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The CJEU's Contribution to the Doctrine
of International Law-Making

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The EU and the Challenge of Informal International Law-Making: The CJEU's Contribution to the Doctrine of International Law-Making

by

Eva Kassoti*

Abstract

The emergence and proliferation of informal means of co-operation has challenged the monopoly of traditional forms of international law-making. This shift to informality has forced modern international legal scholarship to rethink whether, and if so to what extent, the international legal order can adapt to and assimilate the sweeping changes on the international plane. Different accounts of how the discipline ought to come to terms with the phenomenon of informal international law have been offered; however, these often tend to neglect the practice of the EU and its principal judicial organ. In this light, the present contribution purports to examine how the CJEU has treated informal law in its practice with a view to ascertaining the Court's contribution to the continuing development of the doctrine of international law-making. The main argument advanced here is that the CJEU has recourse to a range of tools for factoring in new social developments, while keeping clear boundaries between law and non-law. It is asserted that current theorizing on the topic should engage more strongly in this practice since it attests to international law's ability to cope with informality, thereby lending normative and explanatory force to theoretical approaches that insist on retaining the distinction between law and non-law.

Keywords: Informal law-making; Legal acts; Legal facts; Soft law; Legitimate expectations

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The EU and the Challenge of Informal International Law-Making: The CJEU's Contribution to the Doctrine of International Law-Making

I. Introduction

Nowadays, it is generally conceded that the patterns of dispersion of authority have changed dramatically and that a great part of norm creation occurs outside the classic international law framework. The emergence and proliferation of informal means of co-operation has challenged the monopoly of traditional forms of international law-making. This shift to informality has forced modern international legal scholarship to rethink whether, and if so to what extent, the international legal order can adapt to and assimilate the sweeping changes on the international plane. Different accounts of how the discipline ought to come to terms with the phenomenon of informal international law have been offered; however, these often tend to neglect the practice of the EU and its principal judicial organ.

In this light, the present contribution purports to examine how the CJEU has treated informal law in its practice with a view to ascertaining the Court's contribution to the continuing development of the doctrine of international law-making. The main argument advanced here is that the CJEU has recourse to a range of tools for factoring in new social developments, while keeping clear boundaries between law and non-law. It is asserted that current theorizing on the topic should engage more strongly in this practice since it attests to international law's ability to cope with informality.

The article begins by briefly sketching out the main theoretical approaches to the phenomenon of informal international law. Two major strands of thought are examined. The first one includes authors who have suggested that, since new developments cannot be accommodated within the traditional framework, the discipline should move away from the classic, binary understanding of law and adopt a more flexible definition of 'international law' that would allow us to incorporate new actors, processes and outputs. The second one emphasises the importance of a clear distinction between law and non-law in order to maintain the identity of international law *qua* law.

Against this background, the article continues by focusing on the relevant practice of the CJEU. It is shown that, when confronted with informal instruments, the Court has consistently treated the distinction between law and non-law as something real and relevant – thereby refusing to adopt a ‘pluralised’ notion of law. Thus, the Court’s approach corroborates the arguments of those in favour of a bright line separating law from non-law. The Court’s insistence on a separation between law and non-law does not mean that it is unable to keep pace with the changing realities in modern social practice. On the contrary, it is argued that the Court has developed an array of mechanisms that allow it to capture manifestations of normativity that escape the traditional framework.

First, in keeping with the current trend of deformalization of international-law making, the Court’s practice in ascertaining the normative status of informal international agreements evidences the irrelevance of considerations of form and the importance attached to the ‘reality of consent’. In a series of judgments, the Court has found that the form in which an instrument is clothed does not affect its legal character as long as it expresses the intention of its authors to be bound. Secondly, the CJEU has expressly acknowledged the normative significance of instruments that are not *per se* binding. For instance, it has been accepted that non-binding law may have legal effects to the extent that it creates legitimate expectations on the parties concerned, or to the extent that it is used to assist interpretation of other legal acts. By accepting that normative utterances can be legally relevant without being legally binding, the CJEU has followed public international law’s sophisticated distinction between the broader concept of normativity and that of legality. This distinction is crucial since it enables the Court to take into account the normative contours of conduct that falls below the threshold of ‘bindingness’, and thus to assimilate social reality while keeping the boundary between law and non-law intact.

The article concludes by stressing the wider implications of the findings reached herein. The CJEU’s treatment of informal international law is an important source of guidance on how international courts may come to grips with informal instruments without radically departing from the existing structure. The Court’s practice is also of cardinal importance in shaping the modern doctrine of international law-making since it re-entrenches formalism, thereby lending normative and explanatory force to theoretical approaches that insist on retaining the distinction between law and non-law.

