

European Competition Soft Law in European Courts: A Matter of Hard Principles?

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Abstract: *The recourse to soft law instruments in the competition law sector dates back to 1962. Even if arguments based on competition guidelines or notices were brought to court since early days, it is only during the last two decades that the European Courts seem to take them seriously. The present paper offers several possible explanations to the recent increase in number of references to soft law instruments in the judgments and orders of the European Courts and the opinions of the Advocates General. It points out that soft law instruments are taken into account by the European Courts when this serves the enforcement of hard, general principles of law.*

I. Introduction

On 13 December 1989 the Court of Justice was deciding the case of Mr Salvatore Grimaldi, a migrant worker of Italian nationality suffering from a disease of the hands caused by mechanical vibrations from the use of a pneumatic drill.¹ The Belgian *Fonds des maladies professionnelles* refused to compensate his damage because Dupuytren's contracture was not mentioned in the Belgian schedule of occupational diseases. However, it was mentioned in the relevant European schedule, which a Recommendation of the Commission advised to be introduced in the national law. Recommendations were, according to article 189 EC, deprived of legally binding force, but the ECJ considered that this did not mean that they were deprived of legal effects as well. Therefore, they had to be “taken into account” by judicial authorities when deciding on disputes submitted to their judgment.

The ongoing research on which the present paper is based explores how the European Courts “take into account” non binding legally instruments such as the notices and the guidelines issued by the European Commission in the competition law sector. The qualitative and quantitative analysis of the data collected so far reveals the fact that soft law is more and more referred to in the judgments, orders and opinions issued in Luxembourg. During the last years the European Courts recognized legal effects and accepted article 241 objections of illegality of notices and guidelines, judged on matters such as their non-retroactivity and stated that under certain circumstances, soft law instruments are binding on the Commission. All these elements could raise doubts as to the true nature of soft law, and it is legitimate to wonder whether soft does not transform into hard by the intervention of the European judicature. The question arises whether, while featuring to a large extent in the case law of the European Courts, the notices and guidelines issued by the European Commission in the

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¹ Case C-322/88 *Grimaldi*

competition law sector do not lose their ‘soft’ characteristics and are not judicially transformed into hard law.

This paper is organised as follows: The first part briefly examines the notion of *soft law* as dealt with in recent literature on the topic of European governance and gives an overview of the scope of the present research. The second part presents chronologically the attitude of the European Courts towards the notices and the guidelines of the Commission. This shifted from initial reticence and reluctance to recognize effects to soft law instruments to referring to them on a frequent basis from 1990-2000 on. The third part explores the notion of “taking into account” of soft law provisions, while delving into the text of the judgments, orders and opinions that make the object of the present research. The analysis whether the notices and guidelines preserve their characteristics after the intervention of the Courts draws on the soft law definition construed by Snyder² and on Wellens and Borchardt’s³ theory of judicial transformation of soft into hard law.

II. The soft law phenomenon

A. European governance, soft law and institutions

Recommendations, opinions and other instruments not mentioned in article 249 EC (previously art 189) such as communications, notices or guidelines are generally referred to in the academic literature as “soft law”, even though this term is not used to a large extent in the case law of the European Courts. The most frequently quoted definition is the one by Snyder, according to whom soft law instruments are “rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.”⁴ The recourse to soft law instruments has been granted high importance in the implementation of the principles of subsidiarity and proportionality⁵ and it has been encouraged by the White Paper on European Governance⁶. Nowadays, soft methods of governance are being put into practice in sectors such as employment or the monetary union.⁷

The use and the status of soft law are largely debated issues in the EU law academic writing. The central question addressed in the literature is whether, while not prescribing obligations, soft law instruments may be effective and bring changes on the “political, economic and social life outside the law.”⁸ Depending on their ontological and epistemological stands, scholars have found various virtues or shortcomings for the use of soft law in international relations⁹ and in European affairs.¹⁰ Researchers expressed the view that the effectiveness of

² F Snyder ‘Soft Law and Institutional Practice in the European Community’, (1993) EUI Working Papers (Law) No. 93/5

³ GM Borchardt and KC Wellens, ‘Soft Law in European Community Law’ (1989) 14 (5) ELRev 267

⁴ F Snyder ‘Soft Law and Institutional Practice’ *op cit*

⁵ Conclusions of the Presidency, European Council in Edinburgh, 11-12 December 1992

⁶ European Commission: European Governance A White Paper, Brussels, 25.7.2001 COM (2001) 428 final

⁷ The open method of coordination (OMC)

⁸ F Snyder 1995 *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques* in T Daintith *Implementing Ec Law in the United Kingdom: Structures for Indirect Rule*, pp. 51-87

⁹ For a rationalist approach to the soft law phenomenon see K Abbot, D Sindal ‘Hard and Soft Law in International Governance’ (2000) 54 (3) IO 421; for a constructivist approach to the soft law phenomenon see Finnemore, Toope ‘Alternatives to “Legalization”: Richer Views of Law and Politics’, (2001) 55 (3) IO 743

¹⁰ On the different views of contextualists and formalists see L Senden *Soft Law in European Community Law* (Hart Publishing, 2004); F Beveridge, S Nott ‘A hard look at soft law’ in Craig and Harlow (eds), *Lawmaking in the European Union* (Kluwer 1998); on the different views of constructivists – rationalists and the proposal to merge the two perspectives: D Trubek, P Cottrell, M Nance, “Soft law”, “Hard law”, and European Integration:

European soft law instruments lays in the fact that they may change the behaviour of governmental and legislative bodies and hence they constitute a “desirable alternative rather than simply a second best solution or a way station towards hard law.”¹¹ Furthermore, soft law instruments are sometimes qualified as tools suited to address sovereignty costs and uncertainty in European affairs,¹² having the ability to resolve negotiation ‘deadlocks.’¹³

As the political and administrative bodies made recourse to soft law in their activity, the possibility of soft law instruments to be brought to court increased. Indeed, through the years, the European Courts have been called to assess the justifiability and the validity of soft law instruments as well as their legal effects. The landmark case is the above mentioned *Grimaldi*, but it rather opens than solves the questions related to the attitude of the Courts towards soft law instruments. A thorough research on this topic might shed light on the nature and legal effects of soft law instruments as well as on the role of the European Courts in the process of European integration. However, little has been written on the attitude of courts towards soft law instruments.¹⁴

B. European competition law, soft law and European courts: an ongoing research

An interesting field where such a study could be undertaken is the competition law field, a field characterised, since an early age, by an abundance of soft law instruments. Moreover, arguments based on soft law instruments have been put forward in trials before the ECJ since the 1970s.¹⁵ Recently, a “legal and cultural revolution”¹⁶ has taken place in European competition law and the courts of the member states have been called to deal with European competition cases, and implicitly with European soft law.

