

## THE GROWING IMPORTANCE OF SOFT LAW IN THE EU

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### ABSTRACT

*The objective of establishing legal order sui generis that on the EU level will, due to its flexibility and differentiation, be able to effectively respond to dynamic movements of internal market as well as to globalization challenges in general, in the last two decades lead to extensive transformations of the EU legal order. One of them is growing importance of soft law instruments and subsequent differentiation of legal regulation – to traditional regulation new modes of regulation have been added (as a result of so called “new legislative culture”). Although at first when adopting the decision, the Court of the European Union denied the recognition of existence and function of soft law, later the Court gradually adapted to differentiating trend in the EU legal order and is thus nowadays recognizing the normative value of soft law in the EU. When deriving the decision the Court is considering soft law as part of legal framework (in this case soft law is used as a ground for interpretation of hard law provision or as an instrument of confirmation of interpretation of binding law) or it recognizes self-binding and binding effect of soft law (in this case soft instrument is a substantive rule on which the decision is grounded). With such approach, to soft law normative status is conferred; the latter – despite it being on the non-binding side – is therefore having indirect legal effect and is creating indirect legal consequences.*

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## 1. INTRODUCTION

In the European Union (hereinafter: EU) soft law is all but unknown figure, because the EU has long before relied on instruments legal status of which was not completely clear or unequivocal or which were not legally binding *per se*. However what indeed is new is the trend of encouraging use of soft law and consequent exponent increase of this type of instruments on the EU level. The latter appeared at the break of the Millennium, when critics of the EU legislation began to demand better and less legislation (i.e. more in quality, less in quantity) and better governance. The respond to the debate was the introduction of “*new legislative culture*” with slogan: “*do less, in order to do better*” by the European Commission in White paper on European Governance in 2001.<sup>1</sup> Approximately at the same time EU institutions have begun to acknowledge soft law instruments as possible alternatives to binding legislation. Notices, White and Green Papers, Resolutions, Declarations, Action Plans, Rules of Conduct and Practice and other soft law acts appeared afterwards. Despite such consequent transformation of the EU legal order, Article 288 of the Treaty on the Functioning of the EU (hereinafter: TFEU) as basic provision defining EU legal acts, with exception of opinions and recommendations, today still does not mention other types of soft law at all. Reality of EU legal acts is hence at the non-binding level much more diverse as Article 288 TFEU suggests.

## 2. GENERAL CHARACTERISTICS OF SOFT LAW IN THE EU

The core idea behind today’s extensive use of soft law is that soft law will, because of its flexibility and differentiation, lead to greater efficiency, flexibility, legitimacy and transparency of the EU legal order. Whether this is actually the case remains questionable. Namely soft law is also subject of numerous polemics and doubts, starting even with the European Parliament which in the Resolution from 2007 expressed the view that “*the notion of soft law, based on common practice, is ambiguous and pernicious and should not be used in any documents of the Community institutions*” and that “*soft law all too often constitutes an ambiguous and ineffective instrument which is liable to have a detrimental effect on Community legislation and institutional balance*”,<sup>2</sup> therefore EU institutions shall refrain from its use or at least limit it to the minimum extent.

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<sup>1</sup> European Governance, White Paper COM (2001) 428 final, Brussels, 25. 7. 2001.

<sup>2</sup> European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of “soft law” instruments (2007/2028(INI)), statement A and AA 1.

