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Julia Iliopoulos-Strangas & Jean-François Flauss(†) [eds.]

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Soft law in the EU legal order

Enzo Cannizzaro and Emanuele Rebasti***

Introductory remarks: unity and diversity of soft law

Soft law is a topic of increasing importance in the European legal order. Yet, in spite of the attention devoted to it by legal scholarship, its contours still remain quite mysterious. There is, indeed, a certain consent about a negative definition. Soft law is generally defined on the basis of a quality which it does not possess: the binding value. However, it is much more difficult to define it in the positive. Scholarly views tend to converge on the consideration that soft law does indeed produce some effect, though diverging on the more precise identification of these effects.

The reason probably lies in the fact that the term soft-law is abused, more than used, in European law. Under this label are grouped categories of rules which have very little in common past the common feature of being deprived of binding effect.

Legal scholarship devoted a certain amount of attention to soft law. A number of excellent pieces of scholarly work have extensively dealt with all of the different features of this notion.[1] Now we know more about soft

* *Professor Dr., University of Rom "La Sapienza".*

** *Research Assistant, University of Rom "La Sapienza".*

1 G. BORCHARDT and K. WELLENS, "Soft Law in European Community law", European Law Review, vol. 14 (1989), n. 5, p. 267; D. THÜRER, "The Role of Soft Law in the Actual Process of European Integration",in O. JACOT-GUILLARMOD and P. PESCATORE (eds), L'avenir du libre-échange en Europe: vers un Espace économique européen? Schultess Polygraphischer (1990), p. 131; F. SNYDER, "Soft law and Institutional Practice in the European Community", in S. MARTIN, The Construction of Europe: Essays in Honour of Emile Noël, Kluwer (1994), p. 198; J. KLABBERS, "Informal Instruments Before the European Court of Justice", in Common Market Law Review, vol. 21 (1994), p. 997; L. SENDEN, Soft Law in European Community Law, Hart Publishing (2004); D.M. TRUBEK, P. COTTREL and M. NANCE, "'Soft Law', 'Hard Law' and European Integration" , in G.

law than just a few years ago. However, many aspects still remain in the shadow. In particular, it is uncertain whether we are in the presence of a unitary notion or rather soft-law is just a term for indicating a number of different groups of rules featured by their own effect and function.

In this contribution, we will make an attempt at unveiling at least one of the mysteries surrounding this notion. The main thrust of this contribution is: unity and diversity of soft law. We propose to see whether, in spite of the infinite diversity of its forms of manifestation, soft law is also featured by a common trait; whether, in other words, recourse to non-binding legal acts as an alternative way of legislating is justified by common function discharged by soft law within the EU legal order.

In order to do so, we will use a particular methodology: we will look at soft law in European law by using as a term of comparison the role and function of soft law in international law. Indeed, soft law has developed mainly in the realm of international law, where it found a fertile ground for its growth. Paradoxically enough, soft law has also constantly accompanied the process of the European integration, which, notoriously, is featured by institutional and normative dynamics quite different from those of international law.

This observation serves to give guidance to the analysis, which will unfold along three steps. First, we will shape, very rapidly indeed, the function and role of soft law in the international legal order. We will then turn our attention to European law and will try to capture the analogy and difference surrounding the employ of soft law within the two legal orders. This will lead us to the third step, in which we will try to draw some conclusion and to fashion some overall recommendation.

All in all, the thread connecting the various parts of this contribution is that soft law expresses, beyond the undeniable dissimilarities and among its multiple forms in which it materialises, the consensual nature of law making in Europe.

De Burca and J. Scott (ed.), Law and Governance in the EU and the US, Hart Publishing (2006); A. Peters, "Typology, Utility and Legitimacy of European Soft Law", in Die Herausforderung von Grenzen, (2007), p. 405; O.A. Stefan, "European Competition Soft Law in European Courts: A Matter of Hard Principles?", in European Law Journal, vol. 14 (2008), n.6, p.753; E. Korkea-Aho, "EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?", in Maastricht Journal of European and Comparative Law, vol. 16 (2009), n. 3, p. 271.

I. Soft law in international law

Soft law is largely used in international law as a working alternative to hard law. Experience shows that States are more inclined to accept rules deprived of binding effect than classical commitments which can be enforced under international law. Soft law has therefore the advantage of formulating rules which aspire to influence the conduct of States, without actually imposing it. Paradoxically, a number of soft law instrument are provided with mechanisms of compliance which measure the degree to which States conform to non-binding rules.

The extraordinary success of some of the soft law instrument is witnessed by the process of transformation of many rules, from soft law to hard law. The most famous of these processes is the one triggered by the Universal Declaration of Human Rights (UDHR), adopted in the form of a declaration of principles of the GA of the UN. Nowadays a number of international lawyers would be inclined to recognise that many rules of the UDHR are part of customary law and some of them have even peremptory nature. How this has happened is not easy to explain and probably constitutes one of the profound mysteries in the process of formation of international custom. Interestingly, the EC/EU has given much impetus and has represented even one of the actors who have considerably contributed to this transformation. It is common knowledge that respect for the UDHR is commonly considered as a key element in the policy of conditionality of the EC/EU in its relations with third States.

Nor is that an isolated example. Instruments of soft law are commonly referred to in international judicial decisions as constitutive elements for the formation of custom. Soft law is one of the instruments, and certainly the most frequent, of international legislation, by which centralised organs establish rules which acquire subsequently binding value in as far as they correspond effectively to the need of the international community and are, therefore, effectively complied with by States.

In the following paragraphs, we will try to provide a classification of international soft instruments according to the actors who take part in their formation. This will lead us to reflect on the possible effects that they may nonetheless produce and on the rationale underpinning the recourse to soft law in the international legal order.