II. Informal Law-Making: An Infinite Variety

From the outset, it needs to be noted that, although all legal systems suffer from a certain degree of inherent indeterminacy, international lawyers are routinely faced with a considerably higher degree of uncertainty in relation to their domestic law colleagues. In the early

1980s, Jennings voiced concern over the increasing difficulty of distinguishing between legal and non-legal norms at the international level.¹ The unprecedented rise of informal international law witnessed in recent years has obscured the distinction between law and non-law even further.

International law never put great emphasis on form and formalities to begin with. In municipal legal systems, the law often stipulates specific requirements regarding the form of legal transactions, the non-observance of which may result in rendering the transaction in question invalid.² However, this is not the case with international law where the form in which a transaction is clothed does not say much about its legal character.³ Furthermore, the patterns of dispersion of authority have changed dramatically in recent years and it is generally conceded that a great part of norm creation nowadays occurs outside the classic international law framework.⁴ This turn to informality manifests itself in three ways. First, there is empirical evidence showing a sharp decline in the conclusion of formal instruments and a concomitant rise of informal means of co-operation.⁵ Modern practice is anything but unfamiliar with ‘Memoranda of Understanding’ or ‘Common Positions’, terms that are employed to denote instruments that embody some sort of common understanding but fall short of international agreements proper (output informality).⁶ Pauwelyn, Wessel and Wouters have identified three main reasons underpinning this trend. The slowdown in formal law-making may be the result of the fact that most policy areas are already covered by multilateral agreements.⁷ It may also be perceived as a natural reaction to the exponential growth in the number of agreements concluded during the 1990s.⁸ Finally, the decline in formal law-making may be the result of the recent economic crisis which forced States to focus more on national issues and to avoid undertaking new international obligations.⁹

Secondly, the shift towards informality reflects the range of actors involved in normative activity in a globalised world. A wide array of entities, such as NGOs, transnational corporations and non-State armed groups, that have traditionally been seen as objects, rather than

¹ JENNINGS Robert, *What is International Law and How Do We Tell When We See It?*, Schweizerisches Jahrbuch für Internationales Recht (1981) pp. 59-91, p. 60.

² *Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Preliminary Objections) [1961] ICJ Rep 17, 31.

³ See generally LACHS Manfred, *Some Reflections on Substance and Form in International Law*, in FRIEDMANN Wolfgang, HENKIN Louis, LISSITZYN Oliver (eds), *Transnational Law in a Changing Society: Essays in Honour of Philip C. Jessup*, New York, Columbia University Press (1972), pp. 99-112.

⁴ D’ASPREMONT Jean, *From a Pluralization of International Norm-making Processes to a Pluralization of the Concept of International Law*, in PAUWELYN Joost, WESSEL Ramses, WOUTERS Jan (eds), *Informal International Lawmaking*, Oxford, Oxford University Press (2012), pp 185-199, p. 195.

⁵ See generally BOYLE Alan, CHINKIN Christine, *The Making of International Law*, Oxford, Oxford University Press (2007).

⁶ See generally BAXTER Richard, *International Law in “Her Infinite Variety”*, ICLQ (1980), pp. 549- 566.

⁷ PAUWELYN Joost, WESSEL Ramses, WOUTERS Jan, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, EJIL (2014) pp. 733-763, p. 739.

⁸ *Ibid.*, p. 740.

⁹ *Ibid.*, p. 741.

subjects, of international law (let alone law-makers), have entered into the scene and challenged the norm-making monopoly of traditional subjects (author informality).¹⁰ Thirdly, the increasing complexity of modern global challenges has also affected the ways in which States co-operate both among them and with new internationally active actors. Networks of civil servants meeting in informal contexts, such as the G-20 and the Financial Stability Forum, have come to replace or complement more formal mechanisms of coordination and standard-setting (process informality).¹¹ Overall, the declining importance of form and formalities, treaty-fatigue, and the proliferation of new actors, outputs and processes have accentuated the phenomenon of informal international law-making, and thus, the problem of distinguishing between law and non-law.

At the EU level the situation is not much different; as Cannizzaro and Rebasti note: “the increasing reliance on soft law in its different manifestations is a common trait of the international and the EU legal order.”¹² Over the last decades, it has become widely accepted that binding legislation is not the only way to realise European integration.¹³ The focus is now increasingly shifting to informal regulatory instruments, including benchmarking, standardisation, self-regulation, co-regulation and open co-ordination.¹⁴ Advocate General Cosmas highlighted this trend, in his Opinion in *Dior*, as early as 2000.