This paper draws on an ongoing research in the areas of articles 81, 82 EC and of mergers. The research covers a timeframe from 30/10/1953 to 01/10/2007 and it comprises 155 documents – judgments and orders of the ECJ and of the CFI, as well as opinions of the Advocates General – that refer to soft law instruments in the form of Commission guidelines and notices. It reveals that in the early days of European competition law the Courts and the Advocates General were reluctant to cite soft law instruments in their judgments or

Toward a Theory of Hybridity’ Jean Monnet Working Paper 02/05 available at <http://www.jeanmonnetprogram.org/papers/05/050201.html> (consulted 09/05/2007)

¹¹D Trubek, P Cottrell, M Nance *op cit*

¹² D Hodson and I Maher ‘Soft law and sanctions: economic policy co-ordination and reform of the Stability and Growth Pact’ (2004) 11 JEPP 798

¹³ A Schäfer ‘A new form of governance? Comparing the open method of co-ordination to multilateral surveillance by the IMF and the OECD’ (2006) 13 (1) JEPP 70; H Hillgenberg ‘A fresh look at soft law’ (1999) 10 EJIL 499

¹⁴ J Klabbers (‘Informal instruments before the European Court of Justice’ (1994) 31CMLRev 997; ‘The Redundancy of Soft law’ (1996) 65 Nordic Journal of International Law 167; ‘The Undesirability of Soft Law’ (1998) 67 Nordic Journal of International Law 381) proclaimed the undesirability and the redundancy of soft law, and H Hofmann (‘Negotiated and Non-Negotiated Administrative Rule-Making: the Example of EC Competition Policy’ (2006) 43 CMLRev 153) underlined its virtues in increasing transparency and effectiveness.¹⁴

¹⁵ Case 1/71 *Cadillon v Firma Höss* [1971] ECR 351; Case 22/71 *Béguelin* [1971] ECR 949

¹⁶ KD Ehlermann ‘The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution’ (2000) 37 CMLRev 537. The “revolution” is constituted by the enactment of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

opinions.¹⁷ First mentions of competition soft law instruments in the case law of the European Court date back to the 1980s¹⁸, but the number of such cases starts to raise in the 1990s, registering a significant and sudden boost from 2000 on. This increase coincides with the development of a line of reasoning for dealing with soft law arguments, which appears to grant high importance to the general principles of law.

At this point mention should be made of the caveats determined by the ongoing character of the research undertaken. First, this research covers only soft law instruments in the form of notices and guidelines, and it is not completed with regards to other forms of soft law, such as comfort letters, competition reports, communications and recommendations. Nevertheless, it includes some information related to this type of instruments. Moreover, it is interesting to note the fact that terms such as communication, notice and guideline do not necessarily designate different type of documents. In fact, the Commission uses them interchangeably¹⁹ and in support of this statement it is necessary to quote the title of the 'Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty.'²⁰ Second, the field of research is limited to competition law. It does not yet include state aid, but preliminary investigations show similar patterns in the approach of the Court to soft law instruments in this sector.

Another caveat is determined by the paramount difficulty to undergo a complete analysis of all the cases where the courts and the Advocates General did *not* take soft law into account, even if they should have. There are three reasons for this. First, it is practically impossible, while doing a word search, to find all the cases where soft law instruments might have been applicable but they were not mentioned in the text of the judgments, orders or opinions. Consequently, it is feasible to retrieve only those judgments, orders or opinions in cases where soft law instruments were mentioned by the parties, but the Courts or Advocates General disregarded them and those judgments in the cases where the Advocates General referred to soft law instruments, but the Court did not mention them. Second, the interpretation of the Court of certain hard law provisions might coincide sometimes with the interpretation given by the Commission in soft law instruments. However, it is hazardous to speculate whether soft law provisions were actually taken into account in such cases, if they were not referred to in the text of the document. All that can be done in these situations is to assess the consistency of the judgment, order or opinion with the soft law instrument. Third, it is equally hazardous to assess the reasons why the Court did not mention soft law instruments in certain judgments. For all these feasibility reasons, the decision taken was not to include such cases in the scope of this research, even though interesting conclusions might be drawn also from the silence of the Courts.

¹⁷See for instance the submissions of Advocate General Dutheillet de Lamothe in Case 1/71 *Cadillon v Firma Höss* [1971] CMLR 420; the opinion of Advocate General Warner in Cases 19-20/74 *Kali und Salz AG and Kali-Chemie v E.C. Commission* [1975] 2 CMLR 154 discussed below

¹⁸ First mention of comfort letters in Joined cases 253/78 and 1 to 3/79 *Procureur de la République and others v Bruno Giry and Guerlain SA and others* [1980] ECR 2327 and in Case 99/79 *Lancôme v Etos* [1980] ECR; first mention of the *de minimis* notice in Case 319/82 *Societe de Vente de Ciments et Betons de l'Est* [1985] 1 CMLR 511

¹⁹ H Cosma and R Whish, 'Soft Law in the Field of EU Competition Policy' (2003) 14 EBLRev 25

²⁰ [2004] OJ C101/97

III. The post 2000 boost in references to soft law instruments: a quantitative analysis of the case law

A. Chronology of the references

European soft law dates back to 1962,²¹ when the European Commission was issuing the ‘Christmas notices,’ a Notice on exclusive dealing contracts with commercial agents²² and a Notice on patent licensing agreements.²³ As Goyder remarks, the Notice on agents was the first one of a whole series of notices meant to “enable undertakings to decide their legal position under Article 81(1) and to discourage them from filing unnecessary and purely precautionary notifications.”²⁴ The last sentence of the Notice provided that it did not limit in any way the possibility of the Court to give a different reading to article 81. Thus, the monopoly of interpretation of Community law, entrusted by the Treaty to the European Court remained intact. These first two notices were scarcely brought to court, but there were several instances where the parties made reference to the Notice on agents in order to support their arguments.²⁵ However, it was only in 1995²⁶ that the Court mentioned this instrument in the text of its judgment.

Even though the first soft law instruments date back to the 60s, and their number increases in the following two decades, when important notices and guidelines were enacted²⁷ and subsequently amended, the Courts and the Advocates General were reluctant to mention them in their judgments and opinions. The overall number of documents mentioning soft law instruments in the form of notices and guidelines before 2000 is 41, as opposed to 114 after 2000. The question is what explains such a sudden and important boost of the number of references to soft law instruments in the case law of the European Courts. At this stage of research, two explanations might be put forward, one related to arguments of a contextual nature, and the other related to the nature of the soft law instruments mentioned in the documents analyzed.

²¹ L Senden and S Prechal, 'Differentiation in and through Community Soft Law' in B de Witte, D Hanf and E Vos (eds) *The many faces of differentiation in EU law* (Intersentia, Oxford ; Antwerpen 2001)

