

EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?

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Abstract

New modes of governance are proliferating at all levels, most prominently in the EU. One main characteristic of new governance is adjustability and revisability in the form of soft law. The non-binding nature of soft law is said to contribute to flexibility and diversity in Member States and to secure national autonomy. However, this article argues that while soft law may not be legally binding, it nevertheless has legal effects that throw flexibility and diversity of national action into doubt. Beginning by demonstrating that soft law may have discernible effects on practices in Member States, at the same time restricting Member State choices, the article goes on to develop a categorisation of those effects and to document them in detail. These are: judicial recognition by the European courts, explicit terms of soft law instruments, which demand special types of national implementing measures, the role played by non-state actors, and hybrid forms of regulatory instruments comprising soft and hard law provisions. The analysis shows a need to add variety to existing research on EU soft law, which has traditionally focused on the role of the judiciary in giving legal effects to soft law. Instead, we should be more attentive to the other three factors when discussing soft law. Besides the more holistic approach, research should also analyse soft law in a more case-specific manner in order to fully grasp the implications of choice of soft law in a domestic legal system.

Keywords: soft law; flexibility; new governance; Open Method of Coordination; Member State legal order; legal integration

1 Introduction

European Union institutions are increasingly adopting soft law instruments. While the number of these instruments has increased, the trend is not novel by any means. In 1992 the European Council convened in Edinburgh. The meeting took place in the context of widespread concern for the legitimacy of Community action, and the principles of proportionality and subsidiarity seemed just right to work out the situation. Alongside these fundamental principles, non-binding instruments were promoted as tools to regulate according to those principles. The conclusions set out the premise that the principle of proportionality implies that non-binding tools such as recommendations should, when appropriate, be privileged over binding instruments and thus due consideration should be given to the use of voluntary codes of conduct.¹

Today those aims, as laid out in the conclusions of the Edinburgh European Council, have been largely replaced with the agenda set by the Lisbon

1 Conclusions of the Presidency of the Edinburgh European Council, containing guidelines on the application of Article 3b (now Article 5 EC). Bull.EC (1992/12), para. 15.

European Council in 2000, revised mid-term in 2005. The Lisbon agenda, which spawned academic and political interest in new governance mechanisms, has brought soft law back onto the research agenda.² One main characteristic of new governance is increased flexibility and revisability in the form of soft law.³ Soft law form is believed to contribute to flexibility and diversity at Member State level. The introduction of a soft policy coordination instrument, the Open Method of Coordination (OMC) which is now the most prominent new governance method, is believed to ‘foster convergence on common interest and on some agreed common priorities while respecting national and regional diversities. It is an inclusive method for deepening European construction’.⁴

The number of scholars that hail soft law as a way to protect national diversities in a range of Europeanised policy fields has accordingly increased in recent years. For instance, Trubek *et al* write that soft law can give consideration to divergent national circumstances ‘through flexible implementation’, which gives Member States leeway to adapt European norms to national economic and social contexts.⁵ The Interinstitutional Agreement on better law-making when discussing the use of alternative methods of regulation provides that these mechanisms are not ‘applicable where fundamental rights or important political options are at stake or in situations *where the rules must be applied in a uniform fashion in all Member States*’ (author’s own emphasis).⁶ The message seems to be that soft law is good because it safeguards national autonomy.

These accounts of soft law are founded upon the formal distinction between hard law and soft law: soft law is non-binding, i.e. the EU institutions are not able to invoke their claim for supremacy in relation to non-binding instruments. This feature then guarantees freedom of action for Member States. In practice, the autonomy of Member States is circumscribed in many ways. Despite the existence of such a formal difference between hard law and soft law, soft law

2 See Kohler-Koch and Rittberger, *Review Article: The ‘Governance Turn’ in EU Studies*, *Journal of Common Market Studies* (2006), 36–37.

3 Scott and Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, *European Law Journal* (2002), 6. For flexibility as a general principle in EU integration, see Shaw, *Flexibility and the Treaty Establishing a Constitution for Europe* in D. Curtin *et al* (eds), *The EU Constitution: The Best Way Forward?*, (T.M.C. Asser Press, 2005), 59.

4 Rodrigues, *The Open Method of Coordination as a New Governance Tool*, in M. Telò (ed.), *L’evoluzione della governance europea*, Special Issue of ‘Europa/Europe’, Rome, No. 2–3 2001, 96., cited in P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials*, (4th edn, Oxford University Press, 2007), 151.

5 Trubek *et al*, ‘Soft Law,’ ‘Hard Law’ and EU Integration, in J. Scott and G. de Búrca (eds), *Law and New Governance in the EU and the US*, (Hart Publishing, 2006), 88, referring to Amtenbrink and de Haan, *Economic Governance in the EU: Fiscal Policy Discipline versus Flexibility*, *Common Market Law Review* (2001), 1085. See also Scott and Trubek, *European Law Journal* (2002) 6, Zeitlin, ‘Introduction’.

6 *Interinstitutional Agreement on better law-making* 2003/C 321/01, point 17. Emilia Korkea-aho 274 16 MJ 3 (2009).

has legal effects that throw the flexibility and diversity associated with non-binding instruments into serious doubt. Legal effects are manifold and diverse, but they give rise to four considerations. These are documented below with detailed examples.

First, soft law can be seen transforming into hard law, and as a result closing down legislative flexibility, due to judicial recognition, particularly through the case law of the European courts. Second, legal effect is generated by expectations laid out in soft law instruments. Flexibility of national action is restrained by explicit terms of soft law instruments, which demand special types of national implementing measures, or information or accountability mechanisms put in place. The third distinctive category is the role taken by the Commission to cooperate with non-state actors at national level, thus giving effect to soft law provisions. Fourth, soft law may be incorporated into hard law provisions. Soft law becomes institutionalised in the EU legal framework, and as a result actors pay less attention to a rule's institutional source, or the so-called 'pedigree' of a norm.

