FORGÁCS ANNA

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THE LEGAL AND PRACTICAL EFFECTS OF SOFT LAW IN THE ADMINISTRATIVE LAW SYSTEMS OF THE UNITED STATES AND THE EUROPEAN UNION

Introduction

The aim of the article is to provide a brief comparison of the legal effects of soft law documents in the administrative law systems of the US and the EU. In this regard, the article tries to define the fine line between soft law documents that intend to have legal effects and those that have practical binding effects. Additionally, some questions will be raised regarding the meaning of "practical binding effects" and its relation to genuine legal effects.

Soft law is traditionally defined as a rule with "*no legally binding force which nevertheless may have practical effects*"[1]. The publication of soft law documents may also be considered as soft post-legislative rule-making[2], since most times soft law is adopted to further elaborate, interpret legislative acts. Even without legal effects, both the authorities and the interested parties rely on soft law documents. However, the use of such soft law is not a pathology of the rule-making ossification, it is rather a general phenomenon of a complex administrative law system. Soft law rules bring flexibility and adaptability in a rigid legal order, in addition to providing guidance and uniformity for the lower-levels of the executive.[3] From the perspective of the interested public, soft law rules can at the same time create a sense of predictability by provide information on the future practice of the agency, while creating uncertainty by their undecided force of law effect.

The problem arise when soft law documents intend to do more than giving guidance and contain more imperative language. In these cases, soft law intends to replace legislative acts, usually without going through the same procedure. Both the US and the EU courts have developed similar judicial tests to handle these cases and annul soft law documents with legal effects. Nevertheless, the line between documents with only practical binding effects and legal effects is not always clear, thus the courts usually have a wide margin of appreciation in deciding these cases.

[1] SYNDER 1993b 35. See also: STEFAN 2008. 754., SENDEN 2013. 62.
[2] SENDEN 2013. 57-75.
[3] FRANKLIN 2010. 303.

The US system of agency rule-making and soft law acts

In the US legal system the Administrative Procedure Act of 1946 (APA) covers the rule-making activities of every federal governmental entity, ranging from departments to independent agencies.[4] The scope of the APA covers both rule-making and adjudication (or single case decision-making).

The most formalized type of agency rules is the legislative rule. In this case Congress provides an agency with a statutory authorization to promulgate the necessary rules – constitutionally in line with the non-delegation doctrine. Then the agency adopts the legislative rule according to the provisions of either formal or informal rule-making procedure under the APA and publishes it in the Federal Register. Legislative rules are generally binding on the affected public and the agency itself and they have a force of law effect just as statutes.[5] However, since the adoption of a legislative rule can be very time-consuming, agencies have come up with more informal ways to inform the regulated community and their own lower-ranking officials of the agencies practice and interpretation of rules. Federal agencies adopt a large amount of soft law documents at different level of informality and thus with different binding powers. Under the § 552(a)(1) and (2) of the APA, the distinction lies between interpretive rules and policy statements, both of which are exempted from the general procedural requirements of legislative rules. Interpretive rules inform the public on the agencies' interpretation of statutes or legislative rules, while policy statements put self-imposed restrictions on the agencies' discretionary power by informing the public on how the discretion will be exercised.[6] In order to the interpretive rules to be able to bind the regulated community and to be relied on by the community, these soft law rules must also be published in the Federal Register, but no other procedural requirements are imposed on their adoption under the APA. General statements of policy must also be published, however, they do not constitute a binding rule with force of law. Due to their easier promulgation, these soft law sources have started to outnumber legislative rules. According to Strauss for example the „*rules of the Federal Aviation Administration (FAA) take up two inches, but the corresponding technical guidance materials are well in excess of forty feet.*"[7]

So the concept is that these soft law sources do not have to be exposed to public consultation procedure. However, since interpretive rules and policy statements are under the scope of the APA, the same rules of judicial review apply to them (or at least surely to interpretive rules) as to legislative rules. Thus federal courts have the right to annul them, for example if the duties created by them are "not fairly encompassed within the interpreted regulation",[8] so basically when they try to create entirely new obligations. Although non-legislative rules are not supposed to carry force of law under the system of the APA, as a practical matter, they are often relied on as if they were binding rules. Consequently, the

