

Soft Law in EU Competition Law and its Judicial Reception in Member States: A Theoretical Perspective

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A. Introduction

This work draws from accounts on the nature and legal effects of soft law instruments in EU and international law with the ultimate aim to construct a theoretical framework for recognition of EU competition soft law—guidelines, communications, notices, and the like—in the judicial discourse of national courts of the European Union. “Recognition” is used to encompass instances in which the national judiciary either explicitly interprets—that is, agrees or disagrees with—the content of competition soft instruments, or treats their substance in a roundabout, implicit way—without explicit reference to soft law in the judgment proper. This second option is called “the persuaded judiciary scenario.”¹ Importantly, a foundational assumption of the current work is that courts do not transform soft law into hard law when subjecting the former to judicial interpretation/recognition.²

This Article also takes issue with the fact that CJEU preliminary rulings on competition soft law disputes originating in Member States have thus far exhibited a rather resistant attitude to soft law. The supranational judiciary has, to a large extent, refused to interpret³ soft law because of its lack of binding force. The possibility that national courts adopt a

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¹ Sabine Saurugger & Fabien Terpan, Resistance to EU Soft Law: A Typology of Instruments 24–25 (May 9, 2013) (unpublished manuscript) (on file with the author) (developing a similar typology to account for resistance to, and not recognition of, soft law).

² See *infra* Section B.II (elaborating on this view proposed by Oana Stefan); OANA STEFAN, SOFT LAW IN COURT: COMPETITION LAW, STATE AID AND THE COURT OF JUSTICE OF THE EUROPEAN UNION 142 (2012).

³ The only institution that is bound by competition soft law is the European Commission. See *Dansk Rorindustri v. Comm'n*, CJEU Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, 2005 E.C.R. I-05425, paras. 209–11 (holding that the European Commission binds its own discretion when issuing latter instruments). Thus, in accordance with formal legal doctrine, unless the Commission is party to a dispute involving soft law, soft instruments cannot be deemed to produce binding effects.

similar approach in the currently decentralized competition enforcement system is thus not discounted, but is seen as undesirable for two important reasons.

First, this Article argues that judicial recognition of competition soft law at the national level is not only necessary, but also needed in order to determine the currently uncertain legal position of subjects of the de-centralized competition regime (National Competition Authorities—NCAs) and, importantly enough, natural and legal persons affected by anti-competitive practices. Second, judicial recognition is greatly needed in order to legitimate the substantive analytical framework—the so-called “more economic” approach to competition law sealed in soft law instruments—and thus prevent the possibility of divergent judicial interpretations across the different EU Member States.

More specifically, due to the increased importance of soft law in the decentralized EU competition enforcement system, one could argue that the discrepancy between the practical effects that it produces and its concomitant, but largely unrecognized, legal effects creates a quandary with regard to the rights and obligations of the actors in the system.⁴ This issue is rooted in the high likelihood that the detailed and sometimes imperative content of EU competition soft law is taken at “face value” by both natural and legal persons who adjust their behavior to soft law,⁵ only to realize that conformity does not protect them if faced with an anti-competitive challenge. The national judiciary is highly unlikely to engage with soft law in such a situation because those scenarios involve atypical instruments of law that lack any legally binding force and, allegedly,⁶ cannot affect the legal position of third parties.⁷

Indirectly, national judicial resistance to soft law could also create uncertainty for the NCAs. Because the latter are bound by Commission decisions which should incorporate the more economic reasoning of the guidelines, NCAs are most likely also going to adopt a more economic reasoning. Conversely, national courts could stray away from the guidelines because more economic soft law is not necessarily aligned with the case law of the supranational courts, which jurisprudence national courts are obliged to follow. If this scenario comes to fruition, NCA decisions would not be upheld on appeal.

⁴ G.M. Borchardt & K.C. Wellens, *Soft Law in European Community Law*, 14 EUR. L. REV. 267, 270 (1989).

⁵ *Id.* at 313.

⁶ *See id.* at 321 (“In so far as Community soft law intends to cause legal consequences with regard to the individual these rules of conduct are particularly eligible for an appeal for annulment or a preliminary ruling.”).

⁷ *See infra* Section C (discussing this point in greater detail); *id.* at 312 (“Soft law does create an expectation that conduct of states, international organizations and the individual will be in conformity with the non-binding rules of conduct. In this regard it is correct to speak of ‘commitments’ (legal) and ‘expectations’ (legal).”).

The above-envisioned scenarios pose a serious problem from a rule-of-law perspective and the principle of legal certainty in particular, which postulates that “those subject to the law must know what the law is so as to be able to plan their actions accordingly.”⁸ Taking the principle of legal certainty as a theoretical point of departure, this Article argues that competition soft law should be recognized judicially in national courts. This recognition should be achieved through adoption of a flexible view on law, as opposed to a formalist/positivist view, that rejects all judicial engagement with soft law.

In order to discuss the intricate issue of judicial recognition of soft law, this Article uses terminology developed by Senden⁹ that inventories the different legal guises of soft law. Namely, a distinction is made between (1) incidental binding force, and (2) indirect legal effects that a soft law instrument can produce.¹⁰ The former term refers to attribution of formal legally binding force to a soft law instrument by virtue of its internal “particular or specific merits,”¹¹ while the latter relates to the external dimension of soft law, or the possibility of its validation by the subjects of the law and legal authorities. In this sense:

[T]he legal effect does not ensue directly from the nature of the act itself, but indirectly from the operation of other legal methods and principles . . . such indirect legal effects can occur as a result of interpretation [in light of primary or secondary EU law] but also as a result of general principles of law.¹²

Because, as Senden establishes, it is quite unlikely for a true soft law act to have incidental binding force (unless it is *ultra vires*), this Article concentrates on the second option for judicial recognition of soft law: Indirect legal effects. Thus, when the “nature” of a soft law act is referenced in Section B.III below, it does not claim the existence of an incidental binding force because this is unattainable for a true soft law act, like competition soft law. The nature of soft law should therefore be seen as a discussion of soft law’s internal

⁸ See TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 163 (1999); FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 43 (2009) (“From the perspective of those who are subject to law’s constraints, the gains from marginal improvements in the law are rarely sufficient to outweigh the losses that would come from being unable to rely even on imperfect legal rules and imperfect precedents.”).

⁹ LINDA SENDEN, *SOFT LAW IN EUROPEAN COMMUNITY LAW (ITS RELATIONSHIP TO LEGISLATION)* 265 (2004).

¹⁰ See *id.* (noting that those two terms are, in turn, opposed to inherent binding force—the classical stipulation that a hard law act is binding by virtue of the intent of the legislator).

¹¹ Here, “merits” should be understood as: Drafter’s intention (wording, context, and history), possibility of the act to produce novel legal effects not contained in underlying primary or secondary law, legal basis of the act, institutional competence to adopt in conformity with legal basis, and lack or presence of agreement between parties to the act. See SENDEN, *supra* note 9, at 292–305.

¹² *Id.* at 267.

features that could contribute to it generating indirect legal effects, and not as an incidental binding force.

With this information in mind, the current Article proceeds by acquainting the reader with competition soft instruments and introduces the main theoretical stances on the nature, discussed in Section B, and legal effects, discussed in Section C, of soft law—the factors that determine judicial engagement with soft instruments. Lastly, taking into account CJEU’s case law and literature based off of judicial responses to new governance, Section D of this Article proposes several theoretical possibilities for the national judiciary to recognize competition soft instruments.

B. Soft Law: A Single Concept with Multiple Dimensions

This section will conduct an inquiry into the nature of soft law in the EU Competition domain against the backdrop of theoretical insights on the nature of soft law generated within the fields of international and European law.¹³ Such an approach is useful because it has the potential to bring out the specificities of competition soft instruments by juxtaposing them with instruments that exist in two related domains and bear the same name. But before engaging in this task, due attention will be paid to the transformation of law thesis originating in international law that alleges the inability of soft law to exist as a self-standing instrument of law. It is important to examine—and refute—this theory first because if soft law cannot have a legal existence on its own, a discussion of its legal nature is not necessary.

1. Soft Law in EU Competition Law—Setting the Scene

Soft law instruments have been prominent in the field of EU Competition Law since the inception of regulatory activity in the late 1950s. They are issued unilaterally by the European Commission and are devoid of a legally binding force—namely, they do not constitute valid binding law. Article 17.1 TEU authorizes the Commission to produce soft law and stipulates that “[t]he Commission shall promote the general interest of the Union and take appropriate initiatives to that end . . . it shall exercise coordinating, executive and management functions, as laid down in the Treaties.”¹⁴ The wording of this provision

¹³ Soft law is also used at member state level in the form of, among others, clarifying circulars issued to administrative authorities by the government. The national setting, however, is not considered in this paper because soft law operates differently in the supra-, national, and international contexts. See David Trubek, Patrick Cottrell & Mark Nance, *Soft Law, Hard Law, and European Integration: Toward a Theory of Hybridity* 1, 3 (Univ. of Wis. Legal Studies, Working Paper No. 1002, 2005) (presenting a similar compartmentalization approach).

¹⁴ See Hakon Cosma & Richard Whish, *Soft Law in the Field of EU Competition Policy*, 14 EUR. BUS. L. REV. 25, 50 (2003) (contending that Art. 17.1 TEU is the legal basis for adoption of competition soft law); Dirk Lehmkuhl, *On Government, Governance and Judicial Review: The Case of European Competition Policy*, 28 INT’L PUB. POL’Y 139, 150 (2008). Note that Art. 17.1 TEU (ex. Art. 211 EC) has become even vaguer as to the powers of the Commission after the revision it underwent with the Lisbon Treaty.

leaves the Commission a considerable amount of discretion to develop policy. The notices, guidelines, and communications drafted in the field provide “interpretation and application of the existing body of . . . law.”¹⁵ Thus, via soft law, the Commission aims to summarize and clarify its own decisional practice, as well as that of the European Courts, without prejudicing the case law of neither national nor supranational courts. In this sense, soft law in the competition domain has traditionally served as a complement and clarification to already existing law.

However, certain instruments of soft law extend beyond the traditional by introducing novel elements to the established practice.¹⁶ Most of these instruments also contain imperative, compelling language which, combined with the increasing importance of competition soft law as self-standing rather than merely auxiliary instruments,¹⁷ have caused scholars to note that soft law might facilitate “back door” legislation by the Commission.¹⁸

These concerns were augmented during the competition policy reform of 2004,¹⁹ which decentralized the enforcement regime and made Article 101.3 TFEU, on permissible justifications for otherwise anti-competitive conduct, directly applicable. In effect, both national competition authorities (hereinafter NCAs) and national courts can now conduct full competition analysis. Commission-initiated guidance in the form of competition soft law supposedly diminishes the threat to consistent enforcement resulting from this new multi-level, multi-actor setting. This makes soft law indispensable for national enforcers, especially where formal Commission decisions do not sufficiently inform national decisional practice. The high level of detail in those instruments also increases their perceived reliability and, despite being formally non-binding, they may create expectations in legal persons (businesses) that this Article argues should be addressed²⁰ by national courts of law, notwithstanding supranational judicial resistance thereof.

¹⁵ See SENDEN, *supra* note 9, at 160.

¹⁶ See, e.g., Communication from the Commission—Notice—Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 8 (“[T]he Commission also intends to explain its policy with regard to issues that have not been dealt with in the case law, or that are subject to interpretation.”).

¹⁷ See SENDEN, *supra* note 9, at 21 (acknowledging that although soft law is not a new phenomenon, its “proposed use as an alternative to legislation is new”).

¹⁸ Linda Senden, *Soft Law and its Implications for Institutional Balance in the EC*, 1 *UTRECHT L. REV.* 79, 93 (2005).