As Community law now stands, the need for practical harmonisation ... can only be based on procedures and obligations falling within an alternative framework often marked by a lack of strictness (soft law). That is neither paradoxical nor contradictory. It is justified by the variable geometry and the still incomplete institutionalisation of the coexistence of national, Community and international legal orders. In the context of that institutionalisation, law and politics exchange characteristics: the former imposes its strict and binding nature on the latter and the latter in turn instils its relativity and flexibility in the former.¹⁵

The Commission, in its 2001 White Paper on European Governance, also acknowledged the increased reliance on informal instruments. According to the Commission: “legislation is often only part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework.”¹⁶ In the 2003 Interinstitutional Agreement on Better Law-Making, the institutions recognised “the need to use, in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms.”¹⁷

¹⁰ KRISCH Nico, KINGSBURY Benedict, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, EJIL (2006), pp. 1-13, p. 1.

¹¹ SLAUGHTER Anne-Marie, *A New World Order?*, Princeton, Princeton University Press (2004), pp. 1-7.

¹² CANNIZZARO Enzo, REBASTI Emanuele, *Soft Law in the EU Legal Order*, in ILIOPOULOS-STRANGAS Julia, FLAUSS Jean-François (eds), “The Soft Law of European Organisations”, Baden-Baden, Nomos (2012), pp. 209-232, p. 231.

¹³ SENDEN Linda, *Soft Law and its Implication for Institutional balance in the EC*, Utrecht L. Rev. (2005), pp. 79-99, p. 79.

¹⁴ *Ibid.* In a 2012 study drafted for the Parliament Senden and van den Brink remarked that: “soft EU rule-making has evolved to the extent that it now reflects a general trend or feature of the Union’s institutional and regulatory landscape and does not concern merely a sector-specific issue.” SENDEN Linda, VAN DEN BRINK Ton, *Checks and Balances of Soft EU Rule-Making*, report requested by the European Parliament’s Committee on Legal Affairs, (2012), <[http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/2012/462433/IPOL-JURI_ET\(2012\)462433_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/2012/462433/IPOL-JURI_ET(2012)462433_EN.pdf)> accessed 25 December 2017, 10.

¹⁵ ECJ, joined Cases C-300/98 and C-322/98 *Dior et al.* [2000] ECR I-11307, Opinion of AG Cosmas, para 76.

¹⁶ White Paper on European Governance COM(2001) 428 final [2001] OJ C287/1, 17.

¹⁷ Interinstitutional Agreement on Better Law-Making [2003] OJ C321/01, para 16

The reasons why informal instruments may represent an attractive alternative to formal law-making, both in the context of international and EU law, seem to be largely similar.¹⁸ First, it may be easier for States to achieve consensus when the form is not binding. Secondly, it has been observed that despite their low level of normativity, these instruments tend to be complied with in practice, thus ensuring a high degree of effectiveness. Thirdly, the adoption of informal instruments allows the inclusion of a whole range of different actors – actors that would normally be excluded from formal law-making processes – thereby ensuring the involvement of a plurality of actors in the regulation of certain sectors. According to Cannizzaro and Rebasti, the proliferation of informal instruments both in the international and EU legal order “represents in both cases a paradigm shift: the shift from an approach that focuses on the legal effect of the rule to a different one that focuses on its overall effectiveness; a shift from the centrality of the norm to the centrality of the process.”¹⁹

It would be beyond the confines of the present article to present an exhaustive list of the different types of informal instruments that are associated with the notion of informal law-making in the context of EU law. It suffices to mention that, in this context, informal instruments are often systematised in accordance with their function.²⁰ A functional typology of informal EU law typically includes preparatory and informative instruments, such as Green and White papers and Action Plans;²¹ interpretative and decisional instruments, such as Communications and Guidelines issued by the Commission;²² and steering instruments, such as Council Conclusions, Council Declarations and Council Resolutions.²³ Recent years have also witnessed the proliferation of informal instruments issued by private actors. The trend towards privatisation manifests itself through the increased engagement of private actors with autonomous self-regulation, the emergence of mixed public-private acts (co-regulation) and the proliferation of standard-setting instruments.²⁴

Finally, it needs to be noted that the shift from formal to informal law-making has not gone unchallenged. In its 2007 Resolution on the implications of the use of informal instruments, the Parliament issued a stern warning against overreliance on informal regulation since this may result in ‘competence creep’.²⁵ According to the Parliament: “where the Community

¹⁸ CANNIZZARO, REBASTI (n 12), p. 231. BOYLE Alan, *Soft Law in International Law-Making*, in EVANS Malcolm (ed), “International Law”, Oxford, Oxford University Press (2014) 4th edn., pp. 118-136, p. 121.

¹⁹ CANNIZZARO, REBASTI (n 12), p. 231.

