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SOFT LAW IN THE EU LEGAL ORDER: REFLECTIONS AND CONTEMPORARY TRENDS

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Soft Law Before the European Courts: Discovering a 'common pattern'?

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I. Setting the scene

About 25 years ago, Francis Snyder noted that rules of conduct that have no legally binding force may nevertheless have legal and practical effects in the European legal order.[1] Boosted by institutional support enshrined in initiatives such as the Commission White Paper on Governance, the Lisbon Strategy, and Europe 2020, 'soft law' instruments are now present in nearly every European Union (EU) policy. As expected, much was written on the use of soft law by the EU,[2] on Member States' compliance with soft law provisions,[3] and, most of all, on the desirability of the use of soft law instruments in the process of European integration.[4] Authors have retained a series of 'virtues' for soft law instruments. Cheap, fast, and flexible, soft law can be a catalyst for creating the premises of successful international cooperation;[5] it is ideally suited to deal with the complexity of European affairs and their diversity,[6] to regulate sensitive

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[1] F Snyder, 'Soft Law and Institutional Practice in the European Community' in S Martin (ed.), *The Construction of Europe* (Dordrecht: Kluwer Academic Publishers, 1994), 198.

[2] See eg in the field of social policy, D M Trubek and L G Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination' (2005) 11(3) *European Law Journal*, 343–64; K Jacobsson, 'Between Deliberation and Discipline: Soft Governance in EU Employment Policy' in U Morth (ed.), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Cheltenham: Edward Edgar, 2004).

[3] See eg G Falkner and others (eds.), *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge: Cambridge University Press, 2005).

[4] J Klabbers, 'The Undesirability of Soft Law' (1998) 67(4) *Nordic Journal of International Law*, 381–91; K A Armstrong, 'The Character of EU Law and Governance: From "Community Method" to New Modes of Governance' (2011) 64(1) *Current Legal Problems*, 179–214; C Scott, 'Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU' (2009) 15(2) *European Law Journal*, 160–73.

[5] W Reinicke and J M Witte, 'Interdependence, Globalization, and Sovereignty: the Role of Non-Binding Legal Accords' in D Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000), 76.

[6] A Schäfer, 'A New Form of Governance? Comparing the Open Method of Co-Ordination to Multilateral Surveillance by the IMF and the OECD', (2006) 13(1) *Journal of European Public Policy*, 84.

sectors,[7] and address situations where swift action is imperative;[8] to help with the implementation of EU hard law[9] while avoiding infringement proceedings;[10] and to enhance openness requirements now enshrined in Article 15 of the Treaty on the Functioning of the EU (TFEU).[11] Similarly, deficiencies of soft law have been thoroughly highlighted, starting with a notorious absence of legitimacy safeguards[12] and an 'extreme lack of transparency'[13] in the adoption procedures, which would enhance the discretion of the EU institutions to the detriment of Member State competences,[14] would reduce the role of the European Parliament in EU decision making,[15] failing at the same time to ensure proper consultations with the stakeholders.[16] Furthermore, it has been considered that, absent legally binding force, the legal effects of soft law cannot be clearly determined,[17] which in turn hampers legal certainty. All these deficiencies show that soft law might be at odds with the rule of law itself, a value on which the EU is founded, according to Article 2 of the Treaty of European Union (TEU).

Such problems are highly salient given the important effects that soft law has for individuals and Member States. The interpretative communications of the Commission were found to constitute a source of doctrine, to guide public

[7] D Hodson and I Maher, 'Soft Law and Sanctions: Economic Policy Co-ordination and Reform of the Stability and Growth Pact' (2004) 11(5) *Journal of European Public Policy*, 810–11.

[8] M Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime', (2001) 8(2) *Journal of European Public Policy*, 194; H A Cosma and R Whish, 'Soft Law in the Field of EU Competition Policy', (2003) 14(1) *European Business Law Review*, 33.

[9] E Korkea-aho, 'EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?' (2009) 16(3) *Maastricht Journal of European and Comparative Law*, 276; J Scott 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law' (2011) 48(2) *Common Market Law Review*, 330; I von Homeyer, 'Emerging Experimentalism in EU Environmental Governance' in C Sabel and C Zeitlin (eds), *Experimentalist Governance in the EU: Towards a New Architecture* (Oxford: Oxford University Press, 2010).

