P *Commission v BASF*, para 49; see also case C-235/92P *Montecatini*, paras 96–98.

1254 See case C-235/92P *Montecatini*, para 77; see also Dörr, Art. 263 AEUV, para 38.

1255 For the reasons for (relative) nullity of a legally binding act see Article 263 para 2 TFEU; denying the existence of a *Fehlerkalkül* for a certain type of soft law output, namely the guidelines of European agencies: Raschauer, Leitlinien 42.

1256 See Hofmann/Rowe/Türk, Administrative Law 641, stating (with further references) that the criteria for absolute voidness, according to the CJEU's case law, have become 'clearer', but at the same time 'more difficult to fulfil than was the case in the early days of the E(E)C; critically: Senden, Soft Law 288 f.

1257 For the case of a 'purely informative' Eurogroup statement see case T-327/13 *Mallis*, paras 60 f.

1258 For the background to these cases see Hodson/Maher, Soft law 801 f.



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ful for their wrong legal basis and for a procedural shortcoming. The Court, arguably aware of its incompetence – according to the then prevalent view of the Court – to annul a legally non-binding act of EC law, referred to '[t]he *decision* to adopt […] recommendations' (emphasis added) and annulled the Council's conclusions 'in so far as they contain […] a *decision* modifying the recommendations previously adopted by the Council' (emphasis added).[1259] This misleading terminology cannot, however, alter the fact that the Court annulled – as far as the modification of recommendations (and not the decision to hold the excessive deficit procedure in abeyance) is concerned – an EU soft law act, namely a recommendation of the Council.[1260] With the case law on the Court's powers under Article 267 TFEU having become more generous (see 6.3. below), the annulment of soft law by the Court may become a more frequent occasion. In the case *Balgarska Narodna Banka*, '[h]istory was made'[1261] and a soft law act was declared invalid by the Court.[1262]

It is also possible that, for the sake of legal certainty[1263] (in the context of legally non-binding acts admittedly an ambivalent expression[1264]) – alternatively, and more broadly, we could say: for the sake of legal hygiene – the creator of the norm itself is called upon reacting to legality concerns (eg raised by the Court in the course of a preliminary reference procedure) and, if need be, to repeal/modify illegal soft law. Soft law, as is the case

1259 Case C-27/04 *Commission v Council*, paras 95–97 (with regard to the annulment of the modification of the 'recommendations previously adopted by the Council under Article 104(7) EC'; differently: View of AG *Tizzano* in this case, paras 133–137. Note that Article 104 para 13 TEC actually referred to 'decisions' when addressing – *inter alia* – the recommendations of the Council according to para 7 *leg cit*.

1260 See Häde, Aussetzung 757 f, with further references. For the legal non-bindingness of the Council recommendations addressed here see also Streinz/Ohler/Herrmann, Stabilitäts- und Wachstumspakt 1557.

1261 Marjosola/van Rijsbergen/Scholten, Force 1523.

1262 Case C-501/18 *Balgarska Narodna Banka*.

1263 For examples of cases in which soft law may actually increase legal certainty see references in Senden, Soft Law 333 (but see also 339).

1264 See Jansen, Methoden 1 f.



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with law, may normally be repealed/modified[1265] at any time.[1266] This is to be done by a *contrarius actus*, by another soft law act *of the same kind* that is.[1267] That means, for example, that a soft law act with general application cannot be repealed/modified by a soft law act directed to an individual addressee. This is reflected in the *CIRFS* case in which the Court, although dealing with an act which eventually turned out to be legally binding, very generally held: 'A measure of general application cannot be impliedly amended by an individual decision'.[1268] In another case the Court required the *formal* amendment of internal (only self-obliging) Commission rules.[1269] In this context, AG *Tizziano* may be quoted who said: 'I observe first that, in accordance with a general principle, the power of the institutions to adopt a particular act necessarily also includes the power to amend that act, on condition that the provisions on the exercise of the relevant power are complied with. […] The opposite conclusion would have to be drawn, in my opinion, only if it were shown that the act being amended had been adopted as part of a rigidly regulated procedure which carried an obligation for the competent institution to adopt the subsequent act in the procedural chain by a set deadline, after which the institution lost the power to take a decision'.[1270] Hence for the amendment of a certain soft law act in principle the same procedure as for its adoption is to be applied. Therefore a recommendation, for example, cannot be modified by a decision. The decision may contain norms constituting a modified version of the norms contained in the recommendation, which would thereby –

1265 See the examples of the Commission's first Banking Communication which was 'withdrawn', as of 31 July 2013, by its second Banking Communication, 2013/C 216/01 (para 94); ECB Recommendation ECB/2014/2 amending Recommendation ECB/2011/24 on the statistical reporting requirements of the European Central Bank in the field of external statistics; see also Article 126 para 12 TFEU which stipulates that the 'Council shall abrogate some or all of its […] recommendations […] to the extent that the excessive deficit in the Member State concerned has […] been corrected'.

1266 See von Graevenitz, Mitteilungen 172, with further references.

1267 See case T-251/00 *Lagardère*, para 130: '[A] body which has power to adopt a particular legal measure also has power to abrogate or amend it by adopting a *contrarius actus*, unless such power is expressly conferred upon another body'; see also Braams, Koordinierung 163; Häde, Aussetzung 757.

1268 Case C-313/90 *CIRFS*, para 44; see also Ştefan, Soft Law 170.

1269 See case T-185/05 *Italy v Commission*, paras 43 and 49.

1270 View of AG *Tizzano* in case C-27/04 *Commission v Council*, paras 134 f.



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*qua* legal bindingness – oust the recommendation,[1271] but it cannot modify the recommendation itself. As regards the repeal of soft law, it appears that not only a *contrarius actus*, but also a hard law act with the same scope – individual-concrete or general-abstract, as the case may be – can, *qua* superiority, 'eliminate' a soft law act.

### 3.9. The revisitation of the above approaches on the difference between recommendations and opinions, on whether there is a *numerus clausus* of EU soft law acts, and on the principle of conferral

Having analysed in more detail the explicit primary law competences to adopt soft law, in particular recommendations and opinions, and having addressed selected examples of relevant competences laid down in secondary law, we shall now reconsider three key questions with a view to whether the approaches taken at the beginning of this chapter require an adjustment: whether primary law provides for a difference between recommendations and opinions, whether it provides for a *numerus clausus* of EU soft law acts, and whether the principle of conferral also applies in the context of EU soft law.

As regards the difference between recommendations and opinions in our study of the competence clauses laid down in particular in the Treaties, the initial characterisation of the two EU soft law acts mentioned in Article 288 TFEU appears to have been confirmed. While recommendations are rather prescribed where suggestions or the initiation of a decision-making process, or the adoption of general (soft) rules are at issue, opinions rather constitute the output of consultation on (draft) measures or on actions already taken. Opinions may contain an expression of view ('draft measure X goes against our interests', 'situation Y is unlawful'), whereas recommendations rather suggest specific action ('measure X should be adopted and situation Y should be addressed in this or that way').[1272] The recommendation rather is an expression of *actio*, the opinion rather of *reactio*.

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1271 For the collision between law and soft law more generally see Klabbers, Redundancy 177. For the repeal of (part of) a Directive by a Regulation see eg Regulation 1907/2006, 'amending' Directive 1999/45/EC by deleting its Article 14.

1272 Article 154 para 3 TFEU provides that management and labour shall address an opinion or – 'where appropriate' – a recommendation to the Commission. This suggests a hierarchy of these two acts, meaning that the adoption of a recom-



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In practice, these subtle distinctions may easily blur. After all, and in particular due to the malleability of the terms at issue, the above characteristics do not apply in a compelling or absolute manner, but only by tendency. What is more, in some cases the characteristics of the act at issue may come close both to a recommendation and to an opinion, so that it appears to be little more than a matter of taste whether – *de lege ferenda* – in a certain procedure the power to adopt a recommendation or the power to adopt an opinion should be granted. Nevertheless, the final decision of the Masters of the Treaties or the legislator – in favour of a recommendation (and against an opinion) or in favour of an opinion (and against a recommendation), as the case may be – shall not generally be underrated as arbitrariness, because it must be assumed that most of the time it is the result of a conscious choice.[1273] Depending on this choice, the above understanding of recommendations and opinions shall feed into the interpretation of the respective act and the underlying competence clause, respectively.

As regards the question of whether Article 288 TFEU entails a *numerus clausus* of EU soft law acts, it is to be acknowledged that not only acts of secondary law but also the Treaties themselves provide for a variety of acts bearing different names, such as guidelines, warnings or conclusions.[1274] Only exceptionally, they have distinct effects, like the proposal according to Article 293 para 1 TFEU. Against this background, the *numerus clausus* argument does not seem to be supported by the Treaties other than by Article 288 TFEU itself. This confirms the preliminary conclusion reached above under 3.1.2.

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mendation is more demanding, in terms of its adoption and/or in terms of its consideration by the addressee.

1273 Take this as an example for a conscious choice on the part of the legislator: The Commission Proposal COM(2013) 27 final (Article 21) for what has become Article 25 of Regulation 2016/796 has provided for an ERA *recommendation* to be adopted. Article 25 of Regulation 2016/796, however, due to the Council's position at first reading in the ordinary legislative procedure, provides for the ERA to adopt an *opinion*. Another example is Directive 2002/21/EC which in its Article 15 laid down a competence of the Commission to render recommendations on relevant product and service markets. The Commission Proposal COM(2000) 393 final (in its Article 14) still stipulated a competence to adopt binding decisions. This competence was downgraded to a mere power to adopt recommendations in the course of the legislative procedure.

1274 In addition to that, the institutions, bodies, offices and agencies of the EU have adopted various kinds of soft law acts, which are not explicitly (by name) provided for in EU law – neither in primary nor in secondary law.



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The preliminary finding made under 3.2. above was that the main principle on the distribution of powers between the MS and the EU – the principle of conferral – does not only apply with regard to law-making powers, but also, for lack of an apparent alternative in the Treaties, with regard to soft law powers. From a legal point of view, the applicability can be confirmed with good reasons. But it must be acknowledged that there are also arguments against its applicability in the given context, and that also the case law of the Court leaves room for doubt here.

The existence of the competence category of supporting, coordinating and supplementing competences as laid down in Article 6 TFEU (which to a large extent entails the adoption of soft law acts[1275]), but also the existence of various explicit soft law powers, as analysed in more detail above, clearly are pro-arguments. If no conferral of powers were required for the adoption of EU soft law, why would the Treaties set up a competence category which is mostly concerned with the adoption of soft law acts, and why would they explicitly provide for specific soft law competences in so many different provisions? A heretic answer would be: Most of the time, these powers are explicated in order to structure the respective decision-making procedures. The Treaties clearly lay down eg the Commission's power to send a recommendation to the Council, for this institution to take a decision (see eg Article 143 para 3 TFEU), because this is how the MS – as parties to the Treaties – wanted the institutions to draw up the final decision. In other words: The intention of the provisions at issue is not to grant the Commission a power to send a recommendation to the Council, but to make clear how the procedure should go along. From my point of view, the procedural character certainly plays a role,[1276] but it cannot do away with the competence-conferring nature of these provisions.[1277] Both elements coexist. Where the Commission's power to adopt recommendations is at issue, it is easy to refer to the general competence clause of Article 292 TFEU, arguing that any provision mentioning this competence in a specific context is merely declaratory.[1278] But what about other institutions such as the ECB which are entitled to adopt recommendations only by special competence clauses? For them what was referred to above as special competence clauses is constitutive, not merely declaratory.

1275 See Klamert, Article 6 TFEU, paras 11–13; Senden/van den Brink, Checks 22.
1276 See also Article 292 (2nd sentence) TFEU.
1277 See also Senden/van den Brink, Checks 21 f.
1278 Here it is the existence of Article 292 TFEU itself which supports the argument that the principle of conferral applies to soft law powers.



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A middle way between the application of the principle of conferral on the one hand and the view that no competence at all is required for the adoption of EU soft law, on the other hand, is the *in dubio* approach.[1279] Also pursuant to this approach, EU soft law acts may only be adopted if an according competence exists. However, this competence can be assumed as long as there is no counter-indication, eg no legislative power of the Council excluding the power of the Commission to adopt general recommendations in this field. As the author contended above, while parts of the case law seem to support this view, the applicability of the principle of conferral – from a legal point of view – is more convincing.

From a practical perspective, the differences between the application of the principle of conferral and the *in dubio* approach seem to be marginal. For two institutions – the Commission and the Council – Article 292 TFEU, with regard to recommendations, provides for a generous regime anyway. Apart from that, it is in particular the application of the implied powers doctrine which allows the institutions, bodies, offices and agencies to adopt soft law far beyond their explicit empowerment in the Treaties or – on the basis of the latter – in secondary law. This concessive approach seems to reflect the system of the Treaties.[1280]

## 3.10. Résumé and transition

Before turning to the effects of soft law, let us briefly summarise the findings made in this chapter. Once the applicability of the principle of conferral with regard to soft law was discussed and preliminarily confirmed at the outset of this chapter, its focus was laid on the characteristics and the legal bases for the adoption of recommendations and opinions (the

1279 Arguing against the applicability of the principle of conferral, but in favour of a '"lite" competence test' in respect of soft law powers: Korkea-aho, Courts 489 f.

1280 If bodies of subordinate importance such as the ESC or the CoR have a far-reaching power to adopt opinions, it would be paradoxical to be overly strict with institutions such as the European Parliament. Still, the EP's legally non-binding output is to be assessed critically where there does not seem to exist a relevant competence (not even an implied one), eg its manifold resolutions relating to foreign policy – a field (CFSP) where the EP, with only few exceptions, is excluded from taking action. In our context, it is to be conceded that many of these resolutions do not have normative content, but are merely 'political'. Nevertheless, in some cases the result of a diligent application of the principle of conferral would probably exclude this kind of interference on the part of the EP.



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two legally non-binding 'legal acts' laid down in Article 288 TFEU), as provided for, explicitly or only implicitly, in primary law. On the basis of selected examples, a complementary view was taken, first, on the power to adopt soft law acts provided for in primary law which are not designated 'recommendation' or 'opinion' and, second, on legal bases for the adoption of recommendations and opinions laid down in secondary and in public international law. Thereafter, the effects on soft law of a lack of a legal basis were analysed. Eventually, the findings on the conceptual difference between recommendations and opinions, on the question whether the Treaties provide for a *numerus clausus* of soft law acts and on the applicability of the principle of conferral were revisited against the background of the broader picture of soft law competences in the Treaties, as provided for in Chapter 3.

In order to allow for a more nuanced conclusion, we shall concentrate on three main issues: 1) the applicability of the principle of conferral and its ramifications; 2) the different categories of legal bases; 3) the different functions of soft law as laid down in primary law. Subsequently, a transition to the next chapter shall be attempted.

1) It has been found that the better reasons speak in favour of the applicability of the principle of conferral in the context of soft law acts. The rule of law, one of the fundamental principles on which the EU is based, cannot allow for a normative system (with, in part, highly significant effects) emanating from it, which in respect of the fundamental question of competences is detached from the requirements of law.[1281] This result – that the principle of conferral applies also to soft law powers – is by no means mundane. The consequence, namely that each and every soft law act needs to be set up in law, indirectly at least also in primary law, is remarkable. The comparably generous case law of the Court on implied powers, which can be made use of also in the context of soft law, allows for affirming implicit competences, especially were a related hard law power already exists. This makes it considerably easier to confirm the existence of a legal basis for soft law, but by no means does it render the question of competence pointless, nor should the examination of this question be understood as a mere formality.

In the course of analysing the legal framework, in particular the case law of the Court, indicators of an alternative approach with regard to soft law powers could be found: Where no rule to the contrary exists, a soft

1281 See case 294/83 *Les Verts*, para 23.



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law power can be presumed (*in dubio* approach). While the methodological techniques applied in these two regimes – a positive and a negative one – vary, it is to be conceded that in practice, in particular due to the concessive effect of the implied powers doctrine, their respective results may be very similar.

2) As regards competences laid down in primary law, a distinction was made between general competence clauses on the one hand and special competence clauses on the other hand. Whereas general competence clauses allow for an encompassing power to adopt – in our case – recommendations or opinions, special competence clauses provide for such power only in a certain policy field or, even more restrictively, in a certain decision-/rule-making procedure. While the limits of special competence clauses are inherent to the clauses themselves, also general competence clauses are, in one way or the other, restricted in order to make sure that law-making procedures are not being evaded and that the powers of other institutions, bodies, offices or agencies – in a spirit of loyalty among these actors – are not being thwarted.

The respective competence clauses laid down in secondary law must all root in primary law, and an empowerment of EU bodies *qua* public international law shall, at least, 'not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties'.[1282]

3) The use of soft law may serve different political functions. Law being 'geronnene Politik', coagulated politics that is, it does not come as a surprise that at least some of these functions are also reflected in the Treaties.[1283] From the general competence clauses three main functions of soft law could be extracted: the support of decision-/rule-making, the initiation of (soft) decision-/rule-making, and soft decision-/rule-making. This underlines the versatile character of soft law which allows for flexibility not only because of its legal non-bindingness, but also because of the different forms it may take and hence the various contexts in which it may be used; for a more encompassing picture of the purposes of soft law see Chapter 5 below.

One final point is to be mentioned here, which did not constitute the focus of this chapter, but which emerged as a collateral finding, as it were. It is the special effects explicitly laid down in law, which some of the soft law acts dealt with here have. Recapitulating some of these effects shall form a transition to the subsequent chapter which addresses the different

1282 Case C-370/12 *Pringle*, para 163.

1283 See Goldstein/Kahler/Keohane/Slaughter, Introduction 387.



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categories of effects of soft law. Three examples (discussed above) shall serve as an illustration. First example: Where the Council acts on a proposal from the Commission, it may – exceptions apart – amend that proposal only by acting unanimously. Second example: According to the Statute of the EIB, the Management Committee of the EIB and the Commission shall submit an opinion on proposals for granting of finance. Where they both have launched a negative opinion, the Board of Directors of the EIB may not grant the finance concerned. Third example: Article 7 of the TSCG obliges the MS of the Eurozone to 'commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a [Eurozone MS] is in breach of the deficit criterion in the framework of an excessive deficit procedure', unless a qualified majority of these MS votes against it.

In these examples the effects of the respective acts are increased as compared to the regular effects of soft law. While the first one makes it more difficult to deviate from it, the second one – in case of two negative opinions from different bodies – obliges the addressee to comply, and in the third one again the commitment to soft law is increased. This shows that not only may soft law reach different degrees of (factual) effectiveness (ie different compliance rates), but its effects may also be reinforced *by means of law*. While in the first and in the third example the respective acts remain legally non-binding, in the second example the two acts – in combination – entail a legally binding (prohibitive) effect. These and other effects of soft law shall be dealt with in the following chapter.

## *4. Legal, factual and mixed effects of soft law*

### 4.1. Introduction

Having discussed the morphology of EU soft law and its legal bases, we shall now turn to its effects, that is to say the effects it has on its addressees. Compliance with rules can have many reasons, only one of which is the motive of norm-abidingness. Other motives may be fear from 'sanctions' (in case of soft law this may be eg peer pressure), the conviction that the (compliant) behaviour is morally right, reciprocity of the norm at issue, convenience or politeness. These motives may take effect consciously or subconsciously. Either way, they reach far into the personality of the individual/collegiate addressee, which is why the actual number of motives is



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in fact indeterminable. A necessary prerequisite for the decision whether or not to comply is consideration, that is to say the taking into account of a rule. Without consideration, the addressee cannot know about the normative content of the respective soft law act and hence (non-)compliance is entirely incidental. Whether or not soft law is considered or even complied with again depends on its respective effects, and these effects should be divided here in legal, factual and mixed effects.

The motives mentioned above have been evoked by the factual effects, but they may be underpinned by legal effects, ie effects laid down in law. In spite of the legal non-bindingness of soft law rules, there are legal rules or principles suggesting the consideration of or even the compliance with them. Schematically speaking, to ask for the factual effects means to ask why soft law *is* considered/complied with, whereas the legal effects tell us why soft law *should be* considered/complied with. While the 'voluntary compliance with the non-binding acts of the institutions is an essential element in the achievement of the goals of the Treaty',[1284] as the Court put it, the EU's legal order itself contributes to obtaining this 'voluntary' compliance. This appears to be necessary but not always sufficient, because the compliance rates with soft law, in the respective norm-creator's perspective, are sometimes hardly satisfactory, as the example of Commission Recommendation 2011/442/EU on access to a basic payment account shows. Eventually, this recommendation was, for lack of satisfactory compliance rates, replaced by Directive 2014/92/EU (the so-called 'Payment Accounts Directive').[1285] In the respective legislative proposal the Commission stated: 'Compliance with the Commission's Recommendation on access to a basic payment account was also largely inadequate […]. The introduction of a binding measure is the most effective and efficient way of achieving the set objectives. Only a binding legislative instrument can guarantee that the policy options are introduced in all 27 Member States and that the rules are enforceable'.[1286] This is an example of an outright replacement of soft law by law.[1287] In other cases the norm-creator contents itself with

1284 Case T-113/89 *Nefarma*, para 79.

1285 Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features; see Lengauer/Weismann, Zahlungskonten-Richtlinie.

1286 Commission proposal COM(2013) 266 final, 10.

1287 See also, for example, Article 6 para 4 of Regulation 2019/942, which carries a similar *telos*: '[The ACER] shall promote cooperation between the [national] regulatory authorities and between regulatory authorities at regional and Union



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measures making non-compliance with soft law less attractive, or at least less easy, eg by increasing, in the case of a soft law act addressed to the Council, the majority required for a decision not to follow it. The majority requirement in combination with the factual (increased) difficulty to reach this (larger) majority promotes compliance. Since here the legal aspect, the majority requirement, without itself containing a legal obligation to abide, is clearly linked to the factual reason – the increased ('political') difficulty to reach the larger majority – this and similar constellations shall be addressed under the heading 'mixed effects'. The factual effects in practice are highly important, but they – and the factual aspects of the mixed effects – can be better assessed applying quantitative, not genuinely legal methodology. This is why here they are addressed only cursorily to broaden the view, and, more particularly, to acknowledge the close inter-relation between legal and factual effects when it comes to the application of soft law in practice. This inter-relation is expressed not only in what the author refers to as mixed effects, but in practice exists also beyond this category.[1288]

As regards the legal effects, one sub-chapter shall be dedicated to the effects on MS, and one to the effects on EU institutions, bodies, offices and agencies. In both sub-chapters first the effects as fleshed out by the Court in its case law shall be presented. In this context it is to be emphasised, first, that the Court's jurisprudence is (constantly developing) case law, and, second, that each soft law act is individual. While the legal effects of two different soft law acts may be the same in a certain instance and while we can assume that, in principle, the results of a Court case on a specific soft law act are relevant also for other soft law acts, these two factors shall remind us not to generalise the effects of soft law uncritically and ignorant of the specificities of the individual case.[1289] Subsequently, the actual or potential legal reasons for these effects – namely certain principles

level and shall take into account the outcome of such cooperation when formulating its opinions, recommendations and decisions. Where the ACER *considers that binding rules on such cooperation are required*, it shall make the appropriate recommendations to the Commission' (emphasis added).

1288 For example: The addressee of soft law may partly comply with it because it deems it ought to (legal effect), partly because it is convinced by its content (factual effect); for the (in the practice of EU bodies neglected) role of argumentation in soft law acts see Coman-Kund/Andone, Instruments 183; Andone/Coman-Kund, EU soft law 12 ff.

1289 Arguing for a case by case assessment of whether the Court's case law is applicable: Wörner, Verhaltenssteuerungsformen 190 f, with references to different views in the literature; see also Hofmann/Rowe/Türk, Administrative Law 568.



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or provisions of primary law – shall be addressed. This is necessary because the Court does not always mention the reason *why* the soft law act at issue in a certain case entails the legal effects established in the judgement. Sometimes it merely states the effects.

The case of individuals/undertakings shall not be addressed here under a separate heading, but only to the extent that their being addressed may cause duties of the MS or of EU institutions, bodies, offices or agencies. The effects soft law may have on individuals/undertakings are not relevant for the compliance mechanisms presented and discussed in the following parts of this work. Beyond its legal non-bindingness,[1290] the Court so far has addressed the legal effects of EU soft law on individuals/undertakings mainly in the context of legitimate expectations/equality.[1291] **T**he general[1292] factual effects apply, *mutatis mutandis*, also to individuals/undertakings, the most important one being the fear from disadvantages, eg a fine imposed by the Commission.[1293]

## 4.2. Legal effects

### 4.2.1. Introduction

It can hardly come as a surprise that in a legal study the first and most intensively dealt with effects of soft law shall be its legal effects. But what are 'legal effects'? There is no uniform use of the term in legal discourse. When discussing this issue, we have to bear in mind two general theorems: 1) From the fact that an act is complied with (is effective, that means), no deductions can be made as to its legal nature (see also II.1.3.2. above). 2) Soft law is hierarchically subordinate to law and may not be contrary to law.