¹⁹ See Council Regulation 1/2003, 2002 O.J. (L 4) 1 (changing the EU Competition Law regime both substantively and procedurally on 1 May 2004).

²⁰ See Eleanor Sharpston, *Legitimate Expectations and Economic Reality*, 15 *EUR. L. REV.* 103, 104 (1990) (expressing this same view).

Thus, competition soft law portrays an intriguing dichotomy. While attempting to provide democratic values such as clarity, certainty, and participation,²¹ competition soft law in an increasingly complex policy setup²² simultaneously erodes those same values because of its non-justiciability.

This curious contradiction can be explained if one looks at its theoretical embedding—the conflict between a flexible and a formalist/positivist view of law. While formalists assert non-binding instruments' lack of justiciability largely due to their non-democratic adoption process,²³ proponents of a more flexible view put forward the phenomenon of "legal legitimacy"²⁴ that accounts for the legalization of non-legal norms. Authors with a flexible viewpoint acknowledge that for law to be legitimate, it should go beyond, but not disregard, positivist requirements for internal validity of the law—form, forum, and content²⁵—and secure "agents in the system understanding why rules are necessary."²⁶ Importantly, it is submitted that "[p]articipating in constructing law enhances agents' understanding of its necessity . . . adherence to specific legal rationality that all participants understand and accept helps to legitimate the collective construction of the law."²⁷ In this regard, the flexible view of law marries the formal requirements on the nature and internal validity of the law with a more fluid understanding of its external validity and legitimization by legal subjects. Thus, under a flexible view of law, the internal dimension of a soft

²¹ The term "participation" here refers to the public consultations that the Commission holds before issuing competition soft instruments.

²² Clarity and certainty here should only be understood as practical clarity and certainty. When it comes to legal certainty, contrary to Commission claims that it is enhanced by soft law, soft law creates greater uncertainty for the subjects of the law whose expectations might be induced by soft law, but are subsequently non-defensible in court since soft law lacks legal status.

²³ See, e.g., Borchardt & Wellens, *supra* note 4 (analyzing from a quite formalist viewpoint); SENDEN, *supra* note 9 (presenting a doctrinal thesis from a similarly formalistic perspective). *But see* STEFAN, *supra* note 2 (adopting a more flexible approach to law).

²⁴ See Martha Finnemore & Stephen Toope, *Alternatives to Legalization: Richer Views of Law and Politics*, 55 INT'L ORG. 743, 749 (2001)

Under a broader view of law, the legalization of politics encompasses more than just the largely technical and formal criteria of obligation, precision, and delegation. It encompasses features and effects of legitimacy, including the need for congruence between law and underlying social practice. It attends to the purposive construction of law within inherited traditions, the way participating in law's construction contributes to legitimacy and obligation, and to the continuum of legality from informal to more formal norms.

²⁵ See Borchardt & Wellens, *supra* note 4, at 298.

²⁶ See Finnemore & Toope, *supra* note 24, at 749.

²⁷ *Id.*

instrument is governed by formal requirements whereas, externally, application of a flexible set of norms²⁸ allows the judiciary to recognize the legal subjects' perception of soft law as legitimate. This enables soft law to produce legal effects without acquiring incidental binding force.

Focusing these insights on the case of competition soft law, it is likely that, due to its detailed language and other persuasive internal characteristics, subjects of the current competition regime have experienced and perceived competition soft law as legitimate law. In the words of Schauer, "[T]hey have internalized it,"²⁹ and have consequently created expectations that the enforcement regime should meet. This could potentially occur through active involvement with soft law by the national judiciary, which, by use of general principles of law and other techniques proposed in Section D below, could endow the instruments with two important features: (1) The ability, by producing legal effects, to serve legitimate expectations and thus contribute to legal certainty; and (2) The ability to create uniformity through cross-border judicial and administrative³⁰ dialogue in the sphere of EU competition law.

On a more general level, the formalist-flexible divide evokes a fundamental question on the meaning of democracy in an international context. A stream of innovative scholarship claims that expert technocratic, rather than representative democracy, is the way forward for polities such as the EU that exhibit non-hierarchical, multi-actor, and multi-level methods of policymaking.³¹ Soft law, as a primary product of the latter processes, is therefore capable of functioning as a full-fledged instrument of law.³² On the other extreme, traditional views on representative democracy as a system that secures checks and balances cannot see soft law as anything but auxiliary, legally non-binding, and

²⁸ See *infra* Sections C & D (delineating the concept of "flexible norms" further).

²⁹ See FREDERICK SCHAUER, *PLAYING BY THE RULES* 121 (1991) ("[A]n agent has an internal point of view with respect to a rule when that agent treats a rule's existence as relevant to the question of what to do.").

³⁰ See *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*, COM (2014) 4136 final [hereinafter *De Minimis Notice*] (providing a recent example of the administration (the European Commission) engaging the judiciary in a dialogue on the substance of soft law). The question now is whether the CJEU could explicitly engage with a Commission soft law instrument in its discourse.

³¹ Oliver Gerstenberg & Charles Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, in *GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET* 289 (Christian Joerges & Renaud Dehousse eds., 2002).

³² See Charles Sabel & William Simon, *Epilogue: Accountability Without Sovereignty*, in *LAW AND NEW GOVERNANCE IN THE EU AND US* 395 (Grainne de Burca & Joanne Scott eds., 2006); see also Neil Walker, *EU Constitutionalism and New Governance*, in *LAW AND NEW GOVERNANCE IN THE EU AND US* 15 (Grainne de Burca & Joanne Scott eds., 2006); Grainne De Burca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in *LAW AND NEW GOVERNANCE IN THE EU AND US* 1 (Grainne de Burca & Joanne Scott eds., 2006); Mark Dawson, *Soft Law and the Rule of Law in the European Union: Revision or Redundancy?*, in *LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD* 221 (Bruno de Witte & Antoine Vauchez eds., 2013).

informal. While the debate over the existence of a changing model of possibility of supranational democracy is beyond the scope of this paper, it is worth noting that the above-described doctrinal divisions also underlie the prominent dispute regarding whether soft law transforms into hard law when subject to judicial scrutiny.³³

The matter ultimately boils down to the question of whether a legal system—the EU legal system in this case—can accommodate soft law as a legal, and not merely political, phenomenon. Additionally, under the assumption that the accommodation option exists, the question that arises is how precisely soft law can be accommodated. Answers to these questions will certainly diverge per policy.³⁴ This Article focuses on the recently opened multi-level governance (hereinafter MLG) competition domain. The field's current exposure to multi-level processes presents novel opportunities for fitting soft law into legal discourse. To this end, it is hereby maintained that national courts, as ultimate instances of normative ordering within EU Member States,³⁵ will play an important role in shaping competition MLG processes through the recognition of pertinent soft law instruments.³⁶

With these considerations in mind, this Article's end goal is the exploration of theoretical possibilities for judicial recognition of competition soft instruments at the national level. Before proceeding, it is necessary to get acquainted with theoretical debates on the internal nature and external legal dimension of soft instruments.

II. International Law, EU Competition Law, and the Transformation of Law Thesis

According to Borchardt and Wellens, authors of one of the foundational works on the subject, the concept of soft law rose to prominence in public international law in the 1970s when it became obvious that the exhaustive list of international law instruments enumerated in Article 38.1 of the Statute of the International Court of Justice could not accommodate quasi-legal forms such as resolutions.³⁷

³³ See *infra* Section B.II.

³⁴ See Trubek, Cottrell & Nance, *supra* note 13, at 3.

³⁵ Michelle Everson, *The Crisis of Indeterminacy: An Equitable Law of Deliberative European Market Administration?*, in GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET, *supra* note 31, at 231, 234.

³⁶ See Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 566–67 (2006) (emphasizing the importance of courts in MLG settings); see also Mark Dawson, *Transforming into What? New Governance in the EU and the Managerial Sensibility in Modern Law*, 2 WIS. L. REV. 389, 411 (2010) (stressing the weight of courts in MLG settings as well).

³⁷ See Borchardt & Wellens, *supra* note 4, at 267.

With regard to the legal dimension of international soft law, the authors emphasize the centrality of states' intention to be bound as a basic tenet of hard legal obligations and contend that, because intention to be bound is lacking with regard to soft law,

[s]oft law will not be capable of being used as a lever in order to remove [the] necessary, doctrinal distinction between international law and international politics, or to make it redundant. Indeed, this would lead to a juridification of international relations because of its possible repudiation of the wills expressed by States and international organizations.³⁸

This contention suggests that the authors see international soft law in a legally formalist fashion, as simply an expression of a political commitment. At the other end of the legal-political divide stands hard law with no intermediate (quasi-legal) forms in-between.³⁹ Jan Klabbers also subscribes to this black-and-white view, stating that an approach mixing law and politics would be quite disastrous because "once political and moral concerns are allowed to creep back into the law, the law loses its relative autonomy from politics or morality."⁴⁰ In a different work, Klabbers opines, in line with the formalist view on soft law suggested by Borchardt and Wellens, that when international tribunals interpret soft instruments, the latter simply become hard legal obligations.⁴¹

These views are moderated by the works of scholars who take a more flexible view on law. Abbott, Snidal,⁴² and Chinkin,⁴³ while acknowledging the ability of soft norms to transition into hard ones, opine that soft law has legal merits in and of itself and does not necessarily need to be transformed into hard law when interpreted judicially. Chinkin also considers the desirability of a possible transformation process, stating that,

³⁸ *Id.* at 270. The importance of intended agreement between parties as a determinant of legal obligation of an instrument materializes in the EU Competition Law domain too as will be argued below. See *infra* Section B.III.

³⁹ See Borchardt & Wellens, *supra* note 4, at 271 (discussing soft law as signifying the "inadequate maturity of a particular rule of law" or as a phenomenon with pre-legal or para-legal character, which can thus reach the level of a hard obligation if re-negotiated); *id.* (acknowledging that in a court of law, a soft rule can be transformed into hard law if it forms the *ratio decidendi* of the judges' reasoning).

⁴⁰ Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT'L L. 381, 391 (1998).

⁴¹ Jan Klabbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT'L L. 167, 177 (1996). But see Jan Klabbers, *Institutional Ambivalence by Design: Soft Organizations in International Law*, 70 NORDIC J. INT'L L. 403, 412 (2001) ("A strong argument can be made that to speak of 'political bindingness' versus 'legal bindingness' is not all that meaningful, as there might not exist such a neat separation between law and politics.").

⁴² Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 447 (2000).

⁴³ Cristine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L. Q. 850, 856 (1989).

Lawyers have a tendency to favor the legal norm and see this claim as desirable but the outcome of any such conclusion must also be considered. If a principle is, or becomes, a legal norm certain legal consequences follow from its performance and its breach. If claims that soft law principles have become hard law are to be accepted, it must be possible both to determine breach and the legal outcome of any claim of breach.⁴⁴

Indeed, the establishment of breach can be problematic in international economic law because its subjects are companies and individuals, whose behavior is not subject to sanctions under international law.⁴⁵

The situation is different under EU economic law and competition law in particular. Because the primary provisions establishing the EU competition regime target private action on the market, there is no doubt that the rights and obligations created are aimed towards companies and individuals. In this context, the ability to establish breach—or to resort to any other traditional legal category—is present, and thus the transformation of soft into hard law becomes more plausible. This fact may explain why the transformation thesis has sparked fervent discussion and received both strong acclaim and critique in Europe.⁴⁶

In the specific context of EU competition law, Oana Stefan gives the most in-depth account on the matter.⁴⁷ The scholar presents a strong argument against the transformation thesis. Embedded in the discourse of multi-level governance in the EU⁴⁸ and taking a more flexible view on law, Stefan claims that EU courts do not allow soft law to become hard. To that end, the judiciary employs refined mechanisms that give legal effect to soft law without

⁴⁴ *Id.* at 859.

