

Soft Law in Court

Competition Law, State Aid and
the Court of Justice of the European Union

Oana Ștefan

81

EUROPEAN MONOGRAPHS

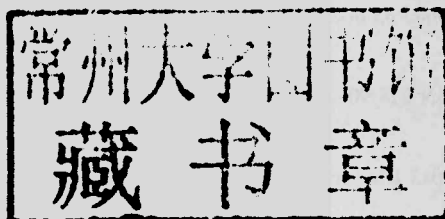


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In this issue, the authors discuss the role of the law in the economy. The authors argue that the law is not only a means of resolving disputes, but also a means of creating and enforcing rules that govern the behavior of individuals and firms. The authors also discuss the role of the law in the development of the economy and the role of the law in the distribution of income and wealth.

Soft Law in Court

EUROPEAN MONOGRAPHS

In this series European Monographs this book, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* is the eighty-first title. The titles published in this series are listed at the end of this volume.

*To my grandmother Maria Carmen.
In the loving memory of Angela, Constantin, and Nicolae.*

List of Abbreviations

AG	Advocate General
CAP	Common Agricultural Policy
CELEX	Communitatis europeae lex
CFI	Court of First Instance (the name of the General Court before the entry into force of the Lisbon Treaty)
CMLR	Common Market Law Reports
CoJ	Court of Justice (part of the Court of Justice of the European Union according to Article 19 TEU)
Com	Commission
DG	Directorate General
EC	European Communities
ECHR	European Convention of Human Rights
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EU	European Union
EU Courts	The Court of Justice and the General Court (part of the Court of Justice of the European Union according to Article 19 TEU)
GC	General Court (Part of the Court of Justice of the European Union according to Article 19 TEU)
MS	Member States
NCA	National Competition Authority
n.a.	Not Applicable
nyr	Not Yet Reported
OMC	Open Method of Coordination

OPOCE	Office for Official Publications of the European Communities
R&D	Research and development
R&D&I	Research, development and innovation
R&R	Rescuing and restructuring (firms in difficulty)
Reg	Regulation
SAPP	State Aid Action Plan
SGP	Stability and Growth Pact
SMEs	Small and Medium Sized Enterprises
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

Acknowledgements

In an age of emails, facebook and twitter, it is probably common place that true letter-writing is almost dead. A victim of this era, I find myself having the dreaded 'writers' block', for putting together an acknowledgement section is more than writing a law book, it is writing a letter. Quite a special letter for that matter, since it has many addressees and needs to translate into words a lot of gratitude, feelings and thoughts accumulated during a research project that lasted for some good years. A type of letter that unfortunately Lewis Carroll did not mention in his 'Eight or Nine Wise Words About Letter-Writing' and about which the relevant section of ehow.com says it has to be 'short and sweet', ranking contributions of people that helped in the process and including just the top ten (the rest can apparently be sent a fruit basket). Or, in my case, this advice is simply not feasible, for many were the people who helped me in this journey that started in Warsaw, at the College of Europe, and went on through UCD in Dublin to HEC in Paris (and some of them do not really enjoy fruit).

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Paris, 17 June 2012

Oana Ștefan, PhD

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Introduction

Encouraged by the White Paper on Governance and by initiatives such as the Lisbon Strategy and Lisbon 2020, recourse to ‘soft law’ is booming in many policy fields at the European Union level. Notices, guidelines, codes of conduct, letters, memoranda, etc. are omnipresent on the European regulatory scene. In principle, the term soft law is used in order to designate not legally binding instruments. However, the legal effects thereof are not straight forward to determine,¹ and empirical studies show that soft law instruments may produce in certain circumstances legal and practical effects. The uncertain legal status, effectiveness, legal force or completeness of such norms might arguably deceive the public that a certain action was set in stone at the legislative level, whereas no hard law provision was yet passed, thus frustrating rule of law principles.² Furthermore, soft law can appear both paradoxical and ambiguous. Paradoxical because ‘the rule of law is usually considered “hard” i.e., compulsory or it does not exist’ and ambiguous because of the unclear legal effects and consequences.³ For all these reasons, it was suggested that ‘somehow, intuitively, we realize that a soft law argument will not go down too well before a court; any court, for that matter’.⁴

This is even more so from a conceptual point of view, since soft law has been often associated with the phenomenon of ‘governance’. Governance, in its restricted sense, comprises ‘types of political steering in which non-hierarchical modes of guidance, such as persuasion and negotiation, are employed, and/or public and private

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1. L. Senden, *Soft Law in European Community Law* 497 (Hart Publishing 2004).
 2. See the discussion about the critique of the American Supreme Court’s interpretation of The Developmentally Disabled Assistance and Bill of Rights Act in *Pennhurst State School v. Halderman* in J.E. Gersen & E.A. Posner, *Soft Law: Lessons from Congressional Practice* 61 Stan. L. Rev. 573, 597 (2008). More generally on international law, see A. Aust, *The Theory and Practice of Informal International Instruments* 35 Intl. & Comp. L.Q. 787, 805–806 (1986) and, with a focus on the Open Method of Co-ordination, see M. Dawson, *Soft Law and the Rule of Law in the European Union: Revision or Redundancy?* Working Paper RSCAS 2009/24 (Working Paper RSCAS Robert Schumann Centre for Advanced Stud. 2009).
 3. P.M. Dupuy, *Soft Law and the International Law of the Environment*, 12 Mich. J. Intl. L. 420 (1991).
 4. J. Klabbers, *The Undesirability of Soft Law*, 67 Nordic J. Intl. L. 381, 382 (1998).