According to Article 263 TFEU, the Court shall review the legality of acts adopted by EU institutions, bodies, offices or agencies 'intended to produce

1290 Case C-322/88 *Grimaldi*, para 16: '[Recommendations] cannot create rights upon which individuals may rely before a national court'.

1291 For the legitimate expectations of individuals which soft law may create see 4.2.2.2.4. and 4.2.3.2.3. below; for further (potential) legal effects see H Adam, Mitteilungen 124, with regard to Commission communications.

1292 These do not include the special scenario addressed under 4.3.2.2. below.

1293 Case 60/81 *IBM*, para 19.



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legal effects'.[1294] With 'legal effects' the Court primarily understands 'legal bindingness' *vis-à-vis* third parties.[1295] This is in conformity with Article 288 TFEU which states that recommendations and opinions – two acts which are excluded from judicial review under Article 263 TFEU[1296] – 'shall have no binding force'. To which extent the Court is ready to acknowledge 'legal effects' other than legal bindingness is unclear. That it does in principle, it has famously expressed in the *Grimaldi* judgement: '[T]here is no reason to doubt that the measures in question are true recommendations, that is to say measures which, even as regards the persons to whom they are addressed, are not intended to produce binding effects [...]. However, [...] the measures in question cannot [...] be regarded as having no legal effect'.[1297]

A broader understanding of 'legal effects' could be the following: The legal effects of soft law are determined exclusively by law – above all by the requirement of an according competence to adopt soft law. As was mentioned above (II.1.3.), soft law is strongly connected to and exists only on the basis of law – it is a 'legal product', as it were.[1298] The decisive difference between law and soft law is that the former is legally binding, the latter is not. Hence the legal effects of soft law may not be legal bindingness (otherwise it would be law), but they are always legal – determined by law that is. This is the understanding which is applied in this chapter for the purpose of a categorisation of the effects of soft law. The effects of soft law are also called 'legal' to distinguish them from factual effects. That way, the (potential) legally prescribed effects of soft law – eg that it ought to be considered – are conceptually distinguished from eg the human desire to rely on official rules, as evoked by a soft law act. Exceptionally, EU soft law may be granted legally binding force by other acts, eg the ESM-Treaty, according to which '[t]he MoU shall be fully consistent with the measures

1294 For the inspiration this phrase has drawn from case 294/83 *Les Verts* see Senden, Soft Law 237.

1295 See eg case C-562/12 *Liivimaa Lihaveis*, para 46.

1296 It is only the recommendations and opinions of the Council, the Commission and the ECB which are *explicitly* excluded; see also 6.2. below.

1297 Case C-322/88 *Grimaldi*, paras 16 and 18; for the Court's original term 'legal effects' gradually changing to 'binding legal effects', indicating a larger variety of different legal effects, see Opinion of AG *Bobek* in case C-16/16P *Belgium v Commission*, paras 69–71.

1298 See already case 310/85 *Deufil*, para 22; for later case law referring to this decision see eg case T-110/97 *Kneissl*, para 51.



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of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned' (Article 13 para 3 *leg cit*).[1299] Such measures elevating the legal status of soft law may also be acts of EU secondary law explicitly incorporating as legally binding a certain soft law act.[1300] In this case, the content of soft law is rendered legally binding by means of law.

Sometimes also the expression 'indirect legal effects' of soft law is chosen in legal literature.[1301] What it means is, abstractly speaking, that soft law applied in combination with law indirectly becomes legally effective. For example: Where soft law is used to determine the content of fundamental principles of law or to interpret a Treaty provision, its content is applied 'as law' because both fundamental principles of law and the Treaty provision are legally binding.[1302] In my understanding, the practice that law is interpreted in accordance with pertinent soft law regularly[1303] reflects a factual effect: Due to the factual authority of soft law it is referred to in the interpretation of law. Where a legal norm makes reference to a soft law act, the content of the latter may become binding due to this reference (see also II.2.2.3. above).

As was mentioned above, the discussion of the legal effects of soft law shall be split in effects on MS on the one hand, and on institutions, bodies, offices and agencies of the EU, on the other hand. It comprises not only the Court's case law, but also legal principles of EU law which may (potentially) be the legal bases for the legal effects of soft law. The effects of EU soft law have been considered by the CJEU in a number of cases in which it

1299 For the interlinkage of economic policy soft law with financial support under the Recovery and Resilience Facility, thereby increasing its authority, see Bekker, Recovery.

1300 See Georgieva, Soft Law 257, with reference to the pertinent cases *Mangold* and *Kücükdeveci*; for the technique of referencing in EU law see Sarmiento, Soft Law 271–273; for the technique of referencing more generally see II.2.2.3. above.

1301 See H Adam, Mitteilungen 118 f; Georgieva, Soft Law 237 ff; see also Senden, Soft Law, in particular chapters 8–10. *Senden* takes a more differentiated approach, though; ibid 242 f. The terminology arguably is inspired by the 'indirect effect' of law used in the context of directives; see eg Craig/de Búrca, EU Law 244 ff.

1302 See Snyder, Agreements 463, who speaks of 'legal effects' to describe, for example, that an act may serve 'as source of information and […] aid in judicial interpretation'.

1303 The effects are legal only where law prescribes such interpretation; see eg the (legal) effects of the (non-binding) Explanations relating to the CFR, as provided for in Article 6 para 1 subpara 3 TEU.



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has described – in a multi-variant way – the location of soft law in the conceptual space between legal insignificance and legal bindingness.

### 4.2.2. Member States

#### 4.2.2.1. The effects of soft law according to the Court's case law

##### 4.2.2.1.1. Introduction

Already in its earlier case law the Court confirmed its competence and its principal obligation to interpret legally non-binding acts of then Community bodies.[1304] It has unmasked both (*prima facie*) soft law to be law and *vice versa*.[1305] In its judgement in the famous *Grimaldi* case, rendered in 1989, it approached the issue of Community soft law more comprehensively. In this case, the *tribunal du travail* of Brussels referred to the Court, *inter alia*, a question on the interpretation of a Commission recommendation addressed to the MS which concerned the adoption of a European schedule of occupational diseases. *Salvatore Grimaldi*, an Italian having worked in Belgium for about 30 years, contested a decision of the *Fonds des maladies professionnelles* which did not recognise the *Dupuytren's contracture*, from which *Grimaldi* suffered, as an occupational disease. The reason for the negation was that the Belgian schedule of occupational diseases, unlike the Commission recommendation mentioned above, did not list this disease.

With regard to the above Commission recommendation and with regard to a Commission recommendation on the conditions for compensation of persons suffering from occupational diseases, the Court concluded that 'there is no reason to doubt that the measures in question are true recommendations, that is to say measures which, even as regards the persons to whom they are addressed, are not intended to produce binding effects. Consequently, they cannot create rights upon which individuals may rely

1304 See case 113/75 *Frecassetti*, paras 8 f. In this case the Court does not deny the possibility to ask it for the interpretation of a legally non-binding Community act, even though it concludes that the recommendation at issue is not applicable in the given case; see also case 90/76 *van Ameyde*, para 15.

1305 See joined cases 8–11/66 Cimenteries, 92; case 19/67 Bestuur der Sociale Verzekeringsbank, 355; case 98/80 Romano, para 20. For an implicit reference of the legislator to this case law see Recital 46 of Regulation 2023/1114, with regard to binding opinions the ECB may adopt under this act.



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before a national court'.[1306] However, the Court adds, this does not divest such acts of any 'legal effect'.[1307] They may 'cast light on the interpretation of national measures' and in particular then national courts are obliged to at least consider them.[1308]

The contested[1309] *Grimaldi* judgement – which arguably can be applied also in the context of other forms of EU soft law[1310] – is only one (important) piece in the large puzzle of Court cases dealing with soft law. It addresses predominantly the legal effects of Commission recommendations on national courts, and – indirectly – also on the national executive.[1311] After this introduction through *Grimaldi*, we shall take a more systematic approach, covering the effects of various soft law acts on the *trias politica* of the MS: the legislative, the executive, and the judiciary.

#### 4.2.2.1.2. The effects on the legislative, the executive, and the judiciary of the MS

In respect of the effects of EU soft law on the MS, the Court generally stated that 'voluntary compliance with the non-binding acts of the institutions is an essential element in the achievement of the goals of the Treaty' and that 'express conferral [by the MS] of the power to adopt [such acts]' shows that.[1312] While compliance with EU soft law by the national legislator is indeed welcomed and certainly in the spirit of the Treaties, as it were, this cannot do away with the leeway MS have when confronted with EU soft law.[1313] This leeway excludes a duty to adopt national legislation in

1306 Case C-322/88 *Grimaldi*, para 16.
1307 Case C-322/88 *Grimaldi*, para 18.
1308 Case C-322/88 *Grimaldi*, paras 18 f.
1309 See eg Ruffert, Art. 288 AEUV, para 97, who describes the duty of national courts to consider recommendations as determined by the Court in *Grimaldi* as a binding effect, and hence as 'Rechtsfortbildung gegen den Vertragstext' [legal development against the text of the Treaty].
1310 See Kovács/Tóth/Forgác, Effects 65, with a further reference.
1311 See Sarmiento, Soft Law 267: 'nothing stops [the said effects on national courts] from being extended to national administrations as well'; supporting this view: case C-274/07 *Commission v Lithuania*, para 50.
1312 Case T-113/89 *Nefarma*, paras 79 and 85.
1313 See case 229/86 *Brother Industries*, 3763; see also Cannizzaro/Rebasti, Soft law 222 f, with references to further literature.



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accordance with soft law, let alone a duty to actually transpose the content of soft law into national law.[1314]

This leeway appears also to apply to the MS' executive. When the Court in the *Expedia* case states that 'the competition authority of a Member State may take into account the thresholds established in paragraph 7 of the *de minimis* notice [a Commission soft law act] but is not required to do so',[1315] *prima vista* this appears to be in contradiction with earlier judgements insisting on a duty to consider. However, the wording in the language of the case, ie French, is, in this respect, slightly different: 'l'autorité de concurrence d'un État membre peut prendre en considération les seuils établis au point 7 de la communication de minimis sans pour autant être obligée de s'y tenir'. This means that the authorities may take into account the *de minimis* notice, but are not obliged *to follow* it. Also the (other) translations considered here[1316] seem to reflect this meaning. However, also in these language versions consideration is voluntary.[1317] The *Cour de cassation* in *Expedia* – a preliminary reference case – did not specifically ask whether such a duty to consider exists,[1318] which is probably why the Court touches upon this issue only briefly.

AG *Kokott* in her Opinion in the *Expedia* case takes a much more pronounced stance on this question, claiming that the national authorities and courts cannot 'simply ignore[]' but 'must take due account of the Commission's competition policy notices, such as the *de minimis* notice, when exercising their powers under Regulation No 1/2003'.[1319] Since the Court did not make any reference to this passage of the AG's Opinion – neither to confirm nor to refuse it – the AG's approach, while being of interest as a legal opinion, does not help to elucidate the Court's view in this respect.

With regard to a Council recommendation on electricity tariff structures in the Community, the Court simply confirmed that it is not binding upon

1314 See eg Opinion of AG *Geelhoed* in case C-478/99 *Commission v Sweden*, paras 37–40.

1315 Case C-226/11 *Expedia*, para 31.

1316 These are the German, the Italian and the Spanish translation of the judgement.

1317 Similarly: Láncos, Core 775; see also case 37/79 *Marty*, para 10, and – likewise on the Commission's comfort letters which were in use in competition law – joined cases 253/78 and 1–3/79 *Procureur de la République*, para 18 (*argumentum* 'in no way').

1318 See case C-226/11 *Expedia*, para 13.

1319 Opinion of AG *Kokott* in case C-226/11 *Expedia*, para 38. For the application of the *de minimis* notice in Dutch case law see Senden, Soft Law 139.



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MS[1320] and in respect of Explanatory Notes of the Commission it stated that they are an 'important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force'.[1321] In a recent case on one of the Commission's Communications on State aid for banks,[1322] the Court confirmed that it is not binding upon MS (in general), without thereby dwelling on whether or not MS are obliged to at least consider it.[1323] In this case again it is the AG who elaborates this issue, claiming CJEU case law to lay down a duty of the MS authorities to take into account EU soft law.[1324]

As regards national courts, the CJEU in *Grimaldi* requested them to 'take into consideration' Commission recommendations (see above).[1325] In the aftermath of *Grimaldi*, the Court has, with different nuances in different

1320 See case C-207/01 *Altair Chimica*, para 43.

1321 Case C-666/13 *Rohm*, para 25, with references to further case law. For the case of a code of concuct of the Commission which went beyond the secondary law it intended to explain (and was therefore, as a 'measure intended to have legal effects of its own', annulled) see case C-303/90 *France v Commission*, paras 18–26.

1322 For an overview of these communications see Weismann, Crisis 385–387.

1323 See case C-526/14 *Kotnik*, paras 35 ff, in particular para 45; for a discussion of this case see Müller/Scholz, Banken 485. Similar already with regard to the effects of the Commission's 'comfort letter' (known from competition law): joined cases 253/78 and 1 to 3/79 *Procureur de la République*, para 13, and case 99/79 *Lancôme*, para 11: 'may take into account'.

1324 See Opinion of AG *Wahl* in case C-526/14 *Kotnik*, para 38, who – in order to prove his claim – only makes reference to the *Grimaldi* decision and AG *Kokott's* Opinion in the *Expedia* case.

1325 Sometimes EU soft law acts *expressis verbis* state that they are not intended to be binding on national authorities; see also case 229/86 *Brother Industries*, 3763, with regard to a memorandum stemming from the Commission: 'The Member States' general obligation to "facilitate the achievement of the Community's tasks" laid down in Article 5 of the EEC Treaty cannot be relied on in this case because no common definition of the origin of the goods has been provided […] and consequently the interests of the Community continue to be protected through independent assessments made by the national customs authorities for which the Commission's findings may be a source of guidance but have no binding force'. With regard to an act of public international soft law, namely the Aarhus Convention Implementation Guide of the UN Economic Commission, the Court, in a more restrained fashion, held that it 'may be regarded as an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material for the purpose of interpreting the convention, the observations in the guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention'; case C-279/12 *Shirley*, para 38.



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cases, roughly followed this path.[1326] The Court has reiterated many times that recommendations are 'not without any legal effect'.[1327] Rather, national courts are '*bound* to take recommendations into consideration […], in particular where such recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding provisions of EU law' (emphasis added).[1328]

In the *Kreussler* case the Court held, with regard to Commission guidelines, that they 'may provide useful information for the interpretation of the relevant provisions of European Union law and therefore contribute to ensuring that they are applied uniformly' which is why the national court 'may […] take account of that document'.[1329] It is unclear whether the Court – not referring to *Grimaldi* – wanted to apply a more lenient approach (*argumentum* 'may'[1330]) or whether this is an insignificant change of wording. Markedly different was the Court's wording in the case *Koninklijke* in which it held – with regard to the effects a general-abstract Commission recommendation has on the national courts, thereby referring to the *Arcor* case (which again makes reference to *Grimaldi*) – that 'a national court may depart from [this recommendation] only where [...] it considers that this is required on grounds related to the facts of the individual case, in particular the specific characteristics of the market of the Member State

1326 See case C-188/91 *Deutsche Shell*, para 18; case C-207/01 *Altair Chimica*, para 41; case C-410/13 *Baltlanta*, para 64, with regard to Commission guidelines; see also case C-89/95P *D*, paras 8 f, in which the Court held – with regard to a code of practice of the Commission, annexed to a recommendation – '[w]hoever is called on to judge the facts alleged has absolute discretion in assessing the probative value of the evidence adduced', the code not prohibiting the taking into account of specific evidence. Since the Court holds that the code 'cannot be interpreted' as prohibiting certain evidence in the relevant proceedings, it does not feel required to say anything about the legal bindingness of the code.

1327 Joined cases C-317–320/08 *Alassini*, para 40.

1328 Joined cases C-317–320/08 *Alassini*, para 40; see also Opinion of AG of *Ruiz-Jarabo Colomer* in case C-415/07 *Gennaro*, para 34; case C-911/19 *FBF*, para 71. In the *Balgarska Narodna Banka* case, the Court confirmed the obligation of national courts to take a certain EU recommendation 'into consideration', thereby referring to a recital of the underlying act of secondary law which placed the recommendation within a regime aimed at '[e]nsuring the correct and full application of Union law'; case C-501/18 *Balgarska Narodna Banka*, para 81; less strict in case C-62/20 *Vogel*, para 31: 'should be […] consulted'.

1329 Case C-308/11 *Kreussler*, paras 25 f.

1330 See also the consideration of the *Expedia* case above.



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in question'.[1331] This finding was later confirmed in another case where a duty to give reasons for deviating from a recommendation was explicitly provided for in secondary law.[1332]

As set out above (4.2.2.1.1.), it can be assumed that where the Court confirms a duty of national courts to take into account certain soft law, this duty applies also to administrative authorities.[1333] After all, these courts regularly (and among other things) decide on the legality of the decisions of the executive. It would therefore be inconsistent in this context not to apply – in principle – the benchmark applicable to the judiciary also to the executive.

In view of the Court's heterogeneous case law, it appears that also the specific creator of soft law and the broader legal context within which it was adopted are relevant for the legal effects it entails. This is underpinned by case law on acts produced by other actors than the EU institutions, in which the Court has considered this question only cursorily – with no clear outcome.[1334]

In conclusion, as regards the legal effects of soft law on the MS the Court does not appear to distinguish clearly between the three branches of public authority of the MS. Also as regards the (assumed) obligation to consider EU soft law, the Court's case law is fragmented. Nevertheless, there is a considerable body of case law in which a duty, on the part of the MS, to take the EU soft law act at issue into account is confirmed.

#### 4.2.2.1.3. *Prima facie* soft law which turns out to be legally binding

In the cases dealt with so far the Court has constantly upheld, even if not with an entirely homogeneous wording, the legal non-bindingness of the respective soft law act. On the contrary, in a number of other cases the Court stated that a *prima facie* soft law act was 'intended to produce binding legal effects'.[1335] The Court, for example, considered a Commission

1331 Case C-28/15 *Koninklijke*, para 42.
1332 Case C-277/16 *Polkomtel*, para 37.
1333 Sceptical: Arroyo Jiménez, Bindingness 21.
1334 See case C-106/14 *FCD*, para 28 (with regard to ECHA guidance); case C-613/14 *Elliott*, para 43 (with regard to private standards published by the Commission).
1335 Case C-355/10 *European Parliament v Council*, para 82; joined cases C-463/10P and C-475/10P *Deutsche Post*, paras 30 and 45; case T-96/10 *Rütgers*, para 34; case T-676/13 *Italian International Film*, para 34; for an early case in this context see



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Communication to exert binding effects due to its 'imperative wording' and regardless of its not having been notified to the MS.[1336] In its analysis, the Court also took account of the concrete circumstances of the case, namely that the Commission published its Communication after a directive on the same matter was withdrawn. A comparison of these two texts 'discloses parallels, in particular as regards the definitions, scope and content of those texts'.[1337] This 'indicates that the Commission was seeking, by means of the Communication, to secure the application of rules identical or similar to those contained in the proposal for a directive'.[1338]

With regard to a Commission act referred to as 'Code of Conduct', the Court held that it 'constitutes a measure intended to have legal effects of its own, distinct from those created by [the Regulation it is supposed to concretise], and that it is therefore a measure against which an action for annulment may be brought'.[1339]

Another case refers to Commission guidelines concerning State aid in the fisheries sector. The Court qualified these guidelines as 'one element of [the] obligation of regular, periodic cooperation [in the constant review of existing State aid by the Commission[1340]] from which neither the Commission nor a Member State can release itself'.[1341] To justify this mutual bindingness, the Court in particular brings forward that the MS at issue,

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joined cases 8–11/66 *Cimenteries*, 91; see also Scholz, Integration 53, with further references.

1336 Case C-57/95 *France v Commission*, paras 18 and 23; for an in-depth consideration of the wording of an act when examining its legal (non-)bindingness see case T-721/14 *Belgium v Commission*, paras 21–28; for the 'imperative, compelling language' which also true soft law acts may contain see Georgieva, Soft Law 227.

1337 Case C-57/95 *France v Commission*, para 12.

1338 Case C-57/95 *France v Commission*, para 12; see Hofmann/Rowe/Türk, Administrative Law 552; with regard to legally binding communciations see also case C-325/91 *France v Commission*.

1339 Case C-303/90 *France v Commission*, para 25; on this case see also Pampel, Rechtsnatur 119; see also von Bogdandy/Arndt/Bast, Instruments 96, who said: 'The borderline to an unlawful creation of new types of acts is crossed if the legal effects of an act become obscured'.

1340 This must be considered a specific framework of cooperation. The mere existence of the principle of sincere cooperation pursuant to Article 4 para 3 TEU would not be sufficient to trigger a binding effect; see also Senden, Soft Law 465. For an(other) increased form of cooperation apparently not reaching the required intensity see case C-428/14 *DHL*, para 43.

1341 Case C-311/94 *IJssel-Vliet*, para 37; see also case C-288/96 *Germany v Commission*, para 65; case C-313/90 *CIRFS*, paras 44 f; on these three cases see Láncos, Core 770–774.



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the Netherlands, has confirmed that State aid granted to the Dutch fisheries sector is in conformity with said guidelines.[1342] From this the Court deduces an approval of the guidelines on the part of the Netherlands. The Court thereby elevates the guidelines to an administrative agreement between the Commission and the Netherlands, which makes these rules different from regular soft law.[1343]

#### 4.2.2.2. The actual or potential legal reasons for these effects

##### 4.2.2.2.1. Administrative cooperation according to Article 197 TFEU

The unprecedented[1344] provision of Article 197 para 1 TFEU stipulates that '[e]ffective implementation of Union law by the Member States [...] shall be regarded as a matter of common interest'; its para 2 addresses the possibility of Union support for MS' efforts to improve their administrative capacity to implement Union law.[1345] Since para 3 provides that Article 197 shall be 'without prejudice to the obligations of the Member States to implement Union law', it is not clear whether a legal reason to comply with EU soft law can be deduced from para 1. It could be argued that there is no obligation of MS to comply with EU soft law anyway, hence no such obligation can be touched upon in the first place.[1346] However,

1342 See also Hofmann/Rowe/Türk, Administrative Law 574. This element of MS consent is also referred to – *ex negativo* – in joined cases T-132/96 and T-143/96 *Sachsen/Volkswagen*, para 209, with a further reference; for lack of MS consent, the 'appropriate measures' proposed by the Commission according to what is now Article 108 para 1 TFEU did not entail binding effect in case T-330/94 *Salt Union*, para 35. The cooperation element may not be downplayed – mere acceptance by a MS does not appear to be sufficient; see Eliantonio, Soft Law 506 f.

1343 Similarly in this respect: case C-313/90 *CIRFS*, paras 35 f; see Georgieva, Soft Law 236 f.

1344 See Chiti, Governance 53 f.

1345 See Schütze, Rome 1407 f, with regard to Article 197 para 2 TFEU and its (potential) consequences for the procedural autonomy of the MS; for the meaning of this provision with regard to 'horizontal soft law' see Lafarge, Coopération 80. For lacking capacity as a reason for MS' violations of EU law see Tallberg, Paths 630 ff; for the ambivalent role of capacity in the context of compliance see also Börzel, Noncompliance 41–43.

1346 The national law of a MS may provide for a binding effect of certain EU soft law. The national authorities are then legally bound by it pursuant to national, not EU law; see von Graevenitz, Mitteilungen 173, with further references.



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we may still ask: Does Article 197 TFEU in any way increase the *stimulus* to comply with, or at least to consider, EU soft law? Does it increase the authority of EU soft law? First, we need to find out what all the phrase 'effective implementation of Union law' referred to in para 1 encompasses. 'Effective' has a lot of different meanings in the context of EU law.[1347] In the given context, it is of only subordinate importance and therefore requires no further analysis. More important appears the term 'implementation'. In EU law,[1348] the term 'implementation' necessarily implies compliance – 'compliant implementation', strictly speaking, constitutes a pleonasm.[1349] 'Implementation' is also used in the context of EU soft law,[1350] and since the term 'Union law', used in an unspecified way, appears to encompass also Union soft law,[1351] the better reasons here speak in favour of a subsumption of EU soft law under the phrase 'effective implementation of Union law'.[1352] This means that EU soft law is encompassed by Article 197 para 1 TFEU.