- Interstate soft law

In international law practice, States may conclude an agreement with the declared intention not to be legally bound by its provisions.

This is classically the case of political agreements, a good example of which is the very well known Helsinki Final Act of 1975. The Final Act was expressly deprived of legal effect but it nonetheless played a crucial role in emphasising the role of international human rights in Central and Eastern Europe and in paving the way for future forms of more advanced cooperation.

Another example of interstate soft law is represented by the various gentleman's agreements concluded by States to regulate the functioning of international institutions, such as the agreements concluded within the framework of the United Nations to allocate the seats in the various organs among the different geographical and political groups of countries.

Finally, States may have recourse to non-binding instruments to coordinate the activity of their administrations or to define common technical standards. This is for instance the case of administrative or technical agreements generally concluded by State agencies such as antitrust agencies and central banks.

According to some authors,[2] the common feature of non-binding interstate agreements would lay in the common intention of the participants to exclude international responsibility in case of breach of their provisions. However, this does not mean that non-binding agreements are systematically disregarded by the parties. On the contrary, the pattern of non-compliance with non-binding agreements does not differ substantially from that of binding treaties and therefore it shows that the choice of soft instruments has more to do with the need to ease the conclusion of an agreement rather than with the intention not to respect its terms.

- Institutional soft law

When it comes to the activity of international organizations, the recourse to soft law instruments represents the rule rather than the exception. Indeed, only in some very specific cases international institutions are endowed with

2 See for instance, T. Treves, Diritto Internazionale. Problemi fondamentali, Giuffrè (2005), at 359 and et seq.

the power to adopt binding acts towards their members: in most circumstances the only normative tools available are recommendations, whatever the *nomen juris* may in fact be, according to the respective Statutes.

This is the case of the Resolutions of the General Assembly, and of most of the acts adopted by the assemblies of the UN Agencies, with the significant exception of the WHO and ILO Assembly when adopting draft conventions. But this is also the case of acts adopted by most regional organizations, regardless of their field of action, in line with the idea that intergovernmental cooperation at the international level, even when institutionalised, hardly can be compared to a legislative function.

However, this does not prevent IGOs from making use of their recommendatory powers to promote a softer approach to regulation. Recommendations are addressed to Member States to promote the advancement of their legislations in specific fields, as it happens with human rights, the protection of indigenous population[3] or the protection of workers.[4] Soft instruments are also adopted by international agencies to set technical standards, guidelines and code of conducts.[5] Soft norms may also directly address private individuals rather than states with the declared aim to promote global goals by triggering bottom-to-top implementation and thereby overcoming resistances at the governmental level: this is for instance the case of the UN Global Compact Initiative[6] or the OECD guidelines for multinational corporations.[7]

3 See the seminal UN Declaration on the Rights of Indigenous Peoples. For an analysis of the Declaration adopted by the GA on the 13th of September 2007, UN Doc. A/RES/61/295. For an overview of the Declaration and its legal effects in international law see M. Barelli, "The Role of Soft Law in the International Legal System: the Case of the United Nations Declaration on the Rights of Indigenous Peoples", The International and Comparative Law Quarterly, vol. 58 (2009), n. 4, p. 957.

4 As it is the case of the number of recommendations adopted by the ILO General Conference on various aspects of labour regulation and worker protection.

5 See for instance the role played by the WHO in setting standards and guidelines in medical matters.

6 The UN Global Compact is an initiative launched by UN Secretary General Kofi Annan in 2000 that promotes the respect of ten core "principles" in the fields of human rights, labours standards, environmental protection and fight to corruption by prompting businesses to assume voluntary commitments and sharing best practices.

7 The guidelines are recommendations addressed to corporations. They provide voluntary principles and standards aimed at promoting a wide set of values, including the workers' rights, environmental protection, consumer protection, competition, combating corruption etc. The last version of the guidelines has been adopted in 2001: see OECD Doc. DAFFE/IME/WPG(2000)15/FINAL.

It is interesting to note that, despite the lack of formal binding force, a number of indirect legal effects have been associated to IGOs' Recommendations.

Thus, for instance, both legal scholarship and international judicial decisions have supported the view that, under specific circumstances, IGOs resolutions may well promote the formation of new hard international law rules. The paradigmatic example of this process is well represented by the UN General Assembly Resolutions that contain declarations of principles (as, *inter alia*, the above mentioned Universal Declaration of Human Rights). Analogous considerations apply also to other IGOs' recommendations when solemnly enacting rules of fundamental importance with the unanimous vote of the Member States (as for instance the 1998 ILO Declaration on Fundamental Principles and Rights at Work). The particular circumstances associated with the adoption of these soft law instruments (e.g. unanimous vote, statements in the preamble underlining the importance and the commitment to respect its content, etc.) have been considered in ascertaining the constitutive elements of custom.[8] As a result, Declarations of Principles have played the role of catalysers of customary norms, concurring in a crucial way to defining the content and the scope of new hard rules.

International judicial organs have recognized to institutional soft law a particular role when assessing whether States have correctly exercised their discretion in implementing formally binding norms. For international jurisdictions, guidelines, code of conducts and technical standards elaborated by international agencies or technical organs of international organizations often represent the benchmark against which the proportionality and reasonableness of State conduct has to be assessed. A good example is provided by the case law of the European Court of Human Rights that often recalls the recommendations of CoE organs, such as the Council of Ministers or the European Commission for Democracy through Law (Venice Commission), as one of the parameters (the other generally being the practice of other CoE member States) to assess whether the wide margin of discretion

8 This is the use that a number of international jurisdictions have made of GA Declaration of Principles. See for instance the judgment of 27 March 1986 of the Iran-US Claims Tribunal in the case Sedco Inc. V. National Iranian Company and Iran, International Legal Materials, 1986, p.633, and the judgment of the International Court of Justice of 27 June 1986 in the case Military and Paramilitary Activities in and against Nicaragua (Nicaragua v Usa), ICJ Reports, 1986, p.14, par.188-192.

that the States enjoy in securing ECHR rights has been exceeded.[9] The same approach has been adopted in much different fields of international law; for instance, WTO panels and Appellate Body refer to health and environmental standards defined in soft instruments adopted by international organisations (also of a non-governmental character – see *infra* next paragraph) to ascertain whether a restrictive measure is proportionate to secure certain level of safety.