Considering this categorisation, it does not seem very helpful to talk of soft law within the framework of a binary distinction between hard and soft law. Instead, the need arises for a new approach, which shifts our attention to emerging institutional and legal linkages between EU institutions and Member States, which is attentive to the significant role played by non-state actors, and to hybrid forms of regulatory instruments comprising soft and hard law provisions. Conceptualising soft law in these terms prevents us from making the mistake of assuming that it will, by default, promote flexibility and diversity. On the contrary, soft law can be an effective way of achieving integration in areas where Member States are sensitive to common provisions, and hard law initiatives are simply not possible. Governing Work and Welfare in a new Economy: European and American Limits', in J. Zeitlin and D. Trubek (eds), *Governing Work and Welfare in a New Economy: European and American Experiments*, (Oxford University Press, 2003), 5 and Frykman and Mörth, 'Soft Law and Three Notions of Democracy: The Case of the EU', in U. Mörth (ed.), *Soft Law in Governance and Regulation. An Interdisciplinary Analysis*, (Edward Elgar, 2004), 164.

2 The Concept of Soft Law: Descriptive and Normative Problems

Soft law is an umbrella concept that is often captured by way of a negation, contrasting the concept with the notion of hard law. Hard law in the European Union arises from treaties, regulations, and the Community method,⁷ normally taking the form of regulations, directives, and decisions (Article 288 TFEU, *ex* Article 249 EC). European hard law is described as having binding legal force,

⁷ Trubek *et al* in *Law and New Governance*, 65.

generating general and external effects, and being adopted by EU institutions according to a specific procedure and a specified legal basis in the Treaties.⁸

In contrast, soft law is understood to refer to rules of conduct that are not legally binding as such but may have practical and legal effects.⁹ This categorisation offers a starting point to develop my argument in this article. Lawyers tend to attach the concept to law-like rules, which are not legally binding *per se*, such as recommendations and opinions (Article 288(5) TFEU, *ex Article 249(3) EC*). Other comparable instruments, such as communications, notices, and guidelines are also regarded as soft law, though often without a legal basis in the Treaties. Indeed, no generic legal basis exists on which soft law is adopted, nor does any set of institutional actors exist that are primarily responsible for adopting soft law instruments. In any event, it is EU institutions, often the Commission, that adopt soft law. This tendency is so pervasive that in some accounts EU soft law is considered ‘non-binding governmental’ rules.¹⁰

For political scientists, legal bindingness is a less important concept. They often speak of soft law in terms of the flexibility, revisability, and heterarchy of a regulatory instrument. Political science has, for instance, used the concept of soft law in analysing the domestic implications of the European Employment Strategy, the Open Method of Coordination adopted in relation to European employment policies.¹¹

Whilst no single definition of soft law can be specified, soft law is increasingly being assessed from a joint perspective. New governance research, which provides a shared framework for legal as well as political science scholars to discuss the phenomenon of governance that perhaps is familiar to them under different headings,¹² allows for a collective approach to soft law, further integrating non-bindingness with the ideals of flexibility and diversity.

At the core, at least, of the legal conception of soft law lies the difference between legal bindingness and legal effects. The simple way to differentiate between them is to say that legally binding force means that a regulatory instrument could be ultimately enforced by means of legal sanctions. The idea

8 L. Senden, *Soft Law in the European Community Law*, (Hart Publishing, 2004), 45.

9 Ibid., 112. Snyder has recently added legal effects into his definition of soft law. See Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, in T. Daintith (ed), *Implementing EC Law in the United Kingdom: Structures for Indirect Rule*, (John Wiley & Sons, 1995), 64. See also Stefan, *European Competition Soft Law in European Courts: A Matter of Hard Principles?*, *European Law Journal* (2008), 756.

10 Christodoulidis and Dukes, *On the Unity of European Labour Law*, in S. Prechal and B. van Roermund (eds), *The Coherence of EU Law. The Search for Unity in Divergent Concepts*, (Oxford University Press, 2008), 417.

11 López-Santana, *The Domestic Implications of European Soft Law: Framing and Transmitting Change in Employment Policy*, *Journal of European Public Policy* (2006), 481–499. EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed? 16 MJ 3 (2009) 275.

12 Korkea-aho, *What Is New About New Governance? Making Sense of the Institutional Implications and Constitutional Conditions of New Modes of Governance*, Retfaerd (2009), 11.

of legal bindingness plays a significant role in the transposition of directives, for the European Court of Justice (ECJ) has held that in order to guarantee possible subjective rights, directives must be transposed by binding instruments, which usually denotes legislation. The requirement of a binding instrument is there to guarantee that individuals can enforce their rights through national courts if need be.¹³ By contrast, legal effects of soft law refer to the potential of soft law instruments to create legitimate expectations for individuals or businesses, or to clarify and specify the terms of hard law.

This article covers a wide range of measures that are not formally binding but have legal effects, beginning with instruments covered under Article 288(5) TFEU, *ex* Article 249(3) EC, explanatory documents accompanying legally binding instruments, policy-making in the framework of the OMC, and also bodies of rules established by non-state actors. Instead of attempting to offer a more rigorous categorisation, the article seeks to distinguish legal effects of soft law instruments on Member State practices in light of multiple evidence on non-binding instruments. Before doing so, I shall briefly illustrate how legal effects are categorised in the existing research.

Soft law is traditionally viewed in the shadow of legislation. Soft law as a relation to legislation is also elaborated in Senden's following categorisation.¹⁴ First, soft law can announce hard legislation. When soft law is adopted with a view to its being 'upgraded' into a binding instrument at some point in the future, it operates as a precursor to legislation (pre-law). Endowed with this task, a non-binding instrument activates Member States and stake-holders, disseminates and communicates information to governmental and non-governmental bodies, and collates data on the basis of which the optimal regulatory instrument can be chosen. Now that soft law paves the way for hard legislation, it is hardly in Member State's interests to disregard a soft law instrument on the basis of its non-bindingness. Member States may not only want to be involved in legislative negotiations in order to propose amendments or omissions, but also in order to remove the proposed instrument from the agenda altogether, as they did in the following instance. The Commission proposed introduction of a novel regulatory model in the context of corporate governance. The idea was to assemble a forum consisting of experts to adopt soft law provisions that were to be put together as the European Code on Corporate Governance. The proposal was withdrawn after strong opposition from Member States.¹⁵

Second, soft law can be intended to elaborate the terms of legislation (post-law). For instance, in competition law the Commission regularly adopts communications that are aimed at clarifying the interpretation of a set of

13 S. Prechal, *Directives in EC Law*, (2nd ed, Oxford University Press, 2005), 81–85.

14 Senden, *Soft Law in the European Community Law*, 119–120. Emilia Korkea-aho 276 16 MJ 3 (2009).

15 See, the European Commission, COM(2003) 284. *Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward*. For the problems in creating a regulatory framework for corporate governance at EU level, see Clarke, *The Takeover Directive: Is a Little Regulation Better Than No Regulation?*, European Law Journal (2009), 189.

relevant norms for national authorities and businesses. Existing norms may simply be restated but new rules can also be given that are not necessarily inherent to the existing legal framework. At times this function may also hide the institution's choice of soft law prompted mainly by a desire to avoid application of competence provisions.