²² [1962] OJ 139/2921

²³ [1962] OJ 139/2922

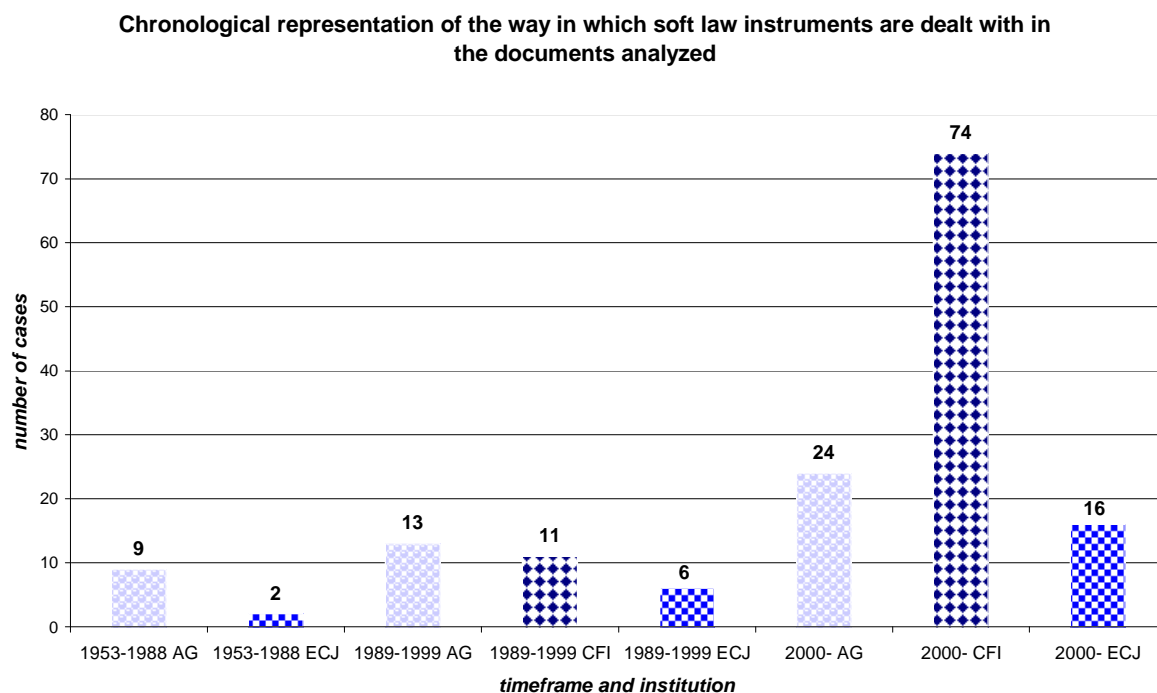
²⁴ DG Goyder, *EC Competition Law* (Oxford EC Law Library, Oxford, 2003) pp 165

²⁵ Opinion of Advocate General Sir Gordon Slynn in Case 243/83 SA Binon & Cie v SA Agence et messageries de la presse [1985] ECR 02015; Case 311/85 ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten [1987] ECR 3801

²⁶ Case T-14/93 *Union internationale des chemins de fer v Commission* [1995] ECR II-01503

²⁷ Commission Notice of 27 May 1970 concerning agreements, decisions and concerted practices of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community [1970] OJ C64/1

Chart 1



(Source: compiled by the author from the ECR)

B. Taking the context seriously

The importance of situating legal documents in their context has been underlined in EU studies.²⁸ In order to better understand a certain shift in case law it is necessary to look at the ‘broader picture’ constituted by the contemporary political, social or legal changes. Explaining the chronological puzzle identified above should therefore start from acknowledging that several issues needed to be addressed at the beginning of the 21st century in European governance. The necessity to simplify procedures and treaties, the democratic deficit, the gap between Europe and its citizens, the enlargement, the role of the Union in the world, are but a few of the challenges to the process of European integration.

In 2001 the European Commission published a White Paper on governance whose declared purpose was to uphold greater openness, accountability and responsibility for all those involved in the process of European integration. Among others, it promoted flexibility in legislation and the recourse to soft methods of governance, such as the open method of coordination. Likewise, it suggested that non binding legal instruments should be coherently combined with hard legislation in order to timely and effectively deliver better regulation. It could be submitted therefore that the attitude of Courts to take more into consideration soft law instruments once the new millennium commenced corresponds to the trend to make more use of non legally binding tools, as expressed by the White Paper on Governance.²⁹

²⁸ See on this point, among others, F Snyder *New Directions in European Community Law* (Weidenfeld and Nicolson 1990)

²⁹ In the same vein, an interesting point was developed by Scott and Sturm ('Courts as Catalysts: Rethinking the Judicial Role in New Governance' (2007) 13 (3) *Columbia Journal of European Law*). They suggest that courts exercise a limited function of catalysts for new governance development.

Another contextual reason for the increase in the number of references to soft law instruments is the creation of the Court of First Instance in 1989. It appears from Chart 1 above that the number of these references at the level of the Court of First Instance is much higher than at the level of the Court of Justice. Proportionally, the Court of Justice refers less to notices or guidelines than the Court of First Instance does. As shown in Table 1 below, the ratio between the number of cases where soft law instruments were mentioned and the total number of competition law cases decided yearly by each Court is clearly bigger at the Court of First Instance level. The fact that the Court of First Instance analyses more readily arguments based on soft law instruments is not specific for the competition law field. It should be recalled at this point that the first mentions of the EU Charter of Fundamental Rights belong to this court.³⁰ This could be explained by a concern to thoroughly motivate judgments at the first instance level, taking into consideration the possibility of appeal.

Table 1

Number of cases referring to soft law instruments versus total number of competition cases decided yearly by the Courts (2000-2006)

| Year | ECJ competition cases where soft law instruments were mentioned ³¹ | ECJ competition cases completed ³² | Ratio ECJ soft law/total cases | CFI competition cases where soft law instruments were mentioned ³³ | CFI competition cases completed ³⁴ | Ratio CFI soft law/total cases |
|------|---|---|--------------------------------|---|---|--------------------------------|
| 2000 | 0 | 22 | 0% | 0 | 61 | 0% |
| 2001 | 0 | 16 | 0% | 5 | 21 | 23,81% |
| 2002 | 1 | 14 | 7,14% | 10 | 40 | 25,0% |
| 2003 | 0 | 13 | 0% | 22 | 38 | 57,89% |
| 2004 | 1 | 29 | 3,45% | 5 | 26 | 19,23% |
| 2005 | 3 | 17 | 17,65% | 11 | 35 | 31,43% |
| 2006 | 6 | 30 | 20% | 13 | 42 | 30,95% |

C. Taking the content seriously

Appealing as they might be, all these arguments related to the historical context cannot be complete without an in depth analysis of the judgments, orders and opinions that make the object of this research. The research reveals the fact that, of 155 cases analysed, the cases mentioning the Guidelines on the method of setting fines³⁵ and the Leniency notice³⁶ account for 57%. As shown in Chart 2, the rest of 43% contain references to various other 25

³⁰ Case T-54/99 *max.mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313; Case T-177/01 *Jégo-Quéré et Cie SA v Commission* [2002] ECR II-2365

³¹ Compiled by the author from the ECR

³² Source: the “Statistics of the Judicial Activity of the Court of Justice”, available at <http://curia.europa.eu/en/instit/presentationfr/index.htm> (accessed 20/04/2007)

³³ Compiled by the author from the ECR

³⁴ Source: the “Statistics of the Judicial Activity of the Court of First Instance”, available at <http://curia.europa.eu/en/instit/presentationfr/index.htm> (accessed 20/04/2007)