Although in legal theory there is no uniform definition of soft law (many authors build their definitions from definitions of soft law at the international level where soft law is widespread and actually represents “*natural*” phenomenon), academics generally agree that undisputable and fundamental characteristic of soft law is, as the name already suggests, its non-binding nature: these acts are not legally binding and enforceable as this is the case for regulations or directives. The logical consequence of the latter is (*inter alia*) general absence of legal sanctions in strict sense. Such softness of instruments in comparison to hard law has caused two lines of understanding of nature of soft law in legal writing. These are: theory of binary view (relative normativity) and theory of continuum view (graduated normativity). Both deal with the question whether soft law shall be acknowledged status of law or not. In short, underlying assumption of theory of binary view is that the essence of law is its normativity or bindingness. The characteristic is not a matter of degree: either the rule is legally binding or it is not. In the first case it is law, in the second case it is politics or morality. Because there is no third possible option, for this theory soft law is logically impossible and *contradictio in terminis*. Because it sells something as law, which in fact it is not, the term soft law from this point of view is also misleading, therefore its use shall be abandoned.<sup>3</sup> Contrary to this, the theory of graduated normativity recognizes that law may have various different legal effects and consequences, which may be direct or indirect, weaker or stronger, harder and softer. Graduated normativity therefore means that law can be more or less binding or more or less non-binding (harder or softer) and that between binding law, soft law and other possible qualities of law continuous connection is given.<sup>4</sup> For this view, despite its non-binding nature, soft law can therefore have normative value. As normative intensity is graduated and should be understood flowingly, the normative value can vary in dependence from type of an instrument and circumstances of its adoption. The denial of soft law for this theory represents closing eyes to the reality, that rules which in full do not fulfill criteria expected for recognized sources of law exist and play more and more important role in international and EU practice and which

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<sup>3</sup> Mörth, U., *Soft Regulation and global democracy* in Sahlin-Andersson, K., Djelic, M.-L. (ed.); *Transnational Governance: Institutional Dynamics of Regulation*, Cambridge University Press, Cambridge 2006, pp. 119-135, p. 120; Weil P., *Towards Relative Normativity in International Law*, *The American Journal of International Law*, Vol. 77, No. 3, July 1983, pp. 413-442, p. 435; Luhmann N, *Das Recht der Gessellschaft (suhrkamp taschenbuch wissenschaft)*, Frankfurt am Main 1984, pp. 57-70.

<sup>4</sup> Reisman, W. M., *The Conceptions and Functions of Soft Law in International Politics v Bello E. G., Bola P. A.A.* (eds.), *Essays in honor of Judge Taslim Olawale Elias*, vol. I, Dordrecht 1992, pp. 135-144, p. 138; McDougal M., *International Law, Power and Policy: A Contemporary Conception*, *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 82, 1953 –I, pp. 137-258, p. 256.

in fact are the rules States and other subjects of international and EU law act in accordance with.<sup>5</sup>

Taking in regard the growing differentiation of legal instruments in the EU and acknowledging polarity and interconnections of law and politics, it is my opinion that although none of the theories is perfect (binary view being to simplified and straightforward, graduated view in certain aspects creating unpractical puzzled reality) the theory of graduated normativity is the one more adequate to the reality of the legal system of the EU. The diversity in the EU is much greater than solely binding legal acts and non-binding political statements. Both are indeed diametrically opposites, but claiming that everything that is binding is law, whereas which does not have such characteristic is solely politics or morality is unsuitable and inappropriate. Identically than in national legal orders also on the EU level different legal sources with different level of normative intensity exist. The key point is that normative strength of legal rules and principles shall not be treated strictly categorically as part of binary system, but rather normative influence shall be understood more flowingly: from this point of view there are more levels and shades of normative influence and they often intermix and overlap. Different legal sources thus achieve different levels of formality, argumentative powers and normative intensity. The conclusion is that soft law, despite its absence of formal legally binding force, nonetheless has certain normative value, creating special legal and not solely political effects. The most adequate definition of term soft law would therefore be that soft law are legal rules which despite the absence of legally binding force in strict sense may nonetheless produce and create practical as well as (indirect) legal effects, influencing actions of Member States, EU institutions and individuals.<sup>6</sup>

Beside the question of nature of soft law instruments, issues relating to soft law are numerous (for example the question of indirect legal effect of soft law, question whether they actually contribute to the transparency, are they efficient and on what ground, are they contrary to fundamental principles of the EU, especially principle of institutional balance etc.). The aim of this contribution is however to enlighten one of them: this is to demonstrate the evolving role of soft law in case law of the Court of the European Union (hereinafter: the Court).

