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BEYOND BINDINGNESS: A TYPOLOGY OF EU SOFT LAW LEGAL EFFECTS

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1. Introduction

The concept of soft law is highly undefined. There are various ways of understanding it in the literature.[1] A very widespread definition accepted by EU lawyers is the one that has been coined by Lina Senden. She describes soft law as 'rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects'.[2] This definition is based on two building blocks. The first circumscribes soft law as instruments that lay down abstract rules of conduct. These consequently perform a steering function and are general in nature. The second encapsulates the conceptual conundrum of soft law. On the one hand, one of its peculiar features – if not the most defining one – is that soft law lacks legally binding force. On the other hand, this definition assumes that soft law can have – albeit indirectly – some legal effects.

Soft law seems to somehow accommodate these two characteristics: it does not have a legally binding nature – or legally binding force, legally binding effects,[3] or simply

(*) I am grateful to Petra Lancos, Napoleon Xanthoulis, Dolores Utrilla and José María Rodríguez de Santiago for valuable comments to this chapter.

[1] Oana Stefan, Matej Avbelj, Mariolina Eliantonio, Miriam Hartlapp, Emilia Korkea-aho, Nathalie Rubio, 'EU Soft Law in the EU Legal Order: A Literature Review', *SoLaR Working Paper* (2019), pp. 9-13 (available at SSRN: https://ssrn.com/abstract=3346629).

[2] Lina Senden, *Soft Law in European Community Law* (Hart 2014) p. 112. See also Francis Snyder, 'The Effectiveness of European Comuunity Law: Institutions, Processes, Tools and Techniques', in S. Martin (ed.), *The Construction of Europe: Essays in Honour of Emile Noël* (Kluwer, 1994), p. 64; Oana Stefan, *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union* (Wolters Kluwer, 2013) pp. 10-11.

[3] Stefan (n 2) pp. 181-191, uses this concept differently: EU soft law lacks legally binding force, but it may have legal effects, including 'legally binding effects'. The latter notion relates to what here are called EU soft law's indirect invalidating effects, i. e., mediated – indirect – legal effects arising from other rules or principles of hard law, and not from EU soft law's – inexistent – legal bindingness. See also Oana Stefan, 'European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects', 75-5, *The Modern Law Review* (2012), pp. 865-893, p. 889. I think it is clearer to reserve the expression 'legally binding effects' to those legal effects that are brought about by the legally binding nature of a rule.

'bindingness' – but at the same time it does have some other legal effects. It is not readily apparent how it is possible that a measure that has legal effects is not legally binding. This provokes the question of what is meant precisely by the notions of '(legally) binding effect' and 'legal effect'. Exploration of the former leads to the application of a binary approach: a specific rule of conduct is either binding and belongs to the realm of hard law, or it lacks legally binding force and belongs to the category of soft law.[4] The relevant criterion for ascribing a measure to one category or another is, therefore, its binding nature, which turns the notions of hard and soft law into bivalent or binary concepts with a classifying function.[5] This chapter explores first how the Court of Justice has devised this connection between soft law and bindingness (section 2).

The perspective provided by this criterion is valuable: it allows us to assess the impact of a rule on other components of the system of legal sources. By exclusively focusing on its legally binding effects, however, it has contributed to concealing that EU soft law measures, even though they do not have a legally binding nature, can have various other legal effects. The hypothesis this chapter is based on is that 'binding effects' or 'legally binding effects' –i. e., legal effects of an act arising from its legally binding force – are a particular type of 'legal effects'. There are, consequently, other legal effects that are not covered by the notion of bindingness.[6] These other legal effects are not purely factual effects – namely, connected with the effective steering of the addressee's behaviour: they are true legal effects in the sense that their production is the legal consequence provided by the legal system in specific circumstances. For this reason, the examination of these other legal effects of EU soft law is not only relevant from the perspective of politics and public administration, but also for the doctrine of public law.

In view of all this, this chapter explores the following typology of the legal effects of EU soft law: (i) interpretative effects, through which the process of interpretation of hard law norms by courts and other public authorities is legally conditioned (section 3); (ii) indirect invalidating effects, which consist of the infringement of the soft law measure giving rise to the violation of another rule or principle – the latter being of a binding nature, which results in the illegality of the infringing act (section 4); (iii) compensatory effects, which relate to the right to claim compensation of those who suffer damages as a result of the infringing act (section 5); and (iv) internal punitive effects, referred to as the possibility of imposing sanctions on public officials who do not comply with hierarchical soft law measures (section 6). The chapter will end with a conclusion (section 7).

The examination of the various types of legal effects of EU soft law may supplement the bivalent, binary approach arising from the bindingness criterion. Such typological approach provides a richer understanding of the operation of EU soft law and of the various ways in which it legally steers the conduct of its addressees. Nevertheless, this

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[4] This is the traditional approach to the concepts of soft and hard law. For a different, gradual understanding, see Fabien Terpan, 'Soft Law in the uropean Union – The changing Nature of EU Law', 21-1 *European Law Journal* (2015), pp. 68-96; Petra Lea Láncos, 'A Hard Core Under the Soft Shell; How Binding is Union Soft Law for Member States?', 24-4 *European Public Law* (2018), pp. 758-760.

[5] Silvia Díez Sastre, *La formación de conceptos en el Derecho público* (Marcial Pons 2018) pp. 118-119.

[6] This hypothesis may have additional consequences from the perspective of judicial protection, whose exploration, however, lies beyond the scope of this chapter. See the Conclussions of AG Bobek in C-16/16, *Belgium v Commission*, paras. 110 (Article 263 TFEU refers '*to "legal effects" and not to "binding legal effect". With river beds as well as with case-law, it is sometimes necessary to clean the stream by removing the (verbal) sediments assembled over the years that make the law impossible to navigate*'). See R. Mastroianni, 'What's in a Recommendation?', *MPILux Research Paper Series*, No 2020(2).

typology is not intended to be exhaustive. Consequently, despite its aim to account for the main types of legal effects of EU soft law beyond bindingness, this classification does not exclude others from falling within it.[7] What is more, far from emerging homogeneously, these legal effects may arise differently depending on criteria such as the policy area, the author, and the form of the soft law measure.[8] Describing these differences lies beyond the scope of this chapter, however.