²⁰ PETERS Anne, PAGOTTO Isabella, *Soft Law as a New Mode of Governance: A Legal Perspective*, Ref No 04/D11 (2006) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1668531> accessed 25 December 2017, pp. 16-21. SENDEN (n 12), pp. 81-83. CANNIZZARO, REBASTI (n 12), pp. 218-229.

²¹ PETERS, PAGOTTO, *ibid.*, p. 16. SENDEN, *ibid.*, p. 81.

²² PETERS, PAGOTTO, *ibid.*, p. 17. SENDEN, *ibid.*, p. 82.

²³ PETERS, PAGOTTO, *ibid.* SENDEN, *ibid.*

²⁴ PETERS, PAGOTTO, *ibid.*, pp. 18-19. See also SENDEN Linda, *Soft Law, Self-regulation and Co-regulation in European Law: Where Do They Meet?*, EJCL (2005), pp. 1-27, p. 1. SCOTT Joanne, TUBEK David, *Mind the Gap: Law and New Approaches to Governance in the European Union*, ELJ (2002), pp. 1-18, p. 1.

²⁵ European Parliament Resolution of 4 September 2007 on Institutional and Legal Implications of the use of “Soft Law” Instruments (2007/2028 (INI)).

has legislative competence, the proper way to act is through the adoption of legislation by the democratic institutions of the Union ... in so far as this still appears necessary having due regard to the principles of subsidiarity and proportionality.”²⁶ The Parliament, while acknowledging that such instruments can be used as “interpretative and preparatory tools for binding legislative acts” they should not be treated as ‘legislation’ as this would create confusion and jeopardise legal certainty.²⁷

Before embarking upon any further discussion, an important note regarding the use of the term ‘informal law’ throughout the article needs to be made here. Informal law-making is used here in juxtaposition to formal law-making - without prejudice to the binding nature of instruments resulting therefrom. In this vein, the instruments discussed here are ‘informal’ to the extent that they dispense with certain formalities traditionally associated with legal regulation, in terms of form, and thus, they are not readily cognisable as law proper. It is noteworthy that large part of the EU law literature discusses informal regulation in the context of EU law in terms of ‘soft law’.²⁸ Under this label, a great variety of different norms are often grouped together which have very little in common apart from the common characteristic of being deprived of any binding force.²⁹ The term ‘informal law’ has been chosen over ‘soft law’, since the former is linguistically more accurate in describing the rich tapestry of instruments that come before the CJEU. The hallmark of new developments is the lack of any formalities associated with traditional forms of law-making and not the lack of binding character of informal instruments *per se*.³⁰ Thus, ‘informal law’ best encapsulates the realities on the ground since it is ‘value-free’ and it may be used to describe instruments that, while lacking in form, may still be construed as binding, as it will be discussed in detail below. By way of contrast, it is believed that the term ‘soft-law’ is bound to create confusion as there is no widely agreed definition thereof and it has been invoked in the literature to describe a wide range of diverse phenomena,³¹ some of which fall outside the purview of the present contribution, such as the question of the binding nature of

²⁶ *Ibid.* point J.

²⁷ *Ibid.* points M. - N.

²⁸ PETERS Anne, *Typology, Utility and Legitimacy of European Soft Law*, in EPINEY Astrid, HAAG Marcel, HEINEMANN Andreas (eds), “Challenging Boundaries: Essays in honor of Roland Bieber”, Baden-Baden, Nomos (2007), pp. 405-428, p. 407.

²⁹ According to Peters “soft law in the European realm can be defined as *norms which are on the one hand not legally binding in an ordinary sense, but are on the other hand not completely devoid of legal effects either*.” PETERS, *ibid.* Senden defines 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.” SENDEN Linda, *Soft Law in European Community Law*, Oxford, Hart Publishing (2004), p. 112. Wellens and Borchardt write that: “Community soft law concerns the rules of conduct which find themselves on the legally non-binding level (in the sense of enforceable and sanctionable) but which according to their drafters have to be awarded a legal scope, that has to be specified in every turn and therefore do not show a uniform value of intensity with regard to their legal scope, but do have in common that they are directed at (intention of the drafters) and have as effect (through the medium of the Community legal order) that they influence the conduct of Member States, institutions, undertakings and individuals, however without containing Community rights and obligations.” WELLENS Karel, BOCHARD Gustaaf, *Soft Law in European Community Law*, E. L. Rev. (1987), pp. 267-321, p. 285.

³⁰ PAUWELYN Joost, *Informal International Lawmaking: Framing the Concept and Research Questions*, in Pauwelyn, Wessel, Wouters (n 4), pp. 13-34, p. 16.