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<sup>5</sup> Neuhold, H., The Inadequacy of Law-Making by International Law: "Soft Law" as an Alternative? in Wolfrum, R. (ed.), *Developments of International Law in Treaty Making*, Berlin 2005, pp. 39-52, p. 47.

<sup>6</sup> Similar definition is suggested also by Senden L., *Soft Law in European Community Law*, Hart Publishing, Oregon 2004, p. 110.

### 3. SOFT LAW IN CASE LAW OF THE COURT OF THE EUROPEAN UNION – INITIAL IGNORANCE AND SUBSEQUENT OVERTURN OF UNDERSTANDING

Before looking at the case law of the Court it is necessary to stress that the attitude of the Court towards the question of legal effects of legal acts is substantive (instead of formal). Despite the fact that legal effects are most clearly created by binding legal acts, creating rights and constituting obligations for individuals (and thus have direct legal effect), the Court understands the concept of legal effects in *sensu lato*. It acknowledges that non-bindingness of certain act does not automatically erode this act of legal effects in general: such act may nonetheless, through interpretation and in relation to other legal acts, create indirect legal effects and have indirect legal consequences.<sup>7</sup>

The analysis of early case law of the Court at the end of 1970-ies shows that in the past soft law was not devoted much attention: at the beginning the Court's attitude towards existence of soft law was intensively restrictive, even ignorant. Although the parties in the cases before the Court often pleaded for soft law provisions to be considered when deriving a decision, the Court always overlooked such instruments and adopted a decision solely on the ground of primary or secondary legislation of the EU. Soft law was disregarded as if it had not existed. This clearly derives from cases such as *Cadillon v Höss*,<sup>8</sup> *Béguelin*<sup>9</sup> and *Miller*,<sup>10</sup> which all dealt with the interpretation of first paragraph of (now) Article 101 TFEU (before Article 81 of the Treaty). In all cases the parties presented arguments that by solving the dispute soft law rules included in *De minimis Notice*<sup>11</sup> shall be considered. When adopting the decision however the Court did not mention soft law at all (not in the scope of presentation of arguments of the parties nor in regard to existent legal framework) but solely gave an interpretation of Article 81 (then actually still Article 85) on the basis of *de minimis* rule included in respective provision of primary legislation itself.<sup>12</sup>

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<sup>7</sup> Case C-322/88 Salvatore Grimaldi v des maladies professionnelles [1989], ECR I-4407, paragraph 11.

<sup>8</sup> Case 1/71 Société anonyme Cadillon v Firma Höss, Maschinenbau KG, [1971] ECR 351.

<sup>9</sup> Case 22/71 Béguelin Import Co. v S.A.G.L. Import Export, [1971] ECR 949.

<sup>10</sup> Case 19/77 Miller International Schallplatten GmbH v Commission of the European Communities [1978] ECR 131.

<sup>11</sup> Commission's Notice concerning Agreements, Decisions and Concerted Practices of Minor Importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community, OJ EU C 64, 1970, p. 1. Later this act was modified in year 1977 (OJ EU C 313, 1977, p. 3), year 1986 (OJ EU C 232, 1986, p. 2) and year 1997 (OJ EU C 372, 1997, p. 13).

<sup>12</sup> Paragraph 12 of the judgement in case *Cadillon v Höss*, paragraphs 27-28 of the judgement in case *Béguelin* and paragraph 15 of the judgement in case *Miller*.

Additionally also Advocate Generals were skeptical whether such Notice shall be used or not.<sup>13</sup>

The same attitude derives from case law of the General Court as well. Although for example plaintiffs pleaded for annulment of the decision of the European Commission with the argument that such decision is contrary to *Commission's Notice concerning agreements, decisions and concerted practices in the field of cooperation between undertakings*,<sup>14</sup> the General Court still adopted its own interpretation of (then) Article 81 of the Treaty considering solely binding legislation and denying soft law even slightest recognition of existence.<sup>15</sup>

However through evolution of case law Court's attitude towards soft law has become more acceptable and is now mostly uniform. It seems that also the Court is not indifferent to rising trend of governance instead of government, appearing in last two decades, and increasing quantity of soft law in the EU: latest developments of case law show that Court is today not merely acknowledging the existence of EU soft acts, but is also prepared to take these acts into account when deriving its decisions. With such understanding of nature and function of soft law informal legal effects are being recognized. What is more, in that way the Court is also acknowledging co-existence of traditional and "new" mode of regulation in the EU. With such acceptance the importance of soft law at the EU level has grown considerably.