2. Legally binding effects?

As far as the Court of Justice is concerned, bindingness features in a binary, all-or-nothing manner.[9] If a rule of conduct is binding it belongs to the category of hard law – otherwise it falls within the notion of soft law. The Court of Justice has established two different ways a rule can have legally binding effects. First, a rule is binding if it is passed in one of the forms of legally binding acts provided for in the EU Treaties: regulations, directives, decisions, international agreements, etc. These legal sources are binding because the Treaties have granted them legally binding effects. This first avenue has been described as 'inherent' legally binding force.[10] Second, a rule can also be binding, even if it has not been passed in the form of any of the above typical hard law sources, if it satisfies certain conditions related to the drafter's intentions. This second avenue, which has been called 'incidental' binding force, has been explored by the Court in two groups of cases. On the one hand, a unilateral act by an EU authority that does not have inherent binding force can nonetheless have incidental binding force, if it is intended that it should have legal effects – in view of various elements such as its wording, context, and history.[11] On the other hand, bilateral or multilateral rules lacking inherent binding force may also have incidental binding force if they are agreed upon by EU and national authorities under an explicit hard law provision or a specific duty of cooperation.[12]

All this does not tell us very much about soft law. In fact, a rule that has incidental binding force does not belong to the category of soft law. The drafter's intentions do not, therefore, confer binding legal effect on a genuine soft law measure; rather, they take it out from the category of soft law and ascribe it to hard law.[13] In turn, the possibility of a rule having incidental binding force illuminates some essential features of the EU system of legal sources that are hard law.

First, it implies that this system does not comprise a closed taxonomy of binding rules. This case law of the Court means that along with the typical binding sources of law, EU hard law includes atypical binding hard law rules. This is particularly relevant regarding unilateral, incidentally binding rules. While the possibility of establishing binding rules in an agreement concluded by various authorities, or even by an authority and private parties, is well known in both EU and comparative public law, atypical, unilateral, incidentally binding rules are quite a different story. One could envisage a *numerus clausus* system of legal sources that would offer regulatory authorities the possibility of

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[7] See, e. g., Francis Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations', in G. Winter (ed.) *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Nomos 1996) p. 463; Stefan (n 3) p. 881-882.
[8] Lancos (n 4) pp. 755-784.
[9] *Contra* Lancos (n 4) p. 759.
[10] Senden (n 3) p. 246.
[11] Senden (n 3) pp. 251-258.
[12] Senden (n 3) pp. 272-280.
[13] Lancos (n 4) p. 774 ('*hard law measures masquerading as soft law'*).

choosing between two alternatives: either passing a rule of conduct as one of these typical sources of hard legal sources – in which case the rule will be subject to formal and procedural constraints in exchange for having legally binding effects, or using a soft law instrument – thus being freed from these formal constraints in exchange for losing legally binding effects. This may be considered as the discretionary decision of regulatory institutions that should be respected by the courts. In turn, the case law of the Court of Justice giving rise to incidental binding force implies that the system of hard law sources cannot logically be *numerus clausus*, and the consequence of this is that the Court reserves the right to have the final say regarding this decision.

Second, this case law leads to a self-fulfilling promise. Rules unilaterally passed outside the system of hard law sources established by the Treaties are not binding in and of themselves; rather, it is the Court of Justice conferring it upon them by applying its doctrine on 'incidental bindingness'. And the mere fact that this is possible gives rise to some uncertainties. One is whether the decision of the authority not to use an inherently binding source of law is sufficient evidence of its will not to grant legally binding effects upon these rules. Another uncertainty is whether these hard law rules disguised in soft law clothes do comply with formal and procedural requirements of binding rulemaking. The answer can logically only be in the affirmative in a legal system that allows public authorities to pass atypical binding rules without implementing the procedure established by law. If binding rulemaking had to unfold through a specific procedure, incidentally binding hard law rules would necessarily breach this requirement. The Court can uphold this doctrine, therefore, as long as EU law does not contain a general rulemaking procedure like the one envisaged in the ReNEUAL model rules.[14]

3. Interpretative effects

Soft law can have a variety of effects on the interpretation of legal provisions. These are genuine legal effects, not only because they emerge in the process of interpretation of legal rules, but also because they circumscribe the margin of discretion of judicial and administrative authorities in doing so. They can be further classified into two groups: ordinary interpretative effects and qualified interpretative effects.

3.1. Ordinary interpretative effects

EU soft law instruments can provide arguments and lines of reasoning in the interpretation of the hard law provisions to which they relate.[15] This is precisely the main function of a particular type of soft law – 'interpretative' instruments, which intend to provide information on how an EU institution or body will interpret a hard law rule.[16] These interpretative effects can however also be produced as a secondary function by other soft law measures, even by those aimed at achieving other primary goals, such as steering third parties' behaviour – 'steering' instruments',[17] or specifying how their author will make use of its discretionary powers – 'decisional' instruments'.[18]

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[14] Book II of the ReNEUAL Model Rools on EU Administrative Procedure (available at: http://reneual.eu/projects-and-publications/reneual-1-0).
[15] Opinion of AG Bobek, in Case C-16/16 P, *Belgium v Commission*, para 91.
[16] Senden (n 2) pp. 143-148.
[17] Senden (n 2) pp. 155-158.
[18] Senden (n 2) pp. 153-155.

All these types of EU soft law can be used as interpretative tools, namely to tackle different challenges in the process of interpretation of law. They can be used, in particular, to clarify vague rules, to settle contradictions between legal provisions, and to fill legal gaps. In all those scenarios, soft law can provide the interpreter with arguments of a different nature: (i) genetic arguments related to the author's purpose if the soft law measure has been taken by the same authority that enacted the hard law rule that is in dispute; (ii) arguments related to the objective meaning of the hard law rule if the soft law measure reflects how other actors understood, or actually understand the meaning of the former; and (iii) systematic arguments if they contribute to elucidating how the hard law rule relates to other sources of law.

The ordinary interpretative effect of EU soft law involves the possibility of it being used as a 'voluntary interpretation aid'.[19] This can be observed before both EU and national courts. As for the former, non-binding EU acts can help to interpret binding EU law.[20] Regarding the latter, EU soft law can also be relied upon in a dispute before a national court that calls for an interpretation of the binding provisions of EU hard law to which it is linked.[21] Yet the scope of this ordinary interpretative effect is limited from various perspectives. First, EU soft law cannot derogate from EU hard legal rules, simply because of its non-binding nature.[22] Second, soft law is used among other sources of interpretation, and it is not attributed a special authoritative force.[23] Finally, it has even been demonstrated that the Court usually refers to EU soft law in order to confirm or support an interpretation of EU hard law that already stems from other interpretation tools, and that only very rarely – namely, when the interpreted provision expressly makes a reference to soft law – does it rely exclusively on it.[24]

3.2. Qualified interpretative effects

Ordinary interpretative effects have a legal nature and are, therefore, genuine legal effects because they appear in the framework of a distinctively legal process, such as interpretation of legal rules. But in certain cases, law may grant qualified interpretative effects upon certain soft law measures. Here, soft law imposes legal obligations or conditions on the judicial or administrative authorities entrusted with the interpretation of hard law. Therefore, these qualified interpretative effects are not only legal in view of the process where they emerge, but also because in these cases soft law somehow circumscribes the scope of assessment of the interpreter when it comes to the meaning of the rule at stake. This can unfold in two different ways.

