

Petra Lea Láncos, Napoleon Xanthoulis, Luis Arroyo Jiménez (eds.), *The Legal Effects of EU Soft Law: Theory, Language and Sectoral Insights* (Book Review)

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From the perspective of early 2024, it appears fair to observe that EU soft law scholarship is experiencing a renaissance after years of dormancy. There have been edited collections, a research handbook, and numerous articles aimed at dissecting the nature of soft law. While I would like to be able to provide a reason for why soft law is once again in vogue, academic trends, like fashion trends, often cycle back around mysteriously, to the delight of some and the dismay of others. In this case, the resurgence of soft law scholarship is a delightful development, and this edited collection stands out as a gem in the current wave of interest.

According to the editorial blurb, this book<sup>1</sup> “evaluates the legal effects of soft law, its foundations and how they behave in some of the most innovative areas of EU law”. While the book certainly accomplishes this task, as a whole, the collection prompts an important question for me: Why do actors believe that soft law carries legal weight? This book not only explores whether or why soft law holds legal significance (*i.e.* legal effects) and what that significance entails but also inquires into why people perceive soft law to possess legal authority. This may seem like a trivial distinction, but it is not.

While it is undeniable that legislation has legal effects, and most individuals you encounter on the street or within the corridors of the Commission Berlaymont building would likely agree, it is far more intriguing to wonder why we – from ordinary citizens to Commission officials – attribute authority to soft law. (Of course, you might encounter a legal theorist eager to challenge the assumption that legislation inherently has legal effects, or one

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<sup>1</sup> Petra Lea Láncos *et al.* (eds.), *The Legal Effects of EU Soft Law. Theory, Language and Sectoral Insights*, Edward Elgar, Cheltenham, 2023.

who wants to figure out the nuanced nature of those effects, but let us set that aside for now.) Understanding why we invest soft law with authority proves to be a much more compelling inquiry.

The book has nine chapters, each offering a unique perspective on the question at hand. The first part consists of three chapters, each raising theoretical stakes. In his contribution, one of the collection's three editors, Luis Arroyo Jiménez, clarifies that while soft law lacks binding force, it still exerts legal influence.<sup>2</sup> He argues that EU soft law goes beyond mere bindingness, introducing a typology of legal effects such as interpretation, annulment, compensation, and sanction. These are indirect, because they do not directly stem from the soft law measure itself but rather from other hard rules or principles connected to it in various ways.

Wolfgang Weiß examines the utilization of soft law in domains of decentralized enforcement.<sup>3</sup> In certain areas, soft law imposes a comply-or-explain burden, while in others, it simply prompts a duty to consider its contents under the principle of sincere cooperation. He argues that soft law measures issued by the Commission engender legitimate expectations among affected individuals, thereby conferring authority on soft law. Weiß considers this notion in the area of decentralized enforcement, cautiously entertaining the idea that also national authorities could be bound by EU soft law based on the legal principle of safeguarding legitimate expectations.

Verena Rošić Feguš suggests that for law to be considered valid, it does not necessarily have to be binding.<sup>4</sup> In more sophisticated terms, bindingness is not a prerequisite for identifying certain norms as valid law. She proposes a distinction between validity, normativity, and bindingness, advocating for a broader understanding of valid law to encompass soft law norms affecting rights and obligations. The fact that EU soft law can sometimes have binding legal effects without being inherently binding highlights the necessity for a "conceptual update".<sup>5</sup> Updating the conceptual approach to bindingness would provide a more accurate description of the current position of soft law within the EU legal order.

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2 Luis Arroyo Jiménez, 'Beyond bindingness: A typology of EU soft law legal effects' in Láncos *et al.* (eds.) 2023, pp. 9–32.

3 Wolfgang Weiß, 'Reconsidering the legal effect of EU soft law in national implementation: Bindingness from an individual rights perspective' in Láncos *et al.* (eds.) 2023, pp. 33–52.

4 Verena Rošić Feguš, 'EU soft law: validity, normativity and 'bindingness' reviewed' in Láncos *et al.* (eds.) 2023, pp. 53–75.

5 *Id.* p. 74.

The second part of the volume also comprises three chapters, all focusing on the role of language in persuading people that soft law holds authority.

Danai Petropoulou Ionescu and Mariolina Eliantonio demonstrate that the language used in soft law instruments plays a crucial role in establishing authority and ensuring compliance.<sup>6</sup> Their analysis, which focuses on EU environmental soft law measures, illustrates how these measures employ highly prescriptive language, thereby constraining the scope for discretion. To compensate for the lack of inherent bindingness, soft law relies on language and appeals to logic to create alternative forms of bindingness – such as moral, political, or social dynamics inherent within a binding instrument. The idea of alternative forms of bindingness is intriguing, and it would be beneficial in the future to consider not only the practical and legal effects of soft law but also its moral, political, and social effects.

Petra Lea Láncos, another co-editor, and Eljalill Tauschinsky conduct a comparative analysis between directives and recommendations that resemble directives to determine if their language indicates variances in their level of bindingness.<sup>7</sup> They construct multilingual collections of both types of documents and employ a Python language processing tool and clustering techniques to computationally examine distinctive terms. Interestingly, they show that the hortatory versus mandatory nature of a statement differs depending on the language version. This presents a challenge in accounting for such nuances in the case law of the CJEU, which assigns a crucial role to language when resolving cases brought before it.