⁴⁵ *Id.* at 858.

⁴⁶ See Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 *MOD. L. REV.* 19, 33 (1993) (providing supporting views of the transformation thesis); Albert Graells, *Soft Law and the Private Enforcement of the EU Competition Rules*, in *INTERNATIONAL CONFERENCE ON THE PRIVATE ENFORCEMENT OF COMPETITION LAW 1* (2010) (supplying additional support for this thesis). *But see* OANA STEFAN, *SOFT LAW IN COURT: COMPETITION LAW, STATE AID AND THE COURT OF JUSTICE OF THE EUROPEAN UNION 142* (2012) (stating opposition to the transformation thesis).

⁴⁷ See STEFAN, *supra* note 2, at 142–54.

⁴⁸ See David Trubek & Louise Trubek, *The Coexistence of New Governance and Legal Regulation: Complementarity or Rivalry?*, in *ANNUAL MEETING OF THE RESEARCH COMMITTEE ON THE SOCIOLOGY OF LAW 1* (2005); Trubek, Cottrell & Nance, *supra* note 13, at 4; David Trubek & Louise Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation* (Univ. of Wis. Legal Studies, Working Paper No. 1047, 2007).

endowing it with binding force.⁴⁹ More specifically, she claims that through the intermediate use of general principles of law—legitimate expectations, legal certainty, and equality—courts allow soft instruments to produce legal effects in the system without turning them into hard law.⁵⁰ The scholar explains the plausibility of this theoretical claim with the conceptual division between incidental binding force and indirect legal effects addressed previously in this Article. She also supports her views with empirical examples.

Stefan's flexible perspective on competition soft law and its interpretation by EU courts gives EU relevance to Chinkin's observations on international economic soft law. Chinkin is hesitant to support the formalist transformation of soft law thesis and stipulates that the very specificity of some international soft law instruments gives them *sui generis* value and makes them more likely to be effective in controlling the respective domains to which they apply, which speaks for their non-transitory character.⁵¹ She also acknowledges that, due to the large variety of soft instruments in the international economic domain, it is undesirable to coin rigid criteria for determining their legal status. Consequently, she advocates an approach whereby each case is evaluated on its own merits. "The effects of entering into a binding or non-binding instrument are not restricted to the international arena and full contextual analysis is needed to resolve claims as to the outcome of becoming party to such an instrument."⁵² At the same time, the author does acknowledge that her approach "plays havoc with juristic concepts and creates conceptual uncertainty."⁵³

The theoretical model of Stefan is more sophisticated than what Chinkin's work suggests because it actually explains how formal legal categories (for example, general principles of law), can be used to mediate the creation of legal effects for a flexible legal category such as soft law. While this function will be addressed in depth in what follows, it should be emphasized here that the battle between fluidity and rigidity in the law is an imminent trade-off that figures prominently in international and EU economic regulation.⁵⁴ In fast-paced, constantly evolving domains, flexibility and effectiveness are needed. A possible

⁴⁹ See STEFAN, *supra* note 2, at 142–54.

⁵⁰ See SENDEN, *supra* note 9, at 352–71 (making the same contention).

⁵¹ *But see* Finnemore & Toope, *supra* note 24, at 748 ("Increased precision could lead to less obligation, when prospective members of legal regimes are driven away by fears of detailed rules that are inflexible.").

⁵² See Chinkin, *supra* note 43, at 864.

⁵³ *Id.* at 865.

⁵⁴ See Daniel Crane, *Rules Versus Standards in Antitrust Adjudication* 1 (Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 162, 2006) (discussing the cyclical ebbs and flows of certainty and fluidity); Arthur Vanderbilt, *The Modernization of the Law*, 36 CORNELL L. Q. 433, 433 (1951) (providing a more philosophical account).

means to secure them is through the use of soft, rather than hard, regulatory instruments.⁵⁵ At the same time, the actors in the system require assurance of their ability to conduct business transactions in an environment of legal certainty—a demand conducive to the adoption of hard forms of law. The strength of Stefan’s thesis in this setting is that it manages to bridge a gap between two polar stances, which is why the latter theory is used as the basis of an attempt to construct a framework for judicial recognition of EU competition soft law at national level in the last section of this Article.

III. The (Legal) Nature of Competition Soft Law vis-à-vis International and EU Law

Several prominent scholars⁵⁶ have explored the nature of soft law in the international and EU law domains. These scholarly works begin by delineating the constituent parts of a hard legal obligation and assert that soft law emerges when one or more of the elements constituting a hard obligation are not present.

One of the more detailed works on the subject is that of Borchardt and Wellens, who assert that the differences with regard to the ingredients of a hard legal obligation in the international realm and EU law realms are minimal.⁵⁷ For both domains, the authors argue that the publication and place of publication of an instrument have an influence on its legal nature.⁵⁸ Additionally, Borchardt and Wellens maintain that the forum (institutional setting at adoption), content (wording), and form (legal form) in which instruments are adopted determine their “distance to the Treaty,” which, in turn “will be important when assessing whether it indeed involves Community soft law and to what extent the EEC Treaty affects this.”⁵⁹

With that background, Borchardt and Wellens claim that, relating to the notion forum: The more the framework within which actors interact is institutionalized in Treaty Articles, the closer the linkage with the Treaty and the greater the possibility to adopt hard law.⁶⁰ Second, when discussing characteristics of content, the authors list—in descending order

⁵⁵ This rationale holds explanatory value for the reforms that the EU Competition Policy regime underwent with the introduction of Regulation 1/2003. It also explains the increased importance that the system has attributed to competition guidelines, notices, and the like ever since.

⁵⁶ See Borchardt & Wellens, *supra* note 4, at 267; Abbott & Snidal, *supra* note 42, at 421; Finnemore & Toope, *supra* note 24, at 743.

⁵⁷ See Borchardt & Wellens, *supra* note 4, at 280.

⁵⁸ *Polska Telefonia Cyfrowa v. Prezes Urzędu Komunikacji Elektronicznej*, CJEU Case C-410/09, 2011 E.C.R. I-03853 (providing a recent example of the CJEU confirming this view).

⁵⁹ See Borchardt & Wellens, *supra* note 4, at 301.

⁶⁰ *Id.* at 301.

in terms of ability to generate legal status—several settings, the first being “matters that are directly connected with the EEC Treaty and with respect to which the Community has exclusive competence.”⁶¹ This is precisely the situation of EU Competition Law. Judging on the basis of those two factors, it would appear that the EU Competition domain is more likely to be governed by hard rather than soft law.⁶² This conclusion remains unaltered by the third factor—form—because it is stated that the form of the instrument can give “a first indication to what extent parties intended a legally binding act,”⁶³ but definitely not a final one.⁶⁴ It thus appears that competition soft law is a theoretical impossibility.⁶⁵ Such a conclusion is further warranted by the fact that non-compliance with competition norms usually entails sanctioning by the European Commission, sanctioning mechanisms being a further criterion determining the existence of hard legal obligation according to Borchard and Wellens.

The analysis does not stop here, however, as Senden, Borchard, and Wellens testify.⁶⁶ In order for an obligation to truly be a hard legal obligation, the adopting institution must possess the necessary competence for adoption established in the relevant legal basis of the act in question. This is the requirement on which competition soft law fails. Most guidelines are adopted on the basis of Article 17.1 TFEU—which the CJEU does not accept as a valid legal basis—or fail to mention an explicit legal basis. This warrants the conclusion that “the competence of the Commission will often be confined to the adoption of true, non-binding soft law acts.”⁶⁷

⁶¹ *Id.* at 290.

⁶² See SENDEN, *supra* note 9, at 282–83.

[R]ecommendations are generally adopted by the Community institutions when the Treaty does not confer the power upon them to adopt binding measures. Where the power is actually provided for, the ‘danger’ lurks that an institution may in fact want to impose (new) legal rights and obligations by way of soft law acts.

⁶³ *Id.* at 290.

⁶⁴ See, e.g., Jan Klabbers, *Informal Instruments Before the European Court of Justice*, 31 COMMON MKT. L. REV. 997, 1016 (1994) (acknowledging that form is not definitive as to the legal nature of an instrument); SENDEN, *supra* note 9, at 276; *Usines à Tubes de la Sarre v. High Authority*, CJEU Joined Cases C-1/57 & C-14/57, 1957 E.C.R. I-105 (serving as the original CJEU decision on the matter).

⁶⁵ See Fabien Terpan, *Soft Law in the European Union: The Changing Nature of EU Law 1* (Sci. Po Grenoble, Working Paper No. 7, 2013) (asserting that a transition to hard law by virtue of internal setup/validation/status is underway in this case).

⁶⁶ See SENDEN, *supra* note 9, at 76; Borchardt & Wellens, *supra* note 4, at 280.

⁶⁷ See SENDEN, *supra* note 9, at 306.

This fact has both positive and negative repercussions. On the positive side, the absence of valid legal bases saves competition soft law acts from the possibility of annulment for constituting illegal hard law in the clothing of soft law. The downside is that the absence of legally binding force does not preclude the instruments from producing effects on legal subjects. Namely, businesses that self-assess according to the framework of the new regime adjust their behavior on the substantive basis of soft law provisions. In a recent paper, Stefan observes that the legal situation of businesses may be affected by soft law.⁶⁸ More than twenty years before Stefan, Borchardt, and Wellens warned of this problem, maintaining that “[i]n so far as Community soft law intends to cause legal consequences with regard to the individual these rules of conduct are particularly eligible for an appeal for annulment or a preliminary ruling.”⁶⁹ Nevertheless, as discussed above, competition soft law is unlikely to be subject to an action for annulment. Even if the latter were possible, it would still be an unfortunate result because the positive rule-clarifying role of soft law would be negated. This situation leaves a legal vacuum in the system difficult to bridge, especially at the national level where courts and administrative authorities now have full authority to enforce the Treaty competition law provisions.

Further research into EU economic soft law and its ability to bind or produce legally binding effects revealed a curious phenomenon in the related to competition law area of state aids. In her article on soft law in the EU State Aid regime, Michelle Cini testifies to the fact that provisions of the soft Community Framework on State Aid to the Motor Vehicle Industry⁷⁰ were converted into hard obligations via a negative Commission decision,⁷¹ the latter formalizing “what would have otherwise been an informal rule.”⁷² Indeed, state aid case law points to the fact that “there is a legal basis for the recognition of binding ‘negotiated’ acts, which is linked to the specific duty of cooperation [of Article 108.1 TFEU].”⁷³ An incidental binding force of soft state aid acts can thus occur because state aid soft law is negotiated between the Commission and Member States, and there is a specific duty of cooperation between parties, stipulated in the legal basis of state aid soft law—Article 108.1 TFEU.⁷⁴ Such a phenomenon, incidental binding force based on agreement,⁷⁵

⁶⁸ Oana Stefan, *European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects*, 75 *MOD. L. REV.* 879, 886.

⁶⁹ See Borchardt & Wellens, *supra* note 4, at 305 (noting that the statement should be read with the caveat that if firms voluntarily choose to comply with soft instruments, this fact need not entitle them to a legal remedy).

⁷⁰ *Community Framework on State Aid to the Motor Vehicle Industry*, 1997 O.J. (C 279) 97.

⁷¹ Commission Decision 90/381, 1990 O.J. (L 188) 55.

⁷² Michelle Cini, *The Soft Law Approach: Commission Rule-Making in the EU’s State Aid Regime*, 8 *J. EUR. PUB. POL’Y* 192, 202 (2001).