A first type of qualified interpretative effect arises in those legal orders where administrative or judicial authorities have the legal duty to take soft law acts – or some types thereof – into account when it comes to interpreting the hard law rules to which they relate. As far as EU law is concerned, it is apparent that this is the case of the

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[19] Senden (n 2) pp. 365-366.
[20] Opinion of AG Kokott in Case C-383/09, *Commission v France*, para 28; Opinion of AG Kokott in Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee*, para 95.
[21] Cases C-322/88, *Grimaldi*, para 8; C-258/14, *Florescu and others*, para, 30; C-16/16, *Belgium v Commission*, para 44; Opinion of AG Campos Sánchez-Bordona in Case C-501/18, *BT*, para 84.
[22] Opinion of AG Warner in Case 19/77, *Miller v Commission*, p. 158; Opinion of AG Léger in Case C-183/05, *Commission v Ireland*, para 86.
[23] Mariolina Eliantonio, 'Soft Law in Environmental Matters and the Role of the European Courts', 37 *Yearbook of European Law* (2018), 511.
[24] Senden (n 2) pp. 397-398.

Grimaldi doctrine,[25] whereby national judicial authorities must take EU soft law into consideration when implementing EU hard law. The duty to take it into account does not imply that the hard rule must be interpreted as soft law requires or invites it to be, but merely that the interpretative arguments stemming from the latter must be weighed, next to others, by the national court, and eventually be incorporated into the reasoning of its final decision. Here, EU soft law has legal effects, but it still lacks legally binding effects.[26] The evolution of this doctrine does not reveal a stable picture. First, despite the fact that it was originally established in *Grimaldi* in respect of recommendations, subsequent case law has extended its scope to soft law rules other than those enshrined in Article 288 TFEU.[27] Second, it is now clear that *Grimaldi* applies to soft law measures taken not only by EU institutions,[28] but also by EU agencies.[29] Third, the intensity of the duty to take it into account seems to fluctuate depending on whether the soft law rule is freestanding or has been foreseen in – or derived from – primary or secondary hard law provisions, on whether it was drafted by an EU institution or not,[30] as well as on whether it as a typical or an atypical soft law instrument.[31]

Accordingly, this first qualified interpretative effect turns soft law into a 'mandatory interpretation aid'.[32] The scope of this legal effect is circumscribed from three different perspectives. On the one hand, it is exclusively attributed to EU soft law. *Grimaldi* does not require national authorities to take national soft law into consideration. I am not aware of domestic legal orders where such an obligation exists, but it would also be logically possible that national legal systems of the Member States would extend such a duty to take domestic soft law into account. Yet this would only happen as a matter of national law. On the other hand, *Grimaldi* only requires national courts to take into consideration EU soft rules. However, a possible future development would be to also apply this duty to other national authorities, and especially to administrative bodies, when the same circumstances exist. Finally, EU soft law is a mandatory interpretation aid only vis-à-vis national courts. *Grimaldi* does not grant any qualified interpretative effect to EU soft law before EU courts.

If this first qualified interpretative effect really emerges from soft law itself, it then has to be conceived of as a duty of the interpreting authority to take it into account *ex officio*, regardless of EU soft law being invoked by the parties. Of course, national authorities might be compelled to take EU soft law into consideration when it has been invoked by the parties in the relevant judicial – or administrative – procedure. However, this has less to do with the legal effects of EU soft law in and of itself, than with the motivation requirements enshrined in the fundamental rights to an effective judicial protection and to good administration. If the duty to take EU soft law into consideration was conditioned on it being invoked by the parties individually, it would not be a legal effect of EU soft law anymore, but part of the content of those fundamental rights.

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[25] Case C-322/88, *Grimaldi*, para 18 ("*are bound to take recommendations into consideration*"); Case C-188/91, *Deutsche Shell*, para 18 ("*are nevertheless obliged to take them into consideration*").
[26] Stefan (n 2) p. 157.
[27] Emilia Korkea-aho, 'National Courts and European Soft Law: Is *Grimaldi* Still Good Law?', 37 *Yearbook of European Law* (2018), pp. 470-495.
[28] Case C-501/18, *BT and Balgasrka Narodna Banka*, para 80.
[29] Case C-911/19, *Fédération bancaire française (FBF)*, para 71.
[30] Korkea-aho (n 22) pp. 494-495.
[31] Lancos (n 4), p. 770.
[32] Senden (n 4) pp. 365-366.

A second type of qualified interpretative effect would go one step further by imposing on administrative or judicial authorities the legal obligation of interpreting hard law as far as possible in conformity with soft law. This is not simply taking the latter into account, but interpreting the hard rule in conformity with the soft law measure. EU soft law would not merely be a mandatory interpretation aid but would benefit from a duty of consistent interpretation.[33] Such a duty comprises the prohibition of attributing a meaning to the legal rule that departs from that required by the soft law instrument, provided that this is admissible in view of the common rules and methods of interpretation. This second qualified interpretative effect has been discussed in EU law. Despite some authors suggesting that *Grimaldi* had to be read in this vein,[34] as an extension of *Von Colson*,[35] the opposite view ultimately prevailed, both in legal doctrine,[36] and in the Opinions of Advocates General at the Court of Justice.[37]

There are indeed good reasons not to read *Grimaldi* as a duty of consistent interpretation. On the one hand, consistent interpretation typically works in cases where higher ranking rules enjoy some type of superiority over lower ranking rules.[38] This is why national laws must be interpreted in conformity with EU law, secondary EU law must be interpreted in conformity with primary EU law, and national legislation often must be interpreted in conformity with the national constitution. Yet EU soft law lacks primacy over national law,[39] and therefore there would not be a reason to compell national courts to interpret the latter in conformity with the former.[40] On the other hand, a duty of consistent interpretation would be incompatible with the non-binding nature of EU soft law. One of the facets of a rule's binding legal effects is precisely that courts are compelled to enforce it. The analogy with *Von Colson* fails because directives might lack direct effect, but they undoubtedly contain binding rules. Finally, a duty of courts to interpret legislation in conformity with non-binding rules made by executive bodies also raises questions from the perspective of the right to effective judicial protection, particularly in terms of the independence of courts vis-à-vis the executive when it comes to interpreting hard law provisions.