³¹ MURPHY John, *The Evolving Dimensions of International Law: Hard Choices of the World Community*, New York, Cambridge University Press (2010), pp. 20-23; ELLIS Jaye, *Shades of Grey: Soft Law and the Validity of International Law*, LJIL (2012), pp. 313-334, pp. 315-318.

norms couched in hortatory language that are included in an otherwise binding instrument.³²

III. Framing the Debate: The Grey Zone and the Bright Line Schools of Thought

Scholars who have addressed the phenomenon of informal law-making can be divided in two camps: the grey zone and the bright line schools of thought. The academic debate has been summarised most succinctly by Shelton: “In respect of ‘relative normativity’, scholars debate whether binding instruments and non-binding ones are strictly alternative or whether they are two ends in a continuum from legal obligation to complete freedom of action, making some such instruments more binding than others.”³³ Faced with the challenges posed by informal international law in its multiple dimensions, part of the discipline has felt that the traditional means of law-ascertainment, namely the sources doctrine, is ill-suited to accommodate the growing complexities of modern international life. As a result, several strands of literature have articulated different visions of international law (law as process/New Haven school of international law),³⁴ as well as different means of gauging normativity that radically depart from existing structures (effects-based approach,³⁵ substance-based approach,³⁶ effects/substance-based approach).³⁷ A common denominator of all these approaches is the (deliberate or unintentional) muddling of the distinction between law and non-law. Attempts to refocus the discipline’s cognitive lens in order to grasp a changing world order have, at some point or another, stumbled upon the binary distinction between law and non-law which they have treated either as something that can be done away with altogether, or as something important, but nevertheless porous.³⁸ By doing so, authors have invariably accepted the existence of a ‘grey zone’ between law and non-law. In other words, they have accepted that there are no clear boundaries between the legal and the non-legal and that an instrument can be law, non-law, but also fall somewhere in between the grey zone of normativity that separates law from non-law (grey zone school).³⁹

³² On this see generally CHINKIN Christine, *The Challenge of Soft Law: Development and Change in International Law*, ICLQ (1989), pp. 850-866.

³³ SHELTON Dinah, *International Law and ‘Relative Normativity’*, in Evans (n 18), pp. 137-165, p. 160.

³⁴ McDUGAL Myres S, A Footnote, AJIL (1963), pp. 383-384, p. 383. See also HIGGINS Rosalyn, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press (1994), p. 2. LASSWELL Harold D, McDUGAL Myres S, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy*, Dordrecht, Martinus Nijhoff (1992), pp. 24-25.

³⁵ See mainly ALVAREZ José, *International Organizations as Law-makers*, Oxford, Oxford University Press (2005), pp. x-xi, 63, 122.

³⁶ See generally FRANCK Thomas, *The Power of Legitimacy Among Nations*, New York, Oxford University Press (1990). FRANCK Thomas, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, AJIL (2006), pp. 88-106, p. 93.

³⁷ KINGSBURY Benedict, KRISCH Nico, STEWARD Richard, *The Emergence of Global Administrative Law*, Law and Contemporary Problems (2005), pp. 15-61, p. 16. KINGSBURY Benedict, *The Concept of ‘Law’ in Global Administrative Law*, EJIL (2009), pp. 23-57, p. 25.

³⁸ For a comprehensive overview see Ellis (n 31).

³⁹ See generally PAUWELYN Joost, *Is it International Law or Not, and Does It Even Matter?*, in PAUWELYN, WESSEL, WOUTERS (n 4), pp. 125-161.

Other authors have resisted the trend of deformalization⁴⁰ discussed above and have fiercely advocated in favour of maintaining a clear distinction between law and non-law (bright line school).⁴¹ The distinction is considered of cardinal importance in retaining the identity of international law *qua* law on a number of grounds. First, it has been asserted that legal certainty, stability and predictability in international relations, key functions of the international legal system, are contingent on the existence of a clear boundary between *lex lata* and *lex ferenda*.⁴² The International Law Commission (ILC) acknowledged this much in its introductory note to the 2006 Guiding Principles on unilateral acts of States: “Clearly, it is important for States to be in a position to judge with reasonable certainty whether and to what extent their ... conduct may legally bind them on the international plane.”⁴³ Secondly, the regime governing the international responsibility of States, at least in so far as this is reflected in the (Draft) Articles on State Responsibility,⁴⁴ functions on the basis of a dichotomy between legal and non-legal obligations. If legal and non-legal obligations were conflated, the regime of sanctions for breaches of obligations of a legal nature would be impossible to apply. This would mean that international law would lose its ‘normativity’, namely its ability to be “a means of control that effectively limits the acts of entities subject to it”,⁴⁵ and thus, its quality as ‘law’ proper.⁴⁶