In a next step it is to be clarified whether from the order that the '[e]ffective implementation of Union law by the [MS] […] shall be regarded as a matter of common interest' a 'legal plea' to the MS for consideration of or compliance with EU soft law can be deduced. It is argued by some

1347 See Ohler, Art. 197 AEUV, para 2.

1348 In the parlance of international law the terminology may be more differentiated: Haas, Hypotheses 21.

1349 Nevertheless, the *oxymora* 'incorrect implementation' or 'wrongful implementation' are common in so-called EU speak; see eg Commission, 'Monitoring the application of European Union Law. 2015 Annual Report', COM(2016) 463 final, 12; see also Andersen, Enforcement 113.

1350 See eg Commission, 'Cultural Heritage. Digitalisation, online accessibility and digital preservation. Report on the Implementation of Commission Recommendation 2011/711/EU 2013–2015' (2016). For the wide interpretation of the term 'implementation' see Budischowsky, Art. 197 AEUV, para 16, with references to the case law of the CJEU; Ohler, Art. 197 AEUV, para 4; Senden, Soft Law 322, with further references; see also case 16/88 *Commission v Council*, para 11.

1351 This is suggested by the facts that, first, EU primary law does not know the term 'soft law' and, second, Article 288 TFEU, also listing recommendations and opinions, is entitled 'The legal acts of the Union'. Also the judges of the CJEU do not seem to use the term 'soft law'; see Láncos, Core 759; Andone/Coman-Kund, EU soft law 9, who refer to the exceptional use of this term in legal acts, eg selected inter-institutional agreements; for the AG see references in Christianos, Effectiveness 327; more recently: Opinion of AG *Bobek* in case C-911/19 *FBF*, eg para 54.

1352 See, in contrast, Article 291 para 1 TFEU, according to which MS 'shall adopt all measures of national law necessary to implement *legally binding* Union acts' (emphasis added); see also case C-360/09 *Pfleiderer*, para 24.



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that para 1 is of a merely programmatic nature[1353] which would exclude a concrete command. Others interpret the meaning of 'common interest' as expressing a (low) level of integration and addressing a duty to avoid, as far as possible, actions which have a negative effect on other MS.[1354] Failure to consider, or to comply with respectively, EU soft law can have a negative effect on other MS, in particular where, in case of an act applicable to all MS, the other MS comply with it.

In my view, the generality of Article 197 para 1 TFEU renders it a provision with no concrete regulatory content.[1355] It is not entirely declaratory in nature, as it stipulates that the effective implementation of EU law by the MS 'shall be regarded as a matter of common interest'. From this command, however, it is difficult to deduce concrete obligations. A mere duty to *consider* EU soft law may possibly be read into the elevation of EU law implementation to a 'matter of common interest'. As was stated above, this argument cannot be countered by para 3, according to which '[t]his Article shall be without prejudice to the obligations of the Member States to implement Union law', because there is no general obligation of MS to implement (ie to comply with) EU soft law. However, as we shall see, there are Treaty provisions more strongly hinting at a MS' duty to consider EU soft law. Against this background, when arguing in favour of a MS' duty to consider EU soft law (or even duties going beyond that), more pertinent provisions or principles of EU law should be invoked (see below). Thus, in the given context Article 197 TFEU has little more than cosmetic effect.

#### 4.2.2.2.2. Sincere cooperation ('loyalty') according to Article 4 para 3 TEU

##### 4.2.2.2.2.1. Overview

Article 4 para 3 TEU lays down the principle of sincere cooperation, according to which 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.

1353 See Frenz, Verwaltungskooperation; Ohler, Art. 197 AEUV, para 1; Terhechte, Art. 197 AEUV, para 3; Weerth, Art. 197 AEUV, para 6.

1354 See M Schröder, Vollzug 672 f, describing the character of Article 197 para 1 TFEU as 'imperativ' [imperative]; Vedder, Art. 197 AEUV, para 4, both with further references.

1355 See Klamert, Loyalty 31, who argues that the regulatory content of Article 197 para 1 TFEU already follows from Article 4 para 3 TEU.



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The provision furthermore stipulates that MS shall take 'any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions' and that they shall 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

The duty of loyal cooperation of the MS with the Union has been contained in the Treaties ever since the establishment of the EEC[1356] and the Court has stressed its 'particular importance vis-à-vis the judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system'.[1357] With regard to the pertinent Article 5 TEEC which expressly enshrined obligations only of the MS,[1358] the Court held 'that there are legal obligations imposed on Member States which do not result from any specific action by the Council or the Commission, but which arise from their general obligation to act in a way consistent with the objectives and spirit of the Treaty. A resolution of the Council, adopted on the proposal of the Commission on an important issue of considerable difficulty for the Community, thus might[1359] give rise

1356 See Article 5 TEEC. For the early understanding of the principle of sincere cooperation in general as a mere 'statement of principle and political intent' see Klamert, Loyalty 234; comparing loyalty in EU law with the principle of good faith in public international law: Georgieva, Soft Law 245; for the role of good faith in public international law as a *stimulus* to consider legally non-binding acts see Miehsler, Autorität 40, with further references; for the practical experiences before national courts (Hungarian courts) see Kovács/Tóth/Forgác, Effects.

1357 Case C-2/88 Imm. *Zwartveld*, para 18. For the importance of the loyalty principle both for administrative authorities and courts see Pernice, Constitutionalism 724 f. For the relationship with the principle of substantive coherence of EU policies (enshrined in Article 7 TFEU) see Braams, Koordinierung 206 f.

1358 For the recognition of a general principle of E(E)C/EU law of mutual sincere cooperation by the Court see eg case 230/81 *Luxembourg v European Parliament*, para 37; case C-2/88 Imm. *Zwartveld*, para 10; joined cases C-36/97 and C-37/97 *Kellinghusen*, para 30. This principle also includes the duty of sincere cooperation of the institutions *vis-à-vis* the MS, which mutuality is now codified in Article 4 para 3 TEU, and between MS (often referred to as 'solidarity'). In the given context, however, only the MS' obligations *vis-à-vis* the institutions shall be addressed; for the difficulty (and the possible dispensability) of clearly separating loyalty and solidarity see Isak, Loyalität 309; see, however, case C-848/19P *Germany v Poland*, paras 37 ff, in which the Court fleshes out, in the context of energy policy, solidarity as a 'fundamental principle of EU law'.

1359 It is clearly indicated that the Court does not intend to generally elevate Council resolutions to legally binding acts, but that it pays tribute to the specific cir-



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to legal obligations'.[1360] More recently, the principle of sincere cooperation was interpreted as also obliging the MS to 'ensure, in their respective territories, the application of and respect for EU law'.[1361] That the duty of cooperation 'has no binding legal effect on the national legal [ie judicial] authorities', as the then Court of First Instance held in the *Tillack* case,[1362] cannot be confirmed in this generality.[1363]

The second sentence of Article 4 para 3 TEU expresses the MS' duty to 'take any appropriate measure […] to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions'. This duty only refers to the 'obligations' arising out of the Treaties or resulting from the acts of the institutions and hence does not appear to include legally non-binding EU soft law.[1364]

The third sentence of Article 4 para 3 TEU expresses the MS' duty to 'facilitate the achievement of the Union's tasks and [to] refrain from any measure which could jeopardise the attainment of the Union's objectives'. Its first alternative – to facilitate the achievement of the Union's tasks – cannot be understood as an obligation to comply with EU soft law. In the past, specific duties to inform – not a general duty to provide information – have been deduced from this provision.[1365] There is an exemplary evidence

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cumstances of the case (*argumentum* 'might'); in a related case, the Court stressed that the resolution was eventually 'formally approved' by the MS some days after its adoption; case 61/77 *Commission v Ireland*, 420.

1360 Case 141/78 *France v United Kingdom*, 2933. For an example of soft law allegedly concretising the MS' duties under Article 4 para 3 TEU and partly entailing legal bindingness see Müller-Graff, Art. 60 AEUV, paras 2 f, with a further reference.

1361 Opinion 2/13 *ECHR II*, para 173.

1362 Case T-193/04 *Tillack*, para 49; see H Hofmann, Decision making procedures 155–157.

1363 See Schill/Krenn, Art. 4 EUV, paras 88 ff. With regard to the compliance with agreements concluded by international organisations on the part of their respective member states which – for lack of an according provision (eg Article 216 para 2 TFEU) – are not binding on them, *Schermers* and *Blokker* said: '[T]he obligation of loyalty to the organization offers another ground for accepting such a provision, even where not expressly incorporated in the constitution'; Schermers/Blokker, Institutional Law, § 1787.

1364 When the violation of concrete obligations is at issue, the Court – in the context of a Treaty infringement procedure – sees no point in additionally scrutinising a violation of the principle of sincere cooperation; case C-392/02 *Commission v Denmark*, para 69; differently: Opinion of AG *Bobek* in case C-16/16P *Belgium v Commission*, paras 102 f.

1365 See Eekhoff, Verbundaufsicht 51; Obwexer, Art. 4 EUV, para 130, with further references to the CJEU's case law; see also Article 337 TFEU which, according



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that the legislator now explicitly invokes Article 4 para 3 TEU in cases in which it has earlier remained silent in that respect.[1366]

The second alternative prohibits measures which could jeopardise the attainment of the Union's objectives, irrespective of whether they go against (other) obligations emanating from EU law. Hence the wording of this provision would encompass a case in which a MS does not apply EU soft law, thereby jeopardising the attainment of the Union's objectives.[1367] Applying a wide interpretation of the term 'measure', this does not only encompass measures but also omissions (instances of failure to act) in contradiction with EU soft law. The EU undertakes to reach its objectives *also* by means of soft law. Cases in which the mere non-application of soft law (which does not – at the same time – result in the violation of a legally binding provision of EU law) could jeopardise the attainment of these objectives are exceptional (see also 4.2.2.2.2.2. below).

#### 4.2.2.2.2.2. The consequences for soft law

From the many concrete duties of the MS the Court has deduced from the principle of sincere cooperation, only the duty to apply national law in conformity with Union law[1368] appears to be promising when searching for a duty of or, at least, a 'legal *stimulus*' for MS to apply EU soft law. In view of the Court's case law, which essentially is located in the context of legally binding acts,[1369] its analogous application to EU soft law in general appears to be questionable, though (see in more detail 4.2.2.2.3. below).[1370] What

to the literature, does not itself entitle the Commission, but which is subject to concretisation through secondary law; see Jaeckel, Art. 337 AEUV, paras 1 f; Ladenburger, Art. 337 AEUV, para 2; Wegener, Art. 337 AEUV, para 1, each with further references.

1366 See eg Recital 5 of Directive 2015/1535, with regard to the MS' duty to notify the Commission of certain projects, as opposed to the respective Recital of the predecessor directive (Recital 5 of Directive 98/34/EC).

1367 See case T-113/89 *Nefarma*, para 79. For the malleability of these objectives, which should, according to *Klamert*, only entail binding effects for the MS where they have been concretised by a Union act see Klamert, Loyalty 291.

1368 See case C-306/12 *Welter*, para 30.

1369 See Schill/Krenn, Art. 4 EUV, paras 67 ff, with references in particular to the Court's case law.

1370 The Court has invoked the principle of sincere cooperation in the context of the question whether national courts have to accept the findings of an only provisional Commission decision; case C-574/14 *PGE Górnictwo*, paras 33 and 41. With



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we may deduce from this duty, however, is an increased authority (below the level of legal bindingness) of EU soft law.[1371] A MS is free not to apply it, but its application is still the expected case, hence a duty to justify, to give the reasons for deviation that is, could be read into the principle of sincere cooperation.[1372] It could also be referred to as an extended duty to inform – a duty which, admittedly in other contexts, has been read into the principle of (then) 'close cooperation' by the Court.[1373] It has stressed this duty to inform specifically in order 'to facilitate the achievement of the Commission's task of ensuring compliance with the Treaty'.[1374]

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regard to 'regular' law, however, the Court held that given the infringement of an obligation laid down in secondary law 'no purpose [is] served by considering the question whether it had thereby also failed to fulfil its obligations [according to the principle of sincere cooperation]': case C-374/89 *Commission v Belgium*, para 13, with reference to case C-48/89 *Commission v Italy*; similarly with regard to a primary law *lex specialis*: case C-18/93 *Corsica Ferries*, para 18; in other cases the Court is less clear in this respect; see Schill/Krenn, Art. 4 EUV, para 74.

1371 See also Brohm, Mitteilungen 111 and 178-183; Eekhoff, Verbundaufsicht 240, with regard to a duty to react to non-binding requests for information, inspection or redress; Hofmann/Rowe/Türk, Administrative Law 575; Pampel, Rechtsnatur 98 f, with further references; Raschauer, Leitlinien 37; Thürer, Role 134, who, as early as in 1990, argued that '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'; van Rijsbergen, Legitimacy 61 f. For the link between a duty to consider and a factual duty to comply see Arndt, Sinn 165.

1372 See Schaller, Intensivierung 425; Opinion of AG *Bobek* in case C-16/16P *Belgium v Commission*, paras 100 f; see also H Adam, Mitteilungen 83 (with regard to recommendations and opinions): duty 'ernsthaft [zu] prüfen' [to seriously consider] and to refuse compliance only 'mit ausreichender Erklärung' [with sufficient reasoning]; Everling, Wirkung 151, stressing the need for 'wichtige Gründe' [important reasons] for deviating behaviour; see also case C-28/15 *Koninklijke*, para 52, on the requirements of judicial review by a national court in this context; Recital 16 of Commission Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union, COM(2017) 487 final (which was not incorporated in Regulation 2019/452, which was eventually adopted on the basis of this proposal): 'The Member States should take utmost account of the opinion and provide an explanation to the Commission if they do not follow this opinion, in compliance with their duty of sincere cooperation under Article 4(3) TEU'.

1373 See case 804/79 *Commission v United Kingdom*, 1062; case C-285/96 *Commission v Italy*, paras 19 f; case C-459/03 *Commission v Ireland*, para 179. Arguing in favour of a generalisation of this duty where the interests of the Union are at risk: Klamert, Loyalty 235 f; differently: Schill/Krenn, Art. 4 EUV, para 68; for exceptions to a duty to provide information see eg Opinion of AG *Kokott* in case C-550/07P *Akzo Nobel*, para 137.



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Whereas such a duty to give the reasons for non-compliance with a soft law act, which in a number of cases is explicitly provided for in secondary law,[1375] so far has not been confirmed by the Court as a general obligation, it has, repeatedly and for a long time now, held that (certain) EU soft law acts are to be taken 'into consideration'.[1376] In this context, *Senden* referred to an 'obligation of effort, as opposed to an obligation of result'.[1377] AG *Kokott* has explicitly based her argument that 'national authorities and courts must take due account of the Commission's competition policy notices', EU soft law that is, on the principle of sincere cooperation.[1378] The Court appears to have fleshed out the ensuing duties – or at least to have attempted to do so – by emphasising the necessity 'to weigh on a case-by-case basis' the various Union policy interests at stake when deciding on whether or not to follow EU soft law.[1379]

In view of the dynamic approach the Court has been taking on close/sincere cooperation,[1380] it does not seem to be far-fetched that the Court may in the future come to confirm a duty to provide the reasons for non-compliance with EU soft law on the basis of Article 4 para 3 TEU.[1381] After all, also the case law on the pre-effect of directives imposes duties on the MS prior to the expiry of the implementation period, ie at a time when non-compliance with the directive is, according to Union law, in principle still lawful.[1382] The Court in this context held that 'according to

1374 Case C-372/05 *Commission v Germany*, para 76.

1375 Eg Article 16 para 3 of Regulation 1094/2010.

1376 See again case C-322/88 *Grimaldi*, paras 18 f; for the meaning of these words see also Láncos, Facets 88 f.

1377 Senden, Soft Law 350; for different readings of this MS' obligation see references in Korkea-aho, Courts 477.

1378 Opinion of AG *Kokott* in case C-226/11 *Expedia*, para 38; see also Opinion of AG *Wahl* in case C-526/14 *Kotnik*, para 38.

1379 Case C-360/09 *Pfleiderer*, para 31; see also Polley, Access 453, pointing at the limited competence of the EU in procedural matters which may have lead to the Court's reserved approach. Duties of information eg on a change of administrative practice – which could be relevant also in the case of non-application of soft law – are also known *between MS*; see case 42/82 *Commission v France*, para 36; see also Schill/Krenn, Art. 4 EUV, paras 100 f.

1380 For the changing understanding of 'loyalty' as expressed in literature and case law see Brohm, Mitteilungen 112.

1381 See A Geiger, Leitlinien; Nettesheim, Art. 292 AEUV, para 4; doubtful, but open: Georgieva, Soft Law 239 and 245.

1382 See case C-129/96 *Inter-Environnement Wallonie*, para 45; see also Klamert, Loyalty 107 f.



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the case-law of the Court, although the Member States are not obliged to adopt measures to transpose a directive before the end of the period prescribed for transposition, it follows from the second paragraph of Article 10 EC [now Article 4 para 3 subpara 3 TEU] in conjunction with the third paragraph of Article 249 EC [now Article 288 para 3 TFEU] and from that directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed by that directive'.[1383] The strong effects the Court has deduced from Article 4 para 3 TEU in this context – the pre-effect of directives – may serve to underpin the approach suggested here in the context of soft law.

In the field of cartel law it is argued by some that national authorities and courts shall be bound by the Commission's soft law output.[1384] However, only exceptionally, where otherwise the attainment of the Union's objectives would be jeopardised, this argument is plausible. The Court in two cases concerning common fisheries policy has affirmed the possibility of implying such duty to the principle of sincere cooperation.[1385] In the case 804/79 *Commission v UK* it had to deal with a situation in which the Commission has proposed conservation measures in the field of fisheries policy to the Council, which the Council itself could not agree upon in due time. Instead, the Council took over part of the Commission proposal in the form of 'guidelines' which, according to the Court, reflected the 'Council's intention to reinforce the authority of the Commission's proposals and, on the other hand, its intention to prevent the conservation measures in force from being amended by the Member States without any acknowledged need'.[1386] In essence, the Court declared these guidelines binding to the effect that their breach would constitute a violation of the principle of sincere cooperation. It held that Article 5 TEEC, a predecessor provision

1383 Case C-422/05 *Commission v Belgium*, para 62, with references to the Court's further case law. For the even more far-reaching duty of a MS to approximate its legislation during an (exceptionally) extended implementation period see case C-144/04 *Mangold*, para 72. This duty was affirmed without express reference to the principle of sincere cooperation, though.

1384 See eg Schweda, Bindungswirkung 1141 f, thereby conceding that the Commission and the German Federal Ministry for Economic Affairs do not share this view; arguing against *Schweda's* position: Pohlmann, Bindungswirkung.

1385 Case 32/79 *Commission v United Kingdom*, 2420 f and 2427 (with regard to a recommendation belonging to public international law); case 804/79 *Commission v United Kingdom*, para 28.

1386 Case 804/79 *Commission v United Kingdom*, para 25; for the facts of the case see in particular its paras 19–28.



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of Article 4 para 3 TFEU, 'imposes on Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation, has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action'.[1387] Against this background, *Senden* argued that a duty of the MS and their respective authorities to comply with EU soft law 'only exists when the soft law act at issue can be considered a specific expression of that principle; that is to say, when the soft law act establishes what the duty of cooperation actually entails as regards the matter in question'.[1388] In *Senden's* view, such specific expressions of cooperation can be found in the field of State aid law (soft law acts taken on the basis of what is now Article 108 para 1 TFEU[1389]) and competition law (particularly in the framework of what is now Article 101 TFEU[1390]), even though she stresses that 'institutional clarification' to that end would be desirable 'for the sake of legal certainty'.[1391]

This assessment was confirmed by the Court: With regard to Chapter IV of Regulation 1/2003, it held '[t]hat cooperation is part of the general principle of sincere cooperation, referred to in Article 10 EC, which governs the relationships between the Member States and the Community institutions. As the Court has held, the duty of sincere cooperation imposed on the Community institutions is of particular importance where that cooperation involves the judicial authorities of a Member State who are responsible for ensuring that Community law is applied and respected in the national legal system'.[1392] Whether this boils down to the bindingness of or at least a duty of the MS to consider the respective soft law acts, is left open by the court in this case.

1387 Case 804/79 *Commission v United Kingdom*, para 28. For the exceptional role of this and related judgements see Everling, Wirkung 151 f; Riedel, Gemeinschaftszulassung 127, with further references; von Bogdandy/Arndt/Bast, Instruments 116.

1388 Senden, Soft Law 356 and 443 f; see also ibid 356 f, with regard to a potential duty to transpose soft law into national law.

1389 See H Adam, Mitteilungen 107–113.

1390 With regard to the authorisations of national authorities by the Commission according to Article 105 para 2 TFEU, and the alleged legal bindingness of this authorisation in light of the MS' loyalty obligations, see Ludwigs, Art. 105 AEUV, para 10.

1391 Senden, Soft Law 446.

1392 Case C-429/07 *Inspecteur van de Belastingdienst*, para 21; reiterated in case C-428/14 *DHL*, para 30, with references to further case law.



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In a later case the Court – with a view to legally non-binding[1393] statements of position made by the Commission in the context of the execution of State aid-related Commission Decision 2007/374/EC – held that 'it must be borne in mind that application of the European Union competition rules is based on an 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 [...]'. In this context, 'national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under European Union law and refrain from those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU'.[1394] Where a national court has 'doubts or [...] difficulties' as regards the application of pertinent EU law, they 'must take [the Commission statements of position] into account as a factor in the assessment of the dispute before it and must state reasons having regard to all the documents in the file submitted to it'.[1395] While here the Court (once again) affirms a duty to consider on the part of the national courts, while from the Court's wording its eagerness to stress that the national court really *should follow* the Commission statements of position becomes clear, and while the Court seems to request the national court to include the Commission statements in its reasoning, at the same time it leaves no doubt as to their legal non-bindingness – also in the framework of competition (including State aid) law, a policy field which is determined by strong cooperation. As AG *Wathelet* said with reference to this judgement: Having to '"[...] take into account the guidance provided by the Council" (which the Commission has acknowledged in this case[]) is not the same thing as "being legally bound to follow it"'.[1396]

As mentioned above, cases of an increased authority of EU soft law, beyond a mere duty to consider, remain exceptional. They should not be made subject to lightheaded analogous application. In his Opinion in the *Kotnik* case, AG *Wahl* correctly pointed out: 'Although the Court has held that the provisions of such acts of "soft law" are, by virtue of the duty of sincere cooperation enshrined in Article 4(3) TEU, to be taken into due account by the Member States' authorities,[] that duty cannot be understood as making those rules binding – not even *de facto* – on pain of

1393 See case C-69/13 *Mediaset*, para 27.
1394 Case C-69/13 *Mediaset*, para 29.
1395 Case C-69/13 *Mediaset*, para 31.
1396 Opinion of AG *Wathelet* in case C-425/13 *Commission v Council*, para 181.



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eluding the legislative procedure set out in the FEU Treaty' (emphasis in original).[1397] What is more, due to the mutuality of this principle, it could be argued that sincere cooperation prevents EU institutions from insisting on MS' compliance with EU soft law, and to rely on the MS' assessment (ie the decision not to comply, which may follow from the MS' consideration of the respective EU soft law act).[1398]

#### 4.2.2.2.3. The principle of interpretation of national law in line with Union law

The requirement that national law is to be interpreted in line with Union law is another rule from which a duty to consider (or another expression of an increased authority of) EU soft law may be deduced.[1399] The Court held that this rule is 'inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it'.[1400] Sometimes it is also explicitly traced to the principle of sincere cooperation.[1401] Thus, it can also be understood as an add-on to the elaborations under 4.2.2.2.2.2. above. The relevant case law predominantly refers to the interpretation of national law 'in the light of the wording and the purpose of [directives]'.[1402] An analogous application to the case of EU soft law,

1397 Opinion of AG *Wahl* in case C-526/14 *Kotnik*, para 38; see also case T-721/14 *Belgium v Commission*, paras 43 ff; Selmayr, Art. 282 AEUV, para 129, with regard to the ECB's opinions.

1398 See eg joined cases T-208/11 and T-508/11 *LTTE*, para 97, in which the General Court stresses the mutual trust between EU institutions and MS resulting from the principle of sincere cooperation.

1399 The practically most frequent case is that EU soft law is concretising EU law. This may also reflect on national law where the latter is implementing EU law; for the reverse case – the interpretation of EU soft law in line with EU law – see case C-410/13 *Baltlanta*, para 65.