⁷³ SENDEN, *supra* note 9, at 298.

⁷⁴ *CIRFS v. Comm’n*, CJEU Case C-313/90, 1993 E.C.R. I-1125; *Spain v. Comm’n*, CJEU Case C-135/93, 1995 E.C.R. I-1651; *Ijssel Vliet Combinatie v. Minister van Economische Zaken*, CJEU Case C-311/94, 1996 E.C.R. I-05023; *Ger. v.*

cannot be generated, however, with regard to competition soft law because the latter are not agreed upon instruments; the Commission issues them unilaterally. Also, there is no reference to general principles of law, such as cooperation, in the legal basis thereof. Still, as argued in the Introduction above, another legal mechanism—that of indirect legal effects—could be the alternative for competition soft law to acquire a legal dimension.

The prospect of soft law producing legal effects via the intermediation of traditional legal categories such as general principles of law is of utmost importance for the safeguarding of the procedural and substantive consistency of the decentralized competition enforcement system. As demonstrated in this section, a strong case can be mounted in support of the independent legal existence and non-transitory nature of soft law, especially in an economic regulatory setting. Also, many of the internal characteristics of EU competition soft law instruments approximate them to hard law. In this sense, there is a mismatch between the outer shell of the instruments framed as non-binding and their quite compelling inner core,⁷⁶ which explains why they are likely to produce expectations in the European competition enforcement regime. These expectations need to be addressed judicially. This can be accomplished through judicial recognition of the indirect legal effects of competition soft law. This Article turns to said legal mechanism next.

C. Indirect Legal Effects of Soft Law

The creation of indirect legal effects, or the ability of soft law to produce legal effects via the intermediary use of general principles of EU law, is a thesis purported in several scholarly accounts on soft law.⁷⁷ It is also particularly popular with detractors of the “transformation of soft law” thesis because it explains how soft law could still produce legal effects without actually becoming hard law.⁷⁸

Further qualification of the notion “general principles of law” is needed, because their substantive content matters with regard to their ability to induce legal effects of soft law.

Comm’n, CJEU Case C-288/96, 2000 E.C.R. I-8237; Comm’n v. Luxembourg, CJEU Case C-69/05, 2006 E.C.R. I-00007; STEFAN, *supra* note 2, at 176, 177; SENDEN, *supra* note 9, at 271, 304, 305.

⁷⁵ See SENDEN, *supra* note 9, at 295 (coining this term).

⁷⁶ If we run competition soft law through the insights of Schauer, it also becomes clear that its compelling and quite detailed content might not be suitable for the context in which it operates. In policy domains that are subject to constant change in circumstances (i.e. electronic communications), it is better to create vaguer rules which are by default more adaptive to change and, in this sense, lend themselves to flexible, prospective decision-making. Insofar as competition regulation is a field experiencing constant change, it needs to be governed by less heavy-weight rules in terms of content (and not only in terms of ‘soft’ law with hard content). See SCHAUER, *supra* note 8, at 195.

⁷⁷ See STEFAN, *supra* note 2, at 142–54; SENDEN, *supra* note 9, at 267; Borchard & Wellens, *supra* note 4, at 288–89.

⁷⁸ See STEFAN, *supra* note 2, at 22.

On the one hand, Takis Tridimas summarizes in his book the basic features of general principles of law by pointing out their pertinence to public law, their primary⁷⁹ application to the relationship between the individual and the state, their origin in the laws of Member States, and their pre-existence of written law.⁸⁰ On the other hand, general principles of law can also apply to purely private relations.⁸¹ In this light, it is not unthinkable that courts, especially national courts, could engage in interpretation of competition soft law on the basis of general principles of law. The plausibility of this option is further strengthened by scholarly accounts, which argue that, in order to acknowledge the values and views of individuals or self-appointed groups in a fluid supranational setting,⁸² courts should resort to ancient legal dogmas such as general principles of law.

Such an act, paradoxically, could also give the competition regulatory system new life because general principles of law are formal tools of law employed when the rigid legal system requires change and flexibility. In this sense, they are the key to bridging the gap between formalism and flexibility, and thus to ensuring a lasting presence of competition soft law in judicial discourse.

Furthermore, an important feature of general principles of law is that they do not carry normative content in and of themselves.⁸³ This is why courts use them more as rules of interpretation than as self-standing rules. As Tridimas contends, “The importance of general principles cannot be assessed in the abstract but only by reference to results reached in concrete cases. To be of any use, the study of general principles must be a study of outcomes.”⁸⁴

Senden argues that the principle of legitimate expectations—as a corollary of the principle of legal certainty—is not suitable for giving legal effect to soft law in the national domain because it does not have a direct connection with the drafter of the rules, the Commission.⁸⁵ According to the latter author, these two principles only work in direct

⁷⁹ See TRIDIMAS, *supra* note 8, at 3 (specifying that general principles of law, because of their diverse application, can also be relied on by Member States and Community institutions).

⁸⁰ TRIDIMAS, *supra* note 8, at 3.

⁸¹ Xavier Groussot & Hans Lidgard, *Are There General Principles of Community Law Affecting Private Law?*, in GENERAL PRINCIPLES OF EC LAW IN A PROCESS OF DEVELOPMENT 155, 163 (Ulf Bernitz et al. eds., 2008).

⁸² Michelle Everson, *The Crisis of Indeterminacy: An Equitable Law of Deliberative European Market Administration?*, in GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET, *supra* note 31, at 231, 252.

⁸³ BERT VAN ROERMUND, LEGAL THOUGHT AND PHILOSOPHY: WHAT LEGAL SCHOLARSHIP IS ALL ABOUT 273 (2013).

⁸⁴ See TRIDIMAS, *supra* note 8, at 2.

⁸⁵ See SENDEN, *supra* note 9, at 451.

claims against the Commission and form the basis of CJEU's case law proclaiming that the institution binds its own discretion when issuing soft law.⁸⁶

Senden recognizes, however, that the principle of legitimate expectations could also be invoked as a principle of national law in competition proceedings between two private parties. Because national authorities are obligated to apply national competition provisions and EU competition law in parallel,⁸⁷ the national principle of legitimate expectations should also apply to the supranational soft competition legal framework. One could claim that because of decentralization, the ties between national and EU competition law—itsself a domain of exclusive competence for the Union whereby Member States have fully transferred their sovereignty and thusly the traditions common to them⁸⁸—have become stronger. Stronger in fact, even to the effect that general principles of EU law originally devised at the national level, such as legal certainty, should apply directly to Commission-issued competition soft law in purely private competition disputes, without a formal community link requirement.

Alternatively, the principle of community loyalty enunciated in Article 4.3 TEU could serve as a basis for giving legal effect to soft law in the national domain.⁸⁹ However, some scholars believe that the latter principle enunciates too general an obligation that would not truly give effect to competition soft law in a national setting.⁹⁰ An additional option considered by Oana Stefan is the principle of equality and non-discrimination. Stefan reasons that individuals could potentially rely on competition soft law provisions via the principle of equality because of competition soft law's function "as a tool to foster formal equality and to ensure that in its discretion to enforce hard law the Commission does not arbitrarily discriminate against individuals."⁹¹

⁸⁶ *Rorindustri v. Comm'n*, CJEU Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, 2005 E.C.R. I-05425.

⁸⁷ Council Regulation 1/2003, art. 3, 2002 O.J. (L 4) 1 (creating this obligation).

⁸⁸ This is how general principles of law that stem from the legal systems of Member States are referred to.

⁸⁹ See SENDEN, *supra* note 9, at 309.

⁹⁰ See Stefan, *supra* note 68, at 892 (basing her conclusion on *Polska Telefonía Cyfrowa v. Prezes Urzędu Komunikacji Elektronicznej*, CJEU Case C-410/09, 2011 E.C.R. I-03853).

⁹¹ See STEFAN, *supra* note 2, at 209; Herwig Hofmann, *Negotiated and Non-Negotiated Administrative Rulemaking: The Example of EC Competition Policy*, 43 COMMON MKT. L. REV. 153, 165 (2006) (providing another discussion on the principle of equality as a general principle of law that can endow competition administrative guidelines with legal effects).

A further possibility to invoke general principles of law in the competition domain is presented by Usher who sees the notion that competition should not be eliminated⁹² as a general principle of EU business law.⁹³ The importance of freedom of economic activity as a foundational, base concern underlying EU law is further emphasized by the existence of a related right under the Charter of Fundamental Rights of the European Union: The freedom to conduct a business.⁹⁴

The remainder of this section will demonstrate how general principles of EU law and other legal mechanisms—namely, interpretation of soft law in light of the hard legislation to which it pertains—have been used by the CJEU to draw the boundaries of indirect legal effects of soft law. The foundation laid in this section will be used as the basis for the construction of a theoretical framework on the possibilities for judicial treatment of EU competition soft law in EU Member States.⁹⁵

1. Indirect Legal Effects on the EU Commission

EU courts—the CJEU and GC—have already held on several occasions that the Commission binds its own discretion by the adoption of soft law.⁹⁶ It is precisely via general principles of law, particularly legitimate expectations and equal treatment, that soft law is deemed to produce a self-binding effect on the latter institution.⁹⁷ In this regard, it is also important to acknowledge that a soft instrument can only produce an effect through legitimate expectations if its wording is sufficiently precise,⁹⁸ as re-stated by the CJEU in *Dansk Rørindustri*: “It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects.”⁹⁹

⁹² See, e.g., *Commercial Solvents v. Comm’n*, CJEU Case C-7/73, 1973 E.C.R. I-00223; *Europemballage Corp. & Continental Can Co. v. Commission*, CJEU Case C-6/72, 1973 E.C.R. I-00215 (asserting that competition in the internal market should not be eliminated).

⁹³ JOHN USHER, *GENERAL PRINCIPLES OF EC LAW* 8 (1998).

⁹⁴ Charter of Fundamental Rights of the European Union, Oct. 26, 2012, art. 16, 2012 O.J. (C 326) 1.

⁹⁵ See *infra* Section D.

⁹⁶ Case 19/77, *Miller Int’l Schallplatten GmbH v. Comm’n*, 2 C.M.L.R. 334 (1978); *Hercules Chemicals v. Comm’n*, CJEU Case T-7/89, 1991 E.C.R. II-1711, paras. 53–54; *Rorindustri v. Comm’n*, CJEU Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, 2005 E.C.R. I-05425, paras. 209–11.

⁹⁷ *Rorindustri*, CJEU Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P at para. 211.

⁹⁸ *Unie v. Comm’n*, CJEU Case C-40/73, 1975 E.C.R. I-01663.

⁹⁹ *Rorindustri*, CJEU Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, at para. 211.

Intent is an important element to the same effect. In *Delimitis*, AG van Gerven expounded on the legal status of the *de minimis* notice:

Without wishing to express a view on the exact legal force of such a notice, which constitutes in any event a declaration of intention from which it is possible to deduce the Commission's policy on implementation and confers on the individuals for whom it is intended certain legitimate expectations, the national court may nevertheless find therein guidance as to how the Commission is applying Art. 85.1 [now Art. 101.1 TFEU], which may be of assistance in its assessment.¹⁰⁰

The above two elements are reminiscent of the criteria for legal nature of an instrument that are used in the international and EU domains.¹⁰¹ The presence of these elements in the discourse of the EU judiciary demonstrates that judges and advocate generals employ formalist analysis to the phenomenon of soft law.