4. Invalidating effects

The question tackled here is whether the validity of rules and acts of EU and national authorities, as well as private actions of individuals or firms, is conditional upon compliance with EU soft law.[41] Put differently: if a rule or act infringes EU soft law, is it illegal? If EU soft law were to have this effect on the legality of subsequent acts, then actions of annulment, injunctions, and other types of actions of restitution could be lodged against the latter based on the infringement of the former. As will be explained next, EU

[33] Senden (n 2) pp. 365-366.
[34] Anthony Arnull, 'European Court (Second Chamber) Judgment of December 13, 1989, Case C-322/88 *Grimaldi v Fonds des Maladies Profesionnelles*', 15-4 *European Law Review* (1990) p. 318.
[35] Case 14/83, *Von Colson*.
[36] Senden (n 2) pp. 389-392; Lancos (n 4) p. 770.
[37] Opinion of AG Bobek, in Case C-16/16 P, *Belgium v. Commission*, paras 99-102; Opinon of AG Campos Sánchez-Bordona in Case C-501/18, *BT*, para 96.
[38] Xabier Arzoz, 'Aproximación a la interpretación conforme como técnica de coordinación normativa', 4 *Revista de Derecho Público: Teoría y Método* (2021) p. 79.
[39] *Contra* Giulia Gentile, 'To be or not to be (legally binding)?Judicial Review of EU soft law after BT and Fédération Bancaire Française', in 70 *Revista de Derecho Comunitario Europeo* (2021) p. 1000 ("*as EU acts, [EU soft law acts] should prevail over national law*").
[40] Senden (n 2) p. 390.
[41] D. Sarmiento, *El soft law administrativo* (Civitas 2008) pp. 164-167 ('*efectos anulatorios'*).

soft law has no direct invalidating effects, but it can indirectly trigger them by virtue of certain hard law rules or principles.

4.1. Direct invalidating effects?

Despite the uncertainty surrounding the concept, 'bindingness' seems to be closely related to having invalidating effects. More precisely, a rule of law is binding if compliance with it is a condition of the legality of its addressees' action. The legal consequences associated with the infringement of legally binding EU rules might be different depending on who their addressees – and the reviewing court – are. First, EU acts breaching EU rules that are higher-ranking and binding are invalid and can be annulled by EU courts.[42] Second, national acts breaching binding EU rules with direct effect must be set aside[43] and repealed[44] by national authorities, and can lead the Court of Justice to declare an infringement.[45] Finally, action taken by individuals and entities disregarding binding EU rules is invalid and can be declared as such by both EU and national courts.[46]

Yet this is not the case with EU soft law, as it is composed of rules of conduct that do not have legally binding force. Compliance with rules of conduct established by EU soft law instruments is not, in and of itself, a condition of the validity – or of the legality more broadly – of subsequent rules or acts. Therefore, soft law cannot logically have direct invalidating effects. As a matter of fact, this is precisely what distinguishes soft law from hard law: given its non-binding nature, the breach of soft law by a rule or act does not necessarily cause its invalidity. Rules and acts that do not comply with the content of previous soft law measures are not necessarily invalid – at least for this very reason. This is not an accidental feature of the position enjoyed by soft law in a particular legal order, but a logical feature of the notion thus conceived. Accordingly, if a court grants direct invalidating effects upon a rule, it will no longer qualify as soft law. This is how the Court's doctrine on incidentally binding force must be understood.

This has an important effect on judicial review: it should logically lead to the dismissal of annulment actions, injunctions and other types of restitution exclusively grounded on the violation of EU soft law. EU acts challenged under Article 263 TFEU because they do not comply with EU soft law should be upheld.[47] Likewise, domestic rules or acts that do not comply with the content of EU soft law do not necessarily violate EU law. And infringement of it by individuals or entities should not be declared by administrative or judicial authorities, in and of itself, as a violation of EU law. Otherwise, EU soft law measures would be binding, and they would no longer qualify as soft law. As will be explained, all this does not preclude, however, the indirect invalidating effects of soft law, or judicial enforcement of EU soft law through actions for damages.

4.2. Indirect invalidating effects

[42] Article 263 TFEU.
[43] Cases 106/77, *Simmenthal*, para 24; and 103/88, *Fratelli Costanzo*, para 33.
[44] Case 167/73, *Commission v France*, paras 47-48.
[45] Article 260 TFEU.
[46] E.g., Article 101.2 TFEU.
[47] Conclusions of AG Campos Sánchez-Bordona in Case C-501/18, *BT v Balgarska Narodna Banka*, para 82 ("*the fact that [EBA recommendations] do not have binding legal effects impact on their invocability*").

There are three groups of cases in which non-compliance with EU soft law can have indirect invalidating effects. In these cases, subsequent acts deviating from the rules of conduct enshrined in an EU soft law measure are illegal. However, such invalidating effects are 'indirect' because the ground for illegality is not the infringement of EU soft law in and of itself; rather, the source of illegality is to be found in other hard law rules or principles, that are triggered by the breach of EU soft law. Moreover, in some of these cases, the violation of EU soft law is a necessary, though not sufficient, condition of invalidity, for hard law may establish other additional requirements beyond the infringement of soft law for the subsequent act to be illegal.

The first group of cases relates to EU soft law measures backed by binding hard law rules or decisions, that can either reproduce or incorporate them by reference. The consequence of this is that subsequent acts in breach of soft law might be invalid. In these situations, however, any invalidating effects are not directly triggered by the breach of the soft law instrument, but by the violation of the relevant hard law rule or decision that had incorporated soft law content. Beyond this broad description, diversity prevails.

EU soft law can be incorporated into EU hard law, as is the case with Commission implementing decisions publishing references of harmonised standards in the Official Journal. By virtue of New Approach legislation, this publication brings about two changes in the legal positions of different actors: undertakings complying with these standards will be entitled to market their products under a presumption of conformity with essential requirements, while national authorities will be prevented from implementing, and be compelled to withdraw conflicting national standards.[48] National decisions deviating from this will infringe the relevant EU secondary law providing for the presumption of conformity.

EU soft law can also be incorporated into national hard law. Soft law rules of the EU Commission or agencies that are addressed to the Member States might be transformed into a binding rule or act if the competent national authority decides to comply with them.[49] Subsequent actions of their addressees – both public and private – could be illegal in case of non-compliance with EU soft law. However, it will be the act under national law that will grant indirect invalidating effects to the rules of conduct enshrined in the EU soft law measure. A similar transformation can follow when national courts implement EU soft law, thereby conferring on the latter the nature of case law.[50] Again, the source of these indirect invalidating effects must be found in the national legal order.

In the second group of cases EU law lays down a hard law rule that imposes a burden on national authorities who decide not to abide by EU soft law. Without granting legally binding force to the latter, this regulatory policy aims at increasing its effectiveness in terms of steering the behaviour of its addressees. Since it will still be possible for them

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[48] See Annalisa Volpato, 'The legal effects of harmonized standards in EU law: From hard law to soft law, and back?', in this volume.

[49] Conclusions of AG Bobek in Case C-911/19, *Belgium v Commission*, para 50 ('*when competent authorities decide to comply, financial institutions effectively become bound by the contested guidelines at the national level as a result of their 'implementation' or 'incorporation' by the competent national authority*').