[4] STRAUSS et al. 2011. 12.
[5] STRAUSS 1992. 1466.
[6] MERRILL-WATTS 2002. 467-477.
[7] STRAUSS 1992. 1469.
[8] Air Transport Association of America v. FAA, 291 F3d 49 (D.C. Cir. 2002)

federal courts gradually developed a complex system of case law to supervise that soft law sources do not impose obligations that can be established only through normal rule-making.[9]

In an influential paper, Robert A. Anthony approached the legal effects of soft law documents. He described interpretive rules as rules with practical binding effect which "*non-legislatively announce or act upon an interpretation that it intends to enforce in a binding way, so long as it stays within the fair intendment of the statute and does not add substantive content of its own*"[10]. While under his taxonomy, all other "*substantive rule-making documents – such as policy statements, guidances, manuals, circulars, memoranda, bulletins, and the like-are in APA terminology "policy statements," which the agency is not entitled to make binding, either as a legal matter or as a practical matter*".[11] Under this approach the main distinction is that while interpretive rules rely on an existing legislative act – either a statute or a legislative rule – and they only explain, interpret this, when its meaning is tangible. This interpretation is considered practically binding by Anthony, so long as it does not try to create new obligations. As opposed to this, policy statements spell out new, not existing policies, however, they are not at all binding on the agency, or the affected public, also since they do not create legal obligations, judicial review is not available against them. Consequently, if an agency adopted an interpretive rule that contains a new right or obligation, it is either violating the notice and comment rule-making requirement of the APA – as it should have been adopted as a legislative rule, or it shall be considered a policy statement without any binding effect.[12] While if an agency adopted a policy statement that intended to have legal consequences, it is also in violation of the APA. In this case, judicial review is available, because the content of the policy statement is in fact that of a legislative rule, thus it can be reviewed, as opposed to a policy statement without binding effect.

The judicial interpretation of soft law norms in the US

US courts have dealt with issues of non-legislative rules in a number of cases, from which we will only look into the ones concerning the general attributes and the legal effects of these rules.

Interpretive rules

In the case of *Air Transport Association of America, INC. v. Federal Aviation Agency*[13] (ATA v. FAA) the D.C. Circuit dealt with questions regarding interpretive rules. The factual beginning of the case was, when in 1985, pursuant to notice-and-comment rule-making, the FAA promulgated a legislative rule, establishing flight time limitations and rest requirements for „*flight crew members engaged in air transportation*". Since the rule left some technical

[9] *United States v. Mead Corp*, 533 U.S. 218 (2001), *Skidmore v. Swift & Co,* 323 U.S. 134 (1944),
[10] ANTHONY 1992. 1313.
[11] Uo. 1315.
[12] Uo. 1324-1326.
[13] 291 F.3d 49 (2002)

issues open, a pilot submitted questions to the agency in 2000, which were answered by the FAA's Deputy Counsel James Whitlow, hence the name "Whitlow letter". Later on the agency published a notice in the Federal Register, stating that it intends to rigorously enforce the regulation, and this notice included the Whitlow letter as well. The ATA challenged the notice. The ATA claimed among others that the FAA violated the APA because the Whitlow Letter is a substantive, not an interpretative rule. The circuit court first stated that

> *"one factor we consider in distinguishing between the two is "whether the interpretation itself carries the force and effect of law, or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe."* Then went on to hold that there was no violation of the §533 of APA, since *"the interpretation contained in the Whitlow Letter is "fairly encompassed" within the regulation it purports to construe and, therefore, under our circuit precedent is an interpretative rule exempt from notice-and-comment rule-making."*

In the case of *Appalachian Power Company, et al. v. Environmental Protection Agency* (EPA)[14] the D.C. Circuit decided on the legality of the EPA's "Periodic Monitoring Guidance for Title V Operating Permits Programs" that took a new approach to the monitoring requirements for State emission permit programs, which should be adopted under the Clean Air Act. The circuit court first of gave an expressive description of the general notion of non-legislative rules, when it stated that

> *"The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities."*

Then the court went in to the binding effect of non-legislative rules and held that although

> *"only "legislative rules" have the force and effect of law (...) but we have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect.*"

Thus the court confirmed the practical binding effect of non-legislative rules. Moreover, it also provided a rather detailed set of factors to evaluate soft law documents:

> *„if an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."*"

[14] 208 F.3d 1015 (D.C. Cir. 2000)

The case also raised the question whether if the guidance document should have gone through the notice and comment rule-making procedure based on its content that – according to the petitioners – create new obligations. Following a detailed analysis of the text of the guidance the court concluded that some elements of the guidance significantly broadened the prior rule, thus in effect it was an amendment to the rule, which should have gone through the informal rule-making procedure.