Analysis of case law shows that today there are two possible modes of consideration of soft law in Court's case law: first, soft law is determined as part of legal framework, serving for adoption of interpretation of hard law or for confirmation of interpretation of hard law provision, otherwise already reached on the basis of hard law. And second, to soft law (self-)binding effect is recognized. In the scope of this approach soft law provisions are the substantive rules on which the ruling is actually grounded (Court's decision is conditional to the soft law rule).

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<sup>13</sup> Opinion of AG Dutheillet de Lamothe in case *Cadillon v Höss*, presented on 04<sup>th</sup> May 1971, p. 351, paragraph II; Opinion of AG Dutheillet de Lamothe in case *Béguelin*, presented on 28<sup>th</sup> October 1971, p. 949, paragraph II, Opinion of AG Warner in case *Miller*, presented on 10<sup>th</sup> January 1978, p. 131 and subsequent, p. 157.

<sup>14</sup> OJ EU C 75, 1968, correction in OJ EU C 84, 1968, p. 14.

<sup>15</sup> Case T-310/94 *Gruber + Weber GmbH & Co. KG v Commission of the European Communities* [1998] ECR II-1043, Case T-334/94 *Sarrió SA v Commission of the European Communities* [1998] ECR II-1439, Case T-347/94 *Mayr-Melnhof Kartongesellschaft mbH v Commission of the European Communities* [1998] ECR II-1751, Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission of the European Communities* [1998] ECR II-2111.

Most often the Court uses soft law as an instrument for confirmation of interpretation of hard law. In these situations the Court is acting in three steps: firstly it mentions soft law as part of legal framework (first step), further it accepts an interpretation of binding legislation solely with consideration of primary and/or secondary legislation of the EU (second step) and then last but not least this interpretation is confirmed by using soft law acts (with using words such as: “*the same interpretation is confirmed also in recommendation....*” third step). This approach clearly follows from various case laws. Namely for example in cases *Auer*,<sup>16</sup> *Thieffry*,<sup>17</sup> *Luisi and Carbone*,<sup>18</sup> *Federal Republic of Germany and others v Commission of the European Communities*<sup>19</sup> the Court used sectoral general programs for confirmation of the interpretation of binding law, whereas in cases *Merkur*,<sup>20</sup> *Dusseldorp*,<sup>21</sup> *Hauer*,<sup>22</sup> and *United Kingdom of Great Britain v Council*<sup>23</sup> resolution of the Council was used for confirmation of the conclusion, already achieved on the basis of systemic interpretation of resolution and/or directive. Also the General Court most often considers soft law instruments in the same manner.<sup>24</sup>

Further, in less extensive but still uniform case law, soft law is used as actual basis for interpretation of hard law. In these situations hence soft law does not simply confirm already accepted interpretation, but is the instrument on basis of which the interpretation of hard law is actually established. Consistent case

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<sup>16</sup> Case 136/78 Criminal Proceedings against Vincent Auer [1979] ECR 437, paragraph 25.

<sup>17</sup> Case 71/76 Jean Thieffry v Conseil de l'ordre des avocats à la cour de Paris [1977] ECR 765, paragraph 14.

<sup>18</sup> Joined cases 286/82 in 26/83 Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro [1984] ECR 377, paragraphs 11-15.

<sup>19</sup> Joined cases 281/85, 283/85, 284/85, 285/85 and 287/85 Federal Republic of Germany and others v Commission of the European Communities [1987] ECR 3203, paragraphs 17 and 18.

<sup>20</sup> Case 43/72 Merkur Außenhandel-GmbH & Co. KG v Commission of the European Communities [1973] ECR 1055, paragraphs 13 and 14.