In these cases, international jurisdictions tend to recognize the non-binding character of the instruments invoked and stress that non compliance does not automatically entail a negative evaluation of the exercise of discretion by the State; however, by adopting technical standards and guidelines as parameters of their judgement, international judges place on States the burden of showing that a different behaviour is nonetheless compatible (in terms of being necessary and proportionate) with the hard norm whose breach is alleged. Such a demonstration may prove extremely complicated in practice:[10] thus, the final effect of soft law instrument is that of contributing *de facto* to define the actual content of general or vague positive obligations.

9 For instance, when assessing cases concerning the right to free elections provided by article 3 of the first Protocol to the European Convention, the Court has often used as a parameter the Code of good practice in electoral matters (Opinion 190/2002, CDL-AD(2002)023rev.para 63) and others opinions on electoral issues elaborated by the Venice Commission. In cases where a change of the electoral law was adopted shortly before the elections, the Court has recalled that the stability of electoral laws prescribed by the Code of good practice would be indeed preferable: as a consequence, while a derogation remains allowed under the Convention, it is up to the defendant State to show that specific circumstances do exist to justify it (judgment of 8 July 2008, Georgian Labour Party v Georgia, application n.9103/04). Moreover, the Court has placed on the State the burden of any negative consequence ensuing from the sudden electoral reform (judgment of 11 September 2009, Petkov and others v Bulgaria, applications n. 77568/01, 178/02 and 505/02).

10 The recourse to international health and environmental standards in WTO case law has proven particularly meaningful. For instance, under the SPS Agreement member States are free to define their own level of acceptable risk and the restrictive measures to trade that they deem necessary to face that risk. However when an international standard is in place, any derogation to that standard is admitted only if the State provide scientific evidence that the derogatory measure it proposes grant the same level of safety without affecting to a greater extent international trade. See as an example the decisions of the panel and Appellate Body in the EC – Hormones (WT/DS26/R/USA and WT/DS26/AB/R) and EC – Biotech (WT/DS291/R, WT/DS292/R, WT/DS291/R) cases.

- Interindividual soft law

International law has recognized forms of "spontaneous" or interindividual law, the most well known of which is perhaps *lex mercatoria. Lex mercatoria* is not by any means designed to be soft; quite on the contrary its aim is to provide hard transnational regulation of commercial transactions.

However in recent time, softer forms of interindividual law have emerged and, what is more, States and international organisations have started looking at them as satisfactory if not desirable techniques of regulation in a number of fields.

A good example is provided by guidelines and technical norms elaborated by independent non-governmental organisations, such as the ISO (International Organisations for the Standardisation), the IEC (International Electrotechnical Commission) or the ICANN (Internet Corporation for Assigned Names and Numbers) in order to define common standards but also to provide independent supranational governance to supranational economic activities, such as the management of the internet.

Other forms of soft norms have been developed by economic operators to self-regulate their conduct, often with the declared aim to prevent the adoption of much harder regulation at the national or supranational level. This is the case of the codes of conduct adopted by professional categories or groups of enterprises operating in the same sector, but this is also the case of unilateral engagements such as those undertaken by multinational corporations under the UN Global Compact initiative.

State practice and international case law show that similarly to interstate soft law, interindividual soft law as well contributes to shape the *opinio iuris* of the international community. In particular interindividual soft law instruments have been invoked by international jurisdiction along with institutional soft law to determine the standard for the assessment of the proportionality or the reasonableness of a certain State action: again the effect is to place on States the difficult burden of proving that different measures are equally effective and proportionate and therefore also interindividual soft law ends up to contribute indirectly to define the content of hard norms.[11]

11 See for instance the use made by WTO Panels of the ISO and IEC technical standards.

- The philosophy of international soft law

The international legal order has a low degree of effectiveness. This idea is expressed in common language by saying that in the international legal order the recourse to soft law instead of hard law does not make much difference. This is certainly an oversimplification, albeit containing some element of truth. Everybody knows that some hard law rules are nonetheless subject to a continuous process of mutual adjustment of the rights and duties incumbent upon the parties (as it is clearly witnessed by the well known case law of the ECJ on the effect of the WTO). International law contains a number of institutes tending to attenuate the normativity of hard law and to make its content dependent upon the will of its addressees.

In a legal order featured by such a scarce level of effectiveness, the advantage of soft law would be evident. States might be more keen to adopt soft law in the awareness that they remain free to disregard at their will. In so doing, soft law may anticipate the evolution of international law and allow States to experiment the suitability of certain normative solutions which can be later developed in hard rules.

Moreover, even when it is not transposed into hard rules, soft law is endowed of a subtler form of normativity (creeping normativity), which contributes to influence the conduct of States towards the behavioural model encompassed in the soft rules.

It follows that the consent of States is more easily attained by lowering the degree of normativity. This does not necessarily entail that also the degree of effectiveness is correspondingly reduced. Indeed, the lack of a centralized mechanism for enforcing binding norms and the inherent limitations to conventional ones (see for instance the role expressly recognised in the WTO dispute settlement system to State consent in the form of reciprocal concessions that allows for a high degree of flexibility – or "softness" – of WTO rules) seriously attenuates the effectiveness of hard law at the international level; on the contrary, the involvement of social and economic actors in promoting the respect and implementation of soft norms (see for instance ILO core labour Standards or the OECD guidelines for multinational enterprises) may overcome the hurdles of regulation at the (inter)-governmental level and therefore greatly increase their impact.