Policy statements

The D.C. Circuit has also reviewed a number of policy statements. In the case of the *Center for Auto Safety, et. al. v. National Highway Traffic Safety Administration* (NHTSA) from 2006.[15] The case evolved around the motor vehicle manufacturers' practice to initiate voluntary "regional recalls", meaning that if a vehicle showed safety-related defects due to certain weather conditions, the manufacturers limited the recalls of such vehicles to owners in the given region with the certain weather conditions. In 1997/1998 the NHTSA started sending out letters to manufacturers, outlining NHTSA's "policy guidelines" for "regional recalls" and stating concerns with the practice of regional recalls. These policy guidelines sent out in letters were challenged by Center for Auto Safety, who claimed that its content constitutes a "de facto legislative rule", thus the guidelines should have been adopted through proper rule-making procedure. The court held that the guidelines do not substitute a binding rule that is finally determinative of the issues it addresses, thus they are not a final agency action, consequently judicial review cannot be available against them. In its reasoning the court stated that

> *"in determining whether an agency has issued a binding norm or merely an unreviewable statement of policy, we are guided by two lines of inquiry.(...) One line of analysis considers the effects of an agency's action, inquiring whether the agency has (1) impose[d] any rights and obligations, or (2) genuinely [left] the agency and its decision-makers free to exercise discretion. (…) The second line of analysis looks to the agency's expressed intentions. This entails a consideration of three factors: (1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency."*

According to the court a general statement of policy is in violation of the APA informal rule-making provisions and reviewable only if

> *"an agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy".*

The court found that this was not the case here, the agency only spelled out a general policy statement, without legal force or legal consequences. Nonetheless, the court admitted

[15] 452 F.3d 798 (D.C. Cir. 2006)

that the guidelines had consequences for the manufacturers, only not from a legal, but from a practical sense, since they voluntarily accommodated their recall practices.

As we can see from the above mentioned cases, when courts are dealing with non-legislative rules, regardless whether interpretive rules or general statements of policy, the normal course of inquiry focuses on the content of the rule and aims to determine if it has binding effect. So in the end, courts do not focus on the procedure in which the rule was adopted to determine its legal effects, but on the substance to determine whether the right procedure was used or informal rule-making procedure should have been used. This is a rather burdensome exercise for the courts, since in most cases it is not easy to determine whether the rule intended to have force of law effects. For this reason, there are voices in the legal literature advocating a more straightforward approach to determine the force of law effects of a rule.[16] Franklin for example promotes an approach called the "short cut", which would reverse the judicial test: instead of looking in to the substance, according to him, courts should focus on the procedure. Under this approach, only those rules that went through the notice and comment rule-making procedure would be afforded legally binding power and force of law effects, and everything else would be denied such force.[17] This approach could be easily reconciled with Strauss's idea, who suggested that instead of trying to figure out the difference between practically and legally binding rules, non-legislative rules should be treated similarly to adjudicatory decisions, and only afford them the force of precedent,[18] which binds the agency and indicative for the interested parties, however, not the same as having a force of law effect.

Soft law documents in the EU

The EU's approach towards soft law documents is both comparable and distinct from the US model, which is partially due to the fundamental differences between the two systems.

The legal base for the publication of soft law documents can be found in the *Treaty on the Functioning of the European Union* (TFEU). Article 288 lists recommendations and opinions among the legal act of the Union, while at the same time asserting the recommendations and opinion shall have no binding force. Beyond the two categories mentioned explicitly in the TFEU, EU institutions and bodies – just like US agencies – also publish a wide range of guidance documents labeled differently, such as communications, guidelines, notices, guidance documents, circulars, etc. An interesting difference between these unofficial and the official categories can be found in their publishing. Similarly to the US, it is also a requirement at EU level to publish these soft law documents, but while recommendations and opinions are published in the L series in the Official Journal, communications and other unofficial soft law documents are published in the C series,[19] which signalizes that

[16] See e.g.: FRANKLIN 2010. 276. or MERRILL-WATTS 2002. 467.
[17] FRANKLIN 2010. 279.
[18] STRAUSS 1992.1486.
[19] HOFFMANN et. al. 2011.

recommendations and opinions are acknowledged as legal acts of the EU, meanwhile communications are not.