It has also been claimed that abandoning the binary system of normativity would comprise international law’s neutrality.⁴⁷ A grey zone of normativity would leave too much leeway for powerful States to manoeuvre and bend the law to fit their interests. Stripped of its neutrality, law would become synonymous with politics and power-brokering. As Tomuschat stresses:

States like China, Russia or the United States are in a much better position to pursue a deliberate strategy of inventing new concepts in order to promote their political goals ... Discourse on what is right and what is wrong must be crystal-clear and should not fall into the hands of a few magicians who invariably are able to prove that law and justice are on their side.⁴⁸

⁴⁰ The term ‘deformalization’ is used here to connote the rejection of the idea that the characterization of a norm as ‘legal’ depends on whether or not it meets certain predefined formal standards as to what constitutes law. See KOSKENNIEMI Martti, *The Politics of International Law – 20 Years Later*, EJIL (2009), pp. 7-19.

⁴¹ See for example KLABBERS Jan, *Law-making and Constitutionalism*, in KLABBERS Jan, PETERS Anne, ULFSTEIN Geir (eds), “The Constitutionalization of International Law”, Oxford, Oxford University Press (2009), pp. 81-125, pp. 93-99. D’ASPREMONT Jean, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford, Oxford University Press (2011), pp. 180-190.

⁴² KOSKENNIEMI Martti, *The Fate of Public International Law: Between Technique and Politics*, MLR (2007), pp. 1-30, p. 30. KOSKENNIEMI Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge, Cambridge University Press (2002), pp. 494-509.

⁴³ Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations with Commentaries Thereto, adopted by the ILC at its 58th session, 2006 Yrbk of the ILC, Vol. II, p. 369, para. 173.

⁴⁴ See Art. 3 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, adopted by the ILC at its 53rd session, 2001 Yrbk of the ILC, Vol. II, p. 36.

⁴⁵ SCHACHTER Oscar, *The Nature and Process of Legal Development in International Society*, in MACDONALD Ronald, JOHNSTON Douglas (ed.), “The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory”, Dordrecht, Martinus Nijhoff (1983), pp. 745-808, p. 747.

⁴⁶ KLABBERS Jan, *The Undesirability of Soft Law*, Nordic J. Int’l L. (1998), pp. 381-391, p. 387.

⁴⁷ WEIL Prosper, *Towards Relative Normativity in International Law?*, AJIL (1983), pp. 413-442, p. 420.

⁴⁸ TOMUSCHAT Christian, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, Recueil des Cours (1999), pp. 9-438, pp. 27-28.

Finally, muddying the waters comes at a price for the discipline itself too. Nowadays, the “invisible college of international lawyers”⁴⁹ seems to be divided into different groups, each using their own means of ascertainment of legal rules.⁵⁰ The mushrooming of theory in the field of law-making carries with it the risk of disappearance of a common *lingua franca* of international law. However, if we lack a shared language to cognise international law, our critique thereof becomes too fragmented to be meaningful. As Crawford put it: “while the builders of the Tower of Babel speak mutually incomprehensible languages, there is no guarantee that they build the same Tower.”⁵¹

This section sketched out the two main theoretical approaches to international law-making. The arguments floated by bright line theorists are compelling: in their attempt to cast the net wide and thus, capture manifestations of normativity that escape the traditional framework, grey zone theorists have invariably conflated the distinction between law and non-law. This blurring of the normativity threshold has proven to be Achilles heel of the grey zone school. Ultimately, this school of thought fails to convince *exactly* because it creates uncertainty about the distinction between law and non-law.⁵² At the same time, the concerns underpinning the grey zone school are not so easily dismissed. How can a diffuse and horizontal system such as international law, retain its formalism in the face of the sweeping changes on the international plane without becoming increasingly obsolete? The next section endeavours to explore how proponents of the binary nature of law have tackled this question and more particularly, how the practice of the CJEU may be used to buttress their line of thought.

IV. Informal Law and the Practice of the International Courts and Tribunals: The CJEU’s Contribution to the Debate on International Law-making

Advocates of a strict separation between law and non-law have pointed out that grey zone theorists consistently downplay the ways in which international courts and tribunals treat informal law in their practice.⁵³ Bright line theorists typically rely on judicial practice pertaining to the existence of mechanisms allowing informal prescriptions to be absorbed into the system. This practice confirms the system’s inherent capacity to cope with informality – without diluting the distinction between law and non-law.⁵⁴ However, these accounts tend

⁴⁹ See generally SCHACHTER Oscar, *The Invisible College of International Lawyers*, Nw. U. L. Rev. (1977-1978), pp. 217-226.

⁵⁰ BIANCHI Andrea, *Reflexive Butterfly Catching: Insights from a Situated Catcher*, in PAUWELYN, WESSEL, WOUTERS (n 4), pp. 200-215, p. 207; D’ASPREMONT Jean, *Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D’Amato*, EJIL (2009), pp. 911-917.