Thus, the idea of international soft law is philosophically interesting because it tends to invert the relationship between normativity and effectiveness: hard law has a high level of normativity but is sometimes ineffective

or scarcely effective; soft law has a low level of normativity but is the one which is sometimes highly effective.

International soft law, beyond the multiplicity of its forms, has the function to increase effectiveness at the cost of lowering the level of normativity. This is required by the structure of the international society, where the law-making function is mainly based on the consent of the subjects to which the law ultimately addresses.

II. European soft law

We must now turn to the European context with a view to perceive possible analogy with the international law scenario.

Differences between the two situations are obvious: international law is a legal order endowed with a low level of effectiveness whereas the European legal order is highly effective; European law has efficient and well working procedures of decision-making independent, to an extent, at least, from the consent of States; the effectiveness of European law is guaranteed by the peculiar position it enjoys with respect to national laws and by the system of judicial remedies available at the national and European levels.

Analogies, however, are not lacking. Indeed the process of formation of European rules is lengthy and complex. Its functioning is still largely based on the consent of institutions and MS. In such circumstances, it is striking to note a certain convergence between the role played by soft law respectively in the two legal orders.

In the following pages we will focus on some of the multiple forms of soft law in the European legal order with a view to discern the reasons which lead European Institutions to prefer adopting soft rules in so many relevant areas rather than relying on the admittedly more effective normative tools provided for by the Treaties.

- *Inter-state European soft law and inter-individual European soft law*

Those who assume that the European legal order is a massively institutionalised one will be surprised to note that both inter-state and inter-individual soft law still play a role. Inter-state soft law is mainly, but not exclusively, used in the formation of overall political directions of the European integration. Interindividual soft law is mainly used in the interstices

of the European regulatory action, where the Institutions are more ready to leave space for activity of self-regulation.

Inter-state soft law has an illustrious predecessor. It is well known that the Common Foreign and Security policy was gradually established through the progressive development of initial informal cooperation among the MS.[12] The establishment and strengthening of the CFSP from the adoption of the Single European Act can be considered a progressive institutionalisation of this early practice. CFSP has then replaced inter-state soft law with a set of soft and hard instruments adopted by EU Institutions; still, the recourse to inter-state soft law instruments has not been completely eliminated and rather remains, according to the prevailing view, a powerful yet silent steering instrument of integration.

Soft-law made by MS has profoundly influenced the evolution of European integration also in a more subtle and indirect way. As a matter of fact, the ECJ has considered that interference in EU material policies by inter-state soft law is more acceptable than interference by inter-state hard law. This conclusion can be effectively illustrated by the comparison between the position taken by the Court in the two very well known *Defrenne* and *Bosphorus* cases.

In *Defrenne*, the Court ruled out the effect within the EU legal order of a resolution adopted by the Member States in order to delay the full application of the principle of equal pay enshrined in the Treaty. According to the ECJ

> "Without prejudice to its possible effects as regards encouraging and accelerating the full implementation of article 11, the resolution of the member States of 30 december 1961 was ineffective to make any valid modification of the time-limit fixed by the treaty. In fact, apart from any specific provisions, the treaty can only be modified by means of the amendment procedure carried out in accordance with article 236".[13]

The Court here appears wary of protecting the system of competence of the EC Treaty by interference coming from the intergovernmental approach by means of international law tools.

A different course was taken by the ECJ in *Bosphorus*, where the Court was asked to assess the effect of soft-law adopted by the MS with a view to enlarging the scope of EU competence.

12 EPC declarations and public documents from 1970 onwards can be found in the monthly Bulletin of the EC.

13 Case C-43/75, Judgment of 8 April 1976, Defrenne v. SA Sabena, at para. 57 and 58.

The facts are well known and there is no point in dwelling upon them at any length. The case concerned the validity of a Regulation adopted to implement within the Community order the sanctionatory measures adopted by the UN Security Council against the Federal Republic of Yugoslavia. Having stressed that the interpretation of a provision of Community law entails the consideration of its wording, its context and its aims, the ECJ went on to say:

> "As to context and aims, it should be noted that by Regulation No 990/93 the Council gave effect to the decision of the Community and its Member States, meeting within the framework of political cooperation, to have recourse to a Community instrument to implement in the Community certain aspects of the sanctions taken against the Federal Republic of Yugoslavia by the Security Council of the United Nations (...)".[14]

The Court thus concluded that interstate soft law ought to be considered in the interpretation of the relevant part of the Regulation and, in particular, that decisions of the MS taken in the framework of political cooperation had the effect of establishing the aim of a Community act.

Beyond of the many controversial issues raised by the decision, *Bosphorus* is a revealing case as it highlights the role of consensual legislation in the dynamics of the European legal order. When all the actors involved, the MS and the EU Institutions, agree on a certain course of action, to be taken across the line separating their respective competence, the judiciary will generally uphold it.

On a different level, soft-law plays the role of consensual legislation when enacted on the basis of a concerted action involving not only EU Institutions and MS, but also, and foremost, the addressees of the prospective measure. This is in particular the case of the so called Open Method of Coordination (OMC), a soft governance technique developed in policy areas, such as employment and social protection that only partially fall within the scope of EU competence but that nonetheless are deemed to be so crucial and so related to basic goals of the Union to require a coordinated action at the European level. According to the OMC approach, direct legislation is replaced by a voluntary self-evaluating process, based on the definition of common objectives and indicators by the European Council, the setting of common principles by Commission recommendations, a monitoring mechanism based on States self-reporting and on Council and Commission

14 Case C-84/95, Judgment of 30 July 1996, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport*, at para. 13.

joint reports, the dissemination of best-practices and generally the involvement of all the relevant stakeholders along the process.[15]

- *Institutional Soft-Law*

• *Regulatory Soft Law*

Similarly to what happens in international law, also in the EU legal order soft law instruments may be adopted to perform a regulatory function as an alternative to or a supplement of legislation in a given field.