Corina Andone and Florin Coman-Kund's chapter asserts that EU soft law should be regarded as a collection of instruments lacking legal bindingness but possessing significant practical efficacy due to their persuasive influence.<sup>8</sup> They argue that the effectiveness of soft law should not be evaluated solely in terms of its enforceability, but rather in its ability to persuade recipients toward desired actions. In their analysis, soft law is likened to a politician with excellent rhetorical skills! They propose a toolkit comprising

<sup>6</sup> Danai Petropoulou Ionescu & Mariolina Eliantonio, 'Words are stones: Constructing bindingness through language in EU environmental soft law' in Láncos *et al.* (eds.) 2023, pp. 76–110.

<sup>7</sup> Petra Lea Láncos & Eljalill Tauschinsky, 'Verbal markers of 'softness' in EU law? A computer-based analysis to delimit soft law and hard law focusing on directive-like recommendations' in Láncos *et al.* (eds.) 2023, pp. 111–141.

<sup>8</sup> Corina Andone & Florin Coman-Kund, 'A legal-argumentative framework for persuasive EU soft law: The case of the European Commission's recommendations' in Láncos *et al.* (eds.) 2023, pp. 142–175.

both legal and argumentative criteria to evaluate and improve the quality and effectiveness of EU soft law instruments.

The final part of the book introduces three sectoral studies. Robert Böttner investigates the soft law instruments issued by agencies within the European System of Financial Supervision.<sup>9</sup> The founding regulations of these agencies have introduced a comply-or-explain mechanism, elevating these non-binding instruments to a heightened normative status and placing pressure on national authorities to adhere to them. Following a critical examination of these mechanisms, the author advocates for a comprehensive overhaul. In situations necessitating binding rules, EU agencies should be endowed with clear decision-making powers. Conversely, where soft law suffices, it should be identified and treated as such, rather than being disguised as hard law.

Annalisa Volpato directs attention to another aspect of EU soft law, specifically technical standards.<sup>10</sup> Despite being private and non-binding, certain technical standards have undergone a process of legal formalization, leading the CJEU to recognize them as a part of EU law. This chapter investigates this evolution, examines the category of 'harmonized standards' and assesses the various legal implications associated with this type of technical standard. Volpato's chapter astutely observes that everyday compliance with soft law is hardly magic or the result of legal theoretical discussions. Namely, when compliance with a harmonized standard becomes the only way to prove observance of essential requirements, it is perceived as hard law by undertakings.

Emanuel Kollmann's chapter focuses on EU soft law within the telecommunications sector.<sup>11</sup> EU secondary legislation specifically authorizes competent EU authorities to issue certain soft law instruments while simultaneously requiring national authorities to give them significant consideration in their duties. The author argues that the legal implications of this form of EU soft law cannot be universally understood but must instead be analyzed in light of the entirety of the provisions outlined in the relevant legal frameworks, as well as the legislative intent, adoption conditions, and procedural regulations in the applicable EU legislation.

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<sup>9</sup> Robert Böttner, 'The comply-or-explain mechanism in the European Supervisory Authorities, or: does Meroni allow nudging?' in Láncos *et al.* (eds.) 2023, pp. 176–192.

<sup>10</sup> Annalisa Volpato, 'The legal effects of harmonised standards in EU law: From hard to soft law, and back?' in Láncos *et al.* (eds.) 2023, pp. 193–212.

<sup>11</sup> Emanuel Kollmann, 'Hard rules for soft law: The case of European Union telecommunications law' in Láncos *et al.* (eds.) 2023, pp. 213–232.

At the outset, I mentioned that to me, this book raises the intriguing question of why people attribute significance to soft law. What prompts this belief that soft law has authority? There are numerous possible explanations. It could be because the Commission treats soft law as being relevant. It may be because the soft law measure includes the word 'shall'. It could even be that it is simply more convenient for a national regulatory authority to comply with it than explain why soft law does not have authority. Or because it represents the only means of obtaining a standard, or because soft law carries a form of validation from Luxembourg. The effects, naturally, are heavily contingent on context. Attempting to transcend each context in which the effects of soft law are evaluated (though I am not certain if we can do so) leads to another argument: that the effects of soft law are interactive. There is always an interplay, whether it is between the Commission and national authorities, hard law and soft law, or the recommendation and its language, and so on.

One aspect I find deserving of further exploration is whether the perception of soft law as authoritative poses a problem. Petropoulou Ionescu and Eliantonio argue that the blurring of boundaries between hard and soft law jeopardizes the legitimacy of EU rulemaking, impacting both the democratic principle and the rule of law. Böttner shares this concern, suggesting that the comply or explain system effectively creates disguised hard law, which is problematic.

However, if this blurring of boundaries is indeed a problem, should we strive to establish a more robust and clear distinction between binding and non-binding legal sources? Or does the ambiguity surrounding the legal effects of soft law serve a useful purpose? And, if we do manage to delineate a clear boundary between hard and soft law, will the confusion simply shift elsewhere? In my view, rather than solely focusing on establishing clear boundaries, the field of soft law scholarship should continue along the path set by this book, seeking to understand how the legal effects of soft law 'behave'. This approach also allows for a deeper understanding of how people's behavior is influenced by soft law, which is crucial for navigating the complexities of legal dynamics within the EU framework.