<sup>21</sup> Case C-203/96 Chemische Afvalstoffen Dusseldorp BV and others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer [1998] ECR I-4075, paragraphs 30 and 31.

<sup>22</sup> Case 44/79 Liselotte Hauer v Land Rheinland-Pfalz [1979] ECR 3727, paragraph 15.

<sup>23</sup> Case 131/86 United Kingdom of Great Britain and Northern Ireland v Council of the European Communities [1988] ECR 905, paragraphs 26 and 27.

<sup>24</sup> See for example Case T-229/94 Deutsche Bahn AG v Commission of the European Communities [1997] ECR II-1689, paragraph 42 and Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, European Night Services Ltd (ENS), Eurostar (UK) Ltd, ex European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission of the European Communities [1998] ECR II-3141, paragraph 102.



law establishes that such approach is limited: it is true only when dealing with the declaration of the Council, accepted in the minutes of the meeting of the Council during which certain hard law was adopted. Only if such circumstances are given the Court will use declaration as ground for interpretation. Approach is the same when faced with joint declaration of the Council and other EU institution (for example European Commission). Stated rule clearly derives from the decision of the Court in already mentioned case *Auer* and cases *Eagle*,<sup>25</sup> *Antonissen*<sup>26</sup> and *The Queen v The Licensing Authority*<sup>27</sup> and was confirmed also in the latest case law.<sup>28</sup> Reasons for such understanding are most likely to be searched in the fact that the Court wishes to interpret provisions of legislation in the light of historical circumstances and development of certain legislative act and in the scope of this determine the objective legislator pursued when adopting legal rule.<sup>29</sup>

In more detail it derives from case law that legal nature of consideration of mentioned declaration is twofold: when declaration of the Council, adopted in the minutes of the meeting on which regulation/directive was adopted fulfils additional criteria, established in case law, it serves for determination of subjective purpose of the Council on how to interpret certain rule. Case law established several conditions that have to be satisfied that this is the case. The most important prerequisite is express referencing in the wording of binding legislation on Council's declaration.<sup>30</sup> Other criteria that have to be met are: 1.)

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<sup>25</sup> Case C-310/90 *Nationale Raad van de Orde van Architecten v Ulrich Egle* [1992] ECR I-177, paragraph 12.

<sup>26</sup> Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-745, paragraphs 17-18.

<sup>27</sup> Case C-368/96 *The Queen v The Licensing Authority established by the Medicines Act 1968* (represented by *The Medicines Control Agency*), *ex parte Generics (UK) Ltd, The Welcome Foundation Ltd and Glaxo Operations UK Ltd and others* [1998] ECR 7967, paragraph 27.

<sup>28</sup> Case C-329/95 *VAG Sverige AB* [1997] ECR 2675, paragraph 23; case C-25/94 *Commission of the European Communities v Council of the European Union* [1996] ECR I-1469, paragraph 38; Case C-206/98 *Commission of the European Communities v Kingdom of Belgium* [2000] ECR I-3509, paragraph 40; Case C-104/01 *Libertel Groep BV v Benelux-Merkenbureau* [2003] ECR I-3793, paragraph 25; case C-402/03 *Skov Æg v Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v Jette Mikkelsen and Michael Due Nielsen* [2006] ECR I-199, paragraph 42; Case C-356/06 *Elaine Farrell v Alan Whitty, Minister for the Environment, Ireland, Attorney General in Motor Insurers Bureau of Ireland (MIBI)* [2007] ECR I-3067, paragraph 31.

<sup>29</sup> Hartley T., *Five forms of Uncertainty in European Community Law*, *Cambridge Law Journal*, No. 55 (2), July 1996, pp. 265-285, p. 275.