According to Stefan, and in keeping with the formalist tradition, the self-binding effect on the Commission has two main results: First, soft law could be used as a standard to assess the legality of Commission decisions; and second, soft law cannot be amended by individual Commission decisions notwithstanding the fact that the latter are acts of hard law.¹⁰²

II. Indirect Legal Effects on the Courts

Senden argues that the effects of soft law on the European judiciary are limited to what she calls "voluntary interpretation aid."¹⁰³ In particular, she observes that the CJEU takes soft law into account either when it assists in the interpretation of the objective scope of hard law or, alternatively, when it aids in understanding the subjective intention of the legislature while adopting hard law.¹⁰⁴ Analyzing this same aspect of soft law usage, Howells stipulates that it is precisely in this manner that soft law can influence the scope of

¹⁰⁰ *Delimitis v. Henninger Bräu AG*, CJEU Case C-234/89, 1991 E.C.R. I-00935, para. 22.

¹⁰¹ See *supra* Section B.III.

¹⁰² See STEFAN, *supra* note 2, at 173–74.

¹⁰³ SENDEN, *supra* note 9, at 379–412.

¹⁰⁴ Similarly, in the international law context, Hilgenberg submits that non-treaty agreements, although technically non-enforceable, could produce legal consequences when taken into account for the purposes of interpreting a Treaty. See Hartmut Hilgenberg, *A Fresh Look at Soft Law*, 10 (3) EUR. J. INT'L L. 499, 513–14 (1999). The same is submitted by KLABBERS, *supra* note 64, at 1012.

rights and obligations that arise from respective hard law.¹⁰⁵ On a different note, Senden submits that EU courts are likely to consider soft instruments when they confirm prior points the judiciary has made with regard to the same subject. In this vein, Senden testifies that “where an interpretative act lacks . . . a basis in case law, there is less likelihood that the court’s interpretation will coincide with that of the Commission, as it has not yet committed itself to a certain interpretation.”¹⁰⁶

As to the effect of soft law on the national judiciary, Senden explains that the latter has a duty of “mandatory interpretation” of EU soft law mandated to it by the case law of the CJEU.¹⁰⁷ The authority establishing this relationship is the widely cited CJEU case *Salvatore Grimaldi v. Fonds des maladies professionnelles* (hereinafter *Grimaldi*),¹⁰⁸ where the Court held that a “European schedule” of occupational diseases, a soft instrument annexed to another soft instrument, namely, a Commission recommendation, could not be binding due to lack of proper legal basis, but could certainly produce legal effects. Famously, the Court stated, “The national courts are bound to take 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.”¹⁰⁹ The last point made by the Court is important because this is the principle that it abides by. For instance, in the *Lodato* case,¹¹⁰ the judiciary dealt with the provisions of several guidelines, but also stated that the discussed terms of the soft instruments coincide with those of hard legislation, thus pointing to the conclusion that the treatment given to soft law was possible due to its textual closeness to the respective hard law provisions.¹¹¹

¹⁰⁵ Geraint Howells, *Soft Law in EC Consumer Law*, in *LAWMAKING IN THE EU*, 329 (Craig and Harlow eds., 1998).

¹⁰⁶ SENDEN, *supra* note 9, at 390. The same idea is present in Liza Gormsen, *Why the European Commission’s Enforcement Priorities on Art. 82 EC Should Be Withdrawn*, 31 (2) *EUR. COMPETITION L. REV.* 45, 49 (2010). Stefan also believes that, “In order to justify their position, courts ground soft law in judicial precedent.” STEFAN, *supra* note 2, at 181-98.

¹⁰⁷ SENDEN, *supra* note 9, at 402–07. Senden explains that, while earlier case law of the CJEU pointed towards the conclusion that soft law could be considered as nothing more than a voluntary interpretation aid for national courts, after *Grimaldi* and the subsequent *Deutsche Shell* (C–188/91 *Deutsche Shell* [1993] ECR I–5357) case, soft law should be used as a mandatory interpretation aid the national judiciary.

¹⁰⁸ *Salvatore Grimaldi v. Fonds Des Maladies Professionnelles*, CJEU Case C–322/88, 1989 E.C.R. 04407.

¹⁰⁹ *Id.* at para. 18.

¹¹⁰ *Lodato Gennaro & C. SpA v. Istituto Nazionale Della Previdenza Sociale (INPS) and SCCI*, CJEU Case C–415/07, 2009 E.C.R. I-02599.

¹¹¹ *Id.* In paragraph 28, the CJEU states completely out of context that a certain comparison term—the subject of the proceedings—that was originally contained in a guideline, is the same as the one adopted in a subsequent Regulation. The statement is out of context because earlier in the judgment in paragraph 22 the CJEU explicitly stated that there was no need for it to further discuss said Regulation because it was not adopted at the time of

The *Grimaldi* judgment has become a textbook example that sets the tone for the discussion on EU soft law, and the decision's vague language contributes to varied scholarly responses.¹¹² Paul Craig and Grainne de Búrca, for instance, opine that "[a]ll binding forms of EU law are capable of direct effect, and while other types of non-binding law are not said to have direct effect, they are influential in other ways and may have what has become known as indirect effect."¹¹³ But is this "indirect effect" the indirect effect of unimplemented Directives as expressed in *Marleasing*,¹¹⁴ or should it be conceptualized differently? Craig and de Búrca do not provide an answer, but Senden qualifies the legal effects that might ensue from soft law in the following manner: "[T]he fact that the community and national courts take account of soft law can also affect the rights and duties of individuals. Yet these effects do not go so far as to make soft law a standard that must be complied with as an end in itself."¹¹⁵ Klabbers, however, adopts a more radical stance, contending that "[i]f legally non-binding provisions supplementing binding provisions must be taken into account, it follows that . . . those legally non-binding provisions must for all practical purposes be treated as legally binding."¹¹⁶ Considering the generality of his claim and its possible applicability to several domains of EU regulatory activity, it is unfortunate that the author does not elaborate on how precisely this could happen and with which instruments of EU soft law.

In light of the stance on the compelling legal nature of competition soft law developed above, this Article stands in between the views of Senden and Klabbers, asserting that competition soft instruments should be consistently followed in judicial discourse. They should become a standard that must be complied with as an end in and of itself.¹¹⁷ They should not, however, be treated as independently legally binding, but should produce indirect legal effects through the use of roundabout legal techniques and mechanisms.

the dispute and was therefore immaterial to it. An explanation for the otherwise redundant paragraph 28, thus, would be the need of the court to somehow ground its soft-law-based arguments in hard law.

¹¹² For instance, see SENDEN, *supra* note 9, at 412; Klabbers, *supra* note 64, at 1014; GRAINNE DE BURCA AND PAUL CRAIG, *EU LAW: TEXTS, CASES AND MATERIALS* 190 (2011).

¹¹³ GRAINNE DE BURCA AND PAUL CRAIG, *EU LAW: TEXTS, CASES AND MATERIALS* 190 (2011).

¹¹⁴ *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, CJEU Case C-106/89, 1990 ECR I-04135.

¹¹⁵ SENDEN, *supra* note 9, at 412.

¹¹⁶ Klabbers, *supra* note 64, at 1014.

¹¹⁷ SENDEN, *supra* note 9, at 412.

III. Indirect Legal Effects at the National Level

The decisional practice of the Commission summarized in its soft instruments can produce legitimate expectations in natural and legal persons. This is evident in *Austria v. Commission*,¹¹⁸ where an un-communicated and unpublished national guide to State Aid affected Member States and interested parties on the basis of legitimate expectations. Specifically, according to Stefan, the decisional practice of the Commission described in the guide, not the guide itself, gave rise to these legitimate expectations.¹¹⁹

The opposite view was expressed by the CJEU in *Polska Telefonia Cyfrowa (PTC)*,¹²⁰ a competition law case. The question raised in this preliminary ruling was whether a National Regulatory Authority (NRA) of a Member State could be precluded, through its administrative decisions, from referring to guidelines that have not yet been published in the Official Journal of the European Union in the language of the Member State in question. The underlying issue that the CJEU considered was whether these guidelines could give rise to third party rights and obligations because, if they did, they had to be subjected to translation in the native language of the Member State in question. The court held that the guidelines did not have to be published in the official native language for the administrative authorities to refer to them, thus indirectly confirming that soft law cannot give rise to rights and obligations for third parties.

It is intriguing to contemplate the results of this decision in practice: Soft law cannot directly give rise to rights and obligations, but individualized decisions, which are eventually informed by the same soft law, undoubtedly affect the legal position of third parties (legal and natural persons). This is why Stefan rightly claims that the judgment presents a paradox: “[I]t shows how the purpose of ensuring, through soft law instruments, transparency and legal certainty in the enforcement of European law is sometimes defeated by the application of not translated, unpublished guidelines.”¹²¹

The bottom-line of the above discussion is that the court came to opposite conclusions with regard to the ability of soft law to affect the legal obligations of third parties in two similar domains—state aid and competition law. This discrepancy exists because state aid guidelines result from compromise pursuant to Article 108.1 TFEU, which contains a

¹¹⁸ *Austria v. Commission*, CJEU Case C-99/98, 2001 E.C.R. I-01101.

¹¹⁹ STEFAN, *supra* note 2, at 181–98.

¹²⁰ *Polska Telefonia Cyfrowa sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej*, CJEU Case C-410/09, 2011 E.C.R. I-03853.

¹²¹ STEFAN, *supra* note 2, at 885.

specific cooperation obligation among the Commission and Member States. This obligation is a specific enunciation of the more general principle of community loyalty of Article 4.3 TEU, which is the principle of law that anchors state aid guidelines in the EU Treaty and generates their incidental binding force.¹²² No similar specific obligation exists in EU competition law, in which the Commission unilaterally issues soft law. Some have further argued that the content of Article 4.3 TEU in and of itself is too general to induce legal effects.¹²³

An example from international law practice may be enlightening in the case of unilaterally issued competition soft instruments. Hillgenberg asserts that the principle of good faith, paired with legitimate expectations, justifies the legal dimension of a unilateral declaration made under international law.¹²⁴ One could argue that within the EU context, it is precisely the principle of community loyalty that comes close to the substantive content of the good faith principle in international law.¹²⁵ Thus, it is not unimaginable that Article 4.3 TEU, paired with the principle of legitimate expectations, could offer sufficient grounds for recognition of legal effects to competition soft law.^{126,127}

Nevertheless, it is difficult to give legal scope to competition soft law. This is further confirmed by more recent CJEU case law. It was unambiguously held by the Court in *Pfleiderer*¹²⁸ that competition soft law was not binding on Member States.¹²⁹ The same stance was subsequently taken in the *Expedia* case: "It also follows from the objectives pursued by the *de minimis* notice, as mentioned in paragraph 4 thereof, that it is not intended to be binding on the competition authorities and the courts of the Member

¹²² STEFAN, *supra* note 2, at 189. See also, Emilia Korkea-Aho, *What Is New About New Governance?*, 32 RETÆRD ARGANG 3 (2009).

¹²³ STEFAN, *supra* note 2, at 190. See also, Laurence Gormley, *Some Further Reflections on the Development of General Principles of Law within Art. 10 EC*, in GENERAL PRINCIPLES OF EC LAW IN THE PROCESS OF DEVELOPMENT, 303 (Ulf Bernitz et al. eds., 2008).

¹²⁴ HILLGENBERG, *supra* note 104, at 506.

¹²⁵ For an illustration, see, *infra* Section D.I.1.b, the section on community loyalty.

¹²⁶ Raitio testifies that, "In EU law literature, the principle legal certainty has been linked with other general principles." See Juha Raitio, *The Principle of Legal Certainty as a General Principle of EU Law*, in GENERAL PRINCIPLES OF EC LAW IN A PROCESS OF DEVELOPMENT, 47 (Ulf Bernitz et al. eds., 2008). For the concrete conditions under which the proposed combination could work, see, *infra* Section D.