[10] E Korkea-aho, 'Watering Down the Court of Justice? The Dynamics between Network Implementation and Article 258 TFEU Litigation' (2013) 20(5) *European Law Journal*, 664–5.

[11] In this context, Snyder talked about 'regulation by publication' and Hoffman about 'regulation by information'. Snyder (n 1), 199–201; H C H. Hofmann, 'Negotiated and Non-Negotiated Administrative Rule-Making: the Example of EC Competition Policy' 43(1) (2006) *Common Market Law Review*, 169–70.

[12] See among others L A J Senden and A van den Brink, 'Checks and Balances of Soft EU Rule-Making', (2002) PE 462.433, available at <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462433/IPOL-JURI_ET(2012)462433_EN.pdf> accessed 1 November 2018; Conseil d'État, Collection 'Études et documents du Conseil d'État', Rapport Public 1992 (1993) Documentation française, 22–3, quoted in S Leclerc, 'Les communications de la Commission et le marché intérieur. A propos de l'arrêt rendu par la Cour de justice des Communautés européennes le 10 Mars 1997 dans l'affaire C-57-95', (1998) 34 *CDE*, 163.

[13] L Senden, 'Soft Post-Legislative Rulemaking: A Time for More Stringent Control' (2012) 19(1) *European Law Journal*, 65.

[14] Snyder (n 1), 201–3.

[15] 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 adoptés à la suite du rapport fait au nom de la Commission juridique par M. Burger [1969] OJ C63/18.

[16] R Baldwin, *Rules and Government* (Oxford: Oxford University Press, 1997), 284; Scott (n 9), 329–55.

[17] L Senden, *Soft Law in European Community Law* (Oxford: Hart Publishing, 2004), 461 and ff.

administrations in their activities and, also, to provide a 'magna carta'[18] for individuals, clarifying matters related to their rights and duties. An important tool of EU administrative governance,[19] soft law limits institutional discretion, encouraging the administrators to take consistent decisions.[20] Soft law can lead to policy change but what is more, it induces subtler changes at the level of discourse, understanding and policy principles.[21] Hence, 'formally non-binding agreements can gradually become politically, socially and morally binding for the actors involved'[22] by the intervention of certain devices other than the legal force of an act, such as those related to learning and peer pressure.

Contrasting such impact that soft law has in practice with its rule of law deficiencies begs an important question: is soft law reviewed and applied by the Court of Justice (the Court), just like any other EU act? Does the Court even engage with such instruments? While some early studies have suggested that soft law is not suitable for Court use,[23] recent empirical work appears to suggest that the approach of EU courts is largely dictated by the policy area and the particular features of the soft law employed. The EU courts make extensive use of soft law in sectors such as competition and state aid,[24] yet fail to engage with instruments issued from Open Method of Coordination (OMC) processes related to macroeconomic and employment policy coordination[25] with soft law having some impact on adjudication in the context of implementation of the Water Framework Directive.[26] Soft law is not systematically reviewed by the Court of Justice, due to a particularly rigid understanding of the notion of legal effects, which made academics and practitioners advocate for a more vigorous engagement with soft law.[27] At the same time, the Court is adopting a rather unclear view in its preliminary references, by imposing duties on national courts

[18] N Tornberg, 'The Commission's Communications on the General Good—Magna Carta or Law-Making?' (1999) 10(1–2) *European Business Law Review*, 27.
[19] H Hofmann, 'Administrative Governance in State aid Policy' in H Hofmann and A H Türk (eds), *EU Administrative Governance* (Cheltenham: Edward Elgar, 2006), 196–9.
[20] Cini (n 8), 194.
[21] Jacobsson (n 2), 89.
[22] K Jacobsson, 'Soft Regulation and the Subtle Transformation of States: the Case of EU Employment Policy' (2004) 14(4) *Journal of European Social Policy*, 359.
[23] C M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) *The International and Comparative Law Quarterly*, 862–5; J Klabbers, 'The Redundancy of Soft Law' (1996) 65(2) *Nordic Journal of International Law*, 167; Klabbers (n 4), 381.
[24] O Stefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (Dordrecht: Kluwer, 2013).
[25] S Smismans, 'From Harmonization to Co-ordination? EU Law in the Lisbon Governance Architecture' (2011) 18(4) *Journal of European Public Policy*, 504; T Hervey, 'Adjudicating in the Shadow of the Informal Settlement?: The Court of Justice of the European Union, "New Governance" and Social Welfare' (2010) 63(1) *Current Legal Problems*, 92.
[26] Korkea-aho (n 10), 649. On reconceptualizing the role of courts in a new governance context, see also E Korkea-aho, *Adjudicating New Governance: Deliberative Democracy in the European Union* (Basingstoke: Palgrave, 2015).
[27] Scott (n 9), 331–2.