1400 Joined cases C-397–403/01 *Pfeiffer*, para 114.

1401 See Calliess/Kahl, Art. 4 EUV, para 98; Hatje, Art. 4 EUV, para 52, with reference to the Court's case law.

1402 Case 14/83 *von Colson*, para 26; drawing a line to *Grimaldi*: Arnull, Status; see also case C-106/89 *Marleasing*, para 8. A similar rule applies with regard to the relationship between public international law and EU legislation: 'Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community'; case



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whereby a duty to interpret national law in the light of the wording and purpose of EU soft law may be construed, is to be refused.[1403] The said obligation of MS results from the legal bindingness upon MS of directives or EU law more generally. Such a legal bindingness in the context of EU soft law is, by definition, excluded.[1404] Therefore no general duty of an interpretation of national law in accordance with EU soft law may be inferred.[1405]

However, from this principle something less, namely a duty of consideration of EU soft law,[1406] may be construed.[1407] The Court has, in a number of cases, affirmed that 'national courts are bound to take the recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions' (see 4.2.2.1.2. above).[1408]

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C-341/95 *Bettati*, para 20; see also Nollkaemper, Role 183–185, for the interpretation of national law in conformity with public international law.

1403 The *Grimaldi* case and the succeeding line of cases do not allow for such a reading; see also Opinion of AG *Bobek* in case C-16/16P *Belgium v Commission*, para 99, with further references; see furthermore Brohm, Mitteilungen 119–121; Eekhoff, Verbundaufsicht 174–176; Hofmann/Rowe/Türk, Administrative Law 575, with further references; Láncos, Core 761 f; Sarmiento, Soft Law 267 f; Senden, Soft Law 387–392, considering arguments in favour and against a duty to interpret national law in a way which is consistent with EU soft law, and eventually refusing it, arguing – *inter alia* – that such a duty would 'admit[] rights and obligations "by the backdoor", also for private parties'.

1404 See Korkea-aho, Courts 490 f, with further references. Unclear: Opinion of AG *Bot* in case C-362/06P *Sahlstedt*, in particular paras 93 and 96, suggesting that the Commission guidance limits the MS' discretion.

1405 This may be different under national law; see eg judgement of the German *Bundesverwaltungsgericht* of 1 September 2010 in case 6 C 13/09, in which the decision of a national authority going against a relevant Commission opinion was considered in excess of the authority's discretion.

1406 In the affirmative also Peters, Typology 413.

1407 This proximity is expressed by the word of the 'empfehlungskonforme Auslegung' [interpretation in accordance with recommendations] (coined by von Bogdandy, Bast and Arndt), which alludes to the widely-used term 'richtlinienkonforme Auslegung' [interpretation in accordance with directives]; von Bogdandy/Bast/Arndt, Handlungsformen 116; see also Brohm, Mitteilungen 120; Thomas Müller, Soft Law 115 f, contrasting the effects of soft law and the duty to interpret national law in accordance with directives. Not only may law be interpreted with regard to soft law. Conversely, also soft law must be interpreted with regard to the (underlying) primary or secondary law; see Ştefan, Soft Law 149–152, with references to the Court's case law; see also Gil Ibáñez, Supervision 79.

1408 Case C-55/06 *Arcor*, para 94, with further references.



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#### 4.2.2.2.4. Legal certainty, legitimate expectations, equality and effectiveness

The principle of legitimate expectations is strongly connected to the notion of legal certainty which both are 'part of the legal order of the Community'.[1409] It even appears that the protection of legitimate expectations is one prong of the principle of legal certainty.[1410] In that context, very generally the Court held that 'Community legislation must be clear and its application foreseeable for all interested parties'.[1411] The latter requirement ('calculability') cannot be applied (*per analogiam*) to EU soft law, even though legal certainty is considered a 'fundamental principle' of Union law.[1412]

It may be argued that – being an 'official act' of an EU body – an EU soft law act evokes a legitimate expectation of those concerned (eg individuals or undertakings) that it is complied with by its addressees.[1413] Thereby – indirectly – the addressees of EU soft law, which often are MS authorities, would be obliged to conform with EU soft law *vis-à-vis* individuals/undertakings.[1414] However, it is to be emphasised that only 'precise, unconditional and consistent assurances, originating from authorised,

1409 Case 205/82 *Milchkontor*, para 30; see also case 169/80 *Administration des douanes*, para 17; for the interwovenness of the two principles see Georgieva, Soft Law 252, with further references, also to the CJEU's case law; proposing an application in conjunction with Article 4 para 3 TEU in the context of EU soft law: ibid 255; for the principle of legitimate expectations in EU law more generally see Craig/de Búrca, EU Law 593–597, with reference to the pertinent case law; Sharpston, Expectations.

1410 See also Wörner, Verhaltenssteuerungsformen 189.

1411 Case C-325/91 *France v Commission*, para 26; see also case C-483/99 *Commission v France*, para 50; case T-358/11 *Italy v Commission*, para 123.

1412 Case C-143/93 *van Es*, para 27; case C-110/03 *Belgium v Commission*, para 30. For the nevertheless existing relationship between this principle and soft law see H Hofmann, Rule-Making 165.

1413 For the wide-spread presumption that compliance with a soft law act constitutes a 'safe harbour', constituting compliance also with (hard) law see eg Dickschen, Empfehlungen 146–148; T Möllers, Standards 159 and 162; Wörner, Verhaltenssteuerungsformen 188–190; with regard to a similar presumption in the context of European standards: Griller, Normung 29; with regard to public international soft law see Brown Weiss, Introduction 4; Friedrich, Soft law 181 and 185; Miehsler, Autorität 40, with further references.

1414 See Opinion of AG *Mazák* in case C-360/09 *Pfleiderer*, para 45; this view was not supported by the ensuing judgement of the Court; see Láncos, Core 768; critically with regard to the EU body's lack of responsibility *vis-à-vis* the individual/undertaking: Kühling, Telekommunikationsrecht, para 73; Schaller, Intensivierung 427 f.



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reliable sources'[1415] provided for in an EU soft law act in accordance with the applicable rules[1416] may create 'justified hopes',[1417] and that – on the part of those potentially protected – the threshold applied is that of a 'prudent and discriminating' actor.[1418] Such an actor can regularly be expected to recognise EU soft law as a legally non-binding act, which is why it cannot take compliance for granted,[1419] ie it cannot legitimately expect compliance by others.[1420] There is no 'soft law certainty', we could say.

There is one important exception to this unpredictability of application. Soft law in principle is binding upon its creators. Thus, their respective

1415 Case C-526/14 *Kotnik*, para 62; see also case T-72/99 *Meyer*, para 53, both with further references. While the Court in the *Kotnik* case is dealing with a soft law act, a Commission Communication on State aid for banks, the question in this case was not whether such an act may produce legitimate expectations, but whether its content infringes upon legitimate expectations. The Court did, as far as the question of legitimate expectations was concerned, not dwell on the legal non-bindingness of the act; AG *Wahl* did: Opinion in case C-526/14 *Kotnik*, para 48.

1416 See case T-242/12 *SNCF*, para 370, with further references.

1417 Case T-489/93 *Unifruit Hellas*, para 51; see Sharpston, Doctrine 90, with further references to the Court's case law. Where the creator of soft law merely lays down principles, no or only a very limited self-binding effect can be affirmed; see Ştefan, Soft Law 106, with references to the case law.

1418 Case T-489/93 *Unifruit Hellas*, para 51. For a case in which legitimate expectations related to a *draft* soft law act of the Commission were negated see case T-23/99 *LR AF 1998*, para 361.

1419 It is a quest of legal certainty, however, that the legal non-bindingness of an act be made clear by its creator; see Opinion of AG *Tesauro* in case C-325/91 *France v Commission*, para 21, with further references; for the case of changing rules see case C-340/98 *Italy v Council*, para 42, in which the Court held: 'Whilst the protection of legitimate expectations is one of the fundamental principles of the Community, economic operators cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained'. With regard to Commission guidelines in competition law see Pampel, Rechtsnatur 128.

1420 See also Georgieva, Soft Law 239, with further references; Heusel/Ballesteros/Kramer/Bently/Bertolini, EU law 174; case T-671/15 *E-Control*, para 85, in which the Court refused the argument that 'the mere fact that certain national regulatory authorities or transmission system operators have communicated to the applicant their desire to implement certain ACER conclusions contained in the contested opinion [was] capable of demonstrating that that opinion has binding legal effects'; refusing legitimate expectations of individuals based on Commission proposals: Opinion of AG *Jacobs* in joined cases C-13–16/92 *Driessen en Zonen*, para 36; see also case T-109/06 *Vodafone España*, para 109, with regard to the individual's/undertaking's rights of defence.



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compliance with soft law is (in principle) obligatory and hence can be (reasonably) foreseen. Due to the ever increasing intertwinement of EU and national administration,[1421] it could be argued that individuals/undertakings (*vis-à-vis* the MS implementing EU law) may, in specific cases, be entitled to have such expectation also *vis-à-vis* a MS authority.[1422] This expectation would then be caused by an act of EU soft law. That is to say that individuals/undertakings could take for granted that they will not be subject to corrective action by a MS authority where they act in compliance with EU soft law. The bindingness of EU soft law upon its creator would then – via the tool of legitimate expectations – be extended to the MS and their respective authorities. While this does not seem to apply to national courts, for national authorities involved in the adoption of the EU soft law act at issue – eg by taking part in the relevant decision-making procedure of a European agency as the creator of soft law – a 'Kollektivbindung' [collective bindingness] was proposed.[1423] In my view, this proposal is to be refused. As expectations in this direction would not normally come up in what was described above as 'prudent and discriminating' actor, they are not worthy of protection.[1424] Only where the MS authority at issue has itself taken action justifying certain expectations of individuals/undertakings – eg by continuously complying with a certain EU soft law act – a sudden deviating action by the authority may qualify as *venire contra factum proprium* and hence violate the principle of legal certainty (in combination with the legitimate expectations; see above).[1425] In this case the 'bindingness of

1421 See W Weiß, Solidarität 424 f, with examples and further references.

1422 See von Graevenitz, Mitteilungen 173, with reference to the case C-226/11 *Expedia*.

1423 See references in Dickschen, Empfehlungen 147 f, with regard to national courts, and with regard to the argument of 'collective bindingness'; for the possibility of factual effects in this constellation see 4.3.2.2. below.

1424 It may appear that the Court applied – in the specific field of competition law – a requirement that 'the administration may not depart in an individual case without giving reasons' not only to the Commission as the creator of the soft law act at issue, but also to the MS authorities (*argumentum* 'administration'); joined cases C-189, 202, 205, 208 and 213/02P *Dansk Rørindustri*, para 209; case T-73/04 *Le Carbone-Lorraine*, para 70. However, such an extended 'self-bindingness' would stretch the effects of soft law too far and also the indications in the above case law are too weak to confirm that assumption; see also Schwarze, Soft Law 243.

1425 See Beckers, Juridification 576, with references to CJEU case law, and 581 ff, with respect to the Code of Conduct for Business Taxation.



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EU soft law' upon the MS authority would follow from its own action, not from EU soft law as such.[1426]

A specific question of soft law to be dealt with in the context of legal certainty is retroactivity. It is to be said that soft law may principally exert retroactive effect under the same conditions as law, namely only exceptionally, when it is ensured that 'the change [ie the adoption of new soft law rules] was reasonably foreseeable at the time when the infringements concerned were committed'.[1427] For example: Persons 'involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation in the fact that the Commission will not exceed the level of fines previously imposed or in a method of calculating the fines'.[1428]

Guarantees of equality – another potential basis for an indirect binding effect of EU soft law on MS authorities (apart from legitimate expectations and/or legal certainty) – may facilitate not only the creation[1429] but also the actual application of soft law.[1430] EU soft law addressed (also) to the MS limits – on a principally voluntary basis – their respective room for manoeuvre. It is the suggestion of a certain political, legislative, etc action or a certain interpretation of law. In principle, these acts cannot oblige MS, not even under consideration of equality rights.[1431] However, where MS have decided to follow the suggested approach once, they may be obliged

1426 Conditions set by EU law may make it easier to trace a MS authority's behaviour in this respect; see eg Article 16 para 3 of Regulations 1093–1095/2010, providing for a comply or explain mechanism with regard to the ESAs' guidelines and recommendations and demanding the publication of non-compliant authorities, possibly including the reasons they have indicated; see also Simoncini, Regulation 155; differentiated: Tridimas, Indeterminacy 61.

1427 Joined cases C-189, 202, 205, 208 and 213/02P *Dansk Rørindustri*, paras 223 f; see also case C-63/93 *Duff*, para 20; for the application in the context of soft law see Ştefan, Soft Law 118 and 130.

1428 Case C-397/03P *Archer Daniels Midland*, para 22. These calculation methods are often specified in soft law acts.

1429 See case C-443/97 *Spain v Commission*, para 32; see more generally in this context Senden/van den Brink, Checks 32 f.

1430 With regard to equal treatment see case C-443/97 *Spain v Commission*, para 32; case T-2/90 *Ferreira de Freitas*, para 61, with many further references; case T-214/95 *Vlaamse Gewest*, para 89; see also Opinion of AG *Campos Sánchez-Bordona* in case C-625/15P *Schniga*, para 67; Senden, Balance 92; references in W Weiß, Leitlinien(un)wesen 258.

1431 See Senden, Soft Law 442.



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to consistently apply it also to similar cases in order to comply with the non-discrimination rules laid down in EU or the respective national law.[1432]

In conclusion, it cannot be excluded entirely that from the principles of legal certainty, of protection of legitimate expectations and of equality obligations of MS to apply EU soft law may arise, in particular where the MS themselves have taken certain action justifying these claims. However, these scenarios are rather exceptional.

Finally, the EU's effectiveness principle is to be examined. However, also from this principle as such no obligation of MS to apply EU soft law can be deduced. The *effet utile* may, however, be brought forward to strengthen an argument that a certain effect of soft law – eg a duty to justify non-compliance with EU soft law – follows from Article 4 para 3 TEU (see 4.2.2.2.2. above).[1433]

With regard to unlawful soft law acts, the above principles, if at all, only apply to a very limited extent. Where the illegality of soft law is blatantly obvious, there is no room eg for a protection of expectations or for equality-based claims on the part of those concerned.[1434] Where the illegality – as later on determined by an authoritative body such as the Court – could not reasonably be foreseen, considering the specificities of the case at issue the trust in the durability of the soft law act may very well be protected.[1435]

### 4.2.3. Institutions, bodies, offices and agencies of the EU

#### 4.2.3.1. The effects of soft law according to the Court's case law

Having dealt with the effects of EU soft law on MS, we shall now address its effects on the EU institutions, bodies, offices and agencies, as reflected upon by the Court, which shall again be dealt with in the three categories legislative, executive, and judiciary.

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1432 For soft law which content-wise promotes equality see Knauff, Regelungsverbund 479 f, 483, and 549, with regard to a duty to justify.

1433 See Brohm, Mitteilungen 116; Senden, Soft Law 85 and 442.

1434 See case C-313/90 *CIRFS*, para 45. Clearly unlawful action in principle may not give rise to a claim for equal treatment; for this principle see eg Reimer, Gleichheit.

1435 See von Graevenitz, Mitteilungen 172; Wörner, Verhaltenssteuerungsformen 203 f; see also joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie*, para 556, relating to a Commission Communication which was drafted in a misleading way and which was subject to (as the Court concluded: legitimate) expectations; joined cases C-75/05P and C-80/05P *Glunz*, para 65.



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As regards the legislative, the wide discretion this branch of the EU disposes of in its decision-making is to be mentioned first.[1436] This is reflected in particular in the leeway accorded to the Council when acting on a proposal/recommendation[1437] and, in particular in the ordinary legislative procedure, also to the EP (acting on a Commission proposal). Unless the legislator does not react at all,[1438] the consideration by the legislator of Commission soft law acts initiating rule-making is a necessary requirement for its reaction. Hence a 'necessity to consider' is inherent in the legislator's institutional position, according to which it can (in the majority of cases) only act upon an appropriate Commission proposal/recommendation.

Also the EU's executive principally seems to be bound to take into consideration EU soft law of other EU bodies.[1439] Since the EU's executive is by far the most important creator of EU soft law, the Court's case law is mainly about the – enhanced – effects of soft law *upon its creator*. Initially, this effect was affirmed by the Court in a number of staff cases. But which kind of bindingness is at issue here? In one of the first cases on this matter, the

1436 As a consequence of the legislator's discretion, the Court has even refused the Council's being bound by its prior announcements; see case C-4/96 *NIFPO*, para 31: 'Annex VII [to a Council Resolution], which expresses essentially the Council's political will to take account, in applying the future common fisheries policy, of the special needs of regions in which the populations are particularly dependent on fishing and related activities, cannot produce legal effects capable of limiting the Council's legislative powers'; see also Cannizzaro/Rebasti, Soft law 222; for the (principal) self-bindingness of EU soft law see 4.2.3.2.3. below.

1437 According to Article 293 para 1 TFEU, the Council may amend a Commission proposal by unanimity; concluding *e contrario*, Commission recommendations may (normally) be amended by qualified majority; see also (more in principle): Opinion of AG *Jacobs* in joined cases C-13–16/92 *Driessen en Zonen*, para 36.

1438 Normally the legislator is not bound to act; note eg that there is no deadline for the legislator's action during the first reading of the ordinary legislative procedure (Article 294 paras 3–6); see Schoo, Art. 293 AEUV, para 17; for an exceptional duty to legislate see case 13/83 *European Parliament v Council*.

1439 With regard to the Commission's duty to consider the soft law of the Council: Opinion of AG *Wathelet* in case C-425/13 *Commission v Council*, paras 176–178, with further references. Ambivalently with regard to the Commission's duty to consider ECHA guidance: case C-106/14 *FCD*, para 28. For the legal effects of *international* soft law on the Commission see case T-481/11 *Spain v Commission*, paras 78–81. While the Court stresses the freedom of the Commission to follow or not to follow standard recommendations of the UN Economic Commission for Europe addressed (also) to the MS of the EU, it confirms a duty of the Commission to at least take these standard recommendations into account (paras 80 and 85); more reluctantly with regard to MS' obligations in this respect: case C-279/12 *Shirley*, para 38.



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Court emphasised that the Council 'should have regarded itself as under a moral obligation to comply with [its internal staff rules]'.[1440] Also in an early staff case concerning the Commission, it held that '[a]lthough an internal directive has not the character of a rule of law which the administration is always bound to observe, it nevertheless sets forth a rule of conduct indicating the practice to be followed, from which the administration may not depart without giving the reasons which have led it to do so'.[1441] This '*Louwage* formula' since then has become settled case law,[1442] also with a view to other EU bodies[1443] and also beyond staff cases[1444] – in particular in the areas of competition and State aid law.[1445]

The Court seems to have taken a stricter approach when it held and confirmed on several occasions (in particular in the context of Commission output) that the creator of soft law 'cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law'.[1446] However, it is to be noted that the self-bindingness of soft

1440 Case 105/75 *Giuffrida*, para 17. Indeed, the Court intentionally left open the question whether or not the internal staff rules were to be considered 'a decision' (ie a legally binding act). The fact that the Court here spoke of a 'moral obligation', however, suggests that it implied the act was legally non-binding.

1441 Case 148/73 *Louwage*, para 12; see further references in: H Adam, Mitteilungen 119; See also the Opinion of AG *Ruiz-Jarabo Colomer* in case C-415/07 *Gennaro*, para 36, in which he stresses that the Commission may not depart from its soft law 'without good reason'. This seems to correspond to a more general understanding of soft law; *Laurent Cytermann*, *rapporteur général adjoint* with the French *Conseil d'État*, with regard to (French) soft law said: 'L'utilisateur peut s'en écarter s'il a de bonnes raisons de le faire mais il ne peut pas complètement l'ignorer'; <http://www.dalloz-actualite.fr/interview/droit-souple-quelle-efficacite-quelle-legitimite-quelle-normativite> accessed 28 March 2023; see also Virally, Décennie 29.

1442 Senden, Soft Law 412 f, with further references.

1443 See case T-23/91 *Maurissen*, para 42, without explicit reference to the *Louwage* case, but only 'to consistent case-law'.

1444 See eg case C-378/00 *Commission v European Parliament*, para 51.

1445 In this context, we need to underline that in the staff cases mostly internal acts were at issue, while the competition and State aid law cases regularly deal with external soft law. With regard to Commission-internal instructions, the Court emphasised that in principle they may entail 'no rights or obligations on the part of third parties' and annulled an instruction which did; see case C-366/88 *France v Commission*, para 9. The staff addressed by such internal instructions cannot be considered a 'third party'.

1446 Case C-464/09P *Holland Malt*, para 46; see also joined cases C-189, 202, 205, 208 and 213/02P *Dansk Rørindustri*, paras 186 and 194–196; case C-431/14P *Greece* v *Commission*, paras 69 and 70; case T-149/95 *Ducros*, para 61; case T-73/04 *Le Carbone-Lorraine*, para 70; for the field of State aid law see Ştefan, Soft Law 167 ff.



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law is not absolute and very much depending on the case at issue.[1447] The Court has indeed suggested that a soft law regime does not always have to be applied slavishly by its creator, but that – in the context of State aid and only 'in exceptional circumstances' – the Commission may grant an authorisation also where the criteria set out in its respective soft law act are not met.[1448] Such a deviance arguably is only allowed where it is not to the detriment of the party concerned,[1449] and where it applies to all (future) parties alike.[1450] In addition to that, soft law is not binding upon its creator when it has explicitly excluded any such effects,[1451] or when the soft law act provides for a wrongful interpretation of EU law.[1452]

As regards the legal effects on the judiciary, it is first to be noted that, since the Court is the highest authority in matters of EU law (in its own words having 'exclusive jurisdiction over the definitive interpretation of EU

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For the importance of the Commission's compliance with its soft law beyond the legal argument of self-bindingness see Opinion of AG *Geelhoed* in case C-125/05 *VW-Audi*, paras 34 ff.

1447 See eg the case of Commission Communication 'European agencies – The way forward', COM(2008) 135 final, in which the Commission uttered that it 'intends to […] [p]ropose no new regulatory agencies until the work of the evaluation is complete (end of 2009)' (pages 9 f). This intention was counteracted in particular by the legislative proposals to create the ESAs, as launched by the Commission in September 2009. It is questionable, though, whether the Commission has legally bound itself by this statement. The expression 'intends to' seems to leave some latitude for the Commission. Against the background of the then on-going banking crisis, from a political perspective it was comparatively easy to justify the proposed establishment of the ESAs as necessary deviation from the Commission's earlier expressed 'intention'. The legislative proposals do not mention this deviation, let alone the reasons for it. The Commission may even have tried to conceal the connex to European agencies. After all, apart from Annex II *inter alia* on the ESAs' financial model, no reference to European agencies is made in the proposal and, as is well known, the ESAs are referred to as 'authorities' (even though, according to scholarly and even the Commission's own classifications, they qualify as European agencies). Considering a more generally binding effect: Hofmann/Rowe/Türk, Administrative Law 575 f.

1448 Case C-526/14 *Kotnik*, para 43.

1449 See, however, case T-304/08 *Smurfit*, para 97; critically: Soltész, Beihilferecht 672, with further references.

1450 See case 148/73 *Louwage*, para 12.

1451 See case T-671/15 *E-Control*, para 81; see point 6 of Opinion 9/2015 of the ACER which is at issue in this case; <http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Opinions/Opinions/ACER%20Opinion%2009–2015.pdf> accessed 28 March 2023.

1452 See von Graevenitz, Mitteilungen 172, with references to the case law.



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law'[1453]), the situation is different from the EU's legislative and executive branches. According to Article 19 TEU, the Court 'shall ensure that in the interpretation and application of the Treaties *the law* is observed' (emphasis added).[1454] This position of the Court would not be incompatible, but somewhat at odds with an obligation to consider non-law – unless this obligation is itself laid down in law. This seems to be reflected in the Court's case law: 'the Court *may* [...] take [recommendations] into consideration where they provide useful guidance for the interpretation of the relevant provisions of EU law' (emphasis added).[1455] But it is also apparent that it does not principally seem to exclude *any* legal effect of EU soft law on itself.[1456] It is not for nothing that the Court has declared soft law to be part of the *acquis communautaire*[1457] and that, when presenting the 'legal framework' or the 'legal background' of a case, it regularly includes the relevant soft law acts.[1458] In the context of the Commission's suggestions for the calculation of a fine according to what is now Article 260 TFEU, it

1453 Opinion 2/13 *ECHR II*, paras 245 f.

1454 The Commission, at times, stresses the Court's superior role; see eg Commission Communication 'Freedom to provide services and the general good in the insurance sector', 2000/C 43/03, 6: 'It goes without saying that the Commission's interpretations do not prejudge the interpretation that the Court of Justice of the European Communities, which is responsible in the final instance for interpreting the Treaty and secondary legislation, might place on the matters at issue'. A closer analysis of the Court cases – in the field of competition and State aid law – leaves it unclear whether the Court of First Instance/General Court is actually, as has been argued in the literature, more willing than the Court of Justice to take soft law into account; see Ştefan, Soft Law 71 f, with further references.