Finally, soft law can be a real alternative to legislation (para-law). Sometimes, soft law is needed only as a temporary solution prior to legislation. For example, it is quite common to see complex issues channelled for decision outside the legislative process. Member States opt for soft instruments in order to avoid deadlocks in negotiations and to circumvent 'real', hard law obligations.¹⁶ Similarly, the existence of 27 Member States makes decision-making cumbersome, so that soft law then becomes the price of agreement. Sometimes, however, it is a proper alternative, establishing or giving further effect to Union objectives with a desire to manage closer cooperation between Member States or the approximation of laws in a non-binding way.

A soft law act fulfilling a para-law function goes with the recognition of the principles of subsidiarity and proportionality. Following the Edinburgh Summit, the principles were subsequently attached as a form of protocol to the Treaty of Amsterdam. The protocol does not mention non-legislative instruments but by the beginning of the 21st century alternative regulatory methods had gained prominence. The Commission's White Paper on European Governance in 2001 and numerous better regulation policy documents have attempted to increase the use of soft law as a way of increasing the legitimacy of EU action in the eyes of EU citizens. Soft law form facilitates common policy-making without making too many inroads into the Member States, whilst maintaining an adequate margin for joint action. It is this type of soft law that concerns us most; hence it is tacitly assumed that non-bindingness will be translated into flexibility and diversity at national level.

However, flexibility and diversity are constrained beyond the binary distinction between hard law and soft law by a host of extra-legislative elements that go apparently unrecognised by this distinction. Senden's categorisation builds upon the binary distinction, and for this reason it can not capture all those ways in which soft law restricts and curtails Member State choices. I now turn to four concrete examples in order to elaborate the relative 'bindingness' of legal effects of soft law, closing down the legal and political flexibility attempted through the choice of soft law.

16 Klabbers, *The Undesirability of Soft Law*, *Nordic Journal of International Law* (1998), 384, Schäfer, *Resolving Deadlock: Why International Organisations Introduce Soft Law*, *European Law Journal* (2006), 194–208. *EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?* 16 MJ 3 (2009) 277.

3 Making Sense of Legal Effects of Soft Law

3.1 *The European Courts giving Effect to Soft Law: Transforming Soft Law into Hard Law?*

Legal research has long argued that the ECJ's cautiously positive attitude towards the use of soft law acts has not only contributed to their overall quantity in the EU, but has also rendered them a significant part of the *acquis communautaire*. The landmark case is no doubt the *Grimaldi* judgment that obligated national courts to take recommendations into consideration when deciding on disputes submitted to them, despite the fact that recommendations have no binding force according to Article 288(5) TFEU (ex Article 249(3) EC).¹⁷ The ECJ was silent on the potential breadth of the obligation but has at times itself referred to a line of interpretation included in a soft law instrument.¹⁸ This is even more likely to happen in cases concerning the institutional dynamics between the Commission and the European courts. In the area of postal services, the Commission guidelines, even if *de lege ferenda*, formed part of the overall legal framework, which could be taken into account in assessing whether the Commission was making appropriate use of its limited resources.¹⁹

In keeping with increasing recognition of soft law instruments, the European courts have taken an approach that limits the discretion of EU institutions to depart from soft law instruments. When soft law instruments are published, they will apply and have legal effects. In turn, this means that the institution in question cannot deviate from them without risk of being found to be in breach of general principles of law, such as equal treatment or protection of legitimate expectations.²⁰

If Member States have taken part in drafting guidelines, they also become obligated.²¹ This was decided in case C-311/94 under the following circumstances. Article 93 (1) of the Treaty provides that the Commission, in cooperation with Member States, has to keep the systems of aid existing in Member States under constant review. That provision thus involves an obligation of regular, periodic cooperation on the part of the Commission and the Member States. As a result of the obligation of cooperation, and of a

17 C-322/88 *Grimaldi* [1989] ECR I-4407.

18 For instance, joined cases C-223/99 and C-260/99 *Agorá* [2001] ECR I-3605, 41. Also see C-310/99 *Italian Republic v. Commission* [2002] ECR I-2289, 52.

19 Case T-77/95 *Syndicat Francais de l'Express International & Others v. Commission* [1997] ECR II-0001.

20 Recently, see joined cases C-189/02 P, C-202/02, C-205/02 – C-208/02 and C-213/02 *Dansk Rorindustri and others v. Commission* [2005] ECR I-5425, 211. However, this limitation is not absolute. See, Stefan, *European Law Journal* (2008), 766. Also, internal guidelines have effects only within the administration itself and give rise to no rights or obligations on the part of third parties. C-443/97 *Spain v. Commission* [2000] ECR I-2415, 28.

21 C-311/94 *Ijssel-Vliet* [1996] ECR I-5023, 36–44. Emilia Korkea-aho 278 16 MJ 3 (2009).

Member State's acceptance of the rules laid down in the guidelines during cooperation, the ECJ held that a Member State must apply the guidelines when deciding on an application for a particular state aid.

The European courts maintain that under certain conditions and depending on their content, soft law instruments may have legal effects. It is important to remember that the European courts are slightly biased towards finding legal effect, because legal effect is a precondition for the courts' competence to declare an action admissible. Only when the courts have established whether a measure adopted by the institutions, whatever its nature or form, is intended to have legal effects, can they subject the measure to an action for annulment.²²

These legal effects may, as we have seen, provide a framework for assessing the activities of the Commission, or require Member States to apply certain guidelines in administrative decision-making. Where is the origin of legal effect? In some cases the courts have invoked the treaty-analogy: soft law acts derive their legal effects from the underlying agreement. This argument can only go so far: it applies to decisions which are taken unanimously on the basis of the consent of each participant involved in decision-making but it seems to fall short of explaining why a decision taken by the majority could bind those who abstain from voting or vote against it. Just as puzzling are those instruments that derive from Commission practice.²³ One way to solve the conundrum is to insist on the purpose of soft law as being to clarify hard law instruments: soft law comes with legal effect as far as it serves 'the enforcement of certain superior principles of law' that are common both to the European legal order and national legal orders.²⁴ This makes significant demands on the courts to review soft law instruments in their legislative and legal context.