¹²⁷ The possibility of pairing legitimate expectations and community loyalty to induce indirect legal effects of competition soft law will be explored in Section D, *infra*.

¹²⁸ *Pfleiderer AG v. Bundeskartellamt*, CJEU Case C-360/09, 2011 E.C.R. I-05161, paras. 21–24.

¹²⁹ *Id.* at paras. 21, 23.

States.¹³⁰ To that effect, the CJEU discussed arguments relating to the content¹³¹ and place of publication¹³² of the notice that were pointing to an impossibility of binding status. It was also claimed that “contrary to the Commission notice on cooperation within the network of competition authorities, the *de minimis* notice does not contain any reference to declarations by the competition authorities of the Member States that they acknowledge the principles set out therein and that they will abide by them,”¹³³ which is a criterion reminiscent of the intended agreement rule as acknowledged in the EU State Aid domain discussed earlier.

The Court’s ruling in *Expedia* regarding the legal status of soft law could be deemed disappointing from a flexible law perspective but legally sound from a formalist one. The *de minimis* notice, however, could not be considered absolutely ignored by the CJEU because the judiciary disagreed with the substance of the notice.¹³⁴ Because disagreement minimally implies acknowledgment and recognition of the instrument at hand, it is by implication illogical to talk about any disregard thereof. The court was nevertheless cautious not to explicitly refer to the contents of the notice.¹³⁵ The generality of its statement is apparent: “It must therefore be held that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.”¹³⁶ This cryptic formulation relies on implied reasoning picked up by the Commission and translated into its revised *de minimis* notice¹³⁷ as meaning that a practice that is shown to have anti-competitive object cannot be saved by the *de minimis* threshold, even if the abusing undertaking is slight enough to fall under that same threshold.

It is intriguing to analyze this rather informal, but still significant, communication between Court and Commission in the *Expedia* case. The communication indicates that a subtle

¹³⁰ *Expedia Inc. v. Autorité De La Concurrence and Others*, CJEU Case C–226/11, para. 27 (Dec. 13, 2012), <https://curia.europa.eu>.

¹³¹ *Id.* at para. 24.

¹³² *Id.* at para. 30.

¹³³ *Id.* at para. 26.

¹³⁴ In order to take account of this substantive judicial disagreement, the Commission issued a new version of the *de minimis* notice in 2014 (O.J. 2014 C 4136) where paragraph 2 of the old *de minimis* notice (O.J. 2001 C 368) was replaced by the holding of the CJEU in para. 37 of its *Expedia* judgment.

¹³⁵ *Id.*

¹³⁶ *Expedia Inc.*, CJEU Case C–226/11 at para. 37.

¹³⁷ Commission Staff Working Document SWD (2014) 198, 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 O.J. (C(2014) 4136 final).

judicial engagement with soft law—although negative—is becoming discernible at the supranational level and allows the judiciary to send signals about its attitude throughout the competition enforcement system. The *Expedia* case can thus be considered an initial indication that supranational courts have begun to recognize the substantive side of competition soft law. This fact may also soon be reflected in national judicial discourse.

Whatever form of action, or lack thereof, *vis-à-vis* competition soft law the CJEU takes in the future, it will be of increased significance for national judicial practice. As AG Kokott acknowledged in her *Expedia* opinion: “The Court’s reply . . . will to a large extent determine the scope which the national competition authorities and courts will have in the future when applying Article 101 TFEU.”¹³⁸ In that regard, the AG suggests the introduction of a requirement that national courts give reasons for deviation from soft law, a stricter requirement than the current obligation of mandatory interpretation.¹³⁹ Indeed, this may be one of the reasons why the Court largely did not follow the AG in her reasoning. Still, her deeply reflective argumentation was not completely disregarded either:

The Commission’s leading role, firmly anchored in the system of Regulation No 1/2003, in framing European competition policy would be undermined if the authorities and courts of the Member States simply ignored a competition policy notice issued by the Commission. It therefore follows from the duty of sincere cooperation which applies to all the Member States [Art. 10 EC, now Art. 4.3 TEU] that the national authorities and courts must take due account of the Commission’s competition policy notices, such as the *de minimis* notice, when exercising their powers under Regulation No 1/2003.¹⁴⁰

As discussed above, in paragraph 37 of the *Expedia* judgment, the CJEU hesitantly took heed of AG Kokott’s strong argument by sending a nebulous, but still extant, signal to national authorities.¹⁴¹

This section presented the legal effects of competition soft law *vis-à-vis* the European Commission and the European and national judiciary. It also showed that the CJEU is prepared to acknowledge indirect legal effects of soft instruments in domains such as state

¹³⁸ *Expedia Inc.*, CJEU Case C-226/11 at para. 5.

¹³⁹ SENDEN, *supra* note 9, at 406-7.

¹⁴⁰ *Expedia Inc.*, CJEU Case C-226/11 at para. 38.

¹⁴¹ *Id.* at para. 37.

aid that are related to the field of competition law.¹⁴² Finally, the supranational judicial practice has been far more resistant to accept the legal effects of competition soft law. While explanations for that result were acknowledged, it is maintained that, in line with a more flexible view on law presented in Section B above, and as argued by AG Kokott, ignoring competition soft instruments judicially—at the national or supranational level—will have serious negative repercussions for the current design of EU competition enforcement. In this sense, recognizing legal effects of competition soft law at the national level—without endowing it with incidental binding force—is a much needed development.

The next section will examine the array of plausible national judicial responses to competition soft law. It acknowledges the possibility of formalist judicial rejection of engaging with competition soft law but does not discuss this at length due to this outcome's dissonance with the flexible theoretical underpinnings of the current Article.¹⁴³ Thus, the following section will first deal with the possibility of competition soft law in national courts to generate indirect legal effects via the intermediation of general principles of law.¹⁴⁴ Then, the section will propose a second option for judicial recognition of competition soft law, not based on the idea of indirect legal effects.¹⁴⁵ These two approaches constitute judicial "recognition" of soft law.

D. Theoretical Possibilities for Recognition of Soft Law as an Instrument That Produces Legal Effects

The largely dismissive attitude towards competition soft law discernible in supranational judicial practice is unfortunate, as it fails to provide the system of decentralized competition enforcement with certainty regarding the future application of rules. Not only do judgments currently militate against the general principle of legal certainty, which is alarming even from a formalist point of view, they also unsurprisingly prove undesirable in light of the premises of more flexible theories on the role of the judiciary in a new governance context, in which competition soft law exists.

Before engaging with flexible accounts on judicial activity that are open to the idea of judicial recognition of soft law, it needs to be emphasized that the above theoretical presumption that the national judiciary could adopt a formalist stance towards competition soft law and refuse to engage with it, although normatively undesirable, is

¹⁴² With regard to state aid soft law, the previous section, *see, infra* Section C.II, showed that incidental binding force has also been accepted by the courts.

¹⁴³ This is why in the introductory definition of "judicial recognition," the formalist possibility for the courts to "refuse to interpret soft law," is not foreseen.

¹⁴⁴ *See, infra* Section D.I.

¹⁴⁵ *See, infra* Section D.II.

nevertheless - according to the author - quite plausible to materialize in practice. The extent to which this presumption holds up in practice, however, has to be ascertained through a subsequent empirical study.

Flexible theoretical approaches¹⁴⁶ to judicial activity acknowledge the pivotal importance of courts as catalysts of new power relations in the multi-level EU regulatory space. They maintain that courts are a “concrete location where new governance and law must be reconciled”¹⁴⁷ by way of ensuring full and fair participation of actors involved in new governance processes, securing the adequacy of the “epistemic or information base for decision-making within new governance,”¹⁴⁸ and requiring transparency and accountability as essential elements of enforceability.

As previously laid out, by adopting a light-touch, near dismissive and largely formalist approach to competition soft law, supranational judicial discourse has so far failed to send an unambiguous signal on the contents of the information base on which administrative and national judicial decision-making should take place. This attitude—with the hesitant exception of *Expedia*—is liable to trump the crucial judicial role as delineated by Scott and Sturm: “[C]ourts asked to review the adequacy of new governance decisions are not merely assessing the outputs of those bodies; they are signaling the benchmarks for normative activity in these other domains, thus influencing how normative activity will take place in subsequent iterations.”¹⁴⁹

The reasoning of the supranational judiciary could be explained, however, by the judicialization theory of Stone Sweet, whose assumption is that in situations of novelty, judges “behave defensively, . . . they struggle, in decision-making processes, to protect themselves from charges of usurpation.”¹⁵⁰ The same attitude seemingly lies at the foundations of the phenomenon of “ignored governance” observed by Scott and Trubek.¹⁵¹ They claim EU courts ignore governance at times and instead tend to draw “formal lines of authority . . . without even the barest of reference to the social reality of partnership or

¹⁴⁶ See generally, Alec Stone-Sweet, *The European Court of Justice and the Judicialization of EU Governance*, 5 (2) LIVING REVS. IN EUR. GOVERNANCE 5 (2010). See also, Scott & Sturm, *supra* note 36, at 566–67.

¹⁴⁷ Scott & Sturm, *supra* note 36, at 566.

¹⁴⁸ *Id.* at 567.

¹⁴⁹ *Id.* at 570. The same observation is also made by Stone-Sweet, *supra* note 132, at 117.

¹⁵⁰ Alec Stone-Sweet, *Constitutional Politics: The Reciprocal Impact of Lawmaking and Constitutional Adjudication*, in LAWMAKING IN THE EUROPEAN UNION, 111 (Paul Craig & Carol Harlow eds., 1998).

¹⁵¹ Joanne Scott and David Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 (1) EUR. L. J. 1, 11 (2002).

engagement with its implications for law.”¹⁵² Judicial refusal to engage with new governance in its different guises, and competition soft law in particular, is a missed opportunity to direct the recently revamped regulatory domain of competition in a time when new rules need to be contextualized and endowed with new normative existence.¹⁵³ Still, as argued above, there are good reasons for the cautious approach of European courts. In addition to their traditional resistance to novelty, courts also consider other elements curbing their ambit of action, such as the vast discretion of the Commission to set the rules of competition.¹⁵⁴ The current normative confusion in the competition regulatory space is nevertheless highly undesirable, especially in light of the above-mentioned principle of legal certainty and the implications its non-observance could have for the subjects of the law in the recently decentralized system.

National courts, enabled by Regulation 1/2003 to directly apply Articles 101 and 102 TFEU in their entirety, will, to a large extent, decide the fate of the Modernization process.¹⁵⁵ This Article will now hypothesize as to the possible responses to competition soft law that national courts might have. National courts might either be resistant, as Scott and Trubek suggest, or, conversely, explicitly engage with soft law by using legal techniques to give indirect legal effect to non-binding provisions as discussed by Senden and Stefan.¹⁵⁶ Finally, national courts could be persuaded by the substantive content of competition soft law,

¹⁵² *Id.* Scott and Trubek also detect instances at which governance had been (1) thwarted—in the instances where the CJEU had insisted that Directives creating rights and obligations for individuals be transposed as hard legislation only—(2) distorted—an artificial concept is created in order to enable the output of a new governance process to be interpreted in light of general principles of community law—or (3) taken seriously—when interpreting the concept of representativeness as a democratically legitimating feature of the process of lawmaking. It is possible that national courts also exhibit similar attitudes to competition soft law in their first direct interactions with it.

¹⁵³ Stone-Sweet discusses the high stakes involved in novel lawmaking in the following way: “At this first stage governments and parliaments enjoy wide policy-making discretion, but face high constitutional uncertainty.” This constitutional uncertainty is according to the current author unfortunately not tackled by the CJEU when it comes to the issue of competition soft law. Stone-Sweet, *supra* note 151, at 114.