A variety of instruments are currently used by EU Institution to pursue soft regulation. Some of them are explicitly provided for by the Treaties and this is in particular the case of recommendations and opinions which are included by article 288 TFUE among the legal acts of the Union with the clear indication that they "shall not have binding force". Recommendations are usually adopted by the Commission or the Council with a view to influencing behaviour of their addressees by inviting or proposing to adopt a certain line of conduct. Unlike opinions, recommendations are of general application and they have been used to promote closer cooperation or coordination of national policies in certain fields or – and this is particularly the case of Commission recommendations – to foster the harmonisation of national legislative and administrative provisions whenever the recourse to legislation was not politically or legally possible nor desirable;[16] in such a case recommendations do have similarities with directives but for the obvious fact they have no binding force.

Non-treaty based soft law instruments are also used. It is in particular the Council that has developed in its activity the recourse to atypical acts as steering instruments. Among these, Council resolutions are by far the most relevant. Council resolutions are usually addressed to both the Commission and the Member States and call upon them to undertake certain actions – generally in the form of concerted policies or cooperation measures – after

15 See for instance the Commission Communication on "A Renewed Commitment to Social Europe: Reinforcing the Open Method of Coordination for Social Protection and Social Inculsion", COM(2008) 418 final, 2 July 2008.

16 As for instance was the case for social, environmental and consumer policies before being formally incorporated in the treaties.

having stressed the existence of a political agreement on the need for an intervention at the Community level.[17]

The recourse to some form of self-regulation by an EU Institution raises the question whether such an exercise of regulatory power may somehow constrain its future legislative action. The issue has been dealt with by the Court in a case concerning the validity of a regulation that had been based upon an allegedly invalid Council resolution. According to an intervening State, the Council had clearly expressed the intention to bind itself by the resolution and had consistently acted in accordance therewith; as a consequence, the principle of legitimate expectations should have precluded it from departing from the resolution and the regulation should have been considered a merely derived act (and therefore annulled).[18]

This position was not shared by the Court. According to the ECJ,

> "[the resolution] which expresses the Council's political will.... cannot produce legal effects capable of limiting the Council's legislative powers".[19]

Thus, unlike to what happens for decisional soft law acts that set out rules of conduct for the future use of discretionary power, the instruments of soft regulation have no self-binding effect and leave unfettered the choice on the contents of future legislation. General principles of EU law such as the principle of the protection of legitimate expectations seem therefore to have a different impact according to the function (legislative rather then implementing: see *infra*) performed by the acting Institution.

Case law has also excluded that a general obligation of transposition and compliance with European soft law may be imposed on member states on the ground of the duties of loyal cooperation ensuing from para. 3 of article 4 TFUE (former article 10 TEC). The idea that former article 10 may attach legal effects to soft law for member states has been strongly supported in a number of legal writings, but scholars have then expressed fairly different

17 A good example is provided by the Council resolution of 15 December 1998 on a forestry strategy, which after having made clear that the (then) EC Treaty contained no provision for a specific common forestry policy and that responsibility for forestry policy rested on the Member States, proposed a concerted line of action on the ground that: "pursuant to the principle of subsidiarity and the concept of shared responsibility, the Community can contribute positively to the implementation of sustainable forest management and the multi-functional role of forests".

18 Case C-4/96, NIFPO, [1998] ECR I-681, at para 28.

19 Ibidem, at para. 31.

views on what these effects in practice would be.[20] However these suggestions have not been endorsed by the Court. According to the ECJ, the duty to facilitate the achievement of the Union's tasks laid down in para. 3 of article 4 TFUE cannot be invoked to create autonomous obligations for the member states in absence of a particular provision in the Treaty or in binding acts adopted by the institutions.[21] Thus, the principle of attributed powers seems to limit the scope of art. 4, par. 3, TFUE and in particular seems to exclude that it can be interpreted as representing an autonomous source of rights and obligations for member states.

This straightforward conclusion has to be tempered and qualified when specific circumstances occur. At this point, a series of cases concerning the so-called Hague Fisheries Resolution is of particular interest. The Hague Resolution was adopted by the Council in 1976 to face the problems ensuing from the political impasse that prevented the adoption within the prescribed period of the common policy for conservation of fishery resources. In particular, the Resolution provided that pending the adoption of the common policy, the member States could adopt appropriate measures to ensure the protection of resources in the fishing zones off their coasts but they had to do so in respect of certain principles, they had to seek a prior approval of the Commission and they had to consult with it at all stages of the procedure. Following the adoption of the resolution, a number of States adopted protection measures but they did so in a way that was not considered to be in

20 Thürer recalls that the principle of loyalty cannot as such transform non-legal engagements in EU law, however he immediately adds that that principle gives rise to certain legal obligation, as the duty to consider and make an effort to comply with soft law and not to act against it unless good reasons are set out, see THÜRER, "The Role of Soft Law" quoted supra note 1. Morand supports the view that the duty of loyal cooperation entails a set of procedural obligations for the addresses of soft law instruments, including the duty to provide information on implementing measures, C.A. MORAND, La legislation dans les Communautés Européennes, Librarie générale de droit et de jurisprudence (1968). According to Temple Lang, the principle enshrined in article 10 imposes at the least the duty not to interfere with the working of EU law and policy, J. TEMPLE LANG, "General Report: The Duties of Cooperation of National Authorities and Courts and the Community Institutions under Article 10 EC Treaty", XIX FIDE Congress, Helsinki (2000). Everling supports the view that under specific circumstances "full legal effect" may be attached to soft law instruments on the ground of the principle of loyal cooperation, U. EVERLING, «Zur rechtlichen Wirkung von Beschlüsse, Entschliessungen, Erklärungen und Vereinbarungen», in U. EVERLING, Das Europäisches Gemeinschaftsrecht im Spannungsfeld von Politik und Wirtschaft, Nomos (1985).