to take EU soft law into consideration,[28] while duly noting that such instruments cannot be binding at the national level.[29]

II. Our contribution

The contribution of this special section to the analysis of the way in which EU courts engage with soft law instruments is threefold. First, it expands the ambit of research on soft law by looking at different policy areas, such as monetary, tax, environmental, consumer protection, energy, and neighbourhood policy. As expected, the use of soft law in policy areas is widespread, and its existence is acknowledged by the European Courts. In a favourable institutional setting, judicial acknowledgement of such instruments can determine their hardening, as documented in the field of taxation by *Beckers*. Yet, the European Courts seem reluctant to employ the term of 'soft law', as confirmed by *Korkea-aho*'s research on the *Curia* database.

Secondly, mindful that soft law comes in an 'infinite variety',[30] we made a conscious choice to deal with a representative mix of soft law forms. In the EU context, soft law consists of recommendations, opinions, and other instruments not mentioned in Article 288 TFEU such as communications, notices, or guidelines, although the institutions and the agencies can get quite creative with the terminologies employed. With authors suggesting various taxonomies, we retain here Senden's three categories, ordered on functional and purposive criteria: preparatory and informative; interpretative and decisional; formal and informal steering instruments. The first category includes acts that put forward various proposals for future action but, with the exception of the White Papers, do not establish rules of conduct and one may consider that they can hardly fit in the soft law definition.[31] *Vianello* identifies, in the neighborhood policy, a series of progress reports, action plans, strategy papers, that can sometimes have both preparatory and rule-making functions. Conversely, *Van Schagen* notes that Regulatory Impact Assessments (RIAs), which are extensive reports accompanying planned EU measures, are preparatory in nature and cannot even be considered soft law. The second category includes those instruments that 'restate or summarise the interpretation that should be given to EU law provisions'[32] (interpretative) and those indicating 'the way in which an EU institution will apply EU law provisions in an individual case where it has implementing and

[28] Case C-322/88, *Salvatore Grimaldi v Fonds des maladies professionnelles* ECLI:EU:C:1989:646.
[29] Case C-526/14, *Tadej Kotnik and Others v Državni zbor Republike Slovenije* ECLI:EU:C:2016:570.
[30] R Baxter, 'International Law in "Her Infinite Variety"' (1980) 29(4) *International and Comparative Law Quarterly*, 549.
[31] Senden (n 17), 219–20.
[32] Ibid 140.

discretionary powers'[33] (decisional). Such interpretative instruments are prominent in the field of environmental regulation, for instance, as documented by *Eliantonio*, where various guidance documents, guidelines, communications, and working documents aim to explain hard law obligations and how implementation of hard law should be carried out. Also in Monetary Policy, *Alberti* identified the Eurosystem Oversight Policy Framework as a form of interpretative and decisional instrument. The third category comprises those legal and/or political instruments with the objective of steering or guiding action in a non-legally binding way by laying down 'new rules independently of an existing legal framework, or ... adopted in the context of such a framework, prior to, simultaneous with or subsequent to legislation'.[34] In this regard, *Beckers* analyses the Code of Conduct for Business Taxation, and the potential of steering instruments to become legally binding through institutional practice. *Stefan and Petri* show the importance of steering instruments issued by agencies, such as ACER, in the elaboration of hard law.

The present contributions add new elements to this list. *Alberti* identifies the Outright Monetary Transactions (OMT) Programme, which is contained in a simple press release, as a hybrid measure with both steering and decisional elements, at it is aimed at steering financial markets and at the same times indicates what the European Central Bank is ready to do to achieve this end. *Van Schagen* adds the interesting case of the EU impact assessment regime. While Regulatory Impact Assessments are identified by *Van Schagen* as non-law, the Better Regulation Guidelines,[35] appear to be a form of *constitutional soft law*, containing rules to ensure the quality of RIAs. *Korkea-aho* shows that the Courts acknowledge the existence of different categories of soft law, while attaching different effects to different types of instruments. However, we did not find any evidence that the other EU institutions recognize such taxonomies, and the issue remains open for further research.