⁵¹ CRAWFORD James, *Chance, Order, Change: The Course of International Law*, Recueil des Cours (2013), pp. 9-369, p. 153.

⁵² As Klabbers put it: “In the end, current theorizing about law forsakes an important point: the point that law ideally should be cognizable, and should be cognizable as such.” KLABBERS (n 41) 103.

⁵³ KLABBERS Jan, *International Courts and Informal International Law*, in Pauwelyn, Wessel, Wouters (n 4), pp. 219-240, p. 230.

⁵⁴ See for example AUST Anthony, *The Theory and Practice of Informal International Instruments*, ICLQ (1986), pp. 787-812.

to focus on ICJ jurisprudence and the relevant practice of the CJEU often goes unnoticed.⁵⁵ At the other end of the spectrum, the theoretical challenges posed by informal law have remained at the margins of EU academic discourse. In 2011 Peters remarked that:

Although some attention has been paid to interinstitutional agreements ..., the overall phenomenon of soft regulation has been much less thoroughly explored on the EU level than it has in public international law. Textbooks and general courses on European Union law still either do not mention soft law at all or only treat it in an extremely cursory function with some standard examples.⁵⁶

However, it is submitted that this almost exclusive focus on ICJ case-law may result only in a partial picture of modern law-making and law-ascertainment processes. Thus, the remainder of this section zooms in on judicial statements on the legal effects of informal instruments emanating both from the ICJ and the CJEU. Two main points are advanced here. First, both courts largely share the same mechanisms for ‘filtering through’ informal output, thereby confirming the existence of a common framework for assimilating social reality. Secondly, the CJEU’s pronouncements on informal law manifest that the EU legal order is neither unfamiliar nor inherently incompatible with the idea that law is not only a question of threshold and that normative utterances that remain below the normativity threshold may still have important legal ramifications – something that classic international law understood very well. This not only lends explanatory force to theoretical approaches that insist on retaining the distinction between law and non-law, but also confirms the importance of taking into account the CJEU’s case-law in the on-going debate on modern international law-making.

A. Irrelevance of considerations of form

Klabbers argues that, far from shrugging their shoulders when faced with informal instruments, or instruments that cannot be shoehorned into the traditional sources of international law, international adjudicatory bodies have invariably accepted their binding force as long as they manifest the intention of their author/s to be bound.⁵⁷ The ICJ’s practice in relation to informal international agreements evidences the irrelevance of considerations of form and the importance attached to the ‘reality of consent’. In the *Aegean Sea Continental Shelf Case*,⁵⁸ in the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and*

⁵⁵ See for example SHELTON Dinah (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford, Oxford University Press (2003). Klabber’s work on the topic of informal law is an important exception, see fn. 53 and 83.

⁵⁶ PETERS Anne, *Soft Law as a New Mode of Governance*, in DIEDRICHS Udo, REINERS Wulf, WESSELS Wolfgang (eds), “*The Dynamics of Change in EU Governance*”, Cheltenham, Edward Elgar (2011), pp. 21-51, p. 21. There are few seminal works on the topic: SENDEN (n 29); SNYDER Francis, *Soft Law and Institutional Practice in the European Community*, EUI Working Paper No. 93/5, Florence, European University Institute (1993); WELLENS, BOCHARD (n 29).

⁵⁷ KLABBERS (n 53), pp. 226-239.

⁵⁸ *Aegean Sea Continental Shelf Case (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3, paras 96, 107.

Bahrain,⁵⁹ in the *Cameroon v Nigeria Case*,⁶⁰ and, more recently, in the *Pulp Mills Case*,⁶¹ the Court found that the form in which an instrument is clothed does not affect its legal character as long as it expresses the intention of its authors to be bound.⁶² Thus, in the context of the aforementioned cases, it was held that a joint communiqué, the minutes of a discussion between Ministers for Foreign Affairs, a joint declaration and a joint press release could be, in principle, considered as formally binding upon their author States to the extent that they recorded an agreement to be bound.