21 Case 229/86, Brother Industries, Order of 30 September 1987, [1987] ECR 3758, at 3763.

compliance with the conditions prescribed; as a consequence, a number of cases were brought before the Court of Justice.[22]

In deciding those cases, the Court endorsed the view that the Council resolution had binding effects on the member States. In its judgments however the Court did not adopt a common line of reasoning but rather invoked various arguments that deserve some consideration.

To start with, former article 10 can indeed play a role in "hardening" soft law provision but only when soft rules have been adopted with the aim to specify the duty of loyal cooperation provided for by the Treaty. Thus in the case at hand

> "[the Hague resolution] makes specific the duties of co-operation which Member States assumed under Article 5 of the EEC Treaty (...). Performance of these duties is particularly necessary in a situation in which it has appeared impossible, by reason of divergences of interest which it has not yet been possible to resolve, to establish a common policy and in a field such as that of the conservation of the biological resources of the sea in which worthwhile results can only be attained thanks to the co-operation of all the Member States".[23]

This quotation also hints to a second decisive argument further elaborated in other judgments: in the case at hand soft regulation had been adopted in a field that falls within the exclusive competence of the Community. Thus, the fact that the Council had not established the required common policy within the required period could not

> "in any case restore to the Member States the power and freedom to act unilaterally in this field".[24]

In such a circumstance, the conditions in which protection measures may be adopted by the Member States

> "must be defined by means of all the available elements of law, even though fragmentary, and by having regard, for the remainder, to the structural principles on which the Community is founded".[25]

Finally in at least one case the Court attached a crucial importance to the conduct assumed by the Member States following the adoption of the Regulation. As a matter of fact in its judgment in case 61/77, *Commission v*

22 C-61/77 Commission v. Ireland, [1978] ECR 417, Case C-141/78 France v. UK, [1979] ECR 2923, Case 32/79 Commission v. UK, [1980] 2403, ECR Case C-804/79 Commission v. UK, [1981] ECR 1045.

23 Case C-141/78 France v. UK, para. 8 and C-61/77 Commission v. Ireland paras. 65-66.

24 Case C-804/79 Commission v. UK, para. 17.

25 Ibidem, para. 19 and 20.

Ireland, the Court underlined that the Hague resolution had been "*formally approved*" by the Member States some days after its adoption, on 3 November 1976. Again, as it was noticed for decisional soft law instruments, Member States' consent seems to trigger the production of legal effects by typical non-binding EC acts, such as a Council resolutions. Yet, the normative dynamic according to which Member States' agreements would attach binding legal effect to soft law remains unclear; in particular, it can be questioned whether the Court is here recognising that member states agreements are an autonomous source of EU law or rather that they can strengthen and specify the set of obligations ensuing from general EU principles, such as the duty of loyal cooperation.

Whatever it may be, the conditions required by the Hague regulation cases in order to confer legal effects to regulatory soft law are extremely restrictive and can difficultly be met in other situations. Indeed, the very basic idea underpinning the resort to soft regulation in the EU legal order appears to be exactly the same that recurs in the international one, that is to lower down the degree of normativity in order to attain the necessary consent to regulation. From this perspective, it appears somehow paradoxical that (the pursuit of) consent may require the recourse to softer techniques of regulation and at the very same time may determine the conditions for the consolidation of soft law into hard law.

- *"Decisional" Soft Law*

In the last years, soft law was enacted by EU Institutions, in particular, by the Commission, as an alternative to the enactment of individual acts of enforcement with a view to predetermine the conduct of the enacting institution and to facilitating compliance by individuals.

This category of soft-law acts includes Notices or Communications; terminology may vary, and terms such as Guidelines, Codes of Practice and Frameworks are also used.[26] Whatever the name, this category of acts dif-

26 This terminology is mostly used in the area of competition and of state aid. One of the first decisional soft law instrument to be adopted was the so called De Minimis Notice in 1970, following the judgment of the Court in case C-5/69, Völk v Vervaecke, which clarified that agreements that have an insignificant impact on trade between member States escape the prohibition under article 101 TFUE. The De Minimis Notice has been since then regularly updated (for the last version Commission Notice on Agreements of

fers from merely interpretative communications in that they are not limited to interpret existing norms but specifically set out rules of conduct by which the Commission will abide in the future exercise of its discretion when deciding individual cases.

The nature of this category of soft-law is particular uncertain. The prevailing view tends to see decisional soft-law as deprived of binding nature and having exclusively the role of predetermining the future conduct of the enacting Institution when it will be called to discharge its enforcing function.[27] In particular, it would not produce additional obligations, neither for the addressees, who are free to discard it without incurring in specific sanctions, nor for the enacting institution.

Since decisional soft law can be seen as a form of self-limitation, it would not need a specific legal basis. If an Institution possesses the power to determine in specific cases what the law is, it also possesses the power to

Minor Importance which do not Appreciably Restrict Competition, OJ C 368, 22 December 2001, p.13). Other relevant soft law instruments adopted in the field are the Guidelines on the Method of Setting Fines Imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1 September 2006, p. 2; the Commission Notice on Cooperation within the Network of Competition Authorities, OJ C 101, 27 April 2004, p. 43; the Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (Leniency Notice), OJ C 298, 8 December 2006, p. 17; the Community Guidelines on State Aid to Promote Risk Capital Investments in Small and Medium-Sized Enterprises, OJ C329, 7 December 2010, p.4.

