

EU soft law and the legal value of non-legislative documents

**Hannah Godfrey
Bar of Ireland**

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Article 288 TFEU

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

Non-binding legal acts

- AG Bobek in Case C-16/16 *Belgium v Commission* at paragraph 73:

“What exactly constitutes *legal* effects may be open to debate. The notion is, however, clearly quite broad, accommodating all types of impact on/in the law, its interpretation and application. By contrast, binding effect, a fortiori binding *legal* effect, represents a much, much narrower category.”
- The broad question raised by the case was whether any legal act within the meaning of Article 288 TFEU was sufficient, by itself, to produce legal effects capable of justifying a review of legality under Article 263 TFEU
- The Court found at paragraph 26 of the Judgment in *Belgium v Commission*:

“By establishing recommendations as a specific category of EU acts and by stating expressly that they ‘have no binding force’, Article 288 TFEU intended to confer on the institutions which usually adopt recommendations a power to exhort and to persuade, distinct from the power to adopt acts having binding force.”

What form does “soft law” take?

- Communications
- Notices
- Codes of conduct
- Guidelines
- Resolutions
- Programmes
- A non-exhaustive list...

Who issues soft law documents?

- Institutions of the EU
- Other EU bodies, agencies and offices
- Such instruments being used increasingly, across policy areas

Is there a firm boundary?

- Recommendations and Opinions are non-binding: are they “soft law”?
- Qualitatively different as cited in the Treaties?
- AG Bobek in Case C-16/16 *Belgium v Commission* appears to treat Recommendations as a category of soft law that is no different to other forms of soft law

Are soft law documents “law” at all?

- A soft law document may bind the body that produced it, for example the Commission’s State aid guidelines bind the Commission in respect of individual State aid Decisions: Case C-409/00 *Spain v Commission*
- Departure from a position may breach legitimate expectations / legal certainty / another general principle of EU law
- Soft law instruments might be an expression of the duty of sincere cooperation under Article 4(3) TEU and might therefore be indirectly binding

DISCUSSION

- In your groups discuss:
 - Whether you think soft law instruments are properly described as “law”;
 - The problems that might arise if acts that produce legal effects are not subject to judicial review;
 - The problems that might arise if instruments are binding on their authors but not on third parties.

What are the benefits of soft law instruments?

- For the bodies adopting them:
 - Easier to issue / fewer procedural stages (of particular benefit in a crisis such as the Covid-19 pandemic)
 - Can be issued even in areas where the EU does not have regulatory competence
 - Can be issued in areas where the EU does have regulatory competence but proposed legal acts would not command the necessary majorities in the Council and the European Parliament
- For potential litigants:
 - Legal certainty / increased knowledge of regulatory outcomes

Examples of soft law instruments: environmental and biodiversity law

- The Commission publishes guidance on compliance with Article 6 of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (“the Habitats Directive”) and on compliance with Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (“the Environmental Impact Assessment Directive”)

Examples of soft law documents: data protection law

- The EDPB publishes guidelines and recommendations on matters within the remit of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (“the General Data Protection Regulation” or “GDPR”)
- For example, guidelines on the calculation of administrative fines under the GDPR

Examples of soft law documents: competition law

- Can request an Opinion from the Commission in respect of competition law or State aid matters
- The Commission publishes notices, guidelines and communications etc. on competition law concerning matters such as leniency in cartel cases, vertical agreements, de minimis breaches of competition law
- The Commission also publishes guidelines and communications concerning State aid – for example, its recent Communication as to the application of the Aarhus Convention to its State aid decisions

The Charter: former soft law

- The Charter of Fundamental Rights of the European Union
- “Solemnly proclaimed” by the European Parliament, the Council and the Commission on 7 December 2000 (but amended in December 2007)
- Cited in the Court’s case law before becoming primary EU law pursuant to the Treaty of Lisbon

Case law on the legal status of EU soft law instruments

- The Court has found that the provision in the Treaties for certain legal acts does not prevent the institutions from producing legal effects by other “soft law” instruments: Case C22/70 *Commission v Council*
- The precise legal effects produced by any act not falling within a defined category must be decided by the content of the act: Case C-22/70 *Commission v Council*
- The instrument itself may indicate whether the body issuing it intended to produce legal effects: Case C-258/14 *Florescu*
- The instrument may create legitimate expectations and may bind the issuing body (but not others): Case C-313/90 *CIRFS v Commission*

Case law on the legal status of EU soft law instruments

- If an EU body is not competent to adopt an act that creates legal obligations, then the Court may declare it void: Case C-303/90 *France v Commission*
- Even where there are no legal effects produced, soft law instruments can still be of use in interpreting Treaty provisions or binding legal acts: Case C-91/05 *Commission v Council*

Case law on the legal status of EU soft law instruments

- In Case C-22/70 *Commission v Council*, the Court had 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”
- Often soft law instruments cannot be the subject of an action for annulment before the General Court – see, e.g., Case C-16/16 *Belgium v Commission* – therefore, they have to be challenged (if at all) indirectly by way of a reference for preliminary ruling from a national court; Recommendation held not to have legal effects
- Case C-911/19, *Fédération Bancaire Française*: recent Grand Chamber judgment, reached the same conclusion in respect of inadmissibility of an Article 263 action challenging a Recommendation, but reviewing a Recommendation within the framework of a reference for preliminary ruling and stated that the standard of review is “stringent”

DISCUSSION

- In your groups, discuss the following questions:
 - What are the advantages of EU soft law instruments?
 - How can EU soft law instruments be of use to legal practitioners in advising clients?