1455 Joined Cases C-422/19 and C-423/19 *Dietrich*, para 48. See also case C-409/00 *Spain v Commission*, in which the Court downplayed its role as (potential) addressee: '[T]hose notices and guidelines apply primarily to the Commission itself' (para 69, with a further reference). The assumption that EU soft law has the same effects on the CJEU as it has on national courts may be 'coherent', but it cannot be deduced from the Court's case law; stressing, in this context, the Court's role in scrutinising the validity of EU soft law: Sarmiento, Soft Law 267.

1456 For the AG' wariness in earlier cases to recommend to the Court to refer to the Commission's *de minimis* notice see references in Senden, Soft Law 367 f.

1457 See references to the case law in Ştefan, Soft Law 118–120.

1458 See Senden, Soft Law 361; for the Court taking inspiration from soft law see eg joined cases C-223/99 and C-260/99 *Agorà*, para 41; case C-310/99 *Italy v Commission*, para 52, both with further references. It is to be stressed that the Court and the AG mostly refer to soft law in order to support a certain argument (of their respective own); see Ştefan, Soft Law 61, with regard to the field of competition and State aid law.



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held that 'these suggestions of the Commission cannot bind the Court [...]. However, [they] are a useful point of reference'.[1459]

More than a useful point of reference soft law may be where it is explicitly referred to in a legislative act,[1460] eg as a set of rules non-compliance with which is unlawful.[1461] Also in other cases the Court has acknowledged EU soft law, in particular of the Commission, eg on the interpretation of Treaty provisions[1462] or on the nomenclature of the Common Customs Tariff.[1463] With regard to the latter it held, without distinguishing between different addressees, that they 'are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force'.[1464] Having said that, there are also cases in which the Court does not make an effort to consider soft law (or at least such an effort is not reflected in its reasoning), sometimes it even interprets the law contrary to what the wording of soft law suggests.[1465] Overall, it appears that the Court does not follow a clear line in considering EU soft law[1466] and that a duty to consider on behalf of the Court cannot generally be deduced from its case law.

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1459 Case C-387/97 *Commission v Greece*, para 89; case C-310/99 *Italy v Commission*, para 52. In case T-52/16 *Crédit mutuel Arkéa*, paras 73–77, the General Court states that certain guidelines of the European Committee of Banking Supervisors 'may be taken into account'. After considering them, it held – arguably with a view to the concrete case – that 'they cannot be accorded any particular weight'; see also references in Ştefan, Soft Law 158–161.

1460 See case C-292/89 *Antonissen*, paras 17 f; case C-203/96 *Chemische Afvalstoffen*, para 31. With regard to 'dynamic references' to soft law and their risks in terms of democracy see Friedrich, Soft law 402.

1461 See Korkea-aho, Soft Law 286–289, with examples.

1462 See eg cases C-367/98 *Commission v Portugal*, para 47; C-483/99 *Commission v France*, para 43; C-503/99 *Commission v Belgium*, para 43.

1463 See case C-203/96 *Chemische Afvalstoffen*, in particular paras 30 f, with regard to the Council Resolution of 7 May 1990 on waste policy; with regard to the Commission's so-called 'Golden Share Communication' (97/C 220/06) see Senden, Soft Law 472, with references to case law.

1464 Case C-124/15 *Salutas*, para 31; for the frequency of the EU courts' references to soft law in the field of competition and State aid law see Ştefan, Soft Law 87 ff.

1465 It is to be noted, however, that the Court did not acknowledge to act contrary to soft law – Commission guidelines – in this case, but that the Commission has 'misconstrued [its] scope'; case T-304/08 *Smurfit*, para 97; critically: Storr, Wirtschaftslenkung 39 f.

1466 See Eliantonio/Ştefan, Soft Law 459 f; Korkea-aho, Courts 476, with further references. In the context of Commission soft law, *Senden* argued that the Court is 'not very willing to take account' of it; Senden, Soft Law 373. The AG generally have been more explicit in this context; see eg Opinion of AG *Kokott* in case C-383/09



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In connection with the self-bindingness of soft law discussed above, we may ask whether the Court – in reviewing the legality of a Commission decision – is bound by the Commission's pertinent soft law, as well. The answer to this question is contested.[1467] The Court held and has repeatedly confirmed that the Commission, eg in competition law, disposes of a wide discretion, and that its soft law often serves the purpose of concretising this discretion.[1468] In the course of judicial review, the Court may not substitute the Commission's exercise of discretion (as expressed in the act under review) by its own view.[1469] In light of this discretion, and depending on its width, it appears appropriate that the Court at least exercises deference to the Commission's discretion-concretising soft law. This applies also where the Court ought to protect legitimate expectations created by soft law. In specific cases this may boil down to an actual obligation of the Court to apply the Commission's soft law (see 4.2.3.2.3. below). Where the Commission in its decision has unlawfully deviated from its soft law, the Court shall state the illegality of the former.[1470]

#### 4.2.3.2. The actual or potential legal reasons for these effects

##### 4.2.3.2.1. Sincere cooperation ('loyalty') according to Article 13 para 2 TEU

The sincere cooperation between the EU institutions (*Organtreue*), which the Court held to be part of the general principle of E(E)C/EU law of mutual sincere cooperation, is now codified in Article 13 para 2 TEU (second

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*Commission v France*, para 28; Opinion of AG *Kokott* in case C-127/02 *Landelijke Vereniging*, para 95.

1467 Unclear: case C-125/07P *Erste Group*, para 143; critically: W Weiß, Leitlinien(un)wesen 258.

1468 For the case law on the Commission's discretionary policy choices more generally see Craig/de Búrca, EU Law 610-612; for the case of competition law see ibid 1145 f; for the duty to exercise the allowed discretion see case T-122/15 *Landeskreditbank Baden-Württemberg*, para 139, with references to further case law. Describing this discretion, procedurally, as the legal basis of soft law: Hofmann/Rowe/Türk, Administrative Law 570.

1469 See eg case T-35/99 *Keller*, para 77; see also Storr, Wirtschaftslenkung 29 f; Opinion of AG *Cosmas* in case C-83/98P *Ladbroke Racing*, paras 15 f, pointing to the Court's tendency to widen the scope of its review; for an exceptional higher intensity of review of discretionary acts see case C-501/11P *Schindler*, paras 36 f, with regard to Article 31 of Council Regulation 1/2003.

1470 See eg case T-185/05 *Italy v Commission*, paras 43 and 49.



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sentence).[1471] The concrete mutual duties of the institutions following from the principle of mutual sincere cooperation are to be fleshed out by the Court which so far has had few opportunities to do so.[1472] The lapidary wording of the provision – '[t]he institutions shall practice mutual sincere cooperation' – bears witness of the kinship between *Organtreue* on the one hand, and the sincere cooperation between the institutions and the MS, and between the MS themselves, on the other hand. This suggests that the duties between the institutions *principally* correspond to those existing between the institutions and the MS, and among the MS respectively.[1473] In general, it is to be noted that sincere cooperation 'is exercised within the limits of the powers conferred by the Treaties on each institution. The obligation[s] resulting from Article 13(2) TEU [are] therefore not such as to change those powers'.[1474] When applying this provision in the context of soft law, this quotation may remind us not to overrate the effect of soft law. Increased requirements for the 'treatment' of soft law by the EU bodies addressed by it may at the same time reduce the competences of these bodies, eg their prerogative of assessment. After all, it is one of the purposes of Article 13 para 2 TEU to ensure that EU bodies do not impede each other in exercising their respective powers.[1475] Thus, the EP, for example, may not delay the issuing of its opinion on a legislative act without an objective reason where the Council has emphasised and reasoned the need for a timely adoption of this legislative act.[1476]

As was said above in the context of Article 4 para 3 TEU, also from Article 13 para 2 (second sentence) TEU no duty to apply the soft law adopted by other EU bodies can be deduced. A duty to merely consider other

1471 See Obwexer, Art. 4 EUV, para 66, with reference to the CJEU's case law; see also Klamert, Loyalty 12 f, arguing that the Court has interpreted Article 4 para 3 TEU (and its predecessors, respectively) very differently with regard to inter-institutional loyalty (as compared to the MS-EU relationship); for the inter-institutional dimension see also Cremona, Interest 157 f.

1472 See Nettesheim, Art. 13 EUV, para 79.

1473 See case 204/86 *Greece v Council*, para 16: '[The] dialogue [between the institutions; here: between the Commission, the Council and the EP] is subject to the same mutual duties of sincere cooperation which, as the Court has held, govern relations between the Member States and the Community institutions'; see also case C-65/93 *European Parliament v Council*, para 22.

1474 Case C-73/14 *Council v Commission*, para 84, with a further reference; see also case C-660/13 *Council v Commission*, para 32, with further references.

1475 See Jacqué, Art. 13 EUV, para 15.

1476 See case C-65/93 *European Parliament v Council*, paras 23–28.



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bodies' respective soft law may, however, be implied to the principle of mutual sincere cooperation between the institutions.[1477] It could be argued that this would also include a general duty to provide information on the reasons for non-compliance which could serve, as it were, as proof that the act at issue has actually been considered. Against this line of argumentation speaks Article 296 para 2 TFEU (see 4.2.3.2.2. below). Since this provision for legal acts only requires a reference to 'proposals, initiatives, recommendations, requests or opinions required by the Treaties', we may conclude *e contrario*: first, that there is no such duty for other acts of EU soft law – in particular those laid down only in secondary law – and, second, that there is no general duty to (substantially) justify deviance from an EU soft law act. Since this is not required for legal acts, it cannot be required in cases where non-compliance with an EU soft law act finds its expression otherwise, eg in an omission (non-action), either.

An example for the 'fleshing out' of the (assumed) obligations following from the principle of *Organtreue* in administrative practice is the Commission's approach towards Article 11 of the Comitology Regulation,[1478] pursuant to which the EP or the Council may express their view that a draft implementing act exceeds the implementing powers provided for in the basic act. The Commission, in a declaration annexed to the Comitology Regulation, stated that it will '*immediately* review the draft implementing act taking into account the positions expressed by the European Parliament or the Council', thereby '*duly* [taking] into account the urgency of the matter' (emphases added). 'Before deciding whether the draft implementing act shall be adopted, amended or withdrawn, the Commission will inform the European Parliament or the Council of the action it intends to take *and of its reasons for doing so*' (emphasis added).[1479] The italicised parts constitute concessions which go beyond the Comitology Regulation and may, apart from simply expressing a good will, be considered (by the Commission) as following from the principle of sincere cooperation according to Article 13 para 2 TEU. Whether the Commission, in addition to that, extends the EP's and the Council's means of control beyond cases in which the

1477 See Selmayr, Art. 282 AEUV, para 80, with regard to the ECB's opinions. See eg the Commission's view paraphrased in case C-119/97P *Ufex*, para 9.

1478 Regulation 182/2011/EU.

1479 Statements by the Commission, OJ L 55/19 of 28 February 2011 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0228(01)&from=EN> accessed 28 March 2023; see also Ilgner, Durchführung 223.



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basic act was adopted under the ordinary legislative procedure[1480] is – in a literal understanding of the Commission's statements – possible, but still unclear.[1481]

#### 4.2.3.2.2. Article 296 para 2 TFEU

Article 296 para 2 TFEU stipulates that '[l]egal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties'. This provision aims at ensuring the reviewability of the act on the one hand (obligation to state the reasons),[1482] and at ensuring the contributory rights of EU bodies, in particular the Commission, in the various decision-making procedures provided for in the Treaties, on the other hand (obligation of reference).[1483] The required reference shall officially prove that the contributory rights were made use of.[1484] Failure to grant the contributory rights in a decision-making procedure renders void the act in question,[1485] the mere failure to refer to such a contributory act does not.

It is contested whether a mere reference to the act at issue suffices, or whether a presentation of the arguments brought forward, a list of those which eventually were refused or even, more generally, a discussion of the respective arguments is required.[1486] In general, individual-concrete

1480 Article 11 of Regulation 182/2011/EU.

1481 See Kröll, Rechtsetzung 294.

1482 An essential tool in this context is the reasoning of soft law acts: Therefore the reasoning serves in particular the interests of the addressees of the measure or other persons for whom the act is of immediate concern. Thus, the Court decided that a MS, having participated in a legislative process leading to the adoption of an act, 'cannot validly complain that the Parliament and the Council, the authors of the [act], did not place it in a position to know the reasons for the choice of measures which they intended to implement'; case C-508/13 *Estonia v European Parliament/Council*, para 62.

1483 See Krajewski/Rösslein, Art. 296 AEUV, para 44, with further references; for a wide interpretation of the term 'opinions' so as to include all kinds of contributions (required by the Treaties): Calliess, Art. 296 AEUV, para 34; similarly: Geismann, Art. 296 AEUV, para 24.

1484 See Krajewski/Rösslein, Art. 296 AEUV, para 45, with further references; Vcelouch, Art. 296 AEUV, para 18.

1485 See case 828/79 *Adam*, paras 15–17.

1486 Affirming a duty to provide a (substantive) discussion in accordance also with the duty to state the reasons stipulated in Article 296 para 2 TFEU: Calliess, Art. 296



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measures have to provide a more detailed reasoning than general-abstract measures.[1487] In particular in the context of generally applicable acts, no general duty to explicitly affirm/refuse or even substantially discuss all the arguments brought forward in the said contributory acts can be deduced from Article 296 para 2 TFEU, neither from the duty to state reasons nor from the duty of reference contained therein. This is underpinned by the Court's case law,[1488] determining that while the statement of reasons according to Article 296 TFEU 'must show clearly and unequivocally the reasoning of the EU authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for it and to enable the Court to exercise judicial review, it is not required to go into every relevant point of fact and law'.[1489] The quality of the reasoning also depends on 'the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties […], may have in obtaining explanations' and 'must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question'.[1490]

Apart from the enhanced requirements for the reasoning of individual-concrete acts, as opposed to general-abstract acts, another differentiation can be carried out: the more contested a measure (normally this is reflected also in the arguments of the contributing EU bodies), the higher the threshold for the reasoning to be given. Thus, a substantive discussion of the counter-arguments *may* be necessary in order to satisfactorily provide

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AEUV, para 34; Vedder, Art. 296 AEUV, para 10; against them: Geismann, Art. 296 AEUV, para 22; Krajewski/Rösslein, Art. 296 AEUV, para 45; and arguably also Gellermann, Art. 296 AEUV, para 17.

1487 See joined cases C-78/16 and C-79/16 *Pesce*, paras 88-90; case T-122/15 *Landeskreditbank Baden-Württemberg*, para 123, with a further reference; see also Türk, Oversight 133, with references to the Court's case law; note Article 41 para 2 lit c CFR.

1488 See references in Hofmann/Rowe/Türk, Administrative Law 199.

1489 Joined cases C-78/16 and C-79/16 *Pesce*, para 88, with further references; see also case C-519/15P *Trafilerie Meridionali*, paras 40 f; case C-493/17 *Weiss*, para 31, with further references; note also joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan*, para 42.

1490 Case T-63/16 *E-Control*, para 68, with further references; see also case T-122/15 *Landeskreditbank Baden-Württemberg*, para 124, with a further reference. The 'legal rules governing the matter in question' may also include soft law acts; see para 125.



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reasons in accordance with Article 296 para 2.[1491] This may also require a consideration of soft law containing such arguments (irrespective of whether this soft law is 'required by the Treaties' or not). However, the consideration of soft law is not necessarily a burden for the decision-maker. The reasoning contained in a soft law measure may be taken over by other acts, eg when the Commission in an individual-concrete decision on a State aid case refers to its (earlier adopted) guidelines for the examination of State aid in the relevant sector, thereby (partially) substituting the decision's own provision of reasons.[1492] This practice may also be applied with regard to soft law acts stemming from other EU bodies. In these cases the consideration of soft law facilitates the reasoning of an act.

In conclusion, it can be said that in Article 296 para 2 TFEU it is the duty to state reasons which effects a duty to consider contributory (soft law) acts, not the duty to refer to these acts. A provision of reasons, limited as it may be, allows the addressee(s) to be informed about the main reasons leading to the adoption of a measure, which again presupposes that the decision-maker took account of the contributory acts mentioned in Article 296 TFEU and – since the limitation to the contributory acts required by the Treaties only relates to the duty of reference – beyond.

#### 4.2.3.2.3. Legal certainty, legitimate expectations, equality and effectiveness

In complementation to what was said above under 4.2.2.2.4. about the legal foundation of the principles of legal certainty, protection of legitimate expectations, equality and effectiveness in EU law (which *mutatis mutandis* applies here, as well), we shall now address the relevant effects of EU soft law specifically on EU institutions, bodies, offices and agencies.

1491 See case 158/80 *Rewe-Handelsgesellschaft Nord*, paras 25–27, in which the Court decided that due to a 'contradiction in the statement of reasons' and a lack of 'legal justification' the Regulation in question 'does not contain a statement of the reasons on which it is based as required by Article [296 TFEU]'; see also case C-304/01 *Spain v Commission*, para 50, with further references.

1492 For hard law acts referring to soft law as a form of '"ready-made" reasons'; Ştefan, Soft Law 127, with references to the Court's case law; see also case T-576/18 *Crédit agricole*, para 138, with further references.



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As regards the binding effect of EU soft law upon its creator(s),[1493] the Court has repeatedly considered legal certainty, legitimate expectations and the equality principle as laid down, *inter alia*, in Articles 20 f CFR,[1494] as legal bases for this effect.[1495] Whether the principles of legal certainty and legitimate expectations and of equality cause the self-binding effect on their respective own or only in combination is unclear. In a judgement on the first Banking Communication the Court mentioned both legitimate expectations and equality in this context.[1496]

Individuals/undertakings concerned by EU soft law can rely on this effect, meaning that – given their legal standing – they can request annulment of a legal act which does not comply with relevant soft law adopted by the creator of this act.[1497] Whether this is also possible for MS or (other)

1493 EU bodies may explicitly exclude this effect; see eg Commission Communication 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission', COM(2002) 704 final, 10 and 15; arguing against an automatic bindingness of soft law upon its creators: Arndt, Sinn 49; with regard to inter-institutional agreements, the following is to be said: If the institutions are allowed to enter into binding agreements with each other (see von Alemann, Einordnung 131–135), they are – as an exception to the principal self-obligation brought about by soft law – also free to agree on legally non-binding terms; see case C-25/94 *Commission v Council*, para 49; see also Hummer, Interorganvereinbarungen 99–102, analysing the Court's case law.

1494 See also case C-636/13P *Roca Sanitario*, para 58.

1495 See case T-374/04 *Germany v Commission*, para 111, with further references, mentioning these principles as alternative (*argumentum* 'or') legal bases of the self-binding effect of EU soft law; for an early judgement which apparently suggests legitimate expectations as a legal basis for self-binding effects of soft law see case 81/72 *Commission v Council*, para 10; for further case law (and references to the literature) see Ştefan, Enforcement 207 f.

1496 Case C-667/13 *Banco Privado Português*, para 69; see also case C-310/93P *BPB Industries*, paras 22 ff; case T-7/89 *Hercules Chemicals*, para 53.

1497 See Tridimas, Indeterminacy 59. See the *Deufil* case, in which the Court denied the violation of legitimate expectations in a case in which the Commission has recovered aid granted by a MS to an industry branch not subject to the Commission's aid code; case 310/85 *Deufil*, paras 20–25; see H Adam, Mitteilungen 121–124, also with regard to the case of soft law eliminating legitimate expectations; Snyder, Institutional Practice in the European Community 205 ff.
That EU soft law addressed to another EU body gives rise to legitimate expectations of individuals that the addressee will comply with it appears to be, if at all, a rare exception. With regard to non-binding EFSA output addressed to the Commission: case T-177/13 *TestBioTech*, para 114. The Court negates the existence of legitimate expectations of individuals here, but it does not in general exclude the possibility that an EU soft law act addressed to an(other) EU body may give



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EU bodies is questionable. In my view this should be confirmed, as it is not perceivable that MS in principle are in need of the above protection to a lesser extent than individuals/undertakings.[1498] Also EU bodies should in principle be entitled to rely on the self-binding effect of the soft law created by other EU bodies.

While soft law, as the Court stated with regard to State aid guidelines, 'certainly help[s] to ensure that [the Commission] acts in a manner which is transparent, foreseeable and consistent with legal certainty',[1499] the Court has not requested strict compliance with this soft law by its respective creator at all times (see 4.2.3.1. above).[1500] In case of deviation, the above principles require the respective EU body to provide the reasons therefor[1501] (so as to ideally make clear that due to the specificities of the given case there is no violation of these principles).

Also with regard to the amendment of soft law – a scenario which is somewhat related to the non-application of (a certain version of) soft law by its creator – these principles play a role.[1502] While amendments must, as in the case of law, be possible in principle,[1503] an abrupt and far-reaching amendment – without any transition period – may well be contrary to the protection of legitimate expectations.[1504] An appropriate reasoning has a key function in justifying an amendment, thereby possibly outdoing the protection of certain expectations.[1505] The (potential) legitimate trust that soft law acts are not amended tends to be higher in case of individual-concrete soft law acts than in case of general-abstract ones.[1506]

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cause to legitimate expectations in individuals; after all, it lists a number of further reasons for refusing legitimate expectations here.

1498 See Wörner, Verhaltenssteuerungsformen 192–194, in particular 193, with further references; for the applicability of the principle of equality also in the relationship EU-MS see case C-387/97 *Commission v Greece*, para 84.

1499 Case C-310/99 *Italy v Commission*, para 52; see also Opinion of AG *Ruiz-Jarabo Colomer* in case C-415/07 *Gennaro*, para 35.

1500 See eg case C-520/09 *Arkema*, para 93; for an example in which strict compliance was required see case T-210/01 *General Electric*, para 516.

1501 See Opinion of AG *Tesauro* in case C-58/94 *Netherlands v Council*, para 20.

1502 See Walzel, Bindungswirkungen 110.

1503 See case C-1/98P *British Steel*, para 52.

1504 See case C-63/93 *Duff*, para 20. This passage informs us more generally that where 'constant adjustments to meet changes in the economic situation' are necessary, the retroactivity of rules – and *a fortiori* arguably also the abrupt change of these rules – may be lawful.

1505 See also Thomas, Bindungswirkung 427.

1506 See Wörner, Verhaltenssteuerungsformen 197.



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The broad principle of effectiveness or *effet utile* of EU law may suggest the consideration of EU soft law by other EU bodies, and also its self-binding effect.[1507] While the adoption of soft law has been praised as increasing the effectiveness of EU law,[1508] as a follow-up this effectiveness also requires the application of soft law. However, due to its broadness, it does not appear that from the principle of effectiveness specific effects of EU soft law *vis-à-vis* EU institutions, bodies, offices and agencies can be deduced. Therefore the principle of effectiveness may only be brought forward as a principle in the light of which more concrete norms, eg Article 13 para 2 TEU, are to be interpreted.

### 4.3. Factual effects

#### 4.3.1. Introduction

It was aptly remarked by *Schermers* and *Blokker* that '[t]he existence of a legal obligation provides merely one of many reasons for observing a rule'.[1509] Here we shall address the factual effects of a category of norms which do not create legal obligations. The factual effects of soft law depend on its addressees, and hence they are as individual and multi-faceted as life itself. People – as citizens or as monocratic/collegiate decision-makers of an authority, of a public or of a private undertaking – may *feel* the necessity to follow soft law for a variety of different reasons: they may feel morally obliged, they may feel it is more opportune, they may simply want to obey what they consider a command, they may be persuaded by the content of the rule,[1510] etc. While these reasons, and the related effects of soft law respectively, principally apply to private persons, MS, and EU actors as addressees of EU soft law alike, which is why here no differentiation between different groups of addressees is required, it is impossible to list

1507 For the effectivity aspect of sincere cooperation see Senden, Soft Law 95; see also Opinion AG *Kokott* in case C-43/10 *Aitoloakarnanias*, para 226, where effectiveness considerations seem to play a role.

1508 See eg Brohm, Mitteilungen 80 f, with further references.

1509 Schermers/Blokker, Institutional Law, § 1220; for the argument that a rule's legitimacy (in the view of its addressees) is decisive for compliance see Tyler, People.

1510 See case C-16/16P *Belgium v Commission*, para 26, which mentions – in the context of recommendations – 'the power to exhort and to persuade'.



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them all.[1511] Therefore we shall confine ourselves to three aspects of the factual effects of soft law, one very generally referring to human nature (4.3.2.), the second one dealing with the phenomenon of 'nudging' which has found resonance in the EU's toolkit for ensuring compliance (4.3.2.1.), and the third one consisting of a systemic idiosyncrasy of the European *Verwaltungsverbund* (4.3.2.2.). The second and the third factor are subsets of the first one, as they are both to be understood against and based on the specificity of human nature. This is why they shall be dealt with under sub-headings to 'human nature'. As mentioned above, this sub-chapter in no way claims completeness, but is expressly limited to selected thoughts which should help understand the factual effects of EU soft law.