Sometimes the task is relatively undemanding. In *France v. Commission*, the Commission tried to impose a directive proposal, which had not been agreed upon in the Council, as a form of a communication called 'Interpretative communication on the internal market for pension funds'. This communication was an unaltered version of a directive proposal that concerned certain investment obligations on pension funds. The ECJ annulled the communication, arguing that the communication was not confined to explaining the Treaty provisions, but intended to lay down obligations with which Member States must comply. It was thus intended to have legal effects

22 Case 22/70 *Commission v. Council* [1971] ECR 263, 42; Case C-27/04 *Commission v. Council* [2004] ECR I-6649, 44. To be sure, European courts often uphold a soft law instrument. In these cases, it could be argued that establishing soft law can be the object of an action for annulment, the judiciary places emphasis on procedural rights.

23 Klabbers, *Nordic Journal of International Law* (1998), 389. In some cases, the European courts provide that the Commission is bound by soft law in question if it does not depart from the Treaty provisions and it is accepted by Member States. See e.g. C-409/00 *Spain v. Commission* [2003] ECR I-1487, 69 and 95; C-351/98 *Spain v. Commission* [2002] ECR I-8031, 53.

24 Stefan, *European Law Journal* (2008), 772. *EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?* 16 MJ 3 (2009) 279.

of its own, distinct from those provided for by the Treaty.²⁵ Similarly, the ECJ annulled the Code of Conduct on implementing provisions for Article 23 of Council Regulation (EEC) No 4253/88 concerning coordination of the various structural assistance operations. The Code of Conduct not only made Member State obligations under Article 23 more explicit but also established specific obligations, which went beyond what was provided for in Article 23.²⁶

The European courts make abundantly clear that those soft law provisions intended to have legal effects distinct from those provided by the Treaty or secondary legislation provisions are at risk of being found to be in breach of general principles of law.²⁷ This reflects the principle of legal certainty, which is part of the EU legal order, and which requires EU legislation to be clear and its application to be foreseeable to all interested parties. However, once it is established that soft law acts do not have legal effects of their own, as distinct from those of secondary legislation, or indeed of the Treaties, then those legal effects become somewhat indistinguishable from what counts as binding force. In other words, in some cases soft law instruments are interpreted in rather binding terms. In Case C-325/91, the ECJ stated that ‘any act intended to have *legal effects* must derive its *binding force* from a provision of Community law which prescribes the legal form to be taken by that act and which must be expressly indicated therein as its legal basis, failing which the act in question will be null and void’ (author’s own emphases).²⁸

It seems that Klabbbers is right to postulate that as soon as soft law is applied in any circumstances, be they judicial or state practices, the concept ‘collapses’ into hard law, or to no law whatsoever.²⁹ Indeed, he concludes that the concept of soft law is redundant. Similarly, Snyder has suggested that soft law becomes hard by judicial recognition.³⁰ Österdahl gives a concrete example of ‘hardening’ in the Charter of Fundamental Rights, which, in her view, hardened due to judicial recognition.³¹ The existence of this mechanism has been disputed in recent research on competition soft law in European courts.

25 C-57/95 *France v. Commission* [1997] ECR I-1627.

26 C-303/90 *France v. Commission* [1991] ECR I-5313.

27 This also means that soft law instruments cannot usually depart from the existing case-law. See, Stefan, *European Law Journal* (2008), 764.

28 C-325/91 *France v. Commission* [1993] ECR I-3283. The case concerned a communication, which required Member States annually to report to the Commission, on a systematic basis, data relating to the financial relations of a particular category of undertaking achieving a specified turnover. The ECJ stated that this constituted an act intended to have legal effects of its own distinct from those of Article 5(2) of the directive and added new obligations to those provided for by that provision. As a result, the Communication was annulled. Also, joined cases C-189, 202, 205, 208 and 213/02 *Dansk Rørindustri and others v. Commission* [2005] ECR I-5425, 223.

29 See, Klabbbers, *Nordic Journal of International Law* (1998), 382.

30 Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, *Modern Law Review* (1993), 33–36.

31 Österdahl, *The ECJ and Soft Law: Who’s Afraid of the EU Fundamental Rights Charter?*, in Mörth (ed.), *Soft Law in Governance and Regulation*, 37–60. Emilia Korkea-aho 280 16 MJ 3 (2009).

Stefan argues that the case law of the European courts in fact reflects the distinction between legally binding force and legal effects: it attaches legal effects to non-binding instruments only when this facilitates the enforcement of particular superior principles of law, common to the European legal order and the national legal orders.³²

Does this understanding of soft law translate into flexibility at Member State level? It is certain that the relative weight of a soft law instrument continues to vary from case to case. However, although we might not accept the hardening thesis, it seems safe to assume that a particular soft law instrument appears hugely credible and influential in the eyes of Member States, if introduced in a context where the obligation to apply the norms arises from general principles of law, not from soft law instruments themselves.

3.2 *Implementation Clauses in Soft Law Instruments: the Institutional Origins of Soft Law Creating Legal Effects*

Soft law enhances the scope and intensity of EU integration. This is particularly true of non-binding instruments that are adopted in the event of no consensus over, or desire for, legislation, or when formal legislative competence to proceed with a policy proposal is lacking though some sort of steering is considered necessary. Steering soft law instruments functions as an alternative ('para') to hard law, particularly in areas where Member States are known to be more sensitive to common provisions and where hard law initiatives may be blocked. Inherent in steering instruments that aim to establish closer cooperation or approximation of laws through informality and non-bindingness is their aspirational nature: a domestic change is aspired to and aimed for.³³ Now that informality and non-bindingness are the defining characteristics, EU institutions' efforts to influence and convince Member States seem to be far more important than those intended simply to command and control.