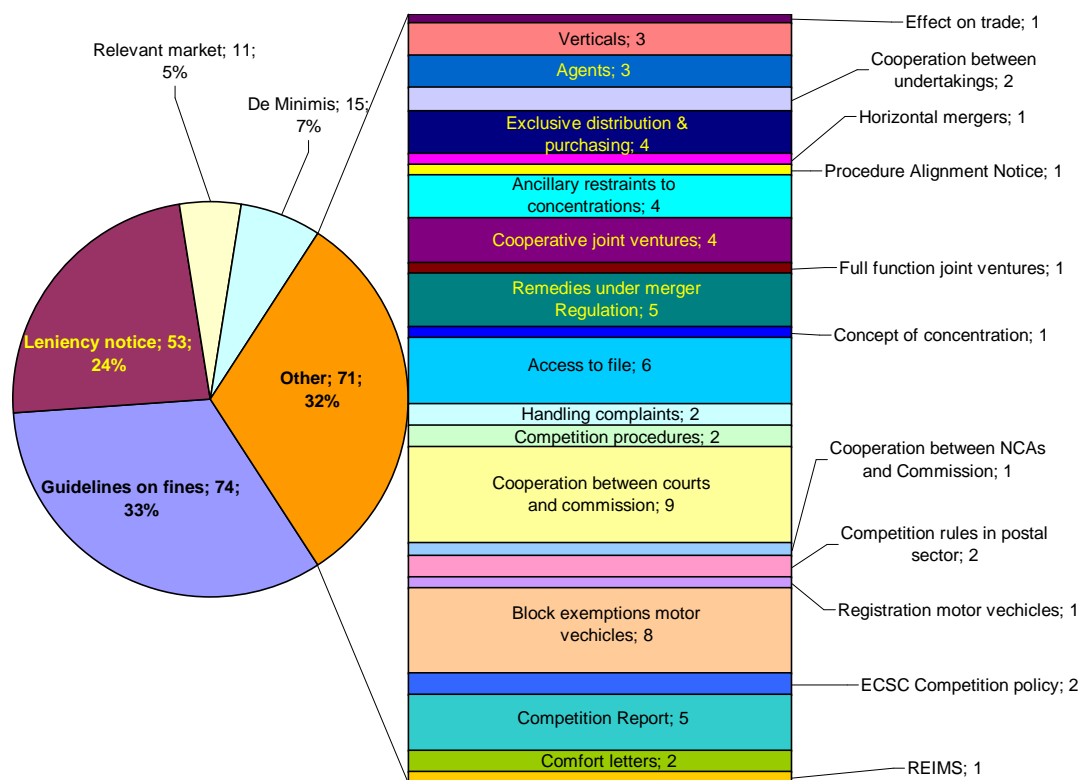
³⁵ Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, [1998] OJ C9/3

³⁶ Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4

instruments, including among others the *de minimis* Notice,³⁷ the Notice on the definition of the relevant market,³⁸ and the Notice on the cooperation between the national courts and the Commission.³⁹ The Guidelines on fines and the Leniency notice were enacted in the second half of the 1990s, and the first proceedings involving these two types of soft law instruments were introduced during the same period, but decided only from 2000 on.⁴⁰

Chart 2

The frequency of specific soft law instruments in the judgments, orders and opinions analyzed



(Source: compiled by the author from the ECR)

Therefore, an explanation for the increase in the number of references to soft law instruments in the case law of the European Courts might be that the fairly recent Guidelines on fines and Leniency notice have a different nature from the other types of soft law instruments, and are more likely to be brought to court. Indeed, as they related directly to the way in which the Commission fixed fines for the competition rogues or exonerated the whistle blowers, the chances for these particular soft law instruments to be mentioned in trials before the

³⁷ Commission Notice on agreements of minor importance which do not fall within the meaning of Article [81](1) of the [EC] Treaty [1970], [1986], [1997], [2001]

³⁸ Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C372/5

³⁹ Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty [1993] OJ C39/16

⁴⁰ First mention of the Guidelines on fines in Opinion of Advocate General Mischo in Case C-298/98 *Metsä-Serla Oyj v Commission* [2000] ECR I-10065; first mention of the Leniency Notice in Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others v Commission* [2001] ECR II-2035

European Courts are significantly higher than in the case of the Guidelines on verticals,⁴¹ for instance, that could be assimilated to standard contract forms.

Another reason for the increase in number of references might be that, naturally, also the number of soft law instruments increased since the early years of competition law. As a preliminary (and not thoroughly finalized) compilation undertaken by the present author from the annual competition reports shows, the number of notices and guidelines enacted before 1990 is 20; between 1990 and 1999 it is 31 and after 2000 – 26.

It can be therefore submitted that both the enactment of the Guidelines on fines and the Leniency notice and the higher number of soft law instruments contributed to the boost of the references to non legally binding provisions in the case law of the European Courts. At this point, it is necessary to refer to the models of neo-functionalism developed by Mattli/Slaughter⁴² and Stone Sweet/Brunell⁴³ that grant high importance to the role of private parties in the development of the jurisprudence of the European Courts. Indeed, the increasing number of soft law instruments determined the litigants to bring more arguments based on this type of provisions in order to support their claims in trials before the ECJ or the CFI. This created the necessary litigation supply for the Courts and the Advocates General to deal more with soft law instruments than they did in the period before the 1990s, and it enhanced the likeliness for a consistent line of reasoning to develop.

From the present quantitative analysis it results that soft law instruments are taken into account at a larger extent now than they were in the early case law of the European Courts. A qualitative analysis of the documents that make the object of the present research reveals the fact that a significant number (64) contain simple mentions to soft law instruments. Sometimes the Court quotes a certain notice or guideline in the description of the legal framework that is taken into account when deciding the case,⁴⁴ or refers to it in order to reinforce a certain argument.⁴⁵ Several references to soft law provisions can be found also in the footnotes of the Advocates' General opinion.⁴⁶ Other documents contain more detailed examination of soft law instruments, discussing issues pertaining to their legal effects, their justifiability, their validity and their compliance with principles such as non-retroactivity. It seems important at this point to briefly outline the results of the qualitative analysis undertaken.

⁴¹ Commission notice - Guidelines on Vertical Restraints [2000] OJ C291/1

⁴² W Mattli and A-M Slaughter, 'Revisiting the European Court of Justice' (1998) 52 (1) IO 177

⁴³ A Stone Sweet and TL Brunell, 'The European Court and the national courts: a statistical analysis of preliminary references, 1961-1995' (1998) 5 (1) JEPP 66

⁴⁴ Case C-301/04 *Commission v SGL Carbon* [2006] ECR I-5915 on the Guidelines on fines

⁴⁵ Case T-201/04 *Microsoft Corp v Commission* [2007] nyr and Case T-61/99 *Adriatica di Navigazione v Commission* [2003] ECR II-5349 on the Notice on the definition of the relevant market; Case C-91/95 *Tremblay and others v Commission* [1996] ECR I-05547 on the Notice on the cooperation between the national courts and the Commission; Case T-59/99 *Ventouris v Commission* [2003] ECR II-5257 on the *de minimis* notice.

⁴⁶ Opinion of the Advocate General Tesauro in Case C-70/93 *Bayerische Motorenwerke* [1995] ECR I-03439 on the Notice on exclusive distribution and exclusive purchasing agreements; Opinion of Advocate General Jacobs in Case C-7/97 *Oscar Bronner* [1998] ECR I-07791 on the Notice on the definition of the relevant market

IV. Judicial transformation of soft into hard law? A qualitative analysis of the case law

As a preliminary point, it is worth reminding the soft law definition quoted at the beginning of this paper: ‘rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.’⁴⁷ The legal scholarship expressed the view that soft law can lose its characteristics and become hard law by the intervention of the courts.⁴⁸ It has also been pointed out the fact that soft law does not amount to ‘real law’, the notion in itself is redundant and whenever a Court is confronted with such an instrument it will recast it in the more familiar, hard sources.⁴⁹ In the same vein, it is interesting to draw attention on a matter of terminology, as soft law is referred in French as *droit mou* or *droit vert*,⁵⁰ thus conveying a temporal dimension and the idea of a necessary transformation from ‘non-law’ or ‘pre-law’ to ‘true law.’

The following analysis notes that the European Courts recognize effects to soft law instruments by stating that the Commission *binds* itself by the rules it lays down in guidelines, notices or reports. It establishes how soft law is perceived by the European Courts, whether it is considered an intermediary version of ‘law’ or a distinct type of norm. Likewise, it determines whether the guidelines and notices transform, by judicial intervention, into hard law.