### 4.3.2. Human nature

The general aspect of soft law's factual effects in this context is human propensity to obey the commands of what is perceived as an 'authority' on the one hand, and to adapt one's behaviour to that of others on the other hand.[1512] This was, among others, impressively demonstrated in the world-famous experiments of *Asch* and *Milgram*.[1513] In the setting of these experiments no legally binding rules were provided. Rather, the test persons adapted their behaviour to the (felt) command of others (peers and a presumed expert, respectively). That a human propensity to obey even unlawful commands exists, has been legally acknowledged, for example, in the form of the legal construct *Befehlsnotstand*, which allows for delinquents to be subject to milder punishment, or even to be acquitted, where they were following an order from a superior body/person when committing the incriminated act. Whether lawful or not, it is often felt to be convenient to follow an existing rule, because it appears to reduce one's own responsibility (in psychology/sociology this phenomenon is referred to as

1511 For different theories towards explaining compliance in the realm of public international law see Kingsbury, Concept. With regard to MS' compliance with EU soft law, *Härtel* mentions practicability, understanding and opportunity as possible motives; Härtel, Rechtsetzung 273.

1512 With regard to EU (soft) law see U Stelkens, Rechtsetzungen 407; with regard to public international law see Koops, Compliance 33. For a broader picture of intrinsic and extrinsic motivation see Ryan/Deci, Motivations; Rupp/Williams, Efficacy.

1513 See Asch, Studies; Milgram, Obedience 371, with further references, also to his own work.



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'diffusion of responsibility').[1514] An existing rule may also be deemed to spare (intellectual) resources because the addressee does not have to think himself or herself of the adequate behaviour in a certain situation.[1515] The question whether this rule is legally binding or not, may then – to some extent at least – lose its importance.[1516]

Both behavioural mechanisms addressed here – obedience to a higher authority and peer pressure – are at issue when it comes to the application of rules of soft law. First, they originate with an authority and, second, where they are addressed to more than one actor, the respective other actors' behaviour may have an influence on individual compliance. It may now be countered that EU soft law is entirely different from the commands given in the *Milgram* experiment, and that *Asch's* experiment was about individuals succumbing to an objectively incorrect opinion of the majority, not about compliance or non-compliance with legally non-binding rules. But it is not the purpose of these lines to enter into an intricate psychological discourse and to scientifically apply the findings of these experiments to the case of EU soft law anyway. This would, for lack of existing empirical data, require new experiments. Rather, the author intends to point to two fundamental *stimuli* of human behaviour which assumedly have, in a number of cases, an influence on the application of soft law by those addressed. The differences between EU soft law and the commands or pseudo-commands in the mentioned experiments – EU soft law is more complex and therefore less easy to be followed *spontaneously*, it is maybe less authoritative, its addressees are regularly more self-confident and knowledgeable than the test persons (they know about soft law's legal non-bindingness), etc – cannot do away with the general relevance of these findings for the topic 'factual effects of EU soft law'.

1514 The counterpart of this reduction of responsibility on the part of the addressee is the exercise of authority *qua* the adoption of rules on the part of their respective creator; see Jabloner, Rechtsetzung 16; for the increased effectiveness of soft law in case of emergencies see Feik, Verwaltungskommunikation 387.

1515 See Kovács/Tóth/Forgác, Effects 59.

1516 See Jabloner, Richterrecht 29, who, in a different context, namely that of case law, describes the phenomenon of a blurring of 'voluntary' consideration and 'obligatory' application of case law.



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#### 4.3.2.1. The steering effects of 'nudging'

Research on the effect of so-called 'nudging' has shed light on the effects of steering measures which are neither order nor ban, neither financial incentive nor penalty. Nudges are described as 'liberty-preserving approaches that steer people in particular directions, but that also allow them to go their own way'.[1517] This actual freedom to act in one or the other way is a necessary condition of nudging. It is based on an empirical approach towards human behaviour in decision-making. The possibilities which nudging entails, by now studied in academia for about 20 years, are being considered by an increasing number of political actors as a welcome supplement to more traditional methods of governing human behaviour.[1518]

*Sunstein* distinguishes four tendencies of human behaviour which make human decision-making accessible to nudges: Inertia and procrastination; framing and presentation; social influences; difficulties in assessing probability.[1519] Here the author would like to dwell on selected findings with regard to two of these tendencies. In respect of inertia and procrastination, one of *Sunstein's* findings is that 'default rules have a large effect on social outcomes'.[1520] Default rules determine the choice between at least two alternatives where the person concerned does not (for whichever reason) actively choose. In the field of retirement savings, *Sunstein* exemplifies, the content of the default rule is highly important. If the question reads 'Do you want to opt in to a retirement plan?' the number of participants is substantially lower than if the addressees are asked 'Do you want to opt out of a retirement plan?', making clear that in the latter alternative in case of inaction they would be enrolled in the programme. Such a 'go with the flow'[1521] approach 'may well be the most effective [group of] nudges'.[1522] With regard to procrastination *Sunstein* claims, *inter alia*, that 'the identification of a specific, clear, unambiguous path or plan has an important effect on social outcomes. Complexity or vagueness can ensure inaction […]'.[1523]

1517 Sunstein, Nudging 583.
1518 See Reisch/Sandrini, Nudging 20 f.
1519 See Sunstein, Regulation 1350 ff.
1520 Sunstein, Regulation 1350.
1521 Dolan/Hallsworth/Halpern/King/Vlaev, Mindspace.
1522 Sunstein, Nudging 585.
1523 Sunstein, Regulation 1352 f.



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Pertaining to the heading 'social influences', he emphasises the dependence of human behaviour on the behaviour of the respective peers.[1524] What may be considered a commonplace is of salient importance when it comes to steering human behaviour. The behaviour of others in a person's environment coins the image of 'what ought to be done', of what is necessary to maintain a good reputation.[1525] *Sunstein* adds that '[i]n some contexts, social norms can help create a phenomenon of *compliance without enforcement* – as, for example, when people comply with laws forbidding indoor smoking or requiring the buckling of seat belts, in part because of social norms or the expressive function of those laws' (emphasis in original).[1526]

While the focus of nudging traditionally has been laid on consumer policy, we may consider the respective findings also from a different perspective, namely from the perspective of soft regulation both addressed to citizens/undertakings and to public authorities.[1527] Compliance with EU soft law is certainly not an automatised act like switching off the light when leaving a room,[1528] but a conscious, reflected-upon decision. Nevertheless, it may be influenced by nudges.[1529] What was paraphrased above about the importance of the default rule also seems to underpin the assumption that if there is a rule, people are – for the reason of inertia – more likely to act in a way corresponding to that rule than if there is no such rule. This is a human idiosyncracy which works in favour of (compliance with) soft law. The effect of soft law may be enhanced, for example, by a 'comply or explain' requirement which also avails itself of people's inertia. Also the finding on people's dependence on their respective peers is relevant, in particular when considering the 'naming and shaming' practice in the EU, especially *vis-à-vis* national authorities.[1530] The concept of 'naming and shaming' or 'naming, blaming and shaming' rests on people's dependence

1524 See Sunstein, Regulation 1356.
1525 Sunstein, Regulation 1357.
1526 Sunstein, Regulation 1357.
1527 Because also the action of public authorities is governed by human beings, in principle there is no difference in the decision-making (motivation etc) of citizens on the one hand, and of public authorities on the other hand; see also Goldmann, Gewalt 338 f.
1528 For nudges facilitating the switching off of lights see Reisch/Sandrini, Nudging 112 f.
1529 For the distinction between these two kinds of nudges – those focusing on automatised behaviour and those aiming at conscious decision-making – see Reisch/Sandrini, Nudging 33, with further references.
1530 See Armstrong, Character 198.



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on others, on their fear of losing their (good) reputation. Thus, where deviance from (soft) rules is disclosed to peers, this may have a chilling effect for potential deviators. Of course, this works only as long as the deviators constitute a minority. Where non-compliance with certain soft law acts becomes more and more common among peers, the 'naming' loses its 'blaming' and 'shaming' effect, because then apparently deviance does not come together with a loss of reputation. In accordance with this logic, there would even be an increased risk of peers adapting their behaviour to that of their surroundings, ie to deviate themselves.

Such nudges need not necessarily be systemically connected to the soft law measure at issue, in the sense that they are, for example, laid down in the very provision which constitutes the (eg secondary law) legal basis for the adoption of the respective soft law act. The incentive to comply may equally well stem from a very distant source. This is the case, for example, with the threat of the Commission initiating a Treaty infringement procedure. A MS body may comply with EU soft law – possibly following an according instruction from a superior national body – in order not to draw the Commission's attention to the respective MS, and in order to thereby reduce the likelihood of the Commission initiating a Treaty infringement procedure for a different reason.[1531] The Commission has already made use of this power in order to facilitate MS support in a different scenario.[1532]

The EU law incentives to comply with EU soft law addressed here are all nudges according to the above definition: They have a steering effect, but allow their addressees to 'go their own way' (*Sunstein*), that is to say that these addressees are still legally free to comply or not to comply.

1531 Where the soft law at issue is concretising EU law, non-compliance with the former may be interpreted as a violation of the latter. A Treaty infringement procedure may then be launched also in this case; see Thomas Müller, Ziele 13; see also case T-258/06 *Germany v Commission*, para 151, with further references.

1532 See Blauberger/Weiss, Commission 1123; Pollak/Slominski, Energy Market 100 f. On the other hand, the Commission has also suspended proceedings for reasons not related to the question of whether the MS concerned has complied with Union law; for the Commission's putting on hold of pending infringement proceedings against Greece during the financial crisis see Gormley, Infringement 68.



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#### 4.3.2.2. EU soft law created by MS officials

A structural element of the European *Verwaltungsverbund* is the strong involvement of MS representatives (including representatives of national authorities) in the decision-making at EU level. Among other things, this involvement or participation increases the acceptance of the resulting decisions and makes it, where they are addressed to a MS or to a national authority, more difficult to oppose them.[1533]

The described scenario is typical in particular of European agencies/network bodies.[1534] Their respective main decision-making bodies are normally composed of one representative per MS/competent national authority.[1535] A number of these agencies/network bodies is competent to address (soft law) acts to its national counterparts. For example: According to Article 6 para 5 of Regulation 2019/942, the Agency for the Cooperation of Energy Regulators (ACER) 'shall provide a factual opinion at the request of one or more regulatory authorities or of the Commission, on whether a decision taken by a regulatory authority complies with the network codes and guidelines referred to in [the pertinent EU law]'.[1536] These opinions are adopted by the ACER's Director, but only upon a favourable opinion of the Board of Regulators.[1537] The Board of Regulators is composed of senior representatives of the competent authorities in the MS. Each representative may once be in the situation that it co-adopted a favourable view on a draft opinion which was then adopted and addressed to his/her respective national authority. The fact that he/she has engaged in *institutional cooper-*

1533 The Court refers to this mechanism in case C-311/94 *IJssel-Vliet*, para 39. With regard to the cooperation between Commission and MS under Article 108 para 1 TFEU see Georgieva, Soft Law 236 f and 244 f; Schweda, Principles, para 32; J Scott, Limbo 341 f; see also H Adam, Mitteilungen 107–113.

1534 See Lafarge, Coopération 68 and, specifically with regard to Eurojust, Europol and Frontex, 80–82; see also C Scott, Government 167.

1535 See Analytical *Fiche* Nr° 5 ('Composition and designation of the Management Board') 1 <https://docplayer.net/19569067-Analytical-fiche-nr-5-composition-and-designation-of-the-management-board-1.html> accessed 28 March 2023.

1536 Explaining the insistence of the Council on the formulation 'opinion, based on matters of fact' under Article 7 para 4 of Regulation 713/2009 (the predecessor of Regulation 2019/942): Ermacora, Agency 268.

1537 Article 22 para 5 lit a of Regulation 2019/942; for the dominant role of the Director in ACER decision-making see Ştefan/Petri, Review 528 f.



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*ation*,[1538] more precisely that he/she has contributed to the adoption of the opinion in his/her role as a member of the ACER's Board of Regulators makes it difficult for him/her to oppose such an opinion in his/her function as a representative of the national authority,[1539] not least for reasons of credibility.[1540] A self-obliging effect *vis-à-vis* the respective EU body – according to which the senior official of the national authority has to make the latter comply with a soft law act which he/she has favoured within the Board of Regulators, and which was then addressed to his/her respective authority – is to be denied, though.[1541] It is to be emphasised that these effects, if any, are factual. The described constellation cannot be qualified as legal 'agreement' between the representatives of national authorities[1542]; for potential legal effects in such constellations see in particular 4.2.2.2.4. above.

These loyalty effects cannot be triggered where the agency's main decision-making body is not composed of MS representatives. This was prominently shown in the dispute on the pesticide-ingredient *glyphosate* in which the EFSA – whose Management Board by then was composed of experts, whose respective nationality played an only marginal role[1543] – and the MS uttered opposing opinions.[1544]

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1538 For different categories of cooperation, institutional cooperation being one of them, see Schmidt-Aßmann, Verwaltung 1380.

1539 See also Lafarge, Coopération 79.

1540 Where he/she has opposed the opinion in the Board of Regulators (as part of a minority) the situation is different, of course; see Article 22 para 1 of Regulation 2019/942, laying down the requirement of a two-thirds majority for decision-making of the ACER's Board of Regulators; raising the idea of an obligation to comply *qua* belonging to one single administrative space: Brohm, Mitteilungen 98 f. These dynamics also have a legitimacy thrust: The more directly a person was involved in the creation of a norm, the more likely it is that he/she deems this norm legitimate, which again creates a certain 'compliance pull'; for this term and the effects described by it see Friedrich, Soft law 376.

1541 See, with regard to similar dynamics in international organisations, Schermers/Blokker, Institutional Law, § 1225.

1542 Pointing in this direction: Korkea-aho, Soft Law 278.

1543 Article 25 para 1b of Regulation 178/2002 (in its original version) only demanded that the composition of the EFSA's Management Board shall reflect 'the broadest possible geographic distribution' (where candidates have equivalent scientific expertise). The composition was changed by Regulation 2019/1381 in order to 'increase the role of Member States [...] in the Management Board of the Authority' (Recital 13).

1544 <https://www.efsa.europa.eu/sites/default/files/corporate_publications/files/efsaexplainsglyphosate151112en_1.pdf>; <https://www.theguardian.com/environment



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The loyalty effects may also be comparatively low in case of Commission soft law addressed to a national authority. The Commission is composed of one representative per MS, it is true, but the bonds to the national administrations are much weaker, in particular because here there is no double-hatting (as in the case of most agencies/network bodies) linking the EU and the respective national administration.[1545] However, this is only one aspect of the loyalty corset, as it were. The 'consociational model of interest intermediation'[1546] may enhance the factual propensity to comply with EU soft law also in other constellations.

### 4.4. Mixed effects

With soft law as a set of legally non-binding norms, it is possible for its addressees to lawfully refuse compliance. This non-application may be aggravated in different ways, though.[1547] In addition to the above reasons facilitating compliance with EU soft law, Union law may make non-compliance with certain acts of EU soft law subject to enhanced conditions, or simply set an enhanced threshold for its consideration – for both MS and EU bodies. Examples for such a differentiation in EU (primary and secondary) law are multiple. Some of these examples shall be mentioned here with a focus on the 'treatment' of soft law they entail, not on the legal field in which they are domiciled.

Article 143 TFEU provides for a case in which the Council may act only upon a recommendation by the Commission. Where the Council does not follow a Commission recommendation (ie does not grant the assistance at issue), the Commission attains regulatory power in lieu of the Council (para 3). The Council may then, however, revoke/adapt the Commission's actions without being dependent on a respective Commission recommendation.[1548]

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/2016/mar/04/eu-states-rebel-against-plans-to-relicense-weedkiller-glyphosate>, both accessed 28 March 2023.

1545 See Döring, Composition 225, who stresses the importance of the Commissioners' 'socialization in office'; pointing at these dynamics in the context of the solidarity principle: W Weiß, Solidarität 415 f.

1546 Hix, System 223–225, with further references.

1547 In the context of Article 126 para 9 TFEU, for example, *Hofmann*, *Rowe* and *Türk* speak of 'quasi-coercive steps [that] may follow'; Hofmann/Rowe/Türk, Administrative Law 546 (fn 58).



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Pursuant to Article 7 of Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality, the effect of national parliaments' reasoned opinions on the non-compliance with the principle of subsidiarity of a draft EU legislative act depends on quantity: Where they represent at least one third of all votes allocated to national parliaments, the draft must be reviewed. The originator of the draft legislative act may then maintain, amend or withdraw the draft, thereby giving the reasons for its decision (para 2). Where, under the ordinary legislative procedure, the reasoned opinions respecting the Commission proposal for a legislative act represent at least a simple majority of these votes, the proposal must be reviewed. The Commission may then maintain, amend or withdraw the proposal. If it decides to maintain it, it shall justify its choice in a reasoned opinion (para 3).

According to Article 19 paras 4–6 of Protocol No 5 on the Statute of the European Investment Bank, the Management Committee of the EIB shall examine whether financing operations submitted to it are in accordance with this Protocol. After this examination, it shall forward the case to the Board of Directors for a decision, together with an opinion. Where this opinion is unfavourable, the Board may grant the finance concerned only by a unanimous decision. The effect of an unfavourable opinion – ie an enhanced degree of approval, namely unanimity, required for a decision not complying with this opinion – is comparable to that of a negative Commission opinion in the ordinary legislative procedure (Article 294 para 9 TFEU): Amendments on which the Commission has delivered a negative opinion may be adopted only by a unanimous decision of the Council (see 3.5.2.1.1. above). It goes without saying that it is politically more difficult to reach unanimity within a collegiate body than to reach a (simple or qualified) majority.

An example laid down in secondary law is the so-called reverse (qualified) majority voting which is, for example, provided for in Regulation 1466/97, as amended by the so-called 'Six Pack'. Article 6 para 2 provides for the following procedure which shall be dealt with here in relative isolation: 'the Commission […] shall recommend to the Council to adopt the decision establishing that no effective action has been taken. The decision shall be deemed to be adopted by the Council unless it decides, by simple

1548 See Bandilla, Art. 143 AEUV, para 33, who stresses the Council's role as a 'Berufungsinstanz' [appeal body].



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majority, to reject the recommendation within 10 days of its adoption by the Commission'.[1549] In other words: A decision not to follow the Commission recommendation requires a majority in the Council, whereas the lack of such opposing majority suffices for the recommendation to become a decision. This substantially increases the authority of the Commission's recommendation and suggests a 'go with the flow' approach on the part of the Council (see 4.3.2.1. above). The recommendation may, of course, still be refused, but only under enhanced conditions. It was argued that this regime actually provides for a *de facto* decision-making power of the Commission with a right to object on the part of the Council. This image reflects well the practical effects, but from a legal point of view it ought to be emphasised that the law provides for a Commission *recommendation* (addressed to the Council) which may be transformed into a Council decision (addressed to a MS) due to the Council's non-objection, that is to say: its inaction. Therefore, reverse (qualified) majority voting is an example – admittedly: an extraordinary example – of an increased authority of Commission soft law, not of the Commission's power to adopt a binding decision.

Another example taken from secondary law is the procedure laid down in Article 17 of the Regulation 1093/2010. Where a breach of Union law by a competent authority in the MS (or, respectively, the ECB as a banking supervisor) is suspected by the EBA, it may – after some preliminaries – address a recommendation to this authority, aimed at ensuring compliance by the latter. Where this recommendation is not followed, the Commission may adopt a formal opinion (with a similar content) as a follow-up to the EBA's recommendation. Where the competent authority does not comply with the formal opinion in due time, either, the EBA may, 'where the relevant requirements of [the pertinent EU law] are directly applicable to financial institutions […], adopt an individual decision addressed to a financial institution […] requiring it to take all necessary action to comply with its obligations under Union law […]'.[1550] Here it is the increased authority of the following acts which arguably vests the recommendation of the EBA with a higher caliber than usual recommendations. After all, a recalcitrant competent authority – if it does not manage to convince the EBA (the Commission) – has to fear a legally binding EBA decision

1549 Article 6 para 2 subpara 5 of Regulation 1466/97. For further examples of reverse (qualified) majority voting see Palmstorfer, Majority 191–193.

1550 Article 17 paras 3–6 of Regulation 1093/2010.



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prevailing over any previous decision it has adopted on this matter.[1551] Also potential reputational losses in the peer group (here: the EBA's Board of Supervisors) are to be taken into account. As *Peters* said (more generally): 'If there is a continuing long-term relationship among the participants in which they must interact, they are likely to comply'.[1552] In this (potential) mix of motives for compliance also loyalty considerations may come into play.

The reasons for compliance mentioned here do not root in any legal obligation. The Council is (legally) free to refuse the Commission recommendation in the case of Article 143 TFEU and also where reverse (qualified) majority voting is applied, eg according to Article 6 para 2 of Regulation 1466/97, the Commission is (legally) free not to follow the national parliaments' uttered view, the Board of Directors is (legally) free to decide against the opinion of the Management Committee, and the competent authority is (legally) free to refuse to follow an EBA recommendation and a formal opinion of the Commission, respectively. However, not to follow these acts is 'more difficult' than in a regular case. This is due to factual reasons: the difficulty to find an enhanced majority/unanimity against the recommendation, the (political) effort to justify non-compliance, the unreasonableness of disobeying the recommendation of the EBA which – in legal terms – holds the upper hand anyway.

The effects addressed here are factual, but to an extent also 'legal', because they are provided for by law and hence intended by the Masters of the Treaties and the legislator, respectively, to work as deterrent against non-compliance. Due to this factual-legal ambiguity, they are referred to as 'mixed effects'.

1551 Article 17 para 7 of Regulation 1093/2010.

1552 Peters, Typology 426; see also Coen/Thatcher, Network 67; Haas, Hypotheses 34; for the involvement of national bodies in ensuring compliance with soft law on the international level see Goldmann, Gewalt 63 f.



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## *5. The purposes of soft law*

### 5.1. On the categorisation of soft law in general

The primary purpose of soft law is to regulate.[1553] To aim at a high degree of compliance on the part of the addressees of regulation is inherent in this purpose. It cannot be assumed that a norm-creator intends to create a norm entirely without effect.[1554] In that respect there is no difference between law and soft law.[1555] The objectives of regulation are, in particular, to provide orientation and to ensure order and peace.[1556] A more nuanced approach may disclose a number of purposes, such as concretisation of law or harmonisation,[1557] which all reflect aspects of the primary purpose, ie to regulate. The French *Conseil d'État* in its comprehensive study 'Le droit souple'[1558] has split this purpose in four functions of soft law: substitution (*substitut*), preparation (*préparation*), company (*accompagnement*) or permanent alternative (*alternative pérenne*).[1559]

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1553 Considering the role and purpose of EU soft law on an international scale: Hopkins/McNeill, Hard Law 115; with a view specifically to Commission recommendations see Andone/Greco, Burden 84 f.

1554 See Potacs, Auslegung 93: '[…] weil einem Rechtsetzer eine völlig wirkungslose Vorschrift prinzipiell nur schwer als von ihm gewollt zugesonnen werden kann' [because in principle it is difficult to imagine that a norm-creator has intended a provision entirely without effect].

1555 This principal similarity is also reflected in Article 296 para 1 TFEU, according to which the institutions *principally* may choose from among the means of regulation – different forms of law and soft law – available; note the words of *Möllers* who said that 'as long as certain goals are achieved, it is irrelevant if this happens by use of legal forms or by informal means': C Möllers, Governance 316 f.

1556 See, *ex multis*, Griller, Grundlagen (2015) 3–5.

1557 That legally non-binding acts may cater for harmonisation – under EU law – is contested (see 5.2. below).

1558 This study also refers to EU soft law. Apparently, it does not refer to the genuinely French 'droit souple' which actually is a specific kind of (hard) law; see Ballreich, Nachdenkliches 383 (fn 4); for the shift in the case law of the *Conseil d'État* this study may have brought about see Gundel, Rechtsschutz 600 f; taking up the categorisation of the *Conseil d'État* and applying it to soft law adopted by MS during the COVID-19 pandemic: Boschetti/Poli 40-44.

1559 See Knauff, Regelungsverbund 378, distinguishing the following functions of soft law: preparation of law, company of law, replacement of law; Peters, Typology 421, who refers to EU soft law's function of 'complementing, supporting and interpreting primary and secondary Community law' as 'law-plus function'; for concrete examples from public international law see Shelton, Compliance 120 ff.