There is a familiar assumption that national measures intended to introduce EU soft law acts are clearly voluntary yet beneficial for Member States. Soft law instruments often hide the Commission's interest in pursuing legislative reform in the field. Indeed, Member State indifference to soft law acts may cost them information that could help them anticipate political issues which will appear later on the agenda. From a normative point of view, it is convenient to refer to the principle of *loyal cooperation* (Article 4(3) TFEU, *ex* Article 10 TEU) in order to explain why we would expect to see any Member State activity. In Senden's view the provision cannot be considered to impose general obligations to comply with soft law instruments without further hard law provisions.

32 Stefan, *European Law Journal* (2008).

33 Prechal and Senden, *Differentiation in and through Community Soft Law*, in B. de Witte *et al* (eds), *The Many Faces of Differentiation in EU Law*, (Intersentia, 2001), 192. EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed? 16 MJ 3 (2009) 281.

Though in careful words, she formulates that a negative obligation may have a wider scope of application and in any event the Member States should, where discernible common interests exist, ‘refrain from taking measures that go against the few Community rules’, even if those rules are merely soft law provisions.³⁴

The principle of loyal cooperation and how it is interpreted in the literature becomes at least partly questionable in the light of the firm language adopted in soft law instruments, often the Commission’s. Without recourse to enforceable legal obligations, steering instruments intended to approximate national legislation often ‘mimic the language and norms of formal legal instruments’,³⁵ so that Member States will at least feel constrained to give a reason for failure to transpose or comply with them yet calling into question the flexibility and diversity provided by those instruments.³⁶

For instance, the Commission Recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board is written in the form of an expectation: ‘With a view to fostering the role of non-executive or supervisory directors, it is therefore appropriate that all Member States be invited to take the steps necessary to introduce at national level a set of provisions based on the principles set out in this Recommendation, to be used by listed companies either on the basis of the ‘comply or explain’ approach or pursuant to legislation’.³⁷ The Commission imposes a direct regulatory task on Member States to make sure that the principles enshrined in the Recommendation are duly (‘appropriately’) observed at national level. The Recommendation also sets the deadline by which Member States must notify the Commission of the measures taken in accordance with the Recommendation ‘in order to enable the

34 Senden, *Soft Law in the European Community Law*, 356.

35 Armstrong and Kilpatrick, *Law, Governance, or New Governance? The Changing Open Method of Coordination*, *Columbia Journal of European Law* (2007), 660.

36 Apart from the obligations established in soft law instruments, research has often referred to the institutional practice of the Commission in creating legal effects. According to Aldestam, the Commission’s authority to start proceedings under Article 88(2) EC seems to have the capacity to transform non-binding policy frameworks ‘into legally binding obligations’ in state aid policy. She also points out that soft law becomes hard if national administrations believe that norms are binding. See Aldestam, *Soft Law and the State Aid Policy Area*, in Mörth (ed.), *Soft Law in Governance and Regulation*, 28. See also Cini, *The soft law approach: Commission rule-making in the EU’s state aid regime*, *Journal of European Public Policy* (2001), 202. Both Snyder and Cini have drawn attention to the important interplay between the Commission and the European courts. Cini writes that the Commission has adopted a more formal legalistic approach as a defence against judicial activism. See, Cini, *Journal of European Public Policy* (2001), 203 and Snyder, *Soft Law and Institutional Practice in the European Community*, in S. Martin (ed.), *The Construction of Europe: essays in honour of Emile Noel*, (Kluwer, 1994).

37 Commission Recommendation of 15 February (2005/162/EC), recital 4. Writing from an Irish perspective, Clarke points out difficulties in terms of application and enforcement and concludes that this soft law instrument ‘lacks the clarity and precision needed to provide predictability and a reliable framework for action’. See, Clarke, *European Law Journal* (2009), 189. Emilia Korkea-aho 282 16 MJ 3 (2009).

Commission to monitor closely the situation and, on that basis, to assess the need for further measures'.³⁸

Similar examples are ample. In a recent Recommendation of 5 June 2008 concerning limitation of civil liability of statutory auditors and audit firms, the Commission explicitly acknowledges that '... it is appropriate at this stage that each Member State [is] able to choose the method of limitation which it considers to be the most suitable for its civil liability system'.³⁹ However, Article 5 of the Recommendation reads that Member States 'should take measures' to limit liability, enumerating immediately below three methods in particular to be used.

Another example concerns the European Code of Conduct for Mediators. As an early concrete policy instrument in the area of Alternative Dispute Resolution (ADR), the draft Code of Conduct was published on 6 April 2004. Officially it was adopted on 2 July 2004. In the explanatory statement to the Code, the Commission states that the Code expresses a number of principles to which individual mediators can voluntarily commit.⁴⁰ Similarly, organisations that provide ADR services can also make a commitment. The list of committed organisations involves 84 names at the time of writing.⁴¹ The Code was drawn up by a working group including representatives from mediation groups, the legal profession, industry specialists, and consumer groups working together with the Commission. Official national representation was not involved. Although the Code enjoys the support of the Commission, the Commission has pointed out that the Code does not represent its official position. Instead it has been explained as the Justice Directorate's way of reinforcing a self-regulatory attitude to ADR by the ADR community. Adherence to the code is without prejudice to national legislation or rules regulating individual professions.

Despite these flexibility-reinforcing characteristics, the Code of Conduct seems to be endowed with the expectation that complementary national measures will be introduced. The new Directive on mediation in civil and commercial matters adopted in 2008 attests to this interpretation. Article 4 of the Directive obligates the Commission and Member States to promote and encourage adherence to voluntary codes. This means that Member States are required to ensure that voluntary codes of conduct are published and adopted, and that mediation-training standards are encouraged. During preparations for legislation, the European Parliament unsuccessfully proposed that this article be deleted and suggested the introduction of a new Article 7b that would read: 'The Commission shall publish the European Code of Conduct for Mediators

38 Article 14.

39 Commission Recommendation of 5 June 2008 concerning the limitation of the civil liability of statutory auditors and audit firms, 2008/473/EC, recital 5.

40 The Code of Conduct can be found at "ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf (visited on 3 September 2009). The principles encompass all areas of mediation including competence, advertising, impartiality, and fees. It applies to all kinds of mediation in civil and commercial matters.