Third, and most importantly, this special section contributes to the literature by further exploring substantive issues pertaining to the status and effects of soft law, as well as to its impact on rule of law values. The remainder of this editorial will briefly outline our conclusions with regard to the legal and practical effects of soft law and their relevance before the European courts (Section III); the justiciability of soft law (Section IV); and the interplay between soft law and general principles of law (Section V). We will conclude with some thoughts on the viability of the hard law–soft law divide in the context of an increasing judicial recourse to soft law (Section VI).

[33] Ibid.
[34] Ibid 157.
[35] Commission Staff Working Document SWD (2017) 350, 7 July 2017 (Better Regulation Guidelines).

III. The effects of soft law

As stated in the definition of soft law employed in this special issue, soft law can have both practical and legal effects, even though, according to Article 288 TFEU, soft law is deprived of legally binding force. The courts have acknowledged binding legal effects to soft law in limited circumstances: where soft law is construed as introducing a new obligation,[36] where a soft law measure states the way in which an EU institution intends to exercise its discretion,[37] or, as far as Member States are concerned, where the soft law measure at stake has been produced in cooperation with the Member States.[38] Failing this binding threshold however, Courts are reluctant to give much weight to the effects that soft law can entail—both from a legal and practical point of view.

The literature has listed a number of legal or practical effects that soft law can have, although the line dividing the two is blurred.[39] For Snyder legal effects can consist of providing a normative framework for future negotiations and for potential arguments or conflicts; binding the enacting institution and also the institutions which are parties to an inter-institutional agreement; concretizing the duty of institutional cooperation; creating the expectation that the enacting institution will comply with the rules it laid down in a soft law instrument; producing a stand-still effect on the non-conforming conduct of a state or institutions; and influencing the legal rights and obligations of third parties. Soft law can impact on national and European legislation by expressing general principles of EU law, being part of the *acquis communautaire*, interpreting hard law provisions, and serving as a legal basis for the enactment of national legislation. In a court of law, the effects of soft law include, among others: providing the basis for judicial review; being the object of an action for annulment; being used in litigation by the parties to a trial; and serving as an aid in the interpretation of hard law provisions.[40]

One of the most relevant effects of soft law in litigation is its use as an interpretative tool. *Eliantonio* shows, however, that, even if the Court relies on soft law to a certain extent when interpreting environmental hard law, it is not a significantly authoritative interpretation source. This limited use of soft was discovered equally when EU secondary law foresees the adoption of soft law and when soft law is free-standing and not linked to any provision of EU

[36] Case C-366/88, *France v Commission (Internal Instructions)* ECLI:EU:C:1990:348, at para. 23.
[37] Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P, and C-213/02 P, *Dansk Rørindustri and Others v Commission* ECLI:EU:C:2005:408, at para. 267.
[38] Case C-311/94 *Ijssel-Vliet Combinatie BV v Minister van Economische Zaken* ECLI:EU:C:1996:383, at para. 43.
[39] See P Weil, 'Towards Relative Normativity in International Law?', (1983) 77(3) *The American Journal of International Law*, 415. Also, see Chinkin (n 23), 862–5.
[40] This list of legal effects is provided in F Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations' in G Winter (ed.), *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Baden-Baden: Nomos, 1996), 463.

primary or secondary law. Such conclusions are interesting and suggest that the Court indeed applies double standards: while it does not consider itself bound by soft law, they urge national courts to take soft law into consideration when judging cases. Notoriously, in *Grimaldi*, national courts were advised to 'take soft law into consideration' with authors going as far as suggesting this obligation to be 'reminiscent of *Von Colson*'.[41]

In order to bring clarity to this debate, *Korkea-aho* traces back *Grimaldi* references in EU case law, investigating the legal effects which the European courts attribute to EU soft law when soft law measures become relevant in national litigation. She notes that the full extent of the wording 'to take into account' is not clear, and potentially allows national courts to endow soft law measures with far-reaching effects. Recent case law has not clarified this point either, instead adding to the complexity when discussing the legal effects of soft law, with national courts advised either that they 'may' or they 'must' take soft law into account. In this regard, the nature of the soft law measure at stake appears to play an important role: where a soft law measure is foreseen or embedded in primary or secondary law, the *Grimaldi* obligation applies in full. If instead the soft law instrument is not derived from primary or secondary law, national courts may decide whether or not to take it into account.