¹⁵⁴ The large discretion of the Commission to develop competition policy is based on the “exclusive EU competence” status of the policy domain and is further confirmed by the supranational courts in their judgments in the field. The rule by which both the CJEU and General Court abide in the domain of competition law is “judicial deference” to the decisions of the European Commission, because those largely involve matters of complex economic assessment. See Nicholas Forwood, *The Commission’s More Economic Approach: Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review*, in EUROPEAN COMPETITION LAW ANNUAL 2009: EVALUATION OF EVIDENCE AND ITS JUDICIAL REVIEW IN COMPETITION CASES, 255, 259 (Claus-Dieter Ehlermann & Mel Marquis eds., 2010).

¹⁵⁵ Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on The Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. L 1, 1.

¹⁵⁶ See, *supra* Section C.

whereby they would incorporate its reasoning in judicial discourse without explicit reference to the instrument proper.¹⁵⁷

The following section will proceed by charting out in greater detail the latter two possibilities for judicial recognition of competition soft law at the national level. The formalist resistant judiciary scenario will not be addressed for reasons outlined above.

1. Explicit Treatment of Competition Soft Law in National Judicial Discourse: General Principles of Law

In the instances where courts take soft law “seriously,”¹⁵⁸ they engage in interpretation of technically non-legal instruments by application of general principles of law to them. This happens in two ways, as Tridimas testifies: “Recourse to general principles as a source of law may be made by a court either as a result of express reference contained in a legal text or spontaneously by the court itself in order to fill a gap in written law.”¹⁵⁹ In other words, in order for general principles to become relevant, the soft guidelines, notices, and the like should contain explicit in-text references to general principles of law; alternatively, it is up to the courts to raise an issue of general principles *ex officio*.

The latter situation is quite unlikely, however, because courts are naturally cautious to engage with atypical instruments, as discussed above.¹⁶⁰ Therefore, for the second scenario to materialize, it is largely up to the parties to the proceedings to raise arguments regarding the applicability of general principles.¹⁶¹ Literature on the matter discussed above¹⁶² showed that, out of the general principles of law applicable to the competition domain, the principles most likely to be invoked are those of legal certainty and the pertinent legitimate expectations, community loyalty, and equality. The ability of these

¹⁵⁷ Gormsen in the context of the Art. 102 guidelines (and the methodology for conditional rebates laid down therein), expresses the opinion that the CJEU could have taken the relevant provisions into consideration had it thought of them as enunciating a sensible approach. Gormsen, *supra* note 106, at 238.

¹⁵⁸ The expression used by Scott & Trubek is “engage seriously with new governance”; we allow ourselves the freedom to supplant the term “new governance” for “soft law” because the latter is an expression or instrument of the former. See Scott & Trubek, *supra* note 151, at 12.

¹⁵⁹ TRIDIMAS, *supra* note 8, at 9.

¹⁶⁰ See, *supra* Section C.II.

¹⁶¹ Miasik contends that, “Another way of applying general principles in judicial practice is to refer to them in order to inspire the judiciary to interpret [national] law in a manner compatible with a particular principle . . . the more applicants raise issues of general principles of law in their submissions to courts, the more valuable judgments dealing with those principles will be delivered.” See Dawid Miasik, *Application of General Principles of EC Law by Polish Courts—Is the European Court of Justice Receiving a Positive Feedback?*, in GENERAL PRINCIPLES OF EC LAW IN A PROCESS OF DEVELOPMENT, 357, 382, 391 (Ulf Bernitz et al. eds., 2008).

¹⁶² See, *supra* Section C.

three principles to endow competition soft law with legal effects—if invoked by parties to the proceedings or *ex officio*—is discussed below.

1. “Spontaneous” Use of General Principles of Law

1.1 Legitimate Expectations and Legal Certainty

The principles of legal certainty and legitimate expectations are so interwoven that sometimes even the CJEU does not distinguish between them.¹⁶³ Scholars do agree that the latter is a more specific expression of the former¹⁶⁴ and could thus be a source of substantive rights, while the former is mostly used as a rule of interpretation due to its general character.¹⁶⁵

It is commonly agreed that the principle of protection of legitimate expectations is inspired by the German principle of *Vertrauensschutz*—a principle that the national courts saw as underlying certain provisions of the German basic law.¹⁶⁶ The principle entered the EU domain via *Topfer*¹⁶⁷ and has since become quite relevant for the competition domain. As Tridimas reasons, legal certainty acquires particular importance in economic law due to the very nature of economic relations and transactions: “Economic and commercial life is based on advance planning so that clear and precise legal provisions reduce transaction costs and promote efficient business. Legal certainty may thus be seen as contributing to the production of economically consistent results.”¹⁶⁸

It is precisely on these desiderata that the current EU competition regime fails. In order to secure more legal certainty for the system, one must make sure that the subjects of the law will be able to claim legitimate expectations, which appears to be quite problematic in the competition domain. This is the case because legitimate expectations can rarely¹⁶⁹ be

¹⁶³ TRIDIMAS, *supra* note 8, at 163; USHER, *supra* note 93, at 52–71; Raitio, *supra* note 127, at 54.

¹⁶⁴ HOFMANN, *supra* note 92, at 162; USHER, *supra* note 93, at 52. For a more detailed discussion of the difference, see TRIDIMAS, *supra* note 8, at 170.

¹⁶⁵ TRIDIMAS, *supra* note 8, at 170.

¹⁶⁶ John Usher, *General Principles and National Law—A Continuing Two-Way Process*, in GENERAL PRINCIPLES OF EC LAW IN THE PROCESS OF DEVELOPMENT, 393, 402 (Ulf Bernitz et al. eds., 2008).

¹⁶⁷ August Töpfer & Co. GmbH v. Commission of the European Communities, CJEU Case C–112/77, 1978 E.C.R. 01019.

¹⁶⁸ TRIDIMAS, *supra* note 8, at 163. For a similar argument, see also Raitio, *supra* note 126, at 59.

¹⁶⁹ It is submitted by Raitio that, “The principle of legitimate expectations is primarily applicable to individual decisions, but it may in limited cases apply to the exercise of a more general power and thus to the EU legislation as well.” Raitio, *supra* note 126, at 54.

based solely on the content of existing legislation—let alone soft law. Rather, they must be derived from consistent administrative or judicial practice.¹⁷⁰ The current state of EU Competition Law, however, seems to exemplify inconsistency at the levels of both administrative and judicial practice.¹⁷¹ This state of flux is to a large extent due to the entirely different substantive and procedural rules of competition introduced in Regulation 1/2003 and the varying speeds with which the administrative and judicial organs accept them.¹⁷²

Thankfully, the case law on legitimate expectations does take into account the possibility of changes to the status quo and allows claims under abnormal circumstances to stand.¹⁷³ In that regard, legitimate expectations may be invoked against the Commission when there has been a substantial and long-lasting dialogue between the applicant and the institution, including the requirement that “the applicant must have acted on the expectation (or have refrained from taking some action which it would otherwise have taken): [M]ere hopes in the continuance of the status quo are not sufficient to found a legitimate expectation.”¹⁷⁴ Thus, it is possible for an individual to claim legitimate expectations against the Community with regard to a Community instrument affecting his rights and obligations that he detrimentally relied on, including soft law.

1.2 Community Loyalty: Article 4.3 TEU

Section C above argued that the principle of legitimate expectations, paired with that of community loyalty,¹⁷⁵ could prove successful in inducing legal effect of competition soft instruments. Although legitimate expectations in and of themselves might already be sufficient to this effect, it is necessary to emphasize the strength of community loyalty as a

¹⁷⁰ See, among others, *Joined Cases Compagnie Industrielle Et Agricole Du Comté De Loheac and Others v. Council and Commission*, CJEU Cases 54–60/76, 1997 E.C.R. I–00645; *Mulder v. Minister Van Landbouw En Visserij*, CJEU Case C–120/86, 1988 E.C.R. 02321; *Von Deetzen v. HZA Hamburg-Jonas*, CJEU Case C–170/86, 1988 E.C.R. 02355.

¹⁷¹ This problem is most acute in the abuse of dominance field under Art. 102 as noted by Gormsen, *supra* note 106, and numerous others.

¹⁷² Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on The Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. L 1, 1.

¹⁷³ See Sharpston, *supra* note 20, at 110–12.

¹⁷⁴ *Id.* at 142.

¹⁷⁵ Community loyalty cannot create duties on its own but only together with another rule of community law or principle or objective of community policy which is to be promoted; the latter also needs to be sufficiently and precisely defined. See John Temple-Lang, *Art. 10 EC—The Most Important “General Principle” of Community Law*, in *GENERAL PRINCIPLES OF EC LAW IN THE PROCESS OF DEVELOPMENT*, 75, 79, 86, 88 (Ulf Bernitz et al. eds., 2008). There are, however, signals that this situation might be changing in the future. *Id.* at 85.

mainly procedural principle, mediating the importance of more substantive principles of EU law, such as legitimate expectations.¹⁷⁶

The principle enshrined in Article 4.3 TEU acquires its importance at the Member State level, whereby it imposes (1) a positive obligation on Member States to comply with community law, (2) a negative obligation on Member States not to jeopardize the attainment of the objectives of Community law, and (3) an obligation for mutual cooperation between the national and supranational levels. The last sub-category is, in the words of Gormley, “[T]he key to the proper functioning of the relationship between the Commission and national courts in the fields of competition and state aids.”¹⁷⁷ In particular, Gormley refers to the relevant notices which secure the proper cooperation between the said institutions¹⁷⁸ and which, in this respective function, silently incorporate the principle of community loyalty.¹⁷⁹

Both the notices and the principle of community loyalty acquired even greater significance for the EU competition regime after its decentralization with Regulation 1/2003, since, with respect to competition, every national court is now also a Community court. This allows the principle of Article 4.3 TEU to enter the domain of private law because it “imposes on public authorities and courts the duty to respect and when necessary to protect . . . the Community law rights of individuals and companies, including their rights against other private parties.”¹⁸⁰

According to Temple-Lang, Article 4.3 TEU obliges Member States to promote competition in general, and Community competition law in particular, via their competent authorities and thus to achieve the results provided for by the EU competition framework.¹⁸¹ To this

¹⁷⁶ Temple-Lang states that community loyalty is “the most important of the general principles because it is the legal basis of the obligation on all national courts and authorities to comply with all other general principles.” In this regard, it cannot stand on its own and needs to be always used together with another general principle, the latter defining the scope of application of the former. *Id.* at 77.

¹⁷⁷ Gormley, *supra* note 123, at 312.

¹⁷⁸ Commission Notice on the Co-Operation between the Commission and the Courts of the EU Member States in the Application of Arts. 81 and 82 EC of 27 Apr. 2004, 2004 O.J. (C 101/04); Commission Notice on the Enforcement of State Aid Law by National Courts of 9 Apr. 2009, 2009 O.J. (C 85/01).

¹⁷⁹ This is in line with Temple-Lang’s argument that community loyalty is an underlying consideration of a vast array of Community actions, although the principle is usually not explicitly mentioned. *See generally*, Temple-Lang, *supra* note 175.

¹⁸⁰ Temple-Lang, *supra* note 175, at 90, 97. The author submits that Community law is gradually developing a concept of laws which protect private rights and requiring these rights to be protected, when necessary, under Art. 4.3 TEU; this process, however, when fuelled by judicial output (case law), is slow, incremental and uncoordinated.