[50] For a comprehensive view on how EU soft law is incorporated into the national legal orders, see Miriam Hartlapp, Emilia Korkea-aho, 'Whatever Law and Teenage Member States? The National Reception of EU Soft Law and How to Study It', in Mariolina Eliantonio, Emilia Korkea-aho, Oana Stefan (eds.), *EU Soft Law in the Member States* (Hart 2021), pp. 57-76.

not to comply with EU soft law, it remains non-binding and within the conceptual boundaries of soft law. However, in that case national authorities must behave in a particular way. On the one hand, it has already been described how the *Grimaldi* doctrine imposes on judicial authorities the legal duty to take EU soft law into consideration when it comes to interpreting hard law rules to which they relate.[51] This burden only exists if it has been specifically provided for in EU secondary law. In turn, it is doubtful whether administrative authorities have a duty to take EU soft law into consideration when implementing EU hard law – or even on a general basis. This extension of the *Grimaldi* doctrine to administrative bodies could be grounded on the principle of sincere cooperation under Article 4(3) TEU.[52] As it will be explained, however, the Court of Justice has not yet taken that step. On the other hand, EU secondary legislation has 'hardened' EU soft law in some policy areas by establishing a comply-or-explain rule, according to which national administrative authorities who decide not to comply with a particular soft law measure have to give reasons for their decision.[53]

In these scenarios, the decision of national authorities not to comply with EU soft law without taking it into consideration or giving reasons would breach the EU hard law rule establishing this burden. It is readily apparent that invalidating effects are in this case indirect, for their source is a hard law rule. What is more, these effects are not immediately brought about by an infringement of EU soft law; rather, their emergence requires national authorities not to satisfy the relevant burden. In sum, illegality requires both non-compliance with EU soft law and not fulfilling the burden of taking into consideration or giving reasons. In case these two conditions are met, the relevant EU hard law provision would be violated, and the ordinary legal consequences foreseen in EU law would apply: first, the decision taken by the national authority must be set aside by administrative and judicial authorities alike; and second, national law could provide avenues for its annulment.

In the third group of cases, non-compliance with EU soft law would be one of the conditions triggering indirect invalidating effects under a general principle of law. Again, the source of illegality is not the infringement of EU soft law in and of itself; rather, the latter could lead to the violation of another, hard law norm – this time in the form of a general principle of law. Moreover, for subsequent acts to be invalid under such principle, a violation of EU soft law would typically be a necessary, though not sufficient condition, since other requirements will apply for the general principle to be violated. As for EU soft law, three general principles may come into play.

On the one hand, deviating in a new case from EU soft law that has been implemented in the past in similar cases can lead to the fulfilment of one of the requirements for the principle of equality to be violated within the administrative and judicial implementation of legal rules.[54] Indeed, when either an EU administrative authority, or a national administrative or judicial authority departs from previous decisions in which it did

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[51] *Supra*, Section 3.2.

[52] Wolfgang Weiß, 'Reconsidering the Legal Effect of EU Soft Law in National Implementation: Bindingness from an Individual Rights Perspective', in this volume. For a similar proposal under national law, see D. Sarmiento (n 41), pp. 168-171.

[53] Cases C-28/15, *Koninkljke*, paras 35-35; and C-911/19, *Fédération bancaire française (FBF)*, paras 43-44. See Robert Böttner, 'The Comply-or-Explain Mechanism in the European Supervisory Authorities, or: Does Meroni Allow Nudging?', and Emanuel Köllmann, 'Hard Rules for Soft Law. The Case of European Union Telecommunications Law', in this volume.

[54] Senden (n 2) pp. 411-415, pp. 422-428.

implement EU soft law, it provides a different treatment to the new case.[55] It is immaterial whether the soft law instrument has been passed by the same authority or by another one, provided that it has been enforced by the decision-making body in previous cases. This has been admitted only when EU authorities disregard EU soft law passed by other Institutions or agencies,[56] but the same might be claimed when different treatment is given by national authorities,[57] for what is crucial is not the mere fact of EU soft law having been violated, but departure from precedent cases. In any event, fulfilment of other conditions necessary for the principle to be breached are difficult to meet, namely that the situation of the applicant – where EU soft law was disregarded – and the situation of precedent cases – where it has been implemented – are truly comparable, and, even if they are, that the difference is not objectively justified.[58] What is more, the Court's approach to these cases – and to the principle of equality of treatment more broadly – has usually been rather deferential.[59]

The infringement of EU soft law could also give rise to a legitimate expectation protected by the law, a frustration of which by administrative authorities may lead to a violation of this principle.[60] Invalidating effects are thus indirect.[61] Two different cases must be distinguished. One arises when the same EU authority who passed the soft law instrument sets it aside in a particular case. The mere fact of having taken the measure – especially if it had been published in the Official Journal – contributes to creating a protection-worthy expectation that the authority will use its discretion as previously and publicly announced.[62] As it has been established by the Court of Justice,[63] EU soft law may thus have a self-binding legal effect for its author. The Court has applied the same criterion to cases where national authorities had declared that they acknowledge the content of the EU soft law measure and will abide by it.[64] The source of these legal effects is not EU soft law itself, but the declaration adopted by the national authority.[65] This declaration expresses the Member States' self-commitment and brings about EU soft law's multi-level invalidating effects.[66]

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[55] Case 148/73, *Louwage v Commission*, para 12.
[56] Case T-10/93, *A v Commission*, para 60.
[57] *Contra* Senden (n 2) p. 442.
[58] Cases C-611/16P, *Xellia Pharmaceuticals and Alpharma v Commission*, para 168; T-814/17, *Lietuvos geležinkeliai v Commission*, para 373; T360/09, *EON v Commission*, para. 261. Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006) 167; Paul Craig, *EU Administrative Law* (OUP 2018) 577-580; Jesús Fuentetaja Pastor, *Derecho administrativo europeo* (Civitas 2019) pp. 76-77.
[59] Craig, *EU Administrative Law* (n 58) p. 581.
[60] Joined Cases C-189/02 P, C-202/02 P, C-205/02 P a C-208/02 P and C-213/02 P, *Dansk Rørindustri*, para 211. Opinion of AG Bobek in Case C-16/16, *Belgium v Commission*, para 90. L. Senden, *Soft Law in European Community Law*, pp. 411-415, p. 416, pp. 428-431; Oana Stefan, 'European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects', 75-5 *The Modern Law Review* (2012) p. 882.
[61] Napoleon Xanthoulis, 'Legal Effects and Reviewability of EU Acts', in Mariolina Eliantonio, Emilia Korkea-aho, Oana Stefan (eds.), *EU Soft Law in the Member States* (Hart 2021) pp. 315-316; Stefan (n 2) p. 181 ('mediated').
[62] Opinion of AG Jacobs in Case C-99/98, *Austria v Commission*, para 35 ('*The guide constitutes conclusive evidence for the existence of such a settled practice*').
[63] Cases C-431/14 P, *Greece v Commission*, paras 69-70; C-526/14, *Kotnik*, para 70; and Joined Cases C-431/19 P and C-432/19 P, *Inpost Paczkomaty*, para 45.
[64] Case C-226/11, *Expedia v Autorité de la Concurrence and others*, para 26.
[65] Lancos (n 4) p. 782-783. Another issue altogether is whether this should prevent or not actions of annulment under Article 263 TFEU. For a negative answer, see Gentile (n 39) pp. 981-1005.
[66] Stefan (n 2) pp. 182-191 differentiates between 'mediated binding effects for the enacting Institution' and 'mediated binding effects for the Member States'. As explained before, I believe in both cases it is more precise to speak about 'mediated, or indirect invalidating effects'. See Section 1.