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Substitution applies where, for legal or factual (eg political) reasons, proper law cannot be adopted,[1560] but a rule is still (deemed to be) needed.[1561] The EU agency Eurofound has expressed this on its webpage in the following terms: 'In reality [...] soft law in the EU tends to be used in situations where Member States are unable to agree on the use of a measure which is legally binding,[[1562]] or where the EU lacks competence to enact such a "hard law" measure. The Member States and EU institutions are thus able to adopt EU policy proposals, while leaving their implementation optional for those Member States who do not wish to be bound by mandatory conditions. They are thus an option for the Commission to use when faced with resistance from some Member States, which could block policy proposals'.[1563]

An example for a preparatory function being fulfilled is where emergent phenomena which ought to be regulated (in the future) cannot yet be defined precisely enough to be regulated by law, which is why they are regulated by soft law (in preparation for law).[1564] Alternatively, soft law can be used as a precursor for future legislation which – for the time being – is not possible, in the EU eg for lack of MS support.[1565]

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1560 For the adoption of soft law in order to circumvent the legislative or the ratification process see Bothe, Norms 94; Knauff, Regelungsverbund 251 and 254; Rossi, Soft Law 11.

1561 See Bayne, Hard and Soft Law 348, with examples from EU law, 349 with an example from WTO law; Schermers/Blokker, Institutional Law, §§ 1233–1236, with examples from public international law.

1562 See also Müller-Graff, Einführung 147, taking the example of the EU's European employment strategy and stressing that a soft approach may avoid differentiated integration.

1563 <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/soft-law> accessed 28 March 2023. At the international level, the establishment of the CSCE (and since 1994 the OSCE) on the basis of a soft law act exemplifies this phenomenon; see Zemanek, Soft law 858, with further references; see also Goldmann, Gewalt 393 f; for the particularly high authority of the CSCE, measured in terms of compliance with its output, see Shelton, Compliance 128 and 142. The renaming to OSCE did not lead to the emergence of the OSCE as an international organisation (ie a body with at least limited international legal personality); see Peters, Compact.

1564 See Bayne, Hard and Soft Law 350, on the influence OECD soft law had on WTO negotiation rounds (and eventually on hard law).

1565 See eg Council Recommendation 86/665/EEC, according to which the Council limits itself to a recommendation because 'it has so far proved difficult to elaborate a hotel grading system at Community level but it would nevertheless be desirable to consider the possibility of doing so in future'; for the development of the law on



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Company describes essentially the concretisation of law, and the term '*alternative pérenne*' addresses cases for which regulation by means of soft law is thought to be the *better* – not the more opportune (see 'substitution' above) – alternative to regulation by law, eg for reasons of flexibility.[1566]

While this list of soft law functions – which, as was indicated above, can all be assigned to the purpose of regulation – in principle appears appropriate, it is difficult in practice to clearly distinguish 'substitution' from the 'permanent alternative', because the political conviction that soft regulation is the better option may often be nourished by the (presumed) impossibility to find a political accord on a binding measure or by the consideration of legal (constitutional) constraints. So while the theoretical difference between these two functions is apparent, in practice arguably they overlap considerably.

Another approach towards categorisation is to contrast the legal purposes to regulate by means of soft law with the factual purposes. The purposes which follow from the law are legal purposes. All other purposes are factual purposes. The range of factual purposes is broad and determined by motives as diverse as: the intention to exclude the EP from the decision-making process (which would not be possible in a specific legislative procedure); the intention to react fast (faster than a legislative procedure would allow[1567]) to a certain problem in order to reduce pressure from the media; the assumption that a hard measure would give rise to criticism from political actors (eg in the MS). Also the legal purposes are manifold and shall only be exemplified here: compliance with the principle of subsidiarity which may suggest the use of soft law instead of hard law (see V.3.4.2. below); considerations of effectiveness which may suggest, for example and in the short run, the adoption of a recommendation instead of a directive, the adoption of which would presumably take years; a competence to act, but a prohibition to harmonise laid down in primary law, may as well

access to (Commission) documents see Schwarze, Soft Law 244 f, with references to the relevant case law.

1566 See Conseil d'État, Droit souple 136 f.

1567 See eg Commission MEMO/14/484 <https://europa.eu/rapid/press-release_MEMO-14-484_en.htm> accessed 28 March 2023: 'a Commission Recommendation can be adopted immediately whereas proposals for legislation would have to be adopted by the EU's Council of Ministers and the European Parliament which can take time'.



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suggest the use of soft law, eg a recommendation, to coordinate MS action 'without proceeding, explicitly at least, to harmonisation'.[1568]

It is to be noted that sometimes these two kinds of purposes – legal and factual ones – which are to be kept separate for conceptual reasons, intersect; eg when the prohibition to harmonise meets with the political conviction of the norm-creator that harmonisation is not opportune, and that therefore soft law is to be adopted, or in the above example related to considerations of the effectiveness of rule-making, which, without their legal edging, can as well be perceived as factual.

## 5.2. On the case of EU soft law in particular

### 5.2.1. Accepted purposes of EU soft law

The main purpose of soft law – that is to set rules and to achieve (voluntary) compliance with these rules – is most strongly dependent on its persuasiveness[1569] in the concrete case.[1570] The main instrument in that respect is the reasoning contained in each soft law act. Thereby also an account of the often highly complex scientific or technical facts underlying a certain matter is provided. Against this background, the informative function of the output of public administration in general and of soft law in particular is not to be underestimated ('regulation by information').[1571]

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1568 Senden, Soft Law 177; for examples see ibid 177 f; see also von Bogdandy/Arndt/Bast, Instruments 113; suggesting that harmonization may also be brought about by soft law: case T-109/06 *Vodafone España*, paras 90 f.

1569 For the distinction between command and persuasion, and the role soft law plays in between see Majone, Agencies 267–269.

1570 See Rosas, Soft Law 318: 'the persuasive weight of different soft law sources cannot be determined on the basis of pre-determined lists but depends more on the nature and content of each instrument and the context in which it is being used'. An essential tool in this context is the reasoning of soft law acts. If the reasoning is not convincing (eg because it does not sufficiently address counter-arguments offered prior to the adoption of the act), it will be less successful in reaching compliance. With this established purpose of soft law in mind, the legal reasoning requirements should not be interpreted too laxly; see Andone/Greco, Burden 79.

1571 For the importance of this notion, illustrated with regard to the ECB's announcement of OMT, see Tridimas/Xanthoulis, Analysis 18; critically: von Bogdandy/Goldmann, Ausübung 71 ff; with regard to EU competition law: H Hofmann, Rule-Making 169 f. Information may, without containing any norms, still influence human behaviour. This causes *Goldmann* to include information within its con-



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Whereas an EU soft law act is legally non-binding for third parties, it regularly is legally binding upon its creator(s). This self-obligation may also be listed as a (possible) purpose of EU soft law, and as a reason for its adoption respectively, as it ensures legal certainty and equal treatment of third parties.[1572] In this context, the then Court of First Instance held: 'Thus, simple guidelines or a simple communication – the Commission's compliance with which can be reviewed by the Community judicature – would have sufficed to guarantee the necessary transparency and legal certainty relating to the Commission's compliance with the obligations which it intended to impose on itself'.[1573] This self-binding effect, clearly a legal, not a factual purpose, allows soft law to fulfil a law-like function, which is particularly important where soft law is used as an alternative to law, either because the adoption of law is not possible (in the terminology of the *Conseil d'État* presented under 5.1. above: substitution) or because soft law is deemed to be more desirable (permanent alternative). But also where soft law is complementing EU law (see below), its self-bindingness is highly expedient. Less important this characteristic seems where soft law serves as a preparation of law, as a *lex ferenda* or *droit vert* and, as such, is used to facilitate a dialogue between the actors involved.[1574] Here it is rather the sometimes educative function of soft law which comes into play.[1575] This purpose has proved itself in practice (factual purpose) and at the same time it is reflected upon in all kinds of procedures laid down in EU law (legal purpose).[1576]

When soft law complements EU law, it mostly does so in the form of a concretisation or, what is similar, an interpretation of law. In the categorisation of the *Conseil d'État*, this falls under the heading 'company', whereby

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cept of 'authority' (to be distinguished from the concepts of 'law' and 'soft law', respectively); see Goldmann, Perspective 61 ff; similarly, for the possible overlap between information and policy-making: Majone, Agencies 264 f.

1572 See 4.2.3.2.3. above.

1573 Case T-240/04 *France v Commission*, para 42.

1574 See Ingelse, Soft Law 77 f and 89 (for this terminology); Senden, Balance 92; Snyder, Effectiveness 33. For the 'separate life as a form of soft law' preliminary draft legal texts may develop: Chinkin, Development 26 f; Frykman/Mörth, Soft Law 155; Hofmann/Rowe/Türk, Administrative Law 543; for an example of draft soft law and its effects see Ştefan, Soft Law 124 f, with regard to a draft leniency notice of the Commission.

1575 See Knauff, Regelungsverbund 250.

1576 For the preparatory purpose of EU soft law see the initiation of (soft) decision-making/rule-making addressed in particular under 3.5.2. above.



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an authentic or an executive (soft) interpretation is produced.[1577] Authentic it is where law creator and concretising/interpreting body are identical. Executive it is where there is no such identity, but the concretising/interpreting body is, as an executive authority, involved in monitoring compliance with the concretised/interpreted law. Such concretisation – which often is undertaken only once the first experiences with the application of a legal act in administrative practice have been made – is often 'indispensable for national enforcers, especially where formal [...] decisions do not sufficiently inform national decisional practice'.[1578] It allows the EU (and the MS) to go easy on law enforcement resources and 'individuals and Member States will be able to minimize [the risk] that their activities could be regarded as violation of [EU law] at a later stage in a Commission investigation'.[1579] *Hofmann* has, in this context, referred to Commission communications whose adoption has increased significantly since the mid-80s[1580] and which may, *inter alia*, lead to a national administrative practice which is in compliance with EU law. This reduces the likelihood of the Commission having to initiate long-winded Treaty infringement procedures.[1581] While it is true that the vast majority of the infringement procedures is resolved prior to the case being referred to the CJEU, also the administrative phase of the Treaty infringement procedure can take a long time.[1582]

While the Commission is most active in the soft concretisation/interpretation of EU law, also other institutions, bodies, offices or agencies within their respective field of activity have complemented EU law in this way.[1583]

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1577 See the cautious early case law: case 74/69 *Hauptzollamt Bremen-Freihafen*, para 9: 'An unofficial interpretation of a regulation by an informal document of the Commission is not enough to confer on that interpretation an authentic Community character'; for the interpretation of an international agreement by means of various soft law acts adopted by the Commission and the Council see Müller/Slominski, Role 877–881.

1578 Georgieva, Soft Law 227.

1579 Hofmann/Rowe/Türk, Administrative Law 567.

1580 See Turgis, Communications 54.

1581 See H Hofmann, Normenhierarchien 217, with further references; see eg the Commission Communication concerning the *Cassis* judgement; for other early examples of communications fulfilling a guidance function or an information function see Meier, Mitteilung 1303–1307; with regard to public procurement law see Lutz, Vergaberegime 897; see also case C-69/05 *Commission v Luxemburg*.

1582 See Koops, Compliance 158.

1583 See eg the CPVO's Guidelines with Explanatory Notes on Article 63 of Council Regulation (EC) 2100/94 of 27 July 1994 on Community plant variety rights. For one of the rare recommendations of the CJEU see Recommendations to national



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In doing so, each EU actor 'doit trouver un juste équilibre entre l'obligation de ne pas créer d'obligations nouvelles sous peine d'annulation et la nécessité d'adopter un instrument ayant une valeur ajoutée'.[1584] If an interpretation of law suggested in a soft law act is followed, soft law – as a matter of course: only indirectly – 'participates' in the pivotal characteristics of EU law, that is direct effect and supremacy.[1585] It is needless to say that the CJEU has the final authority in matters of interpretation of EU law. This applies also with regard to EU soft law.[1586]

So far we have addressed the purposes of voluntarily adopted EU soft law. However, we also need to take into account that EU actors may be under an obligation to adopt soft law. Hence, it may also be one of the (legal) purposes of the adoption of soft law to meet an underlying obligation. Such an obligation may be deduced from the principle of sincere cooperation pursuant to Article 4 para 3 TEU or Article 13 para 2 TEU.[1587] According to this principle, an institution may not impede another institution in exercising its respective competences. For example: Where the Commission fails to adopt a recommendation in accordance with Article 126 para 7 TFEU, even though the Council has decided that an excessive deficit exists, the Council cannot adopt recommendations addressed to the MS concerned. It can only act upon a recommendation by the Commission which in the categorisation of the *Conseil d'État* has a preparatory function. The Commission, like all other institutions, bodies, offices and agencies, shall act in accordance with EU law. The Commission may therefore – in certain circumstances and acknowledging its discretion – be obliged to adopt a recommendation to the Council so as to enable it to adopt recommendations to the MS.[1588] The Commission's (potential) obligation

courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019).

1584 Turgis, Communications 55 f.

1585 See Sarmiento, Soft Law 270 f; see also Rosas, Soft Law 308.

1586 See eg case T-73/98 *Prayon-Rupel*, para 71, in which the Court interpreted Commission soft law in a different way than the Commission itself; see also case C-526/14 *Kotnik*, paras 95 ff; case T-27/02 *Kronofrance*, para 79; differently, namely indicating the high authority of soft law for the interpretation of secondary law *in casu*, in case C-393/16 *Vin de Champagne*, para 45.

1587 Stressing the Commission's duty to give guidance to MS authorities, eg in State aid law, on the basis of Article 4 para 3 TEU and (potentially) in the form of soft law: Opinion of AG *Wahl* in case C-526/14 *Kotnik*, para 83.

1588 Critically with regard to the Commission's failure to act where there was need for a modification of the Council's recommendations: Häde, Aussetzung 763.



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to adopt a recommendation is reflected in the competence of the Council to request the Commission to make a recommendation according to Article 135 TFEU.[1589] The Commission is not obliged to follow this request, but it shall examine it and 'submit its conclusions to the Council without delay'. What is more, the Council may launch an action with the CJEU, accusing the Commission of failure to act in infringement of the Treaties pursuant to Article 265 para 1 TFEU. That this provision also encompasses the failure to adopt a recommendation can be deduced *e contrario* from its para 3 which – unlike para 1, and only with regard to actions of natural or legal persons – explicitly excludes recommendations and opinions.[1590]

In conclusion, the categorisation of purposes of soft law presented under 5.1. above – the scheme of the *Conseil d'État* and the more basic distinction between legal and factual purposes – can reasonably be applied also in the given context, thereby revealing another method of structuring the large *corpus* of EU soft law.

### 5.2.2. Avoiding law as a purpose of EU soft law

Having addressed a variety of purposes of EU soft law, we shall now dwell on the purpose to avoid or even to evade law. The purposes of soft law and its 'hohe politische Attraktivität' [high political attractiveness][1591] strongly rely on the experience that its use often facilitates an 'agreement' between parties which would not otherwise – in the form of law – have been concluded.[1592] Parties may not want to be legally bound for various reasons.[1593] Against this background, soft law may also serve as a way of regulation whereby an often complex and, from a political point of view, difficult law-making process is evaded.[1594] The procedural complexity – which, of

1589 For the EP's and the Council's self-standing and general power to request the Commission to make a proposal see Articles 225 and 241 TFEU; for the Commission's power to adopt and withdraw a legislative proposal see also case C-409/13 *Council v Commission*, paras 70–74.

1590 See also Dörr, Art. 265 AEUV, para 14.

1591 Knauff, Regelungsverbund 248.

1592 See Thomas Müller, Ziele 13.

1593 See Ingelse, Soft Law 77; Terpan, Soft Law (2015) 89; Weismann, Bestimmung 381 f.

1594 See the introduction of the *Lamfalussy* regime in financial market law which does not only – at its level 2 – accelerate the creation of binding decisions, but also – at level 3 – caters for the adoption of soft law; for the procedural innovations brought



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course, is not an end in itself[1595] – in conjunction with the difficulty to ensure the agreement of the required majority in the legislative bodies often makes soft law, as *Gold* said in the context of public international law, 'the only alternative to anarchy'.[1596] With a view to a merely national or EU context we could, less dramatically, say: the only alternative to an unregulated situation.

It need, however, not always be the complexity of the legislative procedure, but it is often also its exclusivity which causes the norm-creator to opt for the soft law road. Where the involvement of private actors in the decision-making process is – for whichever reason – (deemed to be) required, a procedure leading to the adoption of soft law may be chosen due to its less strictly regulated and hence *potentially* more inclusive, open, participatory character.[1597] In these specific cases soft law is actually considered to be the better option than law (permanent alternative). This entails a certain ambivalence which *Georgieva* has aptly expressed in the context of competition soft law: 'Thus, competition soft law portrays an intriguing dichotomy. While attempting to provide democratic values such as clarity, certainty, and participation,[] competition soft law in an increasingly complex policy setup[] simultaneously erodes those same values because of its non-justiciability'.[1598]

Another reason why soft law may in places be deemed more opportune than law is the outright lack of or at least uncertainty about the existence of a competence to adopt a legal act.[1599] It is then adopted 'faute de mieux', as *Schwarze* put it.[1600] While, as was clarified above, also the adoption of an EU soft law act must rest on an adequate legal basis, the requirements for such a legal basis are regularly lower than in the case of law and, what is more, soft law is less likely to be brought before and scrutinised by the

about by the *Lamfalussy* regime see eg Weismann, Agencies 81–97; for the legal and factual qualification of the level 3 output see Arndt, Sinn 74–78.

1595 For the impact the chosen procedure (ie the chosen legal basis) has on its outcome see eg case C-62/88 *Greece v Council*, para 10; Opinion of AG *Tesauro* in case C-300/89 *Commission v Council*, para 2.

1596 Gold, Soft International Law 444.

1597 See Knauff, Regelungsverbund 251; for the importance of inclusivity in the drafting of private standards see Roht-Arriaza, Compliance 209 f.

1598 Georgieva, Soft Law 228.

1599 See Lafarge, Coopération 75 f; Senden, Soft Law 169, with regard to Commission recommendations; differently with regard to Council recommendations: ibid 177. This reason is acknowledged also by the Court in case C-322/88 *Grimaldi*, para 13.

1600 Schwarze, Soft Law 238.



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Court (see in particular 6.2. below). That way, soft law may effectively regulate – and survive – even if it is unlawful, thereby contributing to what *Majone* called 'integration by stealth'.[1601]

The avoidance of law, be it in order to make use of a more simple and/or inclusive procedure, be it in order to limit the risk of an act being challenged before the Court, may constitute an abuse of the chosen type of action.[1602] Such moves also have a democratic thrust, insofar as the avoided or even circumvented legislative procedures often carry more democratic participation (even if in a more formalised way) and hence also more democratic legitimacy than (many of) the procedures leading to the adoption of soft law.[1603] Having said that, there may also be legitimate reasons for the avoidance of law, such as preventing a political deadlock in legislative negotiations or allowing for a more inclusive decision-making procedure. Where these legitimate reasons are particularly strong, taking the soft law route may be justified. However, the decision in favour of soft law should not be taken too lightheadedly, in particular where law-making procedures laid down in primary law are avoided.

While soft law may be a welcome alternative to law in places, suffice it to briefly mention here that in other cases it may turn out to be politically inappropriate and to require 'hardening'.[1604] While the reasons for this preference given to law over soft law lie in the concrete circumstances of

1601 Majone, Dilemmas.

1602 See generally on this topic Biervert, Mißbrauch; see also joined cases 8–11/66 *Cimenteries*, 92; with regard to non-binding public international 'law' see Bothe, Norms 94.

1603 See Frykman/Mörth, Soft Law 155; Meijers Committee, Note 1; see also Arndt, Sinn 185; Dawson, Soft Law 8; Senden, Soft Law 172. For early complaints by the EP and the French *Conseil d'État* see Ştefan, Enforcement 215; for substitution dynamics in EU company law see Lutter, Empfehlungen 799, stressing the 'hohe[n] Charme' [great charm] for the Commission that it does not need to involve the legislator when adopting the recommendations at issue; critically: D Lehmkuhl, Government 150.

1604 See the words of Commissioner *Charlie McCreevy* on potential follow-up action to a Commission recommendation on the cross-border management of copyright for legitimate online music services: '[I]f I am not satisfied that sufficient progress is being made, I will take tougher action'; quoted in European Parliament (Committee on Legal Affairs), Working Document on institutional and legal implications of the use of 'soft law' instruments (14 February 2007), PE 384.581v02–00, 5, including critical remarks on this case.



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the cases at issue,[1605] more generally speaking, and in spite of the increasing importance of soft law, it appears that the implementation of a given EU policy by means of law still in the majority of cases is more effective than soft regulation.

### *6. Judicial review of soft law*

#### 6.1. Introduction

The question whether and, if so, to which extent a soft law act can be made subject to legal review is of eminent importance for the legal protection of those (negatively) affected by the act, and – more generally speaking – the question whether a soft law act can be scrutinised by a Court is highly relevant from a rule of law and from a democracy perspective.[1606] While there is a number of possibilities that a soft law act be examined (eg by the EP according to Article 226 TFEU, by the European Ombudsman according to Article 228 para 1 TFEU,[1607] or by an agency-internal Board of Appeal[1608]), the focus here shall be on judicial review (in a broad sense) by the CJEU. In this context, essentially two procedures are to be mentioned: the annulment procedure (Article 263 TFEU) and the preliminary reference procedure (Article 267 TFEU). Other procedures will be briefly addressed thereafter.

1605 With regard to the originally soft, and subsequently 'hardened', regulation of credit rating agencies see Ferran/Alexander, Soft Law Bodies 760. Another example is Article 13 para 3 subpara 2 of the ESM-Treaty which declares binding for its MoU certain opinions, warnings and recommendations addressed to the respective MS. For those who argue in favour of a general legalisation see references in Knauff, Regelungsverbund 19 f.

1606 See eg Thomas Müller, Soft Law 114.

1607 See eg Senden/van den Brink, Checks 58 ff; Vianello, Approach.

1608 Soft law cannot normally be challenged before Boards of Appeal. However, if the binding act under review was preceded/prepared by a soft law act, an indirect consideration of soft law by the respective Board of Appeal may be feasible; with regard to the ESAs' Joint Board of Appeal and the EP's suggestion to broaden the scope of its review powers so as to include soft law see Chamon/Fromage, Added Value 21; for some kind of scrutiny which the Commission may exercise with regard to the ESAs' soft law see Article 60a of Regulations 1093–1095/2010; see on this ibid 30 f.



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## 6.2. The annulment procedure

As regards the annulment procedure, Article 263 para 1 TFEU sets out that it encompasses the review of the legality of 'legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties'. The latter limitation applies also to acts of bodies, offices or agencies of the EU, which the Court is competent to review according to Article 263 TFEU, as well. The Court does not appear to make a difference between these two groups of excluded acts – recommendations and opinions on the one hand, and acts not producing legal effects *vis-à-vis* third parties, on the other hand. Instead – and with regard to all acts adopted by the mentioned EU actors which are brought before it – it concentrates on the (intended[1609]) legal effects of an act *vis-à-vis* third parties – 'whatever their nature and form'.[1610] This only means that nature and form may be trumped by the (otherwise) established intention of the creator of the act. Overall, it is in particular the wording and the context which are to be included in the assessment.[1611]

In the context of Article 263 TFEU, 'legal effects *vis-à-vis* third parties' appear to be understood as synonymous with external legal bindingness.[1612]

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1609 The phrase 'intended to produce legal effects *vis-à-vis* third parties' was introduced by the Treaty of Maastricht. While the Treaty has been using it only in the context of the EP (and, since the Treaty of Lisbon, the European Council and other EU bodies), the Court has increasingly applied the alternatives – (actual) 'legal effects' or 'intented to produce legal effects' (*telos*) – to examine whether or not an action for annulment against an act is admissible; see references in Dörr, Art. 263 AEUV, para 41.

1610 The landmark decision in this context is case 22/70 *Commission v Council*, para 42 (from where the quote is taken); see also later case law: case C-362/08P *Hilfsfonds*, para 55, with a further reference; case T-258/06 *Germany v Commission*, paras 29–31, referring to form, nature and wording (which may all indicate the existence or lack of legal effects), but stressing that these factors are only to be considered among others.

1611 See case C-443/97 *Spain v Commission*, paras 34–36; case T-496/11 *United Kingdom v European Central Bank*, para 31, both with further references; for the focus on the appearance for the addressee rather than the intention of the creator in this case see Türk, Liability 45.