41 To consult the list, go to the website "ec.europa.eu/civiljustice/adr/adr_ec_list_org_en.pdf" (visited on 3 September 2009). *EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?* 16 MJ 3 (2009) 283.

in the C Series of the Official Journal of the European Union as a notice without legal effects'.⁴²

Soft law aimed to approximate national provisions in a non-binding fashion is likely to need national (governmental) measures in order to meet its aims effectively. However, the underlying goal of soft law to facilitate flexibility in terms of respective national measures falls short of our expectations and assumptions. As we realised, it is not unlikely that the Commission would recommend that it is 'appropriate' for Member States to adopt a set of provisions to introduce soft law norms, and to set deadlines on which Member States are 'invited' to inform the Commission of actions taken in the light of a particular soft law instrument. Flexibility is restrained by the explicit terms of soft law instruments, which, whilst recognising the importance of Member States being able to choose the most suitable regulatory instrument, make inroads into Member State autonomy by limiting the choice of options available to national policy-makers, or demanding that a particular type of information be submitted to EU institutional actors. It is of course unlikely, and indeed unrealistic to assume, that Member States will simply restate soft law provisions, but efforts to guarantee a particular outcome are probably far more common than we have come to realise.⁴³

3.3 *The Important Role of Non-state Actors in giving Effect to Soft Law and Beyond*

Many new governance mechanisms embrace a variety of actors and the broader dynamics of inclusion. The inclusion of various stakeholders, from experts to the public, is believed to contribute to the democratic legitimacy of decision-making at EU level, making them at least feel ownership of decisions they have had a voice in making.

Non-state (private) actors can fill many roles. I will not analyse their role in rule-making more generally but will rather focus upon the relevance of non-state actors in giving effect to EU soft law in Member States. Surely, non-state actors that have themselves adopted soft law norms, or influenced their

42 European Parliament legislative resolution of 29 March 2007 on the proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM(2004)0718-C6-0154/2004 – 2004/0251(COD).

43 The Community institutions have repeatedly voiced concern over the impact of soft law on domestic law, and ultimately on legal integration. The European Parliament identified the development towards framework directives and codes of conduct as harmful, leading to law which is 'uncertain, less binding ('soft law') and less secure'. Such law will then 'result in artificial harmonization and random transposition of provisions into national legislation'. See, *European Parliament resolution on the Commission report to the European Council: Better lawmaking 1998 – A shared responsibility* (1998) (COM(1998) 715 – C5-0266/2000 – 1999/ 2197(COS)) and *Better lawmaking 1999* (COM(1999) 562 – C5-0279/1999 – 1999/2197(COS)), point 23. Implementation of soft law instruments is also viewed as a problem in the area of the former third pillar. See Communication from the Commission to the European Parliament and the Council. *Enhancing Police and Customs Co-operation in the European Union*, COM(2004) 376 final, 5. Emilia Korkea-aho 284 16 MJ 3 (2009).

content, are likely to work for recognition and respect of those norms. Sometimes a legal basis exists for doing so, as is the case with the European social dialogue. Under Article 155 TFEU(*ex* Article 139 EC) an agreement concluded between the social partners can ‘be implemented by the [signatories] in accordance with the procedures and practices specific to management and labour in the Member States’. The other way of implementation is the Council decision by which the Council issues a Directive, which in fact is a blank reference to the agreement between the social partners. Member States have no obligation to apply or transpose collective agreements reached by the European social partners but which have not been adopted by the Council in the form of a directive. For the Member States, this type of agreement represents soft law. The first European collective agreements were implemented by Council Directives, thus guaranteeing their timely implementation at national level. Since 2000, social partners have preferred to implement their agreements themselves.⁴⁴

Some vagueness is apparent as to the status and legal effects of agreements left to be implemented informally, by the social partners themselves. According to one observer, they ‘do not have another legal status other than that of an agreement between two parties falling outside the scope of Community law’.⁴⁵ This conclusion seems to stand in contrast to normative and empirical insights. First, the EC Treaty provides a specific legal basis for implementation of agreements in accordance with ‘the procedures and practices specific to management and labour in the Member States’. Second, informal though these procedures and practices may appear, it is possible to argue that they have an added value to the Europeanisation of labour laws in Member States.

Professional organisations are another group of non-state actors who may well have (vested) interests in supporting a piece of soft law at national level. Some evidence exists to support the conclusion that national professional organisations use EU soft law as a means of setting minimum standards at national level. This is a way for professional organisations to protect and enhance their reputation. For instance, domestic mediation organisations can make available information on the measures they are taking to support respect for the European Code of Conduct by individual mediators through such measures as training, evaluation, and monitoring. Consumer organisations have also shown interest in developing similar measures. The European Consumers’ Organisation suggested in its comment to the draft version of the Code of Conduct for Mediators that provisions should be added at a later stage relating to implementation, compliance, and monitoring aspects of the code.⁴⁶ Whilst for professional and non-professional organisations EU soft law acts primarily

44 Smismans, *New Governance-The Solution for Active European Citizenship, or The End of Citizenship?*, *Columbia Journal of European Law* (2007), 612 fn 75.

45 Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, *European Law Review* (1998), 28.

46 Dated 1 December 2003. *EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?* 16 MJ 3 (2009) 285.

provide a cogent way to establish a reputation, active domestic civil society can also contribute to the convergence of different national practices, and indeed, the Europeanisation of respective policy areas.

In the UK, the central actor in the area of mediation is the Civil Mediation Council. This is a neutral body of civil society, established to represent providers of civil and commercial mediation services. The Civil Mediation Council's pilot accreditation scheme requires those seeking accreditation to comply with a suitable Code of Conduct, and they particularly recommend the EU Code. The actual wording is '(1) An Accredited Mediation Provider must have an appropriate written Code of Conduct for its members to follow, (2) That written code must be no less rigorous than the EU Model Code of Conduct for Mediators published in 2004'.⁴⁷ Likewise, the Scottish Mediation Network (SMN) has launched a register for mediators, and one of the requirements for being on the Register is adherence to a Code of Conduct: 'As a minimum the mediator shall practice in accordance with the Scottish Mediation Register's Guidelines for the Practice of Mediation in Scotland being consistent with the European Union Model Code of Conduct for Mediators or such other code that accepts the SMN Guidelines as a minimum'.⁴⁸

Member States are no longer monolithic regulatory units. Quite the opposite, they are characterised by extensive fragmentation encompassing divergent objectives and orientations, and one set of objects and aims pursued by professional or commercial actors is naturally dissimilar to those pursued for instance by governmental actors. Viewed this way, national professional organisations, and civil society at large, can provide a significant avenue for EU institutions to influence domestic actors and agenda-setting more broadly, at least where common interests exist.