<sup>30</sup> The rule was established in already case C-292/89 *Antonissen*, *op. cit.*, paragraph 18, where the Court stated that: "*such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has*



that the declaration was made on the occasion of the adoption of a measure of secondary legislation which the Council has the power to adopt and that additionally the declaration is applicable only in the scope of this legislative act; 2.) that the declaration is not irreconcilable with legislative act and does not represent parallel legislation (its only purpose shall be in the explanation of legislative act and not fulfillment of lacunae in the legislative provisions); 3.) declaration cannot be the only reference but it must be used in conjunction with others, “*in the sense that it can be verified whether it confirms the interpretation ensuing in other respects from the tenor of the provisions in question and from their context*”.<sup>31</sup> If all criteria are satisfied then the declaration of the Council serves for determination of subjective purpose of the Council.<sup>32</sup> However when adopted legislative act is silent about the existence of the declaration of the Council, adopted in the minutes of the meeting of the Council on which legislative act was adopted, then the declaration solely serves for determination of objective purpose (*ratio*) of legislative act (second approach, the rule was established in case *The Queen v The Licensing Authority*).<sup>33</sup> This approach does not demand the satisfaction of any additional criteria.

What is more, from the case *The Queen v The Licensing Authority* another similar use of soft law as ground for interpretation is evident; this time in regard to interpretative acts of the European Commission. In the respective decision the Court achieved the interpretation of the term “*essentially similar medicinal product*” with reference to guidelines of the European Commission, including the same definition, whereas the definition in binding law was not given. It emphasized that “*the definition of that concept adopted in the minutes of the Council is, moreover, used in the guidelines published by the Commission.... According to the Annex to Council Directive 75/318/EEC of 20 May 1975 on the approximation of the laws of Member States relating to analytical, pharmacotoxicological and clinical standards and protocols in respect of the testing of medicinal products (OJ 1975 L 147, p. 1), as amended by Commission Directive 91/507/EEC of 19 July 1991 (OJ 1991 L 270, p. 32), the particulars and documents accompanying an application for marketing*

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*no legal significance.*” The same was confirmed in cases such as already mentioned *Libertel, Skov and Bilka, Farrell, VAG Sverige and others*.

<sup>31</sup> Opinion of AG Darmon in case Antonissen, presented on 8<sup>th</sup> November 1990, ECR I-745, paragraphs 23-27. Taking in regards all criteria AG Darmon concludes that declaration in case Antonissen presents parallel legislation that is why it cannot be taken into account by adoption of interpretation.

<sup>32</sup> At the time of the research of case law in eur-lex no cases, where Court would evaluate if these criteria are satisfied may be found. Namely in most cases the use of declaration is refused because of absence of express referencing in legislative act to the declaration.

<sup>33</sup> Case C-368/96 *The Queen v The Licensing Authority*, *op.cit.*, paragraph 27.

*authorisation pursuant to Article 4 of Directive 65/65 are to be presented in a way which, inter alia, takes account of those rules [guidelines embodied in soft law]*<sup>34</sup> From such understanding of the Court it is to be concluded that the Court as an instrument for giving interpretation takes into account also interpretative acts of the European Commission. Again prerequisite has to be met that express referencing of legislative act is given: in these cases the Court takes into account an interpretation included in soft law as a silent agreement of the legislator with the interpretation of the European Commission. Besides express referencing also in this case soft law has to be included in the minutes of the meeting of the Council on which the legislative act was adopted. When both criteria are fulfilled the interpretation of the European Commission will be considered as part of substantive framework for interpretation of certain hard law provision.<sup>35</sup> When express legislator's reference is absent and interpretative act of the European Commission includes an interpretation which in binding legislation is not given, the situation is contrary: soft act of the European Commission does not have legal effect – the Court denies the use of soft interpretation (by stating that “*an unofficial interpretation of a regulation by an informal document of the Commission is not enough to confer to that interpretation an authentic Community [EU] character*”) and in (accordance with its competence) adopts an interpretation on basis of hard law.<sup>36</sup>

Along with using soft law for interpretation of hard law or confirmation of the latter, the Court is in certain specific situations also recognizing self-binding and binding effect of soft law - nature of soft provisions is in these cases determined as binding for EU institutions and Member States. Hence despite softness, to these provisions binding authority is conferred. Mentioned recognition of bindingness is typical for cases, relating to legal fields, characterized by wide discretion of certain EU institution for use and exercise of the EU law in individual situations (for example in the scope of state aid, competition or staff relating issues). In these legal fields EU institutions (acting alone or in accord with Member States) regularly adopt legal acts from which the declaration

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<sup>34</sup> Paragraph 28.