A. Legal effects of soft law instruments and the obligations of the Commission

First mentions of Commission notices are found in several opinions of the Advocates General who appear to be unwilling to recommend the Court to use this type of instruments in its judgments. The opinions deal with the *de minimis* notice. This notice was enacted on 27 May 1970 by the Commission as a follow up to judgments of the Court⁵¹, and it proclaimed that agreements that have an insignificant effect on trade between Member States and competition escape from the prohibition under article 81 EC. The principle that the interpretation of hard provisions lies only with the European Court was restated in section I of the notice. Relying on this principle, in *Cadillon v Firma Hoss Maschinenbau*⁵² Advocate General Dutheillet de Lamothe considered that the Court should not refer to the *de minimis* notice in its judgment, since it was meant only for guidance and did not have a normative value. In 1975, Advocate General Jean-Pierre Warner expressed a similar view, emphasising the fact that the Notice, subject to the Court’s interpretation, did not have binding legal effect.⁵³ In his opinion in the *Miller* case he suggested that

‘In a case where an undertaking had, in bona fide reliance on the terms of the Notice, proceeded on the assumption that an agreement to which it was a party was outside the prohibition in Article 85 (1), it may be that a sort of estoppel would arise precluding the

⁴⁷ See on this point, GM Borchardt and KC Wellens *op cit*

⁴⁸ See on the transformation of soft law into hard law F Snyder, ‘The Effectiveness of European Community Law’ *op cit*

⁴⁹ J Klabbbers, ‘The Redundancy of Soft Law’ *op cit*

⁵⁰ R.J. Dupuy ‘Droit déclaratoire et droit programmatore: de la coutume sauvage à la “soft law”’ in *L’élaboration du droit international public, Colloque de Toulouse, Société Française de Droit International* (Pedone, Paris, 1975) pp. 132-148 quoted by Borchardt and Wellens *op cit*

⁵¹ Case 5/69 *Frans Völk v Vervaecke* [1969] ECR 295

⁵² Submissions of Advocate General Dutheillet de Lamothe in Case 1/71 *Cadillon v Firma Höss*

⁵³ Opinion of Advocate General Warner in Cases 19-20/74 *Kali und Salz*

Commission from subsequently fining that undertaking on the ground that the agreement was in fact within the prohibition.’⁵⁴

Thus, soft law instruments are not totally deprived of legal effects in the opinion of Advocate General Warner. From the passage quoted above two conclusions might be drawn. First, it suggests that undertakings are likely to rely on the provisions of *de minimis* notice when they are concluding agreements. Second, and stemming from the first, the Commission’s power to impose fines on undertakings is limited by the conditions it itself laid down in this particular soft law instrument. The *de minimis* notice produces therefore legal effects, but it also binds to a certain extent the Commission. This position was restated and refined in the recent case law of the Courts.

In 1991 the Court of First Instance stated, in *Hercules Chemicals*⁵⁵ that the Commission cannot depart from the rules it imposed on itself in the Twelfth Competition Report.⁵⁶ Accordingly, it had to comply more stringent rules than those jurisprudentially established in the field of access to files and rights of defence. This judgment was confirmed in appeal by the ECJ.⁵⁷ The Commission had therefore to make available to the undertakings involved in art 85 (now art 81) procedures all documents that it obtained during the course of investigation, even though in previous judgments the Court considered that this obligation cannot be inferred from any of the existing legal provisions. The Court further circumstantiated the tenet that the Commission is bound by the rules it enacted by soft law instruments. Thus, in later case law, it was found that by the adoption and the publication of notices or guidelines the Commission imposed a limitation on its power and had to adhere to the rules laid down therein.⁵⁸

The idea that the Commission limits its own power and discretion by issuing guidelines and notices is expressed in most of the judgments and opinions analyzed in the framework of this research. Furthermore, it should be noted that one of the arguments put forward by the applicants against decisions addressed to them is that they infringe instruments such as the Guidelines on fines, the Leniency notice, or the Remedies notice.⁵⁹ Rather than ignoring these arguments, the Court assesses them in detail. Ample space is thus reserved in the post-2000 case law to the analysis of the conformity of Commission’s decisions to the notices, guidelines or reports issued in a particular field.⁶⁰ The number of the cases where the Courts found that the Commission breached the rules it imposed on itself is not insignificant.⁶¹

In the light of the recent post-2000 case law developments, the question arises whether documents such as notices, guidelines, or competition reports preserve their features. If we consider that soft law instruments are, by definition, not legally binding, it might be submitted that by acknowledging the fact that they can impose obligations, the Courts endow them with certain hard law characteristics. Legal scholarship expressed legitimate concerns

⁵⁴ Opinion of Advocate General Jean-Pierre Warner in Case 19/77 *Miller* [1978] 2 CMLR 334

⁵⁵ Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-01711

⁵⁶ Twelfth Report on Competition Policy- 1982 [1983]

⁵⁷ Case C-51/92 *Hercules Chemicals v Commission* [1999] ECR I-04235

⁵⁸ See on this point Case T-23/99 *LR af 1998 A/S v Commission* [2002] ECR II-1705; Case T-31/99 *ABB Asea Brown Boveri v Commission* [2002] ECR II-1881

⁵⁹ Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 [2001] OJ C68/ 3

⁶⁰ See for instance the lengthy argumentation in the recent judgment in the case Case T-282/06 *Sun Chemical* [2007] nyr

⁶¹ So far, this research identified 13 such cases. The caveats expressed at the beginning of this paper apply.

vis-à-vis this approach. It has been pointed out that the enactment of this type of instruments lacks procedural legitimacy, the complicated terms in which they are drafted increases legal uncertainty and there is no possibility for individuals to challenge them via article 230.⁶² It is self obvious that all these shortcomings would only become graver if soft law became hard by simple judicial recognition. Thus, it has been argued that this approach could open the way to bypassing the decision making procedures established by the Treaties and it could increase the likeness of an abuse of power from the part of the Commission.⁶³

The judicial transformation of soft into hard law can have, therefore, serious consequences on the Community legal system and might infringe basic constitutional principles related to law making. Nevertheless, the results of this research reveal that, while the European Courts do take into account soft law instruments more and more after the year 2000 they do not transform it into hard law. This is for a number of reasons. A first set of reasons relate to the way in which Courts perceive the notices and the guidelines of the Commission, and classify them within the hierarchy of Community norms. Second, while the obligation to observe soft law instruments binds the Commission, it does not extend to the judicature. Third, and most important, the sources of this obligation should be looked for elsewhere than in the soft law instruments themselves.

B. *The legal status of notices and guidelines*

A first argument concerns the way in which soft law instruments are perceived by the European Courts, and relates to terminology. It is constantly emphasized that the notices or the guidelines enacted by the Commission are not *rules of law* that the administration is always bound to apply but *rules of practice*.⁶⁴ This argument of a linguistic nature can be backed up by a comparison with the French version of the judgment: '[...] elles [les lignes directrices] ne sauraient être qualifiées de *règle de droit* à l'observation de laquelle l'administration serait, en tout cas, tenue, elles énoncent toutefois une *règle de conduite indicative de la pratique à suivre* [...]'⁶⁵ (emphasis added). Thus, even if the court does not use the term 'soft law'⁶⁶ it makes a clear distinction between rules of law/règles de droit and rules of practice/règles de conduite.