From the numerous ways of categorizing soft law documents,[20] we only mention Linda Senden's approach, which shows similarities to the US approach. According to her, soft law acts can either be classified as interpretative acts or decisional acts.[21] Interpretative acts summarize how EU law should be understood and applied, and as such it is often an indicator for the national authorities as well. While decisional acts indicate how the Commission will use its discretionary powers in single-case decisions (e.g. in competition law or state aid).

The judicial review of soft law in the EU

The lack of binding force of soft law is also reflected in Article 263 of the TFEU that states that the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. Interestingly, the distinction between acts with and without legal effects is missing from the provisions on the preliminary ruling procedure, as Article 267 holds that the Court shall have jurisdiction to give preliminary rulings concerning (…) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

The ECJ's jurisprudence shows that the review of soft law documents is possible both through an action for annulment and through a preliminary ruling procedure. Even though, from Article 263 TFEU it would seem that an action for annulment is not available against soft law documents, the Court consistently held that

> *"It would be inconsistent with this objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by article 189.*
>
> *An action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects."*[22]

Thus in order to decide whether an action for annulment is admissible, the content of the soft law document must be examined to see if it intended to have legal effects. Naturally, this review is also decisive in the merits of the case, since if the soft law document was intended to have legal effects, then an action for annulment is well-founded. In the *France v.*

[20] See for example: TREPAN 2014. 13-25.
[21] SENDEN 2013. 60.
[22] Commission v. Council, Case 22/70, EU:C:1971:32 paragraph 38-42.

Commission case[23] for example the Court decided that the `Commission Communication on an Internal Market for Pension Funds' must be annulled, due to the following reasons:

> *"The fact that the Communication was published after the proposal for a directive was withdrawn indicates that the Commission was seeking, by means of the Communication, to secure the application of rules identical or similar to those contained in the proposal for a directive. (…)*
>
> *Accordingly, it must be observed in the first place that those provisions of the Communication are characterized by their imperative wording. (…)*
>
> *In those circumstances, it must be held that the Communication constitutes an act intended to have legal effects of its own, distinct from those already provided for by the Treaty provisions on freedom to provide services, freedom of establishment and free movement of capital, with the result that an action for annulment will lie against it. (…)"*

A number of cases have arisen from the field of competition law as the Commission has published a number of soft law documents in this field (e.g. Guidelines on the method of setting fines, the Leniency notice, or the de minimis notice). Also, due the Commission's direct supervisory and adjudicatory powers, a lot of cases have reached the Court appealing the single-case decisions of the Commission. In these cases, the Court has reached a number of important conclusions related to soft law documents. The Court held in the *Dansk Rørindustri* case[24] that soft law documents

> *"may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment."*
>
> *"In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects."*

The question of the binding (soft binding, self-binding) effect of soft law was best elaborated in the *Grimaldi* case,[25] where a preliminary ruling procedure was brought to the Court by the Belgian courts. The dispute in the case arose from a conflict of national and EU soft law documents. The plaintiff was suffering from Dupuytren's contracture, which was not contained in the Belgian schedule of occupational diseases but could be deemed to be a „*disease caused by the over-straining of peritendinous tissue*". This disease appears in point F 6(b) of the European schedule of occupational diseases which the Recommendation of 23 July

[23] *France v Commission*, C-57/95, EU:C:1997:164
[24] C-189/02 *P Dansk Rørindustri and Others v Commission*, EU:C:2005:408
[25] C-322/88 *Grimaldi v Fonds des maladies professionnelles*, EU:C:1989:646

1962 recommended should be introduced into national law.[26] The Court first stated that a request for preliminary ruling is admissible. Then on the merits of the case, the Court went on and famously held that:

> *"In these circumstances there is no reason to doubt that the measures in question are true recommendations, that is to say measures which, even as regards the persons to whom they are addressed, are not intended to produce binding effects. Consequently, they cannot create rights upon which individuals may rely before a national court. (…)*
>
> *However, in order to give a comprehensive reply to the question asked by the national court, it must be stressed that the measures in question cannot therefore be regarded as having no legal effect. The 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."*

Common features and distinctions between the EU and the US

It is important to note that while in their legal effects and judicial review, soft law seems to be approached almost identically in the EU and in the US, still there are some fundamental differences that must be mentioned beforehand.