These examples have dealt with instances in which private actors have had a strong role in establishing bodies of rules. Can non-state actors occupy a role in giving effect to soft law without necessarily being involved in its adoption? To the extent that active civil society is designed to ensure that Member States fulfill their implementation obligations, it could be argued that we should attempt to enhance the interplay between the Commission and private actors. For instance, non-state actors could be encouraged to report to the Commission any flaws, or inaction they perceive in implementation of soft policy coordination instruments, particularly the OMC. It has become clear that the Commission lacks material resources, or indeed a legal basis, to monitor Member States effectively in implementing a particular OMC. This has led scholars to argue that the OMC 'is not good' for the EU.⁴⁹

47 For the CMC code, see "www.civilmediation.org/downloads.php" (visited 3 September 2009). The Pilot Scheme has been extended to apply until 31 March 2010. For more information, see www.civilmediation.org/provider-organisations.php (visited 3 September 2009).

48 For the Scottish code, see "www.scottishmediationregister.org.uk/standards/index.asp" (visited on 3 September 2009).

49 Hatzopoulos, *Why the Open Method of Coordination Is Bad For You: A Letter to the EU*, *European Law Journal* 309 (2007). Emilia Korkea-aho 286 16 MJ 3 (2009).

It would not be out of the question to mobilise stakeholders to monitor national measures intended to put into practice the aims of the OMC. Of course, the effectiveness of this kind of informal monitoring depends on the degree of participation non-state actors are entitled to in policy- and rule-making and how transparent national administration is. In the best-case scenario, relevant stakeholders are well equipped to monitor realisation of OMC targets at national level.

3.4 *Incorporation of Soft Law into Hard Law: Hybrid Forms of Regulatory Instruments*

We have so far focused mainly on the institutional and legal context that limits discretion of Member States in relation to soft law norms. Flexibility of national action can also be curtailed by including soft law as part of hard law instruments. The Unfair Commercial Practices Directive, which incorporates national codes of conduct so as to render them virtually binding, is illuminating.⁵⁰ Its Article 6 determines conditions on which a commercial practice is considered misleading. The second point says that

commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise', and it involves: ... '(b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where: (i) the commitment is not aspirational but is firm and is capable of being verified, and (ii) the trader indicates in a commercial practice that he is bound by the code.

The Directive transforms what are essentially voluntary codes of conduct binding on traders.⁵¹ The Directive not only aims to make traders bound by national codes of conduct; it also attempts to indirectly influence their substantive content. It is hoped in the preamble that by strengthening the role of national codes of conduct in regulating traders' professional behaviour, professional organisations incorporate the principles of the Directive in national codes of conduct, and hence 'enable traders to apply the principles of the Directive effectively in specific economic fields'.⁵²

50 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

51 This corresponds to legal practice in most Member States in relation to the law on fair trading.

52 Recital 20 of Directive 2005/29/EC. *EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?* 16 MJ 3 (2009) 287.

Many examples exist of embedded soft law provisions in environmental directives, limiting choices available to Member States. For instance, in January 2005 the EU launched the Greenhouse Gas Emission Trading Scheme (EUETS) as the largest multi-country, multi-sector Greenhouse Gas emission trading scheme world-wide. The scheme is based on Directive 2003/87/EC, which entered into force in 2003. Article 14 of the Directive concerns guidelines for monitoring and reporting emissions. The Commission is given the responsibility of adopting guidelines for monitoring and reporting emissions resulting from the activities listed in Annex I of greenhouse gases specified in relation to those activities.⁵³ Member States must ensure that emissions are monitored in accordance with the guidelines. In addition, Member States have to ensure that each operator of an installation reports emissions from that installation during each calendar year to the competent authority in accordance with the guidelines.

Another example is more complex. Directive 2008/1/EC pertains to integrated pollution prevention and control (the IPPC directive).⁵⁴ The permit can be issued only if certain environmental obligations are complied with. The obligations must be based on Best Available Techniques (BAT), defined as using established techniques which are the most effective in achieving a high level of environmental protection and which can be implemented in the relevant sector in accordance with economically and technically viable conditions, taking into account costs and benefits of doing so. An information exchange on BAT is organised by the Commission together with Member States and other stakeholders to establish BAT reference documents (BREFs) indicating what is considered as BAT at EU level for each industrial sector.⁵⁵ Final responsibility for publication of BAT reference documents rests with the Commission.

The aim of a BAT reference document is to offer information to the competent authorities of Member States, businesses, the Commission, and the public to guide the determination of BAT-based permit conditions. BAT reference documents are non-binding, and EU institutions prefer to emphasise

53 The guidelines are to be based on the principles for monitoring and reporting set out in Annex IV. Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

54 Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control. This Directive codifies all previous amendments to Directive 96/61/EC. The substance of Directive 96/61/EC has not been changed and the new directive is without prejudice to the proposal for a directive on industrial emissions.