<sup>35</sup> See also Case T-236/07 *Federal Republic of Germany v European Commission* [2010] ECR II-5253, paragraph 65 and Case C-545/11 *Agrargenossenschaft Neuzelle eG v Landrat des Landkreises Oder-Spree* [2013], not yet published, paragraph 52.

<sup>36</sup> Case 74/69 *Hauptzollamt Bremen-Freihafen v Waren-Import-Gesellschaft Krohn & Co* [1970] ECR. 451, paragraph 9; Case C-266/90 *Franc Soba KG v Hauptzollamt Augsburg* [1992] ECR 287, paragraph 19; Case C-309/94 *Nissan France SA, Serda SA, Lyon Vaise Auto SARL, Garage Gambetta SA in Lyon Automobiles SA v Jean-Luc Dupasquier du Garage Sport Auto, Star'Terre SARL in Aqueducs Automobiles SARL* [1996] ECR I-677, paragraph 22, Case C-545/11 *Agrargenossenschaft Neuzelle eG v Landrat des Landkreises Oder-Spree* [2013], not yet published, paragraph 52.

about the use of the EU law and the mode of exercise of discretion derives. The analysis of case law shows that these rules have self-binding effect on the adopting EU institution (first approach; i.e. self-binding effect of soft rules) and that additionally also Member States must take these rules into account if the rules were adopted with their agreement (second approach; i.e. binding effect of soft law on the basis of an agreement).

In regard to first above mentioned approach, the review of practice and case law show that if certain EU institution with wide discretion for adoption and exercise of law, has adopted its own rules, relating to use and mode of exercise of its discretion, such institution has bound itself with these rules: the Court repeatedly held that soft rules in this case have self-binding effect for the adopting EU institution, therefore the latter is (generally) obliged to take account of these rules when adopting an individual decision. In the wording of the Court such understanding is in accordance with principle of equal treatment<sup>37</sup> and protection of legitimate expectations.<sup>38</sup> Exceptionally the EU institution may still depart from those guidelines in an individual case if reasons that are compatible with the principle of equal treatment or protection of legitimate expectations are proven.<sup>39</sup>

Other group of situations in which the Court is recognizing binding nature of soft law rules, are, as mentioned above, acts adopted in collaboration between the EU institution (mostly the European Commission) and Member States. In practice it is often that for the purpose of creating joint policy EU institutions and Member States adopt (soft) bilateral or multilateral agreements. As these acts are, in the understanding of the Court, “*agreed*” (also “*negotiated*”) acts

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<sup>37</sup> Case 148/73 Raymond Louwage and Marie-Thérèse Marie-Thérèse Louwage, née Moriamé, v Commission of the European Communities [1974] ECR 81, paragraph 12; Case 25/83 Adam Buick v Commission of the European Communities [1984], ECR 1773, paragraph 15; Case T-23/91 Henri Maurissen v Court of Auditors of the European Communities [1992] ECR II-2377, paragraph 42.

<sup>38</sup> Case 70/74 Commission of the European Communities v Council of the European Communities [1975] ECR 795, paragraphs 18 and 20; Case 81/72 Commission of the European Communities v Council of the European Communities [1973] ECR 575, paragraph 13.

<sup>39</sup> See also Case 282/81 Salvatore Ragusa v Commission of the European Communities [1983] ECR 1245, paragraph 18; case 263/83 Mariette Turner v Commission of the European Communities [1985] ECR 893, paragraphs 20-21; Case T-380/94 Association Internationale des Utilisateurs de Fils de Filaments Artificiels et Synthétiques et de Soie naturelle (AIUF-FASS) in Apparel, Knitting & Textiles Alliance (AKT) v Commission of the European Communities [1996] ECR II-2169, paragraphs 56-57; Case C-409/00 Kingdom of Spain v Commission of the European Communities [2003] ECR I-1487, paragraph 73; Case T-154/2009 Manuli Rubber Industries SpA (MRI) v European Commission [2013] not yet published, paragraph 115 and others.