First and foremost, most cases of the ECJ regarding soft law documents concern soft law documents published by the Commission and not EU agencies. This is clearly related to differences between EU and US administrative agencies and their powers of rule-making or in the EU rather the lack thereof. This phenomenon might be changing with the establishment of EU agencies with more and more regulatory powers (see for example ESMA and the other ESAs). Soft law in the US is attached to the rule-making activity of the agency, as it interprets or rarely even supplements legislative rules of the same agency. Meanwhile in the EU, soft law documents, regardless whether they are published by the Commission or by an agency, are attached to a legal act adopted by the main institutions of the EU.

As we mentioned above, the evolution of soft law documents in the US has been closely linked to the ossification of the notice and comment rule-making procedure. In the EU, there seem to be other reasons fueling the spread of such soft legislative mechanisms. On the one hand, soft law documents are adopted in order the inform the interested parties of the Commission's use of its discretion – in this regard the US model is parallel. On the other hand, the Commission is also able to influence directly or indirectly national regulatory authorities by publishing soft law documents, which is a unique feature of the EU's shared administration.

Under the normal functioning of soft law, it informs the regulated community about how the Commission – or in the US, an agency – interprets a legislative act and how it will apply it

[26] C-322/88 Grimaldi, EU:C:1989:646, paragraph 4.

in a single-case decision-making process. However, since these guidance documents do not have any legal effect or binding force, they cannot create any rights or obligations for the interested parties. Still they can give rise to certain legitimate expectations and due to legal certainty concerns they bound the publishing authority, in the EU maybe even the national authorities. This phenomenon of soft law is described as a "*practical binding effect*" both in the EU and in the US. In both systems, the judicial review acknowledges this practical binding effect and differentiates it from "real" legal effects. In case a soft law document is intended to produce legal effects, then the soft law is annulled by the courts. Nevertheless, there is a fine line between practical binding effects and genuine legal effects, which leaves the courts great discretion in these cases. This is also reflected in the above mentioned judicial tests that use ambiguous standards to evaluate the existence of legal effects.

With the rise of agencies in the EU and with the ever-increasing complexity of administrative legal systems in both the EU and the US, the ambiguous legal status of soft law documents may raise more and more questions. Soft law documents will always exist in administrative systems, but it would be highly important to better clarify their legal status.

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SOFT LAW ESZKÖZÖK AZ EGYESÜLT ÁLLAMOK ÉS AZ EURÓPAI UNIÓ KÖZIGAZGATÁSI JOGÁBAN

A tanulmány a soft law források joghatásával foglalkozik az Egyesült Államok és az Európai Unió közigazgatási jogában. E dokumentumok elméletileg jogi kötelező erő nélküli szabályok, melyek legfeljebb közvetett gyakorlati hatással rendelkeznek. Létrejöttük szoros összefüggésben van a hatóságok mérlegelési jogkörével, hiszen egyik funkciójuk, hogy a hatóság saját munkatársai számára útmutatást nyújtsanak, hogy a tételes jogban megfogalmazott mérlegelést engedő szabályt hogyan értelmezzék és alkalmazzák az egyedi ügyekben. Amint nyilvánossá válnak ezek a mérlegelési jogkört kitöltő dokumentumok, a külső jogalanyoknak jogos várakozása keletkezik, hogy a jogbiztonság és a kiszámíthatóság jegyében az ő egyedi ügyükben is az ajánlásnak, közleménynek, útmutatónak megfelelő döntés szülessen. Ez már nemzeti szinten is problémákat jelenthet, de különös jelentősége van olyan összetett jogi-szervezeti konstrukciókban, mint az EU kétszintű végrehajtása vagy az amerikai szövetségi rendszer. A soft law forrásokkal kapcsolatos kérdések közül a tanulmány kettőt említ. Elsőként az amerikai és az uniós bírói választ elemzi arra az esetre, ha a soft law jogokat és kötelezettségeket állapít meg. Ezt követően pedig azt vizsgálja, hogy a soft law kötőereje – ha van ilyen – kire terjed ki és milyen mértékben.