The other case would emerge when a national authority consistently implements a soft law instrument approved by an EU authority. The Court has not applied the principle of legitimate expectations in this type of multi-level cases to a national authority.[67] Despite not being its drafter, however, regular enforcement of EU soft law in previous cases by national authorities can give rise to a legitimate expectation regarding its future implementation. The point here is not the violation of the EU soft law measure as such but departing from the previous practice of national authorities which had enforced it. For a legitimate expectation of future compliance with soft law to be born, however, it is necessary that the latter had brought it about with their own consistent and publicly known practice. Member States cannot be constrained by expectations brought about by EU Institutions and agencies alone.[68]

Disregarding EU soft law is not sufficient, though. In both scenarios, EU law requires the fulfilment of additional conditions for the general principle of legitimate expectations to be encroached. The soft law measure should have given rise to the reasonable expectation that a benefit would be obtained in the future, and such expectation should rest on objective criteria. Soft law instruments make it easier to justify that these requirements are met, particularly if the measure was published. Yet the ability of soft law measures to create expectations worthy of protection also depends on their content: the more specific and accurate the content of soft law, the easier it will be to expect a given behaviour relying thereon. On the contrary, the broader and vaguer the wording of soft law provisions, the more difficult it will be to claim that a party's legitimate expectations have been breached. To give rise to an expectation worthy of protection, the context and wording of the soft law instrument must exhaust the scope of discretion of the decision-making authority. In case soft law still leaves a margin of discretion on how to decide future cases, subjective expectations will not deserve protection.[69]

What is more, the principle would only lead to a *prima facie* protection of legitimate expectations. The EU or national authority will still be able to show an overriding reason of public interest to justify disregard for EU soft law. This means that the decision-making authority can prevent EU soft law from having indirect invalidating effects under the general principle of legitimate expectations, by giving reasons.[70] It is, however, uncertain how deferential judicial review in this case is, as well as how exactly these two general principles – equality and legitimate expectations – relate to each other. It seems that in the case law of the Court of Justice they apply separately. And this makes sense because their substantive tests are different – the first one demands a comparison with other cases, while the second one exclusively focuses on how the new decision frustrates an expectation that deserves to be protected by the law. However, what is uncertain is whether, and in which cases, the principles of equality and legitimate expectations apply simultaneously, alternatively or subsidiarily.

A third general principle of EU law could also come into play when it comes to exploring possible indirect invalidating effects of EU soft law. The Court held that Member States

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[67] Case C-226/11, *Expedia v Autorité de la Concurrence and others*, para 31. Oana Stefan, 'Helping Loose Ends Meet? The Judicial Aknowledgement of Soft Law as a Tool of Multi-Level Governance', 21 *Maastricht Journal of European and Comparative Law* (2012) p. 374.
[68] Senden (n 2) p. 442.
[69] Craig (n 58) pp. 635-636.
[70] Xanthoulis (n 61) pp. 315-316.

had to abide by an EU soft law measure as long as it specifies the duties of cooperation which were already binding under the current Article 4(3) TEU.[71] As in previous cases, the invalidating effects of EU soft law are indirect because what would be declared violated is the general principle of sincere cooperation. Accordingly, it has been submitted that when a soft law instrument passed by EU authorities is a specific expression of the Member States' duty of cooperation, its content will also be binding on them.[72] The scope of this duty remains undefined, though. On the one hand, it seems to be crucial what type of competence the EU has in the relevant policy area. On the other, in this particular context the principle of sincere cooperation seems to impose on national authorities more than a mere duty to take EU soft law into account, for it means that national authorities are compelled to abide by it.[73] Finally, it has been already advanced that the principle of sincere cooperation has been invoked to extend a *Grimaldi*-like duty to take into consideration upon administrative authorities, despite this development having not been endorsed by the Court yet.[74]

5. Compensatory effects

The previous section has shown that EU soft law can have indirect invalidating effects in three scenarios: when it is backed by or incorporated into a hard law rule; when EU law imposes a burden on those authorities willing to disregard it; and when infringement of EU soft law triggers a general principle of law. In these cases, EU or national rules or acts might breach EU law. Consequently, measures taken by an EU Institution or agency in any of these circumstances would be annulled under Article 263 TFEU, and those taken by a national authority must be set aside by national courts. Moreover, national law could provide for the annulment of national measures, and the Court of Justice can uphold an infringement action. All these remedies are forms of restitution following illegal action. But ignoring an EU soft law provision could also lead to a claim for compensation.[75] Disregarding EU soft law by an EU or a national authority could give rise to compensation claims in two groups of cases.

5.1. Illegality

In the first one, the ground for compensation is illegality. In the three aforementioned scenarios, indirect illegality of EU and national acts that infringe EU soft law could also justify a claim for damages. However, indirect illegality does not always give rise to compensation for the injured parties. Put differently: compensation is not coextensive with annulment – or illegality more broadly. Despite the fact that this discrepancy between unlawfulness and compensation emerges in both the EU and – at least some – national legal orders, only the former will be discussed here. It is settled case law of the Court of Justice that EU law only recognises a right to compensation if three conditions are met: (i) the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals; (ii) the fact of damage; and (iii) the existence of a causal link between the breach of the rule and the damage sustained by the injured parties. The first

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[71] Cases 141/78, *France v UK*, para 8; and 61/77, *Commission v Ireland*, para 65; C-4/96, *NIFPO and Northern Ireland Fishermen's Federation*, para 32.
[72] Senden (n 2) 443.
[73] Senden (n 2) 448 (cfr. 446).
[74] Wolfgang Weiß, 'Reconsidering the Legal Effect of EU Soft Law in National Implementation: Bindingness from an Individual Rights Perspective', in this volume.
[75] D. Sarmiento (n 41) pp. 200-208.

of these conditions has, in turn, two dimensions: on the one hand, illegality must refer to the breach of a rule of law intended to confer rights on individuals; on the other, the breach must be sufficiently serious.[76] The fact that there are no cases before the Court of Justice where damages had been awarded due to the indirect invalidating effects of EU soft law is a hint of how difficult these conditions might be to prove.