The interplay between judicial acknowledgement of soft law and the practice of the other EU institutions can lead to the hardening of these instruments, and the creation of new obligations. *Beckers* draws on insights from the legalization and juridification literatures to show how the Code of Conduct for Business taxation became, throughout the years, hard law. While the Code of Conduct was framed as a political commitment that should not be legally binding, it has been treated by EU institutions and Member States as an obligation. It has created legitimate expectations for individuals and was considered an integral part of the *acquis communautaire* that needed to be implemented prior to EU accession. In turn, the Court and the Commission have implicitly recognized such effects for the Code. Specifically, while the Court of Justice has rejected legal enforceability for the Code, it has employed it frequently in its state aid, establishment, and services case law. The matter is highly topical, given the current controversy with regard to tax rulings. As shown by *Beckers*, it is up to the Court to endorse the strategy of the Commission and use the Code in order to regulate taxation in Europe, or, conversely, practise judicial restraint and establish some boundaries to the ever expansive reach of EU state aid law.

With regard to the practical effects of soft law, *Van Schagen* notes that the 2015 Better Regulation Guidelines aim at having a practical effect, as 'they form the basis of the evaluations of the RSB that are clearly meant to be followed'. It

[41] A Arnull, 'The Legal Status of Recommendations' (1990) 15(4) *European Law Review*, 318; D Chalmers and others, *European Union Law: Texts and Materials* (Cambridge: Cambridge University Press, 2010), 388.

is argued that practical effect depends not only on the wording of the Guidelines, but also on the corresponding guidance that the officials can derive from them. The case study in consumer protection shows that there are severe and persistent shortcomings of RIAs, which constitute breaches of the Guidelines, and raises questions with regard to their effectiveness. This is mainly because of a major weakness of the RIA regime: the guidance provided is not always detailed enough and is sometimes ambiguous.

Vianello discusses important practical effects of EU soft law in the Pre-Accession and Neighborhood policy. She argues that EU soft law in this field can severely limit the freedom of third countries because the advantages of compliance outweigh the costs of non-compliance and implementation mechanisms are foreseen whereby positive or negative sanctions can be imposed as a result of a neighbouring state's decision on whether to follow EU soft law or not. *Vianello* goes so far as suggesting that 'the legal freedom not to follow a merely conditioning act is often a mere fiction'. The example of the ACER opinion on the highly contested split of the bidding zone Austria–Germany–Luxembourg documented by *Stefan and Petri* show that national authorities can voluntarily implement soft law, which entails important consequences for the stakeholders. Yet, neither ACER's own Board of Appeal, nor the Court attach any legal consequences to such voluntary compliance.[42] Such a rigid attitude towards the judicial recognition of effects entailed by soft law has important consequences at the level of justiciability, as explained in the next section.

IV. The justiciability of soft law

The European Courts can be asked to review soft law following an action for annulment pursuant to Article 263 TFEU. However, given (among others) the lack of legally binding force and the ensuing unclear legal effects of soft law, the availability of this avenue is rather limited. Both academics[43] and practitioners[44] have argued that the Court should relax its legal effects threshold in order to allow judicial review of all types of EU acts, not only of hard law. Turk[45]

[42] Decision of ACER's Board of Appeal No A-001-2015 of 16 December 2015, available at <https://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Decisions/238%20A-001-2015%20BoA%20decision%20(non%20confidential%20version)%202112-2112.pdf> accessed 1 November 2018; Case T-671/15 *Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control) v Agency for the Cooperation of Energy Regulators* ECLI:EU:T:2016:626, at para. 48.

[43] Scott (n 9), 329–55; O Stefan, 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance' (2014) 21(2) *Maastricht Journal of European and Comparative Law*, 359–79.

[44] Case C-16/16, Opinion of Advocate General Bobek, *Kingdom of Belgium v European Commission* ECLI:EU:C:2017:959, at para. 110.

[45] A Türk, 'Liability and Accountability for Policies Announced to the Public and for Press Releases' in *ECB Legal Conference 2017—Shaping a New Legal Order for Europe: A Tale of Crises and*

suggested as alternatives the preliminary reference procedure and/or the pleas in illegality under Article 277 TFEU, given that these two articles do not require a reviewable act to produce 'legal effects'. This special issue contributes to the research on justiciability of soft law as it analyses, from the various perspectives of different policy fields and instruments, all these avenues.