1612 See case C-31/13P *Hungary v Commission*, paras 54 f, with further references; see also Thomas Müller, Soft Law 118. Merely internal acts may not be subject to an action for annulment; see case T-236/00R *Stauner*, para 43, with further references. One important exception are decisions in staff matters which normally



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In the words of the Court: This 'legal effect' required under Article 263 TFEU by no means 'relates to any legal effect, irrespective of its nature', but it is the 'binding nature' which matters.[1613] Where, on the contrary, an act is 'only proposing a course of conduct [...] [and hence] similar to a mere recommendation within the meaning of Article 288 TFEU [...] it should be concluded that the act does not have legal effects that are such as to render an action for annulment brought against it admissible'.[1614] That non-binding acts may affect the interests of individuals, for example in the form of what the Court refers to as 'purely implementing measures', does not render them reviewable under Article 263 TFEU. Such implementing measures are, in particular, 'measures which, without giving rise to any rights or obligations for third parties, are designed merely to put into practical effect an earlier measure, or measures adopted in order to implement earlier decisions which produce only internal legal effects within the administration and do not affect the interests of third parties'.[1615] The Court also explicitly determined that 'preparatory act[s] or intermediate measure[s]'[1616] as well as 'confirmatory measures, [...] mere recommendations and opinions and,

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also concern only the internal organisation of a body, but which may be reviewed, nevertheless; see further references in W Cremer, Art. 263 AEUV, para 20. Also in case of (intended) legal effects *vis-à-vis* third countries, the Court in principle confirms the admissibility of an action under Article 263 TFEU against the respective act; for the refusal of admissibility see eg case T-670/14 *Milchindustrie*, with regard to Commission Guidelines on state aid for environmental protection and energy 2014–2020. For a critique of the focus on legal bindingness and arguments in favour of a wider understanding of 'legal effects' see Opinion of AG *Bobek* in case C-16/16P *Belgium v Commission*, paras 94 and 109 ff.

1613 Case C-689/19P *VodafoneZiggo*, paras 56–58; also consider the wording in case C-431/20P *Tognoli*, para 33: 'any measures [...] which are intended to have binding legal effects, are regarded as acts open to challenge, within the meaning of Article 263 TFEU'. Legal effects below this threshold do not suffice; see eg ibid, para 53, and case C-687/15 *Commission v Council*, para 54; with regard to legally non-binding 'intermediate measures whose purpose is to prepare for the final decision' see joined cases C-551/19P and C-552/19P *ABLV*, para 39, with further references. *De lege ferenda* arguing, along the lines of liberal constitutionalism, in favour of a more open understanding of Article 263 TFEU: Gentile, Review; see also Ştefan/Petri, Review 533; see also the differentiated approach of AG *Hogan* in his Opinion in case C-572/18P *thyssenkrupp*, para 70.

1614 Case T-496/11 *United Kingdom v European Central Bank*, para 32; see also case C-370/07 *Commission v Council*, para 42, with further references; case C-689/19P *VodafoneZiggo*, paras 51–53.

1615 Case T-185/05 *Italy v Commission*, paras 51 f, with further references.

1616 Case T-671/15 *E-Control*, para 63; case T-280/18 *ABLV*, para 30; case T-283/18 *Bernis*, para 32; joined cases C-551/19P and C-552/19P *ABLV*, paras 40 ff.



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in principle, internal instructions'[1617] fall outside the scope of Article 263 TFEU.

A peculiar issue are acts which appear to be soft law at first sight, but turn out to be law (*prima facie* soft law). The general hazardousness of *prima facie* soft law acts was referred to by AG *Tesauro*. According to him, they 'give rise to confusion and uncertainties amongst its addressees, be they Member States or individuals, as to whether the conduct contemplated by it is obligatory. Manifestly, this is detrimental, not only to individuals, but also to the administration'.[1618] Confronted with such acts, the Court has first unmasked them as acts intended to have or actually having 'legal effects' and eventually annulled them (eg for not having been adopted on an adequate legal basis).[1619]

Due to the rather material question of whether an act has 'legal effects', the examination of admissibility thereby becomes intertwined with questions of substance.[1620] It is the substance of an act which is decisive also in the context of admissibility, not its name.[1621] The Court expressed this in the following way: 'In order to determine whether the contested act produces binding legal effects, it is necessary to examine the substance of that act and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in

1617 Case T-721/14 *Belgium v Commission*, para 17.

1618 Opinion of AG *Tesauro* in case C-325/91 *France v Commission*, para 21.

1619 See eg case C-57/95 *France v Commission*; case C-16/16P *Belgium v Commission*, paras 29–31; case T-561/14 *One of Us*, para 83 (confirmed in appeal case C-418/18P *Puppinck*); see also Opinion of AG *La Pergola* in case C-443/97 *Spain v Commission*, paras 22 and 27, proposing the annulment of 'internal guidelines' of the Commission (The Court did not follow this proposal.); see H Hofmann, Rule-Making 176, with further references; Senden, Soft Law 149, referring to a case in which the Commission refrained from making the legal non-bindingness of its Communication explicit – contrary to a plea of the EP. For the possibility of only partial annulment of *prima facie* soft law acts see arguments by Pampel, Rechtsnatur 128 f.

1620 See eg case C-325/91 *France v Commission*, para 11; for further references see H Hofmann, Rule-Making 176.

1621 See case C-322/88 *Grimaldi*, para 8, in which the Court, with regard to recommendations, stresses 'that acts *in the nature of* recommendations' (emphasis added) are excluded from scrutiny under what is now Article 263 TFEU; see also case T-721/14 *Belgium v Commission*, para 66; see Opinion of AG *Tesauro* in case C-366/88 *France v Commission*, para 6. Still stressing the importance of 'style [ie title; see the German version of the judgement: 'Bezeichnung'] and form' of an act: joined cases 90 and 91/63 *Commission v Luxembourg*, 631; see also Dörr, Art. 263 AEUV, para 42; Raschauer, Leitlinien 37 f, both with further references.



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which it was adopted and the powers of the institution which adopted the act'.[1622]

It may occur that a soft law act is indirectly scrutinised in the course of an annulment procedure. Where a soft law act *content-wise* is the main basis of an act having legal effects (eg because a regulation essentially takes over the content of the recommendation which has initiated the decision-making procedure or because a decision applies an interpretation of EU law which is suggested by guidelines), it is likely that the Court, in the course of an annulment procedure against the latter act, indirectly also considers, ie scrutinises, the soft law act.[1623] In the context of a scientific opinion adopted by an EU committee, the Court held that '[a]lthough the opinion does not bind the Commission, it is none the less extremely important so that any unlawfulness of that opinion must be regarded as a breach of essential procedural requirements rendering the Commission's decision unlawful'.[1624] While a scientific opinion does not necessarily contain rules and thus may not qualify as soft law, we may still conclude from these words that preparatory acts (including soft law) will be taken into account when the resulting act is examined.

The case law also contains contested judgements which, against the backdrop of the above case law, seem to be non-system. One example is the decision of the General Court, taken on the basis of an annulment action filed by a privileged claimant, namely the UK as a MS, in which it (partially) annulled the ECB's Eurosystem Oversight Policy Framework, according to conventional wisdom a legally non-binding act.[1625]

In conclusion we can say that Article 263 TFEU, as interpreted by the Court, does not allow for the annulment of a true soft law act – for lack of (intended) legal effects and irrespective of whether it is called recommenda-

1622 Case C-16/16P *Belgium v Commission*, para 32; case C-310/21P *Aquind*, para 50; see also case C-911/19 *FBF*, para 38; joined cases C-551/19P and C-552/19P *ABLV*, para 41, both with further references.

1623 See case 60/81 *IBM*, para 12; case T-326/99 *Olivieri*, paras 50 and 55; case T-671/15 *E-Control*, para 81.

1624 Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan*, para 197.

1625 Case T-496/11 *United Kingdom v European Central Bank*, in particular para 84; see discussion by Alberti, Evolution 644–647; for the exceptional annulment procedure against a recommendation in case C-27/04 *Commission v Council* see Häde, Aussetzung 757 f.



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tion, opinion or otherwise.[1626] More progressive approaches, as uttered eg by AG *Bobek*,[1627] so far have not been taken up by the Court.[1628]

### 6.3. The preliminary reference procedure

Quantitatively speaking, the preliminary reference procedure is the most important procedure for the assessment of EU law by the CJEU. The predecessor provisions of Article 267 TFEU, apart from the interpretation of the Treaty, only referred to the validity check and interpretation of acts of the institutions of the EC (and of the ECB), and to the interpretation of the statutes of certain bodies established by the Council respectively.[1629] Considering this exclusive wording, the Court hesitated to deal with acts from bodies not explicitly mentioned in Article 177/234 of the Treaty.[1630] Starting in the early 90s, the Court has gradually developed a more generous approach in this respect.[1631] With the Lisbon reform, the scope of creators of eligible acts under the preliminary reference procedure was extended to 'bodies, offices or agencies' of the EU. In the *Elliott* case, the Court broadened the ambit of Article 267 TFEU further by even accepting to interpret acts 'which, while indeed adopted by bodies which cannot be described as "institutions, bodies, offices or agencies of the Union", are by their nature measures implementing or applying an act of EU law'.[1632]

When it comes to the required effects of eligible acts, Article 267 TFEU and its predecessors have been more encompassing. Unlike Article 263 TFEU and its predecessors, the preliminary reference regime does not provide for a limitation to acts producing legal effects *vis-à-vis* third parties.

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1626 For actions for annulment against 'explanatory' acts which go beyond the normative content of the legal act to be 'explained' see 3.3.3.1. above.

1627 Opinion of AG *Bobek* in case C-16/16P *Belgium v Commission*, para 4.

1628 At the national level, courts show an increasing willingness to review soft law; see Eliantonio, Review 292–299.

1629 Article 177 TEEC; Article 234 TEC.

1630 See case C-322/88 *Grimaldi*, para 8; case C-11/05 *Friesland Coberco*, paras 36 ff; with regard to the Court's approach towards soft law adopted by the Commission together with the MS see Eliantonio, Soft Law 505, with a further reference.

1631 See eg case C-188/91 *Deutsche Shell*.

1632 Case C-613/14 *Elliott*, para 34, with further references. This wording seems to be excessively broad, as also MS acts could implement or apply an act of EU law; with regard to output adopted in the framework of the OMC: Knauff, Regelungsverbund 512.



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Accordingly, the Court has for a long time interpreted soft law acts adopted by the institutions under the preliminary reference procedure.[1633] With regard to the interpretation of acts, in general the Court appears to take a liberal, a 'flexible approach'.[1634] The case of the ECB's (mere) press release announcing the Outright Monetary Transactions Programme (OMT) is a good example for this.[1635] While an action of private parties under Article 263 TFEU was refused as inadmissible,[1636] in the *Gauweiler* case the Court has accepted to provide a preliminary ruling on the press release, namely on its interpretation.[1637] While the Court's interpretation of a soft law act uttered in the course of a preliminary reference procedure is binding,[1638] the act itself remains to be non-binding.[1639] Where the national court or tribunal decides to apply it, it is bound by the CJEU's interpretation.[1640]

With regard to the second prong of the preliminary reference procedure, the validity of acts other than the Treaties, the Court's jurisdiction with regard to soft law has not received broad attention in the case law for quite some time.[1641] In view of Article 263 TFEU, as interpreted by the Court, and

1633 See eg cases 113/75 *Frecassetti*, para 8; C-188/91 *Deutsche Shell*, para 18; C-42/99 *Queijo Eru*, paras 20 ff; C-101/08 *Audiolux*, among others para 46; C-526/14 *Kotnik*, para 33; T-109/06 *Vodafone España*, para 102.

1634 Opinion of AG *Campos Sánchez-Bordona* in case C-613/14 *Elliott*, para 61, with references to the Court's case law. For recent indications of a rebound effect in the Court's approach see Wahl/Prete, Gatekeepers.

1635 Whether this press release constitutes a soft law act is disputed. For lack of a rule, ie of normative content, the author would say it is not; differently: Alberti, Evolution 632, thereby pointing to the specificities of this press release as compared to usual EU soft law; for the question of liability see Türk, Liability 43; see also case T-192/16 *NF*, para 42, specifically referring to press releases.

1636 See case C-64/14P *European Central Bank v von Storch*.

1637 See case C-62/14 *Gauweiler*, para 28. This concessive approach follows from the Court's reliance on the 'direct knowledge of the facts giving rise to the dispute and […] [its] responsibility for the subsequent judicial decision' of the referring court; see also case C-112/00 *Schmidberger*, para 31.

1638 See eg case C-346/93 *Kleinwort Benson*, para 24.

1639 See Georgieva, Soft Law 231–233, with further references. For the possibly successful approach for individuals to make EU soft law subject to national proceedings and then – via Article 267 TFEU (requiring a request of the national court) – to bring it to the attention of the CJEU see Eliantonio, Soft Law 513.

1640 See eg joined cases C-120/06P and C-121/06P *FIAMM*, paras 123 f.

1641 Case C-322/88 *Grimaldi*, para 8, according to which, in very general terms, it may 'give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception'; more specific (and denying the scrutiny of validity of a soft law act not stemming from an institution): case C-11/05 *Friesland Coberco*, paras 36-41; see Opinion of AG *Bobek* in case C-16/16P



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its exclusion of true soft law acts, ruling on the validity of EU soft law under Article 267 TFEU could be considered as an (unlawful) evasion of the requirements laid down for the annulment procedure.[1642] This may be one of the reasons why the Court's approach had been rather reserved in this respect,[1643] even if it did not outright refuse the possibility of examining the validity of soft law.[1644] AG *Bobek* rather observed a tendency to convert questions on the validity of soft law into questions of interpretation.[1645] In recent judgements, however, the Court was quite explicit in this respect. In *Belgium v Commission* the Court clearly held that 'even though Article 263 TFEU excludes the review, by the Court, of acts which are in the form of recommendations, Article 267 TFEU confers on the Court jurisdiction to deliver a preliminary ruling on the validity and interpretation of all acts of the EU institutions without exception'.[1646] This line of argumentation was confirmed by subsequent case law, among other things leading to the partial

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*Belgium v Commission*, paras 106–108, suggesting the possibility of a preliminary reference to assess also the *validity* of a recommendation; for the lack of clarity of the concept of validity in the context of EU soft law see Knauff, Soft Law 738 f.

1642 The link which was originally drawn between the annulment procedure and the preliminary reference procedure is well expressed by the Opinion of AG *Poiares Maduro* in case C-11/05 *Friesland Coberco*, para 24, in which he states that '[o]nly provisions which are intended to produce binding legal effects can be the subject of a review of legality' under the preliminary reference procedure, thereby pointing to case law adopted in the context of the annulment procedure; with regard to the overlapping purpose of the annulment procedure and the validity control as part of the preliminary reference procedure see also case C-72/15 *PJSC Rosneft*, para 68; for the case of CFSP more generally see Butler, Age 673. For the relationship between these two procedures in terms of the rule of law see case 294/83 *Les Verts*, para 23. However, gradually over the past 35 years, the conviction seems to have gained ground that the different wording and purpose of Article 263 and Article 267 TFEU (and their predecessors), respectively, suggest that 'some degree of dissociation between the two types of procedures is indeed possible' and that '*in order to be complete*, the individual procedures must be *complementary*' (emphasis in original); Opinion of AG *Bobek* in case C-911/19 *FBF*, paras 135 and 138.

1643 See Korkea-aho, Courts 491 f; considering certain legal effects a requirement for a preliminary ruling on the validity of an act: Alberti, Evolution 639 f, with further references.

1644 See case C-94/91 *Wagner*, paras 16 f; case C-11/05 *Friesland Coberco*, paras 40 f.

1645 See Opinion of AG *Bobek* in case C-911/19 *FBF*, paras 98–103, with references to the Court's case law. For the Court's general readiness to re-word preliminary references so as to make them fit see already case 26/62 *van Gend & Loos*, 14.

1646 Case 16/16P *Belgium v Commission*, para 44; for the novelty of this approach see also Gundel, Rechtsschutz 603 f.



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invalidation of an EBA recommendation for wrongful legal conclusions made therein.[1647] The standard of review applied for the examination of soft law does not appear to be principally different from that referred to in the examination of law.[1648] The effect of the invalidity of an (interpretative) soft law provision is that the actor in charge 'must not take [this soft law] into consideration when interpreting EU law'.[1649] That is how AG *Campos Sánchez-Bordona* put it in the *Balgarska Narodna Banka* case, and the Court does not seem to have contradicted him.

### 6.4. Other procedures

EU soft law may also be (indirectly) reviewed by the CJEU in the course of other procedures. According to Article 340 para 2 TFEU, the Union shall make good any damage caused 'by its institutions or by its servants in the performance of their duties'.[1650] The illegality of the damaging behaviour must be 'sufficiently serious' for there to be a claim under Article 340 paras 2 f TFEU.[1651] Where the EU body concerned disposes of discretion, this means that only a 'manifest[] and grave[] disregard[] [of] the limits on [this] discretion' can lead to a damages claim.[1652]

Already in light of this requirement, it can be doubted that non-compliance with EU soft law by the named actors may lead to a successful claim

1647 See case C-501/18 *Balgarska Narodna Banka*, paras 98-101.

1648 See case C-501/18 *Balgarska Narodna Banka*, para 83; case C-911/19 *FBF*, para 57 (examination of validity) and 67 (standard of review); for the relationship between the two judgements, and for a discussion of the latter, see Chamon/de Arriba-Sellier, Justiciability; for a critique of the Court not actually sticking to the standard of review it has announced to apply see ibid 308–313; for the question of whether the (exceptional) duty to make a preliminary reference pursuant to the *Foto-Frost* case law also applies in the context of soft law see Scholz, Soft law 457, with further references.

1649 Opinion of AG *Campos Sánchez-Bordona* in case C-501/18 *Balgarska Narodna Banka*, para 120.

1650 For the ECB see para 3 *leg cit*; for European agencies see, for example, Articles 3 and 39 of Regulation 2019/1149 establishing a European Labour Authority.

1651 For the original limitation of this qualification to normative illegality and its gradual extension to executive and judicial illegality see I Augsberg, Art. 340 AEUV, paras 51–53; for exceptional cases not requiring illegality see ibid, paras 82 ff.

1652 Case C-352/98P *Bergaderm*, para 43.



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for damages.[1653] Since soft law in principle, leaving the binding effect on its respective creator apart,[1654] is legally non-binding, a deviation from the prescribed behaviour can by definition – and given that this behaviour is not, in addition to that, legally prescribed elsewhere[1655] – not be illegal, let alone constitute a sufficiently serious breach of Union law. This holds true also with regard to the Treaty infringement procedure according to Articles 258–260 TFEU, which does not concern the behaviour of EU bodies, but in which a MS' alleged failure 'to fulfil an *obligation* under the Treaties' (emphasis added) is at issue.[1656] The situation is different – and generally more complicated – when compliance with a soft law act leads to a damage (and an action for damages) or is at issue in a Treaty infringement procedure.[1657]

As regards Article 340 paras 2 f TFEU, relevant scenarios may not only be (non-)compliance with (unlawful) soft law, but the damaging behaviour may also itself take the form of soft law.[1658] In the *Arizmendi* case the then Court of First Instance, in the context of a reasoned opinion adopted by the Commission in a Treaty infringement procedure, stated that 'it cannot be precluded that in very exceptional circumstances a person may be able to demonstrate that such a reasoned opinion is vitiated with illegality con-

1653 Similarly: Arroyo Jiménez, Bindingness 26 f; Ştefan, Soft Law 241, with regard to State liability (which also requires there to be a 'sufficiently serious breach'). In other legal orders, non-compliance with non-binding norms may – exceptionally – lead to damages claims; see eg Arndt, Sinn 174–176.

1654 See 4.2.3.2.3. above. For the legitimate expectations soft law may create see 4.2.2.2.4. above. The violation of legitimate expectations may give rise to a damages claim.

1655 See also Sarmiento, Soft Law 278–280. If a legal provision, as interpreted by a soft law act, is deemed to be violated, an action for damages may be successful. That way, the violation of soft law may – indirectly – result in the confirmation of a damages claim; see (in the context of State liability) case C-501/18 *Balgarska Narodna Banka*, para 81; see also Arroyo Jiménez, Bindingness 20.

1656 See also case C-69/05 *Commission v Luxemburg*. For the 'different purposes' and 'different conditions' of the annulment procedure on the one hand, and the Treaty infringement procedure on the other hand see case C-16/16P *Belgium v Commission*, para 40; see also Wörner, Verhaltenssteuerungsformen 510 f.

1657 The Court's rather restrictive approach can be deduced from its general case law (which is not related to damages claims, though); see case 133/79 *Sucrimex*, paras 20–23; case T-54/96 *Oleifici Italiani*, para 67; case T-585/14 *Slovenia v Commission*, para 44. See also J Hofmann, Protection 464 f, with further references. With regard to private addressees of EU soft law see von Graevenitz, Mitteilungen 173.

1658 With regard to acts of public international (soft) law, namely the MoU adopted by the Commission on behalf of the ESM, see joined cases C-8–10/15P *Ledra*, para 55.



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stituting a sufficiently serious breach of a rule of law that is likely to cause damage to him',[1659] and subsequently held:

> 'The fact that a reasoned opinion adopted by the Commission under the first paragraph of Article 226 EC is not a measure intended to produce binding legal effects with respect to third parties and that, accordingly, that opinion is not a measure capable of forming the subject matter of an action for annulment [...] does not affect the preceding assessment. A reasoned opinion may, owing to its unlawful content, cause harm to third parties. Thus, for example, it cannot be precluded that the Commission should cause harm to persons who have entrusted it with confidential information by disclosing that information in a reasoned opinion. Likewise, it cannot be precluded that a reasoned opinion should contain inaccurate information about certain persons likely to cause them harm' (emphasis in original).[1660]

The wrongful disclosure of information is not the only way in which soft law can cause a damage. It may also be the (soft) legal substance of the act which can be made subject to a damages claim.[1661]

In our context, the main question is whether a claim for damages or a Treaty infringement procedure may lead to a (direct or indirect) *review of* (the legality of) *soft law* by the Court. From the above we can conclude that in the course of the procedure following an action for damages, an EU soft law act may in fact be scrutinised. In the course of a Treaty infringement procedure this may principally be the case, but – since an EU soft law act does not impose obligations on the MS – in practice is less likely.[1662] There is, however, one soft law act which will always be considered (indirectly), if the Court renders a judgement: the content of the Commission's reasoned

1659 Joined cases T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04 *Arizmendi*, para 68.

1660 Joined cases T-440/03, T-121/04, T-171/04, T-208/04, T-365/04 and T-484/04 *Arizmendi*, para 69; case T-107/17 *Steinhoff*, paras 55-57, with many further references; case T-868/16 *QI*, para 71; see also Senden, Soft Law 465, with reference to case law.

1661 See case T-107/17 *Steinhoff*, para 57.

1662 Soft law may be invoked by a MS to justify its behaviour, though, which could lead to a consideration of this act by the Court; see case C-342/05 *Commission v Finland*, paras 29 ff.



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opinion pursuant to Article 258 TFEU, to the extent that it is repeated in the Commission's action.[1663]

Apart from that, Article 277 TFEU allows for an *incidenter* review of acts of general application, which may lead to a declaration of inapplicability in the case at issue. This review may be performed in other procedures such as the aforementioned annulment procedure, the preliminary reference procedure, or the procedure on an (alleged) failure to act (Article 265 TFEU).[1664] The Court has specified that under Article 277 TFEU not only regulations, but all 'acts of the institutions [in a broader sense] which, although they are not in the form of a regulation, nevertheless produce similar effects' can be challenged.[1665] Thus, also soft law acts of general application seem to fall within this category.[1666]

1663 After all, it is the action ('application' according to Article 120 of the Rules of Procedure of the CJEU) initiating the Court procedure, not the reasoned opinion.

1664 Article 277 TFEU applies to all procedures before the CJEU; see eg Stoll/Rigod, Art. 277 AEUV, para 6. For the possibilities to act against an EU body's failure to adopt a soft law act see Article 265 TFEU (privileged claimants). A non-privileged claimant, however, is limited to complain about the failure to address to him/her an act other than a recommendation or an opinion; critically of the Court's strict approach: J Scott, Limbo 344 ff and 349 ff (with reform proposals); see also references in Eliantonio/Ştefan, Soft Law 464.

1665 Case 92/78 *Simmenthal*, para 40.

1666 In its original version, this provision explicitly excluded recommendations and opinions; see Article 173 TEEC (Rome). The current version – Article 277 TFEU – refers to Article 263 TFEU instead, which also speaks against the inclusion of soft law – or rather: in favour of an inclusion of (unlawful) soft law (of a general application) only to the extent it is challengeable under Article 263 TFEU. However, the term 'similar effects' in the Court's case law appears to be rather malleable. The Court seems to be more concerned about a 'direct legal connection' of the soft law act to the act challenged in the main procedure, which it was ready to confirm in a number of cases; see eg joined cases C-189, 202, 205, 208 and 213/02P *Dansk Rørindustri*, para 237; case T-23/99 *LR AF 1998*, paras 274–276; cases T-394/08, T-408/08, T-453/08 and T-454/08 *Sardegna*, paras 206–210, all with regard to Commission guidelines; for the CJEU's readiness to include acts adopted by European agencies see Ehricke, Art. 277 AEUV, para 11, with further references.



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