55 See, European Commission. *Proposal for a Directive of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control)*. COM(2007) 844 final, 2. Due to the dynamic concept of best available techniques, review of BAT reference documents is a continuing process. A BAT reference document is the product of an exchange of information carried out with a technical working group constituted for the purpose. The working group is the primary means through which all information required for reference documents is gathered and evaluated. Emilia Korkea-aho 288 16 MJ 3 (2009).

that the responsibility for implementation remains within the competence of Member States, and a BAT reference document does not remove the obligation on operators and Member States under the IPPC Directive to make decisions at national, regional, or local level including the necessary balanced decisions required by the Directive. A BAT reference document should remain a fundamentally technical document.⁵⁶

However, reference documents are likely to be hugely influential in the implementation process, particularly in Member States that cannot devote a large amount of resources to environmental regulation, and which are likely to be the same Member States that do not enjoy a strong bargaining position in negotiating the documents.⁵⁷ The potential influence of BAT reference documents is even more evident in the light of possible reasons to strengthen and make the use of reference documents more frequent. The Commission noted in its proposal for an IPPC Directive that significant imbalances and shortcomings exist in the implementation of best available techniques because of the unclear provisions on BAT in the current legislation, the degree of flexibility bestowed upon competent authorities to deviate from reference documents when issuing permits, and the vague role of BAT reference documents. As a result, the Commission continued, permits issued for implementing the Directive often contain conditions that are not based on BAT as described in the BREFs. This again has resulted in poor delivery of the environmental benefits originally intended, and distortions in the internal market.⁵⁸

In order to deal effectively with these shortcomings, the proposal laid down several provisions to strengthen and clarify the use of BAT. For instance, it was suggested that BAT reference documents be the reference for setting permit conditions, and that emission limit values set by the competent authority do not exceed emission levels associated with the best available techniques as described in those BAT reference documents (Articles 15–16). The latter provision would in fact acknowledge the binding force of BREFS on Member States.

Although the revision process is still underway, reference documents are going to have considerable scientific and political, if not necessarily legal, authority, and it is likely that Member States will at least feel obliged to explain why they have not complied with them.⁵⁹ However, Article 3, which requires Member States to ‘take the necessary measures to provide that

56 BREF Outline and Guide 2005, 2 available at “eippcb.jrc.es/ief/” (visited on 3 September 2009). For the reference documents in the old IPPC Directive 1996/61 see Scott, *Flexibility, ‘Proceduralization’, and Environmental Governance in the EU*, in J. Scott and G. de Búrca (eds), *Constitutional Change in the European Union*, (Hart Publishing, 2000).

57 In relation to similar Guidance Documents in water protection policy, see Lee, *Law and Governance of Water Protection Policy*, in J. Scott (ed.), *Environmental Protection: European Law and Governance*, (Oxford University Press, 2009), 53.

58 See IPPC Proposal. COM(2007) 844 final, 9.

59 In respect of similar Guidance Documents in water framework directive implementation, see Lee in *Environmental Protection*, 53. *EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?* 16 MJ 3 (2009) 289.

the competent authorities ensure that installations are operated in such a way that: a) all the appropriate preventive measures are taken against pollution, in particular through application of the best available techniques', may provide the Commission with the legal authority it needs to limit national discretion in implementation. With respect to the original IPC Directive the Commission said that it saw the 'BAT reference notes' in IPPC as the point of departure for enforcement.⁶⁰

4 Conclusions

The use of non-binding instruments, soft law, has proliferated in the EU during the last two decades. Two main reasons appear to explain the rise of soft law instruments: lack of formal legislative competence to adopt hard law provisions, and the desire to guarantee flexibility and diversity of national action. Focusing on the latter argument, we have come to realise the 'Edinburgh heritage' of soft law, an idea which has enormously contributed to the role adopted by soft law in the EU: soft law is useful because it preserves Member State autonomy.

Since the 1992 Edinburgh Summit, legal integration coupled with binding instruments has been demonstrated as a form of suppressing cultural and political diversity whereas non-binding laws have been promoted as a way to advance legal integration without interfering too much with the autonomy of Member States, while retaining a necessary margin for common manoeuvres. Unlike European hard laws, which at the extreme require that a potential national conflicting norm be disapplied in order to give effect to a supranational law, soft law does not have the same effect, thus guaranteeing flexibility and diversity of national action. More recently, soft law has become associated with new governance research. It also emphasises the potential of soft law to contribute to flexibility and diversity.

This article concludes that it does not seem very helpful to talk of soft law by stressing the binary distinction between hard and soft law, binding and non-binding. Soft law might be 'less binding' but we should exercise enormous caution in judging flexibility and diversity prominently in terms of the relative bindingness of a regulatory instrument. Instead, a need exists for research, which is attentive to hybrid forms of instrument composed of soft and hard law provisions, and which shifts our attention to emerging administrative and legal linkages between national and EU level actors. Finally, research should seek to unearth and understand the role played by non-state actors. These factors evidently reinforce each other: for instance, explicit terms of soft law instruments, which demand particular types of information to be submitted to EU institutional actors, may also facilitate non-state actors in tapping into information that might not otherwise be easily available.

⁶⁰ See Emmott *et al*, *Policy Review: IPPC and the Sevilla Process*, *European Environment* (2000), 205. Emilia Korkea-aho 290 16 MJ 3 (2009).

For this reason we need to analyse soft law instruments within a framework which takes into account the legal and institutional context, as well as the substantive and procedural flexibility provided by its norms, before concluding that soft law serves the objectives of flexibility and diversity. Besides a more holistic approach, research should analyse soft law in a more case-specific manner in order to fully grasp the implications of the choice of soft law.

These conclusions allow us to observe certain tendencies and assumptions in the existing research. First, we need to add variety to EU soft law research, which has traditionally focused on, and to a certain extent overstated, the role of EU courts in giving effect to soft law.⁶¹ It is important that the special role of judicial recognition be acknowledged. However, other considerations are equally significant, and soft law research should be pursued in a context of awareness of the multiplicity of incentives and assumptions of regulation. Second, the conclusions of this article should add a critical edge to new governance research, which often assumes that soft law will, by default, promote flexibility and diversity. Indeed, soft law constitutes a potentially legitimate vehicle for shaping European integration in the name of flexibility and diversity.

New governance research can teach us much about legally relevant integration, which takes place through non-binding instruments: it does not take for granted binding legislation or the supremacy doctrine but is instead founded upon persuasive use of non-binding mechanisms, administrative and legal linkages between EU institutions and Member States, and the inclusion of non-governmental actors. The values of flexibility and diversity may, however, only be ideals that have informed the adoption of soft law and which are compromised by the institutional and legal practice, which makes a soft law instrument 'the optimal' regulatory model against which Member State activities are measured.

61 Hunt and Shaw reflect more generally the pronounced role of the ECJ for legal scholarship in European integration. See Hunt and Shaw, *Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration*, in D. Phinnemore and A. Warleigh-Lack (eds), *Reflections of European Integration. 50 Years of the Treaty of Rome*, (Palgrave MacMillan, 2009), 93.