It will be necessary, first, to demonstrate that by disregarding the soft law instrument, a hard law rule or principle that intended to confer individual rights had also been breached. This might well be the case when soft law steering the behaviour of private parties is incorporated into EU secondary legislation – as in the case of harmonised standards, as well as when its breach triggers general principles that confer individual rights – such as equal treatment or legitimate expectations. On the contrary, infringement of soft law measures on administrative organisation, cooperation and procedure would normally not lead to compensation.[77] Likewise, indirect invalidating effects under the general principle of sincere cooperation could hardly give rise to compensation, because the latter aims to shape the relations between public authorities and not to protect individual rights. And the same must be concluded regarding the *Grimaldi* doctrine, 'comply or explain', and other regulatory arrangements intended to improve coherence, uniformity and the effectiveness of EU law implementation through soft law measures. This is in line with the case law of the Court finding that flaws in the statement of reasons for a legal act is not a reason in itself that gives rise to liability on the part of the EU.[78]

Second, non-contractual liability will arise only in case of manifest and particularly serious infringements. Yet what has to be evident and serious is not the breach of EU soft law – which has a non-binding nature, but of the relevant, indirectly triggered hard law rules or principles. This might be easier to prove in cases of EU or national hard law incorporating detailed EU soft law – such as harmonised standards – than in cases of EU general principles of law affected by EU or national decisions that do not follow EU soft law measures. It is not sufficient that the principles of equality or legitimate expectations are encroached upon. A breach needs also to be manifest and severe for damages to be granted. This implies that, at least in theory, not every violation of these rights leads to compensation. Considering the stringent requirements laid down by the Court to conclude that they have been breached, the scope for obtaining damages seems to be rather narrow.

Finally, in cases of violation of the duties to take EU soft law into account and to give reasons for departing from its content, it will be extremely difficult to demonstrate that there is a direct causal link between the infringement of these duties and the damage suffered by the private party. Harm might well be caused by the decision not to abide by the content of the soft law measure. However, this is not what needs to be shown. It is the fact of not having taken EU soft law into account or not having given reasons for departing from it that must have caused damage. This causal link seems to be rather improbable. As has been advanced, the Court refuses to qualify rules on reasoning as rules of law intended to protect individual rights.[79] This case law is fairly awkward, because the right to a reasoned decision is part of the right to effective judicial protection

[76] Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur,* para 51; C-123/18 P, *HTTS Hanseatic Trade Trust & Shipping GmbH*, para 32.
[77] Cases C-221/10 P, *Artegodan v Commission*, para 81; C-615/19 P, *Dalli v Commission*, paras 56-63.
[78] Case C-134/19 P, *Bank Refah Kargaran v Council*, paras 61-65.
[79] *Supra* (n 78).

and the right to good administration.[80] Either way, what seems clear is that it will be difficult to show a direct link between the lack of reasons and the harm suffered by the party with an interest in national authorities' compliance with EU soft law.

5.2. Legitimate expectations?

Under EU law, frustration of legitimate expectations leads to the forms of restitution that have been mentioned before: annulling EU acts, setting aside national measures, and declaring an infringement of the Member State. If a party has a right to be compensated for damages caused by the act breaching legitimate expectations, this will only be because such act is illegal. In other words, under EU law, illegality is the only reason for compensating damages. In turn, the legal consequences of the principle of legitimate expectations at a national level can be more diverse. In particular, in some jurisdictions it might well be possible that frustration of legitimate expectations by administrative authorities does not always give rise to annulment of administrative decisions, but merely to compensation for damages.[81]

In these situations, cases seeking compensation for damages have three peculiar features. First, the grounds for compensation is not illegality, but inconsistency of administrative action.[82] Second, the damages granted as compensation are strictly those directly linked with the investment or expenses made by the private party relying on those legitimate expectations, as well as with the the loss of profit related to lost business opportunities, as a result of reliance on future administrative conduct being consistent – the so-called 'negative interest'.[83] And finally, this ground for compensation would come into play only on a subsidiary basis, in case damages are not granted on grounds of illegality – for example, if a plea based on the breach of the principle of equality is rejected.[84]

This demonstrates that the principle of legitimate expectations would allow a more refined and complex system of remedies against inconsistent administrative conduct to be designed in comparison with the one that EU law comprises. Instead of a restrictive, all-or-nothing model, administrative decisions that disregard EU soft law and frustrate legitimate expectations could give rise to: (i) annulment or disapplication, as well as full compensation on the ground of illegality, or (ii) to compensation of the negative interest on the ground of inconsistency.

6. Disciplinary effects

Lastly, it remains to be explored whether and to what extent EU soft law may have punitive, or disciplinary effects. A distinction needs to be made in this respect, depending on whether these effects relate to the possibility of imposing sanctions on individuals or entities – external disciplinary effects; or on civil servants within the organisation of administrative authorities – internal disciplinary effects.

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[80] Article 41 CFREU.

[81] For an analysis of German and Spanish law, see Silvia Díez Sastre, *El precedente administrativo* (Marcial Pons 2008) pp. 404-409.

[82] Luis Medina Alcoz, 'Confianza legítima y responsabilidad patrimonial', 130 *Revista Española de Derecho Administrativo* (2006) pp. 275-326.

[83] Luis Arroyo Jiménez, Gabriel Doménech Pascual, 'The Europeanisation of Spanish Administrative Law through the Principle of Legitimate Expectations', 13-2 *Review of European Administrative Law* (2020) pp. 65-66.

[84] Díez Sastre (n 81) p. 373.

6.1. External disciplinary effects?

EU soft law instruments may be used to clarify how administrative authorities will interpret binding rules – 'interpretative soft law'. They may also explain the use of the margin of appreciation that they enjoy in the exercise of their discretion – 'decisional soft law'.[85] In both cases, EU soft law may be relevant in terms of implementing binding rules that foresee the imposition of sanctions on private parties. An EU Institution or agency may make public how it will interpret vague concepts enshrined in a hard law provision, the violation of which could give rise to a fine or other administrative sanction. Likewise, EU authorities may also outline which criteria they will follow when implementing discretionary powers that could lead to imposing sanctions. In both scenarios, EU soft law might be used in order to interpret or implement hard law rules that outline forbidden conduct and allow the imposition of sanctions on those who commit them. EU soft law can thus perform an instrumental, adjacent role in terms of sanctions. This role is carried out through the vehicle of interpretative, invalidating and compensatory effects that have been described in the previous sections.