A first hurdle to justiciability is the so-called authorship criterion. Indeed, under Articles 263 and 267 TFEU, in order to be reviewable, a measure needs to be an act adopted by the European institutions. *Eliantonio* argues that guidance documents which have been adopted jointly by the Commission and the Member States will not meet this criterion, while *Stefan and Petri* note the same with regard to instruments issued by networks of transmission system operators for energy. *Korkea-aho* unpacks the same issue with regards to preliminary references. In relation to validity challenges, the Court of Justice is likely to only accept a reference concerning the validity of a soft law instrument insofar as it is an act of the EU institutions. Both *Eliantonio* and *Korkea-aho*, however, notice a more flexible attitude in recent case law. It is to be hoped that this trend will be stabilized and that the European Courts will interpret this criterion broadly enough to capture EU soft law that is the product of a cooperation between European and national authorities.

A further significant hurdle to direct actions is that, following *ERTA*, reviewable acts must be 'intended to produce legal effects vis-à-vis third parties' according to Article 263 TFEU and the Court of Justice's case law.[46] The Court interprets this requirement to mean that soft law should produce *legally binding* effects (see above Section III). *Eliantonio* notes that such a restrictive interpretation entails a too limited judicial control of soft law measures in environmental law. The *E-Control* case discussed by *Stefan and Petri* show that absent legally binding effects, soft law issued by EU Agencies are neither internally reviewed by the Board of Appeal, nor judicially reviewed by the ECJ, impacting negatively on accountability. Interestingly, *Alberti* notes that in economic and monetary policy cases the Court might decide differently on reviewability. In *Clearing Houses*,[47] the General Court admitted the review of a non-binding policy of the European Central Bank on the ground that, in essence, Member States were likely to follow and respect the European measure. Such an approach shows an emphasis on the *perception* of the addressees of the measure which differs remarkably from other policy fields. As noted by *Alberti*, in competition law 'the assumption usually goes the other way around, stating that national authorities are not bound by soft law acts enacted by the Commission'. In general, it can be concluded that the criterion of legal effects is far from clearly

Opportunities, available at <https://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf> accessed 1 November 2018, 43–58.

[46] Case 22/70, *Commission v Council* ECLI:EU:C:1971:32, at para. 42.

[47] Case T-496/11, *United Kingdom of Great Britain and Northern Ireland v European Central Bank (ECB)* ECLI:EU:T:2015:133, at para. 42.

interpreted and applied by the European Courts. In light of the blurred line between 'introducing a new obligation' (which is necessary for soft law to be reviewable in court) and fleshing out an existing obligation, and in order to foster both accountability and legal certainty, it is to be hoped that this criterion will be interpreted in a more relaxed way in the future.

Most recently, after the present contributions were completed, Advocate General Bobek suggested revising the test for the reviewability of soft law measures.[48] He argued that the requirement of an act being 'intended to produce legal effects' should be reconsidered in light of its unclear connotation, the restrictive subsequent case law of the Court of Justice, and the proliferation of soft law instruments in the past decades. Furthermore, comparative examination of supreme administrative jurisdictions showed also a trend towards broader admissibility of challenges against soft law. In this light, the AG proposed that the test for admissibility should be, in line with the original case law, whether the challenged measure is capable of producing legal effects. Such approach would arguably remove the uncertainty surrounding the 'intention' of the drafter of the rule (which was included in the original *ERTA* doctrine) and the need for a measure to produce 'binding' legal effects (which was derived from the post-*ERTA* case law). In essence, the AG pleaded for a much lower admissibility threshold for soft law measures, but this was not followed by the Court of Justice, which applied the orthodox criterion of a measure's intention to produce binding legal effects.[49]

A further complication with regard to a direct action against a soft law measure is represented by the criterion of 'direct concern' which is enshrined in Article 263(4). The CJEU has consistently held that a measure is of direct concern only if it affects the claimant's legal position directly and leaves no discretion to the addressees of the measure in relation to who is obliged to implement the measure.[50] Interestingly, *Alberti* shows how the European courts have used this criterion (instead of the capacity of the soft law measure to produce legal effects) to reject direct actions. In a case concerning a press release on the Outright Monetary Transactions Programme in the framework of EU Monetary Policy, both European courts dismissed the claim on grounds of direct concern, holding that the soft law measure in question (a press release) was not capable of directly affecting the applicants' legal spheres.[51] Should this

[48] C-16/16 P, Opinion of Advocate General Bobek, *Kingdom of Belgium v European Commission* ECLI:EU:C:2017:959.