27 This is the most mysterious category of institutional soft law. It is by no means the only one. In the institutional practice, the term soft-law is referred to instruments performing also different functions – such as preparatory or interpretative instruments – provided that they manifest the aptitude to produce indirect legal or factual effects (that is the qualifying feature of soft law: compare the definitions proposed in the legal literature quoted supra at note 1).
Preparatory acts can be considered to be soft law instruments in so far as they are not confined to providing a framework for public consultation (such as Green Papers) or mere information, but actually lay down work programmes and express the Commission's commitment to undertake certain action, identifying the concrete legislative or policy measures to be adopted within a certain time frame (as in the case of Action Programmes and White Papers).
Interpretative instruments offer the Commission's interpretation of single pieces of legislation, judicial decisions or codify a variety of different sources of EU law on one specific subject. Their declared purpose is to promote greater coherence and clarity in the application of EU law, by providing a uniform administrative interpretation; as such, they do not aim at producing legal effects other than those ensuing from the underpinning legislation. However, in so far as they draw consequences from general norms, infer general implications from specific judicial decisions or propose a far-reaching clarification of vague pieces of legislation, interpretative communications also announce the stance that the Commission will assume in the future application of EU law and may thus affect the behaviour of the addressee of the norms.

curtail its discretion by predetermining in general terms the criteria which will be applied on a case-by-case basis.[28] In so far as it does not depart from the rules of the Treaty, soft law might be seen as useful tool which contributes to the transparency, consistency and legal certainty of the action of the EU Institutions.

This argument was broadly endorsed by the ECJ. The Court established that decisional soft law, although deprived of binding effect by itself, has nonetheless effect upon the Institution which has enacted it and which cannot depart from it without good reason, in force of general principles of EU law designed to protect individuals against arbitrary institutional conduct.[29]

Although seductive, this conclusion appears highly unconvincing. It blurs the distinction between the function of law-making and the function of law-enforcing and inverts the logic upon which the entire process of legitimacy of law within the EU is based.

28 "The adoption of (…) guidelines by the Commission is an instance of the exercise of its discretion and requires only a self-imposed limitation of that power when considering the aids to which the guidelines apply, in accordance with the principle of equal treatment. By assessing specific aid in the light of such guidelines, previously adopted by it, the Commission cannot be considered to exceed the limits of its discretion or to waive that discretion. On the one hand, it retains the power to repeal or amend any guidelines if the circumstances so require (...)"
Case T-214/95, Judgment of of 30 April 1998, Het Vlaamse Gewest (Flemish Region) v Commission of the European Communities, par. 89.

29 In Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rørindustri and others v Commission, [2005] ECR I-05425, the Court treated Guidelines as true rules having general effect:
"The Court has already held, in a judgment concerning internal measures adopted by the administration, that although those measures may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. Such measures therefore constitute a general act and the officials and other staff concerned may invoke their illegality in support of an action against the individual measures taken on the basis of the measures.
That case-law applies a fortiori to rules of conduct designed to produce external effects, as is the case of the Guidelines, which are aimed at traders.
In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. 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".

In order to explain this point, a reference to the conceptual difference between law-making and law-enforcing is hardly necessary. One thing is for an Institution to enforce a general rule on a case-by-case basis, acting within the margin of appreciation conferred to it. Another thing is for such an Institution to give up its discretionary power and to predetermine its line of conduct. In the latter case, the Institution is not only predetermining its conduct; it also gives guidance to the addressees of its act as to the lawfulness of their conduct. By so doing, it is producing a rule of conduct having general scope and binding effect.

This is easily demonstrated. To contend that an Institution which has enacted a soft law act cannot depart from it without giving reasons that are compatible with general principles of law is logically tantamount to saying that, unless such an act does not prove to be inconsistent with general principles of law, this Institution is under an obligation to abide by it.[30] In practical terms, this also entails that the act is, indirectly, binding upon the addressees. If an Institution is under an obligation to abide by a general act which predetermines the exercise of its enforcement power, this means, logically, that the individual is under an obligation to comply with it. Lack of compliance would inevitably entail enforcement action in the terms envisaged by the soft-law act.

This is a necessary consequence of the way in which law typically produces effect. Binding effect does not constitute an inherent quality of a rule. It is the consequence attached to the existence of a rule by another superior rule. Therefore, there is not much wisdom in asserting that soft law has not binding effect, but this binding effect is acquired only indirectly, by virtue

30 In case 92/01 JACOBS, GA contended that guidelines enacted by the Commission are not even binding on the Commission, which can derogate if it finds that, in a specific case, their application produces effect inconsistent with the Treaty:
"The adoption of guidelines, or other forms of 'soft law' (...) cannot derogate from Article 87 in any circumstances, and does not release the Commission from the obligation to assess each case against the criteria laid down in that provision. If circumstances require, the Commission may well repeal or amend those guidelines. The Commission's discretion cannot be fettered once and for all by adopting such documents. Accordingly, it may even derogate from them if their application in a given case would run counter to Article 87 EC".
See Opinion of AG JACOBS on case C-91/01, Italian Republic v. Commission, [2004] ECR I-04355. A similar view had been already expressed by AG DUTHEILLET DE LAMOTHE in relation to the De Minimis Notice who denied that the parties could usefully rely on its provisions due to the lack of any formal binding force. See case C-1/71 Cadillon [1971] ECR 351 at 361 and Case 22/71 Béguelin [1971] ECR 949 at 968.

of general principles of law. More than a legal argument, this seems an elegant way to circumvent the problem of the nature of decisional soft law.