¹⁸¹ *Id.* at 101.

end, Temple-Lang mentions several duties for promotion of competition, such as offering legal aid to claimants relying on EU competition law, striving for full compensation of victims of a competition law breach and the related adoption of presumption of harm when it is excessively difficult for the claimant to prove it. It is here that the above-proposed link between community loyalty and the general good faith principle becomes most obvious. These duties are procedural in nature, however. It would be equally interesting to know whether the Article 4.3 TEU principle also applies with regard to the achievement of substantive results envisioned in the soft law instruments that constitute the rules of the competition regulatory framework. A significant number of scholars submit that community loyalty alone is too general of a principle to create specific duties.¹⁸² This is also why it was suggested above¹⁸³ that community loyalty could be successfully paired with the principle of legitimate expectations, which is more concrete in its application.

Prominent scholars like Klabbers and Everling opine to the contrary—they believe that community loyalty is,¹⁸⁴ or is evolving towards,¹⁸⁵ a self-standing principle of EU law capable of creating specific legal duties. This latter scenario is not unimaginable, especially in light of Temple-Lang's contention that community loyalty is a principle with an often neglected substantive dimension,¹⁸⁶ and especially with regard to private damages actions in national courts.¹⁸⁷ In order to test these theoretical views with respect to competition law further research in the form of an empirical study on national judicial practice is needed.

1.3 Equality

Equality, or the principle of non-discrimination, emerged out of the early EEC Treaty articles which prohibited difference in treatment with regard to nationality, international taxation of goods, pay for men and women, and agricultural markets.¹⁸⁸ It is relevant for all

¹⁸² See generally, Gormley, *supra* note 123; SENDEN, *supra* note 9; STEFAN, *supra* note 2. The principle could, however, produce a duty at least to motivate deviation from soft law provisions as advocated by AG Kokkot in her *Expedia* opinion. *Expedia Inc.*, CJEU Case C-226/11.

¹⁸³ See, *supra* Section D.I.1.b.

¹⁸⁴ Klabbers, by citing Everling, endorses the view that Art. 10 EC might be just enough to give legal effect to soft law in view of the instruments' "meaning within the context of the integration process at large and the goals of the Treaty in particular." Klabbers, *supra* note 64, at 1016.

¹⁸⁵ See Temple-Lang, *supra* note 175, at 85.

¹⁸⁶ *Id.* at 111.

¹⁸⁷ *Id.* at 101.

¹⁸⁸ USHER, *supra* note 93, at 12.

fields of EU activity, with a particular importance for EU economic law,¹⁸⁹ and ensures that authorities apply the law equally to all citizens in the same position (formal equality), and that the content of these laws does not discriminate on arbitrary grounds between groups of peoples (substantive equality).

This principle binds EU institutions and Member States when they act within the scope of EU law and can also, in the context of EU competition law, bind natural and legal persons.¹⁹⁰ These categories of applicants are thus entitled to invoke the principle in competition proceedings at the national level. National courts deciding disputes based on EU competition rules may also be compelled to refer to soft law because those instruments inform the substantive content of the hard competition regulatory framework. Therefore, to ensure formal equality,¹⁹¹ soft law must be taken into account explicitly, by the use of general principles of law, or implicitly, by mere consideration.¹⁹²

Furthermore, the principle of equality of treatment has been associated with legal certainty in the case law of the CJEU.¹⁹³ This Article thus argues that, much like in the case of community loyalty, equality might be paired with legal certainty and the pertaining legitimate expectations in order to give legal effect to otherwise non-binding competition law instruments.

2. General Principles of Law Expressly Incorporated in the Text of Soft Law Instruments

In her dissertation on the treatment of soft law in courts, Stefan argues that it is more likely that the judiciary engages with guidelines if they contain in-text references to general principles of law.¹⁹⁴ In the context of competition law, she maintains that the courts and the Commission engage in a “dialogue” with regard to soft law, mutually accepting each other’s creativity in the sphere.¹⁹⁵

¹⁸⁹ TRIDIMAS, *supra* note 8, at 43, 45. In EU competition law, the principle of equality is seen as underlying the very basic premise of undistorted competition.

¹⁹⁰ *Id.* at 44.

¹⁹¹ Formal equality is what EU economic integration (including the internal market and competition policies) strives to achieve. See DE BURCA & CRAIG, *supra* note 112, at 605.

¹⁹² See, *infra* Section D.II.

¹⁹³ Raymond Louwage and Marie-Thérèse Louwage, Née Moriame, v. Commission of the European Communities, CJEU Case C-48/73, 1974 E.C.R. 00081.

¹⁹⁴ STEFAN (note 2), 220–21.

¹⁹⁵ *Id.* at 219–25. The case of *Expedia* may serve as a recent example thereof. See *Expedia Inc.*, CJEU C-226/11.

In this line of thinking, relevant passages of case law that refer to general principles of law are “inserted in new soft law being made at Commission level and then back again in new judgments of EU courts, completing a virtuous circle.”¹⁹⁶ The CJEU is thus willing to discuss non-binding law when it incorporates and serves general principles of law.

Such a development is hardly surprising if one makes a parallel with the recent CJEU case law in the field of non-implemented Directives – the *Mangold* judgment¹⁹⁷ and others produced in its aftermath.¹⁹⁸ The importance of both the *Mangold* and the subsequent *Kucukdeveci* judgment lies in their assertion that a non-implemented Directive that cannot formally influence the legal situation as between private parties can nevertheless be deemed to do so by the Court if it explicitly mentions and serves the attainment of general principles of higher, constitutional order—namely, the principle of equal treatment in its guise of non-discrimination on the basis of age.¹⁹⁹ Although both the aforementioned cases concern themselves with hard law—a non-implemented Directive—the similarity with soft law lies in the fact that both categories of instruments (soft law and non-implemented Directives) cannot directly produce legal effects at the national level and can thus not be the source of rights and obligations for individuals.²⁰⁰ But, as demonstrated by these judgments, this situation can be changed in case the instruments in question incorporate general principles of law (of constitutional significance) and are, by virtue of this fact, held to produce legal effects even in horizontal situations between private parties.²⁰¹

¹⁹⁶ STERAN, *supra* note 2, at 201-25.

¹⁹⁷ Werner Mangold v. Rüdiger Helm, CJEU Case C-144/04, 2005 E.C.R. I-09981.

¹⁹⁸ Seda Küçükdeveci v. Swedex GmbH & Co. KG., CJEU Case C-555/07, 2010 E.C.R. I-00365.

¹⁹⁹ Dagmar Schiek, *The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation*, 35 (3) *INDUS. L. J.*, 329, 333 (2006).

²⁰⁰ As a matter of EU Law (Article 288 TFEU), a Directive needs to be first implemented at the national level in order to produce legal effects and to be a source of rights and obligations for parties. Thus, a non-implemented Directive cannot create rights and obligations until implemented. In the period between adoption and implementation, however, Member States' bodies are obliged not to take measures which might work counter to the objectives of the Directive. See *Inter-Environnement Wallonie ASBL v Région wallonne*, CJEU Case C-129/96, 1997 E.C.R. I-7411. For soft law, the only formal obligation that national organs have is to take utmost account of those instruments, following *Grimaldi*.

²⁰¹ For an argument that *Mangold* is actually not a case where horizontal direct effect of Directives was further confirmed, see Schiek, *supra* note 199, at 337. Schiek argues that, “a Directive . . . having direct effect on a legislative activity that impacts on horizontal relations is not the same as a directive having horizontal effect itself.” While the argument is technically correct, the ultimate result of the judgment is nevertheless to create a situation in which the rights and obligations of two private parties (employer and employee) are *de facto* impacted by the non-implemented Directive in question.

II. Implicit Treatment of Competition Soft Law in National Judicial Discourse: The “Persuaded Judiciary” Scenario

The persuaded judiciary theory provides the possibility of engaging with the substantive content of soft law implicitly, without relying on the mechanism of indirect legal effects. This scenario may materialize when courts want to signal that they agree with the substance of a soft law instrument, but do so by alluding to its content rather than explicitly referencing the instrument proper.

This theory builds on the phenomenon of “legal legitimacy” as conceptualized by Finnemore and Toope.²⁰² The idea of legal legitimacy is that courts might slip in arguments indirectly upholding soft law when the latter instruments are both internally—by virtue of their ‘nature’—and externally persuasive—towards subjects of the law and institutions. This happens, for instance, when soft law instruments are sufficiently clear and precise and have been adopted on the basis of broad agreement,²⁰³ involving a majority of relevant stakeholders who exercise pressure on the legal system through perceiving competition soft law as legitimate law and thus aligning their behavior to its provisions.

The phenomenon here highly resembles the account of Frederick Schauer on judicial learning from—as opposed to following—precedent:

With respect to the former . . . the instant court may learn from a previous case, or be persuaded by some decision in the past, but the decision to do what another court has done on an earlier occasion is not based on the previous case’s status as a precedent.²⁰⁴

By the same token, the decision of a national court to follow competition soft law is not based on the latter’s status as law, but on its persuasive force stemming from what Finnemore and Toope call “legal legitimacy.”²⁰⁵

Additionally, subjects of the law are themselves on both the input and the receiving ends of soft rules. On the one hand, the perceived legal legitimacy of soft rules fuels the persuasion process by which courts will engage with the latter; on the other hand, once courts have signaled their attitude, it is again up to the subjects of the law to pick up on

²⁰² Finnemore & Toope, *supra* note 24, at 743.

²⁰³ Here we refer to the possibility of multi-party agreement secured at public consultations preceding the adoption of competition soft law.

²⁰⁴ SCHAUER, *supra* note 8, at 38.

²⁰⁵ Finnemore & Toope, *supra* note 24, at 749.

this signal and complete what appears to be an iterative cycle not unlike the one Scott and Sturm as well as Stefan suggest.²⁰⁶ Consequently, the success of this method of judicial recognition will depend on the actors of the system being able to pick the relevant signals coming from the judiciary and on the judiciary not totally rejecting engagement with soft law in the first place.

This section, in line with a more flexible approach to law, proposed several theoretical possibilities for the judicial acknowledgment of competition soft law at national level, while still acknowledging formalist arguments pointing towards rejection of judicial engagement with the latter instruments. It distinguished between explicit and implicit recognition of soft law, the former being possible through the creation of indirect legal effects by the intermediation of general principles of law, and the latter through the phenomenon of legal legitimacy that competition soft law could potentially evoke.

E. Conclusion

This Article focuses on studying competition soft instruments as instruments of law for the purposes of establishing the theoretical possibility of their recognition in national judicial discourse. The core idea, therefore, asserts that a legal dimension to competition soft law should be judicially acknowledged—in line with a flexible view of law—in order to ensure the functioning of a decentralized competition enforcement system governed by legal certainty and substantive coherence in legal outcomes. In the process of judicial recognition, however, one should keep in mind that soft law does not directly transform into hard law as hypothesized by formalist international legal scholars. To the contrary—and in line with the flexible view—soft law generates legal effects when subject to judicial scrutiny, while remaining soft as an instrument.

In order to further delineate those legal effects, a theoretical framework was devised. On the basis of a study of academic work on judicial attitudes to soft law and the current practice of the supranational European courts, it was hypothesized that national courts could acknowledge the legal effects of competition soft law by either: (a) Employing general principles of law *ex officio* or upon a request of a party to the proceedings, or (b) employing general principles of law because the latter are expressly mentioned—as objectives to be fulfilled—by the soft instrument under review. Within the limits of the same theoretical framework, it was also argued that courts could slip in arguments borrowed from soft law in their judicial discourse because they are “persuaded” of the merits of the point that a soft instrument makes. Finally, this study remains wary of the fact that courts could be unreceptive to soft law and, following a formalistic stance, deny engagement with it in their judicial practice.

²⁰⁶ Scott & Sturm, *supra* note 36, at 570–75. See also STEFAN, *supra* note 2, at 219–25.