[49] C-16/16 P, *Kingdom of Belgium v European Commission* ECLI:EU:C:2018:79.

[50] See also Case C-207/86, *Asociación Profesional de Empresarios de Pesca Comunitarios (Apesco) v Commission* ECLI:EU:C:1988:200, at para. 12; Case C-417/04 P, *Regione Siciliana v Commission* ECLI:EU:C:2006:282, at para. 28; Case C-69/69, *SA Alcan Aluminium Raeren and others v Commission* ECLI:EU:C:1970:53, at para. 8; Case C-222/83, *Municipality of Differdange and Others v Commission* ECLI:EU:C:1984:266, at para. 9.

[51] Case T-492/12, *Sven A. von Storch and others v ECB* ECLI:EU:T:2013:702, at para. 38; Case C-64-14/P, *von Storch and others v ECB* ECLI:EU:C:2015:300, at para. 42.

be taken to mean that the Courts implicitly recognised that the press release was *in principle* able to produce legal effects, hence it was a reviewable act, but not on the specific applicant challenging it? As *Alberti* explains, this would have very far-reaching consequences in the monetary field.

Moving from direct challenges under Article 263, *Korkea-aho* and *Eliantonio* examine the potential for an indirect review of soft law, through a preliminary question of validity under Article 267 TFEU. This route is potentially available for those who challenge soft law, as there is no need to prove the existence of legal effects. In *Grimaldi*, the Court affirmed its 'jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception',[52] and restated this more recently in *Belgium v Commission*.[53]

The findings of this special issue show that judicial review of soft law is limited, but not impossible. Preliminary references and indirect actions are important remedies, through which Courts can control the legality of soft law instruments. However, whether such avenues offer effective judicial protection is a wholly different matter, and the answer to this question depends mostly on the positioning with regard to the debate around the existence of a 'complete system of legal remedies' within the Treaties.[54] Whatever the perspective adopted on this matter, this special issue acknowledges that modern ills of regulation cannot always be solved through judicial intervention. There is of course a limit to what courts can do, given the high degree of specialization and technical expertise of many of the soft law instruments discussed by our articles. However, we agree with Scott and Sturm that courts can be at least the catalysts of a more principled approach towards new governance mechanisms, an aspect to which this editorial now turns.[55]

V. The interplay between soft law and general principles of law

The debate on whether the use of EU soft law in court fosters or undermines general principles of law is far from settled. While earlier works stressed the undesirability of soft law,[56] more recent accounts showed that the EU courts legitimize the recourse to soft law by grounding Commission competition and

[52] Case C-322/88, *Salvatore Grimaldi v Fonds des maladies professionnelles* ECLI:EU:C:1989:646, at para. 8.
[53] Case C-16/16 P, *Kingdom of Belgium v European Commission* ECLI:EU:C:2018:79, at para. 44.
[54] See in this regard the notorious contradiction between the Advocate General and the Court in UPA: Case C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union* ECLI:EU:C:2002:462; Case C-50/00 P, Opinion of Advocate General Jacobs, *Unión de Pequeños Agricultores v Council of the European Union* ECLI:EU:C:2002:197.
[55] J Scott and S P Sturm, 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' (2007) 13(3) *Columbia Journal of European Law*, 565.
[56] Klabbers (n 4), 381–91.

state aid guidance in hard principles drawn from the common constitutional traditions of the Member States.[57]

In this special issue, *Van Schagen* shows the potential of soft law to contribute to principled decision making at the European level. She argues that drafting Regulatory Impact Assessments in light of the Better Regulation Guidelines and following the Opinions of the Regulatory Scrutiny Board enhance the potential for the final hard law instrument adopted to comply with good administration (in particular the duty to state reasons) and proportionality. Consequently, in the case of badly drafted RIAs, the Guidelines might inform judicial review. However, *Van Schagen* concludes that the Courts are not the appropriate fora for such analysis. Engaging with the Guidelines would exceed the competences of the Court of Justice of the European Union, as this might entail qualitative assessments. In these circumstances, *Van Schagen* considers that a better forum for review of RIAs would be the Regulatory Scrutiny Board.