Thus, the question which really matters is not to determine if decisional soft law has binding effect, but rather to identify the legal basis for EU Institution to adopt it.[31]

- The philosophy of European soft law

Soft law has gained momentum in the European legal order because of the continuous overlap between the formal decision-making process, based on the supranational method, and a number of informal decision-making processes, based on the consent of the main political and social actors. In this framework, soft law can fulfil essential functions for the functioning of the process.

Firstly, it facilitates the search for the consent of the various actors; and by doing so, it increases the effectiveness and the social legitimacy of the rules, which emerge through a process of continuous bargaining among a plurality of actors.

Secondly, soft regulation satisfies the need for flexibility and immediacy of the EU legislation. Soft law acts can be amended very rapidly and can be repudiated, withdrawn and possibly replaced, in order to accommodate emerging needs or to respond to rapid social and economic changes.[32]

On the other hand, the normative dynamic which is proper to soft law instruments also raises a number of serious concerns.

To start with, the pursuit of a higher degree of effectiveness through a lower level of normativity may have a negative impact on the transparency

31 This consideration should logically lead to dismiss the idea that the power to adopt soft-law acts of general nature is inherent in the enforcement power conferred by the Treaty to an institution. The enforcement power is by nature a case-by-case power of appreciation which has no value of precedent for future decisions. The binding effect of an act for the institution, which has adopted it, is the best evidence that the power to enact general acts is not inherent in the power conferred to that institution to enforce the law in specific circumstances.

32 A good example of this is provided by the choice to make use of Council recommendations – albeit alongside legislation – to promote harmonisation in the field of telecommunications from the mid-1980s: as it has been underlined, the recourse to soft norms has allowed the European legislator to keep the pace of the rapid technological developments that have characterised this field. See SENDEN, Soft law, quoted supra at note 1 at page 176, who analyses the various Council Recommendations adopted by the Council in the field of telecommunications.

of the decision-making process and on legal certainty. Indeed, soft law often emerges through a process that remains to some degree obscure and susceptible to be influenced by external, non-institutional, actors whose legitimacy is open to question. Moreover, it can materialise in atypical acts whose application by internal courts is highly unpredictable as are unpredictable its indirect legal effects, as our analysis has shown.

Secondly, the recourse to soft law may raise serious issues when it comes to the EU institutional balance. Internally, soft law tends to overlap with the decision-making procedures of the founding Treaties and may therefore affect the prerogatives of the various Institutions; externally, it may trespass across the boundaries of the competences between the EU and the MS or otherwise overstep the law.

Most of all, the very same rationale underpinning the recourse to soft law, that is the recourse to consent as an alternative form of legitimacy for law-making, raises the question of the democratic gap that would affect the functioning of the EU law order. From this perspective, the main finding of our analysis also becomes the main source of worries.

Soft law appears to play a role that is very similar to the one played in the international legal order. Still, the two system have a radically different degree of effectiveness and integration and such a difference should be reflected in their normative dynamics. In particular, the higher level of integration which characterises the EU should require a higher level of democratic control upon the exercise of the competences that have been transferred by the member states.

This clearly is not the case when it comes to soft law. Indeed, the real loser in the great game of soft regulation appears to be the European Parliament: the EP is clearly not equipped for a soft approach to regulation, since its institutional role is built upon the legislative procedure; moreover it has so far played only a minor role in the adoption of soft instruments (see for instance its limited participation in the OMC). Thus, the recourse to soft law and the pursuit of consent that it implies ends up to lessen the role of the Parliament.

This criticism may be attenuated if we look at soft law according to a dynamic perspective and try to seize its evolutionary dimension. As we have underlined, soft regulation often represents the first step to expand EU action in fields where competence lays exclusively or mainly with the Member States or where a EU competence is provided but there is no consent on its exercise. In so doing, soft law opens new normative spaces at the suprana-

tional level and helps at creating the political conditions for the attribution of new policies to the EU and eventually paves the way for a stronger consensus on the need for harder normative instruments. Thus, on the long term, the recourse to self-regulation seems to ease the transferral of competence from the member states to the EU and the expansion of the community method.

Concluding remarks

The increasing reliance on soft law in its different manifestations is a common trait of the international and the EU legal order. In both systems, soft instruments seem to offer similar advantages: they facilitate the advancement of regulation in fields where consensus for hard norms is not attained yet; despite a lower level of normativity they nonetheless secure a high degree of compliance; they reach out social and economic actors and propose to involve them in the regulation of certain sectors and in the enforcement of existing rules in order to ease the pursuit of common goals. All in all, the soft law approach represents in both cases a paradigm shift: the shift from an approach that focuses on the legal effect of the rule to a different one that focuses on its overall effectiveness; a shift from the centrality of the norm to the centrality of the process.

Yet, the similar use that the two legal order make of soft law is somehow paradoxical, given the profound differences in their structure, normative dynamics, accessibility to judicial remedies and therefore in their degree of effectiveness. Indeed, if we look at the phenomenon through the lenses provided by the two different legal frameworks, a different picture does emerge.

Unlike international soft law, European soft law does not operate in a normative vacuum but rather within the framework of the Treaties. In this context, shifting the attention from the legal effect to the effectiveness of a rule may represent a strategy to escape the legal and procedural constraints imposed by the Treaties (in terms of length and complexity of legislative procedures, of allocation of competence among the institutions and among the institutions and the member States) for the adoption of hard norms. Generally speaking such a strategy may well serve two opposing interests: either that of Member States to lessen the degree of integration in favour of a intergovernmental approach based on State consent or that of the EU In-

stitutions, and notably the Commission, to expand its role and the reach of supranational action beyond the legal bases provided for by the Treaties.