Another argument in favour of the idea that the notices and the guidelines do not have, in the Courts' opinion, the same status as hard law instruments is the fact that they are not considered being the legal basis of the decisions taken by the Commission. For instance, in the fines cases, the Court always stresses the fact that the guidelines do not constitute the legal basis that determines the amount of fines, which can be found in the provisions of Regulation 17.⁶⁷ Furthermore, the judgments and opinions analyzed underline the fact that the

⁶² HCH Hofmann, *op cit*

⁶³ H Cosma and R Whish, *op cit*

⁶⁴ Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri and others v Commission* [2005] ECR I-5425 para 209; Case C-167/04 *JCB Service v Commission* [2006] ECR I-8935 para 207

⁶⁵ *ibid*

⁶⁶ A word search on www.curia.europa.eu revealed 4 hits, all Advocates' General opinions. One of them is in the field of state aid, where the Community Guidelines on State aid for small and medium-sized enterprises are designated by the term 'soft law' (Opinion of Advocate General Jacobs in case C-91/01 *Italy v Commission*)

⁶⁷ Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri* paras 207 and 208, Case T-9/99 *HFB Holding and others v Commission* [2002] ECR II-1487 para 418; Case T-329/01 *Archer Daniels Midland v Commission* [2006] ECR II-1487 para 19; Case C-3/06 *Groupe Danone v Commission* [2007] nyr para 23

guidelines and notices cannot depart from the provisions of Treaty⁶⁸ or of other ‘higher-ranking law.’⁶⁹ The principle that soft law provisions cannot modify hard law was consecrated for the first time in *Soba*,⁷⁰ and restated in the competition law field since early case law. Thus, in cases dealing with competition in the motor vehicles sector, the Court held that communications are interpretative documents that cannot modify the imperative rules contained in a regulation.⁷¹

Guidelines and notices cannot depart from previous case law either.⁷² This has been identified in the literature as an expression of the monopoly of interpretation of European hard law, entrusted by the articles 220 and 234 EC to the European Courts. According to this view, the soft provisions the Commission adopts are valid only if they do not contradict the way in which the Court has chosen to interpret the Treaty or a certain regulation.⁷³ In many of the cases it has been concluded that the guidelines or the notices reflect the case law of the European Courts.⁷⁴

Nevertheless, all these arguments should not lead to the conclusion that soft law instruments are simply not considered to be a part of the European normative framework. It is difficult to agree with that part of scholarship that submits that soft law is simply a tool that courts may use as they please in order to enforce their legal reasoning⁷⁵ and it does not constitute ‘true’ norms.⁷⁶ This is primarily because, as discussed in the previous sections, this type of instruments features more and more in the documents analysed. Four more arguments seem to go against these theories as well.

First, in the judgment *Dansk Rørindustri*, the Court of Justice held that ‘having particular regard to their legal effects and to their general application [...] such rules of conduct come, in principle, within the principle of ‘law’ for the purposes of Article 7(1) of the ECHR.’⁷⁷ Second, even though the Guidelines do not constitute the legal basis for the fine, they make part of the legal framework of the fining decision. The Courts decided that the duty to state reasons (art 253 EC Treaty) and the rights of defence are not infringed by the fact that the Commission does not always quote the Guidelines in the text of the fining decision. Since the Commission undertook to apply them to future situations, the undertakings should have been aware that they form part of the legal framework applicable.⁷⁸ Third, the Court pointed out

⁶⁸ Case T-114/02 *BaByliss v Commission* [2003] ECR II-1279 para 143; Case T-119/02 *Royal Philips Electronics v Commission* [2003] ECR II-1433 para 242; Case T-329/01 *Archer Daniels Midland* para 279

⁶⁹ Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon v Commission* [2005] ECR II-10 para 157; Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri* para 252; Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon v Commission* [2004] ECR II-1181 para 157

⁷⁰ Case C-266/90 *Soba* [1992] ECR I-287 (dealing with agriculture)

⁷¹ Case T-9/92 *Peugeot v Commission* [1993] ECR II-493 para 44 confirmed in appeal Case C-322/93 *Peugeot v Commission* [1994] ECR I-02727; Case C-226/94 *Grand garage albigeois and others* [1996] ECR I-651 para 21; Case C-309/94 *Nissan France* [1996] ECR I-00677 para 22

⁷² Case T-9/99 *HFB Holding* para 446; Case T-65/99 *Strintzis Lines Shipping v Commission* [2003] ECR II-5433 para 168; Case T-213/00 *CMA CGM and others v. Commission* [2003] ECR II-913 para 262; Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri* para 261

⁷³ *Senden op cit* p 373

⁷⁴ Case C-308/04 *SGL Carbon v Commission* [2006] ECR I-05977 para 106; Case C-407/04 *Dalmine v Commission of the European Communities* [2006] ECR I-5977 para 142

⁷⁵ *Senden, op cit*

⁷⁶ J Klabbers, ‘The Redundancy of Soft Law’ *op cit*

⁷⁷ Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri* para 223

⁷⁸ Case T-31/99 *ABB Asea Brown Boveri* paras 257 and 258; Case T-44/00 *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223 para 213

the fact that the notices and guidelines have primacy over previous administrative practice of the Commission. Taking into account the discretion that the Commission enjoys when applying administrative rules, it can depart from its previous practice and can, for instance, decide to make more severe the fining regime whenever required by the market conditions and provided that hard law provisions are not infringed.⁷⁹ Fourth, the case law makes a clear distinction between draft soft law instruments and soft law instruments. In a recent case the Court of First Instance held that draft notices do not produce legal effects, and do not limit the power of the Commission in any way.⁸⁰ Indeed, they are meant only for consultation and their objective is to allow all the interested parties to express their view on a draft text that will become in the future soft law.

These arguments plead in favour of the idea that soft law is seen by the European Courts as a particular type of norms, complementary to (hard) laws and part of the broader normative framework they consider when judging cases submitted to their jurisdiction.

C. Are the courts bound by Commission soft law?

As it has been laid out previously, the fact that the soft law instruments in the competition law sector impose certain obligations thus limiting the discretionary power of the Commission cannot be disputed in the light of the recent case law. This may constitute an argument in favour of the transformation into hard law thesis. However, after a thorough look at the judgments and opinions that make the object of this research, it appears that the European Courts are not bound by the notices or guidelines. Besides being written down in the very text of instruments that make the object of this research, this assertion is one of the first formulated in the judgments and opinions studied with relation to competition soft law. At this point the opinion of the Advocate General in the *Miller* discussed above should be recalled. Likewise, in his opinion in the case *Societe de Vente de Ciments et Betons de l'Est*, Advocate General Van Themaat pointed out the fact that the *de minimis* notice does not bind the European Court and neither does it bind the national courts.⁸¹

In more recent case law⁸² it was confirmed that the Commission soft law in the competition sector cannot prejudice the view taken by the European judiciary. Thus, it cannot fetter the jurisdiction of the Court, who should not limit itself to determining whether the decision of the Commission is in line with the guidelines, but who is “under a duty to verify whether the amount of the fine imposed is proportionate in relation to the gravity and duration of the infringement, and to weigh the gravity of the infringement and the circumstances invoked by the applicant”.⁸³ An illustration of the exercise of the Court’s power in this matter is offered by the cases where it found that the guidelines on fines or the leniency notice were infringed. In those situations, the Court made use of its unlimited jurisdiction conferred by Regulation 17/62⁸⁴ and established itself the amount of the fine to be imposed on the undertaking