Vianello discusses whether the use of EU Pre-Accession and Neighborhood policy soft law by the European courts undermines general principles of law. While she explains that the relevant soft law instruments may have very significant legal and practical effects for third countries and their nationals, the Court of Justice has consistently failed to recognize that the relevant soft law measures could entail legitimate expectations for applicants, or a right to require a certain course of action from the EU institutions. This, in *Vianello*'s view, fails to acknowledge the reality of the use of soft law in this policy area. Interestingly, she argues that the European Ombudsman could be regarded as an adequate alternative forum to force the EU to uphold a more principled approach in its external activities.

Alberti also discusses the relation between soft law and general principles of law, specifically the principle of institutional balance. He argues that the judicial 'handling' of EU soft law in the field of Monetary Policy has endangered the institutional balance in the EU legal system, because it has given the chance to the European Central Bank to detail, during the judicial proceedings, the details of implementation of a soft law measure. With regards to institutional balance, *Stefan and Petri* illustrate, with an energy case study, an underlying tension of the *Meroni* doctrine.[58] Following a strict application of this doctrine with regards to the limits of what can be delegated, ACER was only given soft powers to regulate mostly through non-legally binding instruments. Yet, given that neither the Courts nor the Board of Appeal recognize legal effect to such instruments, they are hardly ever reviewed, undermining accountability and institutional balance, which is another tenet of the *Meroni* doctrine.

[57] Stefan (n 24).
[58] Cases 9/56 and 10/56, *Meroni & Co, Industrie Metallurgiche SpA v High Authority* ECLI:EU:C:1958:7.

VI. Conclusion: embracing hybridity

Soft law is present in virtually all policy fields in which the EU operates and is more and more often inextricably linked to hard law. It serves to set the course of action of EU and national institutions alike, thereby avoiding arbitrary behaviour, and to interpret hard law provisions in a legislative context of an interestingly technical and technological nature. Is it still viable to strictly separate hard law from soft law, as if they were two ontologically distinct entities? The literature has already given a negative answer to this question, with authors arguing that law should be either seen as a continuum, varying from non-law through soft law to hard law forms,[59] and that regulation is inherently hybrid, including both soft and hard law features.[60] In these circumstances, is it still sustainable for European courts to deny judicial review of soft law on the grounds that they do not produce legally binding effects?

In the words of Advocate General Bobek, soft law measures contain 'a type of *imperfect* norm: on the one hand, they clearly have the normative ambition of inducing compliance on the part of their addressees. On the other hand, no instruments of direct coercion are attached to them'.[61] The articles collected in this special issue confirm that soft law measures do not only have the 'normative ambition' of inducing compliance, but often represent the 'no other choice' option in terms of compliance, from the perspective of EU and national authorities. Furthermore, as shown by *Beckers*, soft law can acquire binding features through institutional practice. In such circumstances, it becomes untenable to keep on denying that the legislative framework is defined by the combination of hard and soft law. While the European Courts ought, therefore, to embrace hybridity, it is necessary at the same time to re-think basic notions of judicial review, relaxing the straight jacket of binding legal effects. Moreover, embracing hybridity ought not to mean a new chance for EU institutions to by-pass the basic tenets of the rule of law, including transparency, reason giving, and accountability, but acknowledging that soft law is here to stay and needs to be both used and controlled by the European courts. This requires a more streamlined approach to procedural requirements concerning the adoption of soft law instruments, which in turn might be of use for the Courts when exercising judicial review.

[59] K W Abbott and D Sindal, 'Hard and Soft Law in International Governance' (2000) 54(3) *International Organization*, 421; F Terpan, 'Soft Law in the European Union—The Changing Nature of EU Law' (2015) 21(1) *European Law Journal*, 68-96.

[60] G De Búrca and J. Scott, 'Introduction: New Governance, Law and Constitutionalism' in G De Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006); D M Trubek and L G Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' (2007) 13 *Columbia Journal of European Law*, 539.

[61] C-16/16 P, Opinion of Advocate General Bobek delivered on 12 December 2017, *Kingdom of Belgium v European Commission* ECLI:EU:C:2017:959, at para. 86.