(Member States and EU institution have agreed upon it), the rules constituted therein, despite their softness, are determined as binding.

The acknowledgment of bindingness is however not automatic for all “*agreed*” acts: the Court has limited such recognition to two concrete spheres: the first recognition of binding effect of (soft) “*agreed*” acts will be established when hard law expressly provides for adoption of such acts – hence for the Court to recognize binding effect of “*agreed*” act an express legal ground for adoption of this act has to be envisaged in binding legislation.<sup>40</sup> *A contrario* it derives from the latter that “*the fact that an act may have been adopted by mutual agreement is not capable of altering the legal position of the Member States, unless the possibility of adopting such a “negotiated” act was expressly provided for by a Community provision*”<sup>41</sup> The second situation when the Court establishes *de facto* binding effect of soft but negotiated rules is when in the EU special obligation of cooperation between the EU institution and Member States is established, “*agreed*” act being the result of such mutual cooperation (this is the case for example in the area of state aid). The recognition of binding force of “*agreed*” acts is hence possible also in this case.<sup>42</sup> Although the Court has not yet been confronted with this type of instruments outside the area of state aid and staff relating issues, taking in regard the explanations of the Court in mentioned cases, which were all given in broad terms and not limited to solely for example state aid, the conclusion is possible that the rule of recognition of binding effect of soft “*agreed*” rules under above mentioned conditions holds true for the EU legal order as whole.

#### 4. CONCLUSION

From the analysis of case law of the Court it is clear that case law has evolved for initial ignorance of soft law to not solely recognition of its existence but also to the approval of its complementary role together with hard law. As the Court is regularly making use of soft instruments, to soft law normative status is conferred. The latter is not equal or “static” as normative level of hard law,

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<sup>40</sup> Case 303/90 French Republic v Commission of the European Communities [1991] ECR I-5315, paragraph 23; Case C-325/91 French Republic v Commission of the European Communities [1993] ECR 3283, paragraph 28.

<sup>41</sup> Opinion of AG Tesouro in case C-325/91, presented on the 16th December 1992, paragraph 9.

<sup>42</sup> Case C-311/94 IJssel-Vliet Combinatie BV v Minister van Economische Zaken [1996] ECR I-5023, paragraph 13 and 14; Case T-354/05 Télévision française 1 SA (TF1) v Commission of the European Communities [2009] ECR II-471, paragraph 73; Case T-17/02 Fred Olsen, SA v Commission of the European Communities [2005], ECR II-2031, paragraph 164.

but rather normative intensity varies depending from type of the act: when soft law is used “only” for confirmation of already reached interpretation, the normative intensity is low; but when the Court determines binding effect of soft law, the normative value is much higher, actually *de facto* similar to normative intensity of binding EU legislation. Such undisputable acknowledgment of the dynamic nature of the term normative intensity by the Court confirms the assumption of the theory of graduated normativity, in accordance with which there are more levels of normativity on the continuum scale between binding legislation and non-binding political statements as two extremes.

With such recognition of collaboration and cooperation of soft and hard law, the Court is also recognizing that in the scope of the EU regulation soft and hard law do not necessarily exist one at the expense of the other, but are better working side by side (the question is therefore not soft law versus hard law, but soft law together with hard law).<sup>43</sup> As soft law is rising in quantity as well as are in quantity growing cases in which the Court uses soft law, this unique characteristic of hybridity of regulation in the EU legal order will be even more crystallized in the future. Consequently to this it is therefore to presume that the relevance of the EU soft law will grow importantly, influencing legal relations between EU institutions and Member States and/or individuals, relying to such soft law provisions. Soft law is thus beside binding legislation gradually evolving into an increasingly important and constituent part of the EU law.

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