⁷⁹ Case T-23/99 *LR af 1998 A/S* para 233; Case C-397/03 *Archer Daniels Midland v Commission* [2006] ECR I-4429 para 19

⁸⁰ Case T-322/01 *Roquette Frères v Commission* [2006] ECR II-3137 paras 223 and 224

⁸¹ Opinion of the Advocate General in Case 319/82 *Societe de Vente de Ciments et Betons de l'Est* [1985] 1 CMLR 511

⁸² Case T-25/99 *Colin Arthur Roberts v Commission* [2001] ECR II-01881 para 120; Case T-368/00 *General Motors Nederland and Opel Nederland v Commission* [2003] ECR II-4491 para 188; Opinion of Advocate General Jacobs in Case C-167/04 *JCB Service v Commission* [2005] ECR I-8935 para 141

⁸³ Case T-49/02 *Brasserie nationale v Commission* [2005] ECR II-3033, para 170

⁸⁴ Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82(4) of the Treaty OJ 13, 21.2.1962, p. 204/62 repealed with effect from 1 May 2004

concerned.⁸⁵ Nevertheless, even though they are not binding on the Court, the soft law instruments adopted by the Commission can constitute ‘an useful point of reference.’⁸⁶

As to the national courts, two early cases⁸⁷ provide that the opinion expressed by the Commission in soft law instruments in the form of comfort letters constitute a factor that the national court may take into account when considering whether an agreement complies with competition rules. It is also the position expressed by Advocate General Van Gerven in 1990⁸⁸ with regards to the *de minimis* notice.

This is nevertheless the place to interject a caveat, since this case law should be read in conjunction with the judgment in the case *Grimaldi*, where it was held that ‘national courts are *bound* to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions’⁸⁹ (emphasis added). This judgment was considered to be ‘reminiscent of *Von Colson*’⁹⁰, which could lead to the idea that it introduces a duty of consistent interpretation for soft law instruments. Conversely, it was argued that the reading of *Grimaldi* should be stricter, and that the conclusion to be drawn from it should be that ‘recommendations should be considered a mandatory interpretation aid for national courts.’⁹¹

D. The source of Commission’s obligation and the importance of legal principles

In the cases that make the object of the present research, the Court appears to link the legal effects of soft law instruments and the limitation of the power of the Commission to principles of law such as legal certainty, equality and legitimate expectations. A good outline of this position is offered in the recent case *Dansk Rørindustri*.⁹² It was stated that after adopting and publishing the Guidelines on fines the Commission cannot depart from the provisions thereof “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.”⁹³

It is thus generally admitted by the Court that the adoption and the publication of notices and guidelines produces the legitimate expectation that the Commission will apply them in the cases it will deal with. As stated in the text of the soft law instruments that make the object of this research, they ensure the transparency and the objectivity in the activity of the Commission. They help the individuals to understand what the law is, what the boundaries of

⁸⁵ Case T-220/00 *Cheil Jedang Corp v. Commission* [2003] ECR II-2473 paras 92 et s; Case T-223/00 *Kyowa Hakko Kogyo v Commission* [2003] ECR II-2553 paras 77 et s; Case T-230/00 *Daesang v Commission* [2003] ECR II-2733 paras 53 et s

⁸⁶ Case C-310/99 *Italian Republic v Commission* [2002] ECR I-2289 para 52. This is a state aid case, that does not make part of the object of the current research. However, it seems necessary to quote it at this point, since the way in which it treats the guidelines of the Commission in this sector is practically identical to the way in which the ‘antitrust’ guidelines are treated in the judgments and opinions analyzed.

⁸⁷ Joined cases 253/78 and 1 to 3/79 *Procureur de la République and others v Bruno Giry and Guerlain SA and others* para 13 and Case 99/79 *Lancôme v Etos* para 11

⁸⁸ Opinion of Advocate General Van Gerven in Case C-234/89 *Stergios Delimitis v Henninger Bräu* [1991] ECR I-00935 para 22

⁸⁹ Case C-322/88 *Grimaldi*

⁹⁰ A Arnall, ‘The Legal Status of Recommendations’ (1990) 15 (4) ELRev 318

⁹¹ See on this point the debate in Senden *op cit* p 387-393

⁹² Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri*

⁹³ *Ibid* para 211

their actions should be, and what should they expect in case of infractions, thus increasing legal certainty. Furthermore, they ensure that alike cases are not treated in an unlike manner, and that the Commission follows the same criteria when it applies hard law instruments. The fact that the Commission has to comply with its guidelines and notices has its source, therefore, in legal principles, such as the protection of legitimate expectations, legal certainty and equal treatment.

The importance of the principles of equality and legal certainty is underlined by the judgments in the case *Archer Daniels Midland (ADM) v Commission*. The Court of First Instance⁹⁴ found that the fines were wrongly calculated by the Commission, who took into account only the worldwide turnover of ADM, and not the EEA turnover. However, it considered in its unlimited jurisdiction that the fine imposed in the case was proportionate, and dismissed the application. In appeal, the Court of Justice⁹⁵ found that the CFI erred in law by directly judging on the proportionality of the fine, after having established the infringement of the Guidelines by the Commission. The principles of equality and legal certainty required that the CFI determined first whether, in taking into account the EEA turnover, the fine nevertheless remained within the framework established by the Guidelines and only after this assessment should it have applied the principle of proportionality.⁹⁶

An interesting aspect that is worth discussing is that of justitiability of soft law instruments, another issue that brings forefront the question of legal principles. The Court had the opportunity to determine whether the Guidelines on fines are *justitiable* on several occasions. The procedure followed by the applicants was generally that of the objection of illegality mentioned in article 241 EC. In its judgments, the Court first underlined again the fact that the Guidelines did not constitute the legal basis of the decision in question. However, since they produced legal effects,⁹⁷ since they created legitimate expectations for the undertakings and since legal certainty required that the Commission applied them,⁹⁸ they could in principle make the object of an article 241 objection.⁹⁹ Because there was a direct legal connection between the general measure represented by the guidelines and the contested decision, the objection of illegality of the former was admissible.

Such solution is, in the opinion of this author, the right one. It should be point out the fact that the justitiability of soft law instruments cannot constitute an argument in favour of the ‘soft into hard’ thesis. The article 241 objection was admissible because of the fact that the Guidelines produced legal effects, and this is perfectly in agreement with the soft law definition quoted at the beginning of this paper. In the same vein, it can be submitted that subjecting norms capable to produce legal effects to judicial review is the normal course of action. Additionally, the obligation of the Commission to apply the norms it undertook appears to stem, again, rather from the principles of legitimate expectations and legal certainty than from the guidelines themselves.

⁹⁴ Case T-224/00 *Archer Daniels Midland v Commission* [2003] ECR II-2597.