The same disregard for considerations of form has been shown by the CJEU. In *Opinion 1/75*, the ECJ stressed that “the formal designation of the agreement envisaged under international law is not of decisive importance.”⁶³ The Court treated the draft ‘Understanding of a Local Cost Standard’ developed under the auspices of the OECD as an agreement since it contained “a rule of conduct, covering a specific field ... which is binding upon the participants.”⁶⁴ In *France v Commission*, the Court confirmed its broad understanding of the term ‘agreement’ that encompasses “any undertaking entered into by entities subject to international law, *whatever its formal designation*.”⁶⁵ Similarly, in its Opinion in the *Case of the Convention on the Civil Aspects of International Child Abduction*, the Court noted that the essence of international agreements is that they express “a convergence of intent” on the part of two or more subjects of international law,⁶⁶ thereby signifying that it pays little attention to questions of form. More recently, in its 2014 *Venezuelan Fishing Rights* judgment, the Court had little trouble coming to the conclusion that a Council Decision authorizing Venezuelan fishing vessels to fish in EU waters off the coast of French Guiana culminated into the establishment of an international agreement between the EU and Venezuela once the latter tacitly accepted it.⁶⁷

Furthermore, in the context of judicial review, the CJEU has consistently held that the form in which an act is cast is immaterial as regards the question whether it is open to challenge under Art. 263 TFEU.⁶⁸ According to the Court what matters is whether the act is capable of affecting the legal interests of the applicant by bringing about a distinct change in his/her

⁵⁹ *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112, paras 25, 27.

⁶⁰ *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, para 264.

⁶¹ *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, paras 138-150.

⁶² KLABBERS Jan, *The Concept of Treaty in International Law*, The Hague, Kluwer Law International (1996), pp. 65-72; FITZMAURICE Malgosia, *The Identification and Character of Treaties and Treaty Obligations between States in International Law*, BYIL (2002), pp. 141-185, pp. 165-168; D’ASPREMONT (n 41), pp. 180-190.

⁶³ ECJ, *Opinion 1/75* [1975] ECR I-1355, p. 1360.

⁶⁴ *Ibid.*

⁶⁵ ECJ, case C-327/91 *French Republic v Commission of the European Communities* [1994] ECR I-3641, para 27. (Emphasis added. For an overview of the concept of ‘agreement’ under EU law see ODERMATT Jed, *The European Union as a Global Actor and its Impact on the International Legal Order*, Ph.D. Thesis, University of Leuven, 2016, pp. 101-104. For the view that the CJEU’s approach to what constitutes an ‘agreement’ is wider than that under international law, see ODERMATT, *ibid.*, pp. 103-104.

⁶⁶ ECJ, *Opinion 1/13* [2014] EU:C:2014:2303, para. 37.

⁶⁷ Joined Cases C-103/2 and C-165/12 *European Parliament, European Commission v Council of the European Union* [2014] EU:C:2014:2400, paras 68-72.

⁶⁸ ECJ, case 60/81 *International Business Machine Corporation v Commission of the European Communities* [1981] ECR I-2639, para. 9.

legal position.⁶⁹ Thus, in *IBM* and in *Bosman* the Court found that a Commission letter and a joint press release issued by the Commission and the Union of European Football Associations were not reviewable acts within the meaning of Art. 263 TFEU purely on the basis of their contents and paid no heed to their form.⁷⁰ However, in a number of cases, the Commission has also been faced with the annulment of some of its informal instruments. The common feature of all these cases was that the instruments in question, despite their informal character, were in fact intended to have legal effects and that the Commission did not have the competence to adopt them.⁷¹

In *ERTA*, the informal character of the Council resolution adopted on 27 March 1970 laying down its position regarding the negotiation of a European Road Transport Agreement did not preclude the Court from ascribing legal effects thereto.⁷² According to the Court:

[T]he proceedings of 20 March 1970 could not have been simply the expression or the recognition of a voluntary coordination, but were designed to lay down a course of action binding on both the institutions and the Member States ... In the part of its conclusions relating to the negotiating procedure, the Council adopted provisions which were capable of derogating from the procedure laid down by the Treaty regarding negotiations with third countries and the conclusion of agreements. Hence, the proceedings of 20 March 1970 had definite legal effects both on the relations between the Community and the Member States and on the relationship between the institutions.⁷³

In a more recent case (*OIV*) the Court was confronted with the question of the legal character and effects of an informal act issued by an international organisation to which the EU is not a member.⁷⁴ The case concerned an action for annulment brought by Germany against a Council decision establishing the position of the EU in the International Organisation of Vine and Wine (OIV).⁷⁵ Germany argued, *inter alia*, that OIV acts cannot be considered as ‘acts having legal effects’ within the meaning of Art. 218(9) TFEU since they are merely ‘recommendations’ and thus, they have no binding force under international law.⁷⁶ Advocate General Cruz Villalón, siding with applicant, opined that OIV resolutions merely constitute non-binding international technical standards and, as such, they come under the

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* paras. 8-9. ECJ, case C-117/91 *Bosman v Commission of the European Communities* [1991] ECR I-4837, paras 13-14.

⁷¹ ECJ, case C-366/88 *French Republic v Commission of the European Communities* [1990] ECR I-3571, para. 25; ECJ, case C-303/90 *French Republic v Commission of the European