In turn, EU soft law is not an appropriate instrument to create new sanctions in case individuals or entities do not comply with it, therefore lacking external disciplinary effects. On the one hand, precisely because they have no legally binding force, soft law measures cannot directly impose obligations or prohibitions on their addressees. This must be done either by a hard law rule or by a single-case decision. On the other hand, even if the substantive obligation or prohibition had been created by a hard law rule or decision, the principle of legality prevents soft law from establishing a criminal or an administrative sanction in case of infringement. The requirement of foreseeability is not compatible with an act which is not intended to be binding.[86] Both in EU law and in the national legal orders the decision to create new sanctions to be imposed by either administrative or judicial authorities is reserved to hard law – either to a statutory provision or a common law offence.[87]

6.2. Internal disciplinary effects

A different issue altogether is whether administrative or judicial authorities may impose a sanction on the administrative official who makes decisions disregarding EU soft law standards. As long as soft law measures have no legally binding force, this will typically not be the case. However, there might be an exception regarding soft law measures that convey internal administrative instructions under the principle of hierarchy. This is a distinctive type of soft law that actually has a venerable tradition in various national legal orders within the EU – and beyond.[88] So called *circulaires administratives*,[89] *circolari*

[85] Senden (n 2) 140.
[86] European Court of Human Rights, *S. W. v United Kingdom*, Application No 20166/92, para 35.
[87] European Court of Human Rights, *Norman v United Kingdom*, Application No 41387/17, para 62; Case C-189/02, *Dansk Rørindustri A/S*, para 216.
[88] See, e.g., Alexander Nabavi-Noori, 'Agency Control and Internally Binding Norms', 131-4 *The Yale Law Journal* (2022) 1278-1345.
[89] Nathalie Rubio, Oana Stefan, 'No Longer Small Enough to Fall through the Cracks'. A French Story of Adaptation to the Petite Sources of EU Law', Mariolina Eliantonio, Emilia Korkea-aho, Oana Stefan (eds.), *EU Soft Law in the Member States* (Hart 2021) pp. 135-143.

amministrative,[90] *circulares administrativas*,[91] and *Verwaltungsvorschriften*,[92] are soft law measures that have no external binding force, while at the same time they set out internal instructions, the content of which might become internally binding vis-à-vis public officials by virtue of the principle of hierarchy.[93] EU Commissioners are also empowered to address internal instructions to the members of the departments and services for which they are responsible,[94] which are expression of the principle of hierarchy and, therefore, are binding on the administrative officials serving them.[95]

These internal soft law measures are not binding for individuals or entities, but they do have binding force for the administrative officials responsible for implementing them. As for individuals or entities, such measures are not binding because subsequent acts disregarding their content are not invalid in and of themselves. This is, however, compatible with the fact that administrative officials are compelled to implement them when taking decisions. Upon a closer look, the soft law measure as such remains non-binding. What happens is that an official deviating from it with their behaviour is violating the – certainly binding – duty of obedience imposed on them by the principle of hierarchy. Deviation from soft law measures triggers the principle of hierarchy, thereby instilling indirect internal binding effects. The peculiarity of these internal instructions is that breaching them does not give rise to external invalidating effects – its legal effects remain within the administrative organisation.

The logical distinction between the rule creating the substantive obligation and the rule qualifying its violation as an administrative or criminal offence also applies here. Even if administrative officials are bound by these internal hierarchical soft law measures, there would still have to be a hard law provision foreseeing the imposition of internal disciplinary sanctions in case of an infringement. In terms of EU law, it is the Regulation laying down the Staff Regulations that provides that any failure on the part of EU administrative officials to comply with their obligations – including, therefore, the obligation to abide by hierarchical instructions and orders, whether intentionally or through negligence, shall make them liable to disciplinary action.[96] Consequently, EU hierarchical instructions may not have external binding force, but they do bind administrative officials and can give rise to internal disciplinary effects.

7. Conclusion

[90] Jacopo Alberti, Mariolina Eliantonio, 'Judges, Public Authorities and EU Soft Law in Italy – How You Cannot Tell a Book by its Cover', Mariolina Eliantonio, Emilia Korkea-aho, Oana Stefan (eds.), *EU Soft Law in the Member States* (Hart 2021) pp.187-188.
[91] Luis Arroyo Jiménez, José María Rodríguez de Santiago, 'In Search of Symmetry Lost. European and Spanish Soft Law before the Spanish Authorities', Mariolina Eliantonio, Emilia Korkea-aho, Oana Stefan (eds.), *EU Soft Law in the Member States* (Hart 2021) pp.in 235-236.
[92] Miriam Hartlapp, Andreas Hofmann, Matthias Knauff, 'Soft Law in Germany. Still Opposing Dynamics in Status and Effect', in Mariolina Eliantonio, Emilia Korkea-aho, Oana Stefan (eds.), *EU Soft Law in the Member States* (Hart 2021) pp. 152-155.
[93] Mariolina Eliantonio, 'Soft Law before the European and the National Courts. A Wind of Change Blowing from the Member States?', in Mariolina Eliantonio, Emilia Korkea-aho, Oana Stefan (eds.), *EU Soft Law in the Member States* (Hart 2021) pp. 292-299.
[94] Article 19 of the Rules of Procedure of the Commission [C(2000) 3614] (DO L 308 de 8.12.2000, p. 26).
[95] Articles 21 and 21bis of Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ P 045 14.6.1962, p. 1385).
[96] Article 86 of the Staff Regulations (n 95).

This chapter has explored the various types of legal effects of EU soft law. On the one hand, positive law, case law of the Court, and the legal literature assume that EU soft law has no legally binding force. What is more, bindingness is precisely where the conceptual distinction between EU soft and hard law lies. The logical implication of the lack of legally binding force of EU soft law is that it does not have direct invalidating effects: that is to say, subsequent rules or acts disregarding its content are not necessary illegal. EU soft law instruments also do not have direct external disciplinary effects, for the very same reason.

On the other hand, EU soft law can have different types of indirect legal effects, which do not directly emerge from the soft law measure, but from other hard rules or principles that are connected with it in various ways. First, these can confer qualified interpretative effects upon EU soft law under certain circumstances. Second, EU soft law may have indirect invalidating effects in three groups of cases: (i) when it is backed by, or incorporated into a hard law rule; (ii) when EU law imposes a burden on those authorities willing to disregard it; and (iii) when infringement of EU soft law triggers a general principle of law. In these scenarios, subsequent acts infringing EU soft law could be illegal and this may lead to different forms of restitution. Third, departing from EU soft law can also give rise to compensation for damages. Under EU law, this would only be the case on the ground of illegality and provided that the strict requirements of non-contractual liability are met. Finally, EU soft law can have internal disciplinary effects that also emerge indirectly.

This analysis gives a more complex and multifaceted picture of the legal effects of EU soft law than the bivalent – or binary – approach that comes from studying its binding force or legally binding effects. The conclusions drawn from it also allow us to identify the components with which the EU's legislative bodies and the Court can draw the scope and outline the types of legal effects of EU soft law: conferring qualified interpretative effects to it; establishing regulatory arrangements to foster compliance with soft law measures; extending indirect invalidating effects through general principles of law; granting damages on ground of mere inconsistency; and exploring internal disciplinary effects are some of them.