⁹⁵ Case C-397/03 *Archer Daniels Midland*

⁹⁶ *Ibid*, para 93

⁹⁷ Case T-64/02 *Dr Hans Heubach v Commission* [2005] ECR II-05137 para 35

⁹⁸ Case T-23/99 *LR af 1998 A/S* para 274; Case T-9/99 *HFB Holding* para 418

⁹⁹ Opinion of Advocate General Antonio Tizzano in Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri and others v Commission* [2004] ECR I-05425 paras 54 et s and Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri* para 236

The plaintiffs sometimes argue that the Commission applied to their individual case soft law instruments that were not in force at the time when they committed a breach to competition law. In the case *LR af 1998 A/S v Commission* one of the arguments of the Court of First Instance was that the Guidelines on fines are not retroactive because they are in line with Regulation 17 and do not go against any hard law provision. Thus, the examination of non retroactivity amounted in fact to an examination of the legality of soft law instruments. In appeal, the Court of Justice found that this line of action is incorrect, because the analysis was based essentially on the assumption that the Guidelines were not part of the legal framework determining the amount of fines. Since the principles of legitimate expectations and legal certainty required that legal effects should be recognized to soft instruments, it meant that a more thorough investigation of the observance of the principle of non-retroactivity should have been undertaken.¹⁰⁰ The Court went on by a brief analysis of the case law of the European Court of Human Rights. Then, it pointed out the importance of the principle in the European legal order, and concluded that the adoption of new guidelines by the Commission constitutes a change in the enforcement of the competition policy in the matter of fines and “may have an impact from the aspect of the principle of non-retroactivity.”¹⁰¹

However, the Court noted that, according to the case law of the European Court of Human Rights, the principle of non-retroactivity would be infringed only if new and unforeseeable interpretative rules were applied to situations that had occurred before their entry into force. Therefore, in order to establish whether the principle of non retroactivity has been breached by the application of a new soft law instrument, the Court undertakes an assessment of the foreseeability of the instrument at stake. This analysis is closely connected with considering whether the principle of legitimate expectations was respected too. For instance, in the cases on fines included in this research, the Court concluded that the application of harsher rules was foreseeable, since there was nothing to entitle the undertakings to legitimately expect that the Commission will not raise the level of fines by reference to past situations.¹⁰²

From the case law quoted above two conclusions might be drawn. First, it appears that the European Courts take soft law instruments into account, as norms producing legal effects. This results from the fact that the article 241 objection of illegality is accepted, and the respect of the principle of non-retroactivity is analysed, even though the guidelines do not constitute the legal basis for the fines. Second, soft law is not judicially transformed into hard law. It seems necessary to bring into discussion at this point the work of Borchardt and Wellens. They argued that

‘From the moment in which and to such extent as the European Court uses rules of conduct, which until initiation of the procedure are labelled as Community soft law, as legal foundation, *ratio decidendi*, for a judgment, the formerly perhaps also disputed soft law character of the rules of conduct is substituted by an undisputable Community hard law nature’.¹⁰³

While acknowledging the inherent limits of the present research, it is the submission of this paper that competition soft law instruments such as guidelines or notices are not used as *ratio decidendi* in the judgments and opinions analyzed, and, therefore, soft does not transform into

¹⁰⁰ Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri* paras 206-214

¹⁰¹ *ibid* para 222

¹⁰² Case C-3/06 *Groupe Danone* paras 92 and 93; Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré v Commission* [2007] nyr paras 408 and 409

¹⁰³ GM Borchardt and KC Wellens, *op cit*

hard. As the case law quoted above shows, in circumstantiating the legal effects of soft law instruments the Court of Justice pays particular attention to general principles of law.

The general principles of law were defined among others by Tridimas, who considered that they constitute abstract propositions of law on which the legal systems are founded.¹⁰⁴ He classified them in three categories: principles underlying the constitutional structure of the Communities; principles of substantive community law; and ‘principles which derive from the rule of law and pertain primarily to the relationship between the individual and the (community and national) authorities.’¹⁰⁵ It is the third category to which the *fines* case law seems to refer: legal certainty, the protection of legitimate expectations, equal treatment, but also transparency, objectivity and impartiality in the activity of the Commission,¹⁰⁶ non retroactivity, proportionality,¹⁰⁷ the respect of human rights. One of the hypotheses that can be endorsed, after looking at the *fines* case law, and keeping to mind all expressed caveats of the present research, is that European Courts and the Advocates General take into consideration competition soft law instruments and recognize the effect thereof only when this serves the enforcement of certain superior principles of law, common to the European legal order and to the national legal orders.

Thus, the *ratio decidendi* of these cases is not constituted by the guidelines and notices of the Commission, but of hard, general principles of law, and in particular legal certainty, protection of legitimate expectations and equality. That general principles are hard rather than soft law is not an illegitimate assumption. Their source of inspiration is essentially hard, and pertains to the constitutional traditions common to the member states,¹⁰⁸ the international treaties to which the Member states are signatories or to which they have collaborated,¹⁰⁹ and the European treaties.¹¹⁰ Furthermore, the Treaties themselves attach legally binding force to the general principles of law. Thus, article 6 TEU places general principles (including those principles deriving from the rule of law) at the very foundations of the Union. The breach of these principles may trigger serious consequences, such as the suspension of rights of the defiant state (article 7 TEU) or the non-contractual liability of the Community (article 288 EC). The violation of general principles is also a ground for annulment under article 230 EC, implicitly comprised in the expression “infringement of this Treaty or of any rule of law relating to its application”.¹¹¹

Finally, an argument drawn from the rationalist literature on soft law pleads for the inclusion of the principles of law in the hard rather than in the soft category. Thus, high degrees of obligation, delegation and precision are seen as being indications of hard forms of “legalization.”¹¹² In the case of legal principles, the arguments presented above plead for a high level of obligation; delegation is also high, since the European Courts have the

¹⁰⁴T Tridimas, *The General Principles of EU Law*, (2nd edn Oxford EC Law Library, OUP 2006)

¹⁰⁵ *ibid*

¹⁰⁶ Case T-374/00 *Verband v Commission* [2003] ECR II-02275 para 79; Case T-241/01 *Scandinavian Airlines v Commission* [2005] ECR II-02917 para 64; Case T-15/02 *BASF v Commission* [2006] ECR II-497

¹⁰⁷ Case C-397/03 *Archer Daniels Midland*

¹⁰⁸ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125

¹⁰⁹ Case 4/73 *Nold v Commission* [1974] ECR 491

¹¹⁰ Case 46/93 *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame and others* [1996] ECR I-1029

¹¹¹ On this point see also A Arnall *The EU and its Court of Justice* (Oxford EC Law Library, OUP 1999) pp 190 et s

¹¹² KW Abbott and others, 'The Concept of Legalization' (2000) 54 (3) IO 401; Abbot, Snidal *op cit*

competence to solve disputes related to the application of legal principles; and their precision is embedded in the definition of the particular general principles of law, developed through years of national and European law.

V. Final remarks

This paper introduced several problems related to the attitude of European Courts and Advocates General towards competition soft law instruments, while exploring possible explanations for this attitude. It pointed out that the European Courts started to take soft law seriously during the last two decades. On the one hand, this is because the enactment of instruments such as the Guidelines on fines and the Leniency notice created the possibility of more arguments based on soft law to be brought to court. On the other hand, the recent developments in European governance created the appropriate framework for the Courts and the Advocates General to be more open towards such arguments. Moreover, this paper provided the outline of a qualitative analysis of the European case law relating to instruments such as guidelines, notices, competition reports and comfort letters. It identified the hypothesis that soft law instruments are taken into account by the European Courts when this serves the enforcement of hard, general principles of law.

The following answer could be given to the question exposed in the Introduction to this paper: The case law of the Courts does not transform the guidelines and the notices of the Commission into hard law; it rather recognizes the legal effects of non-binding documents while acknowledging their status as a specific and important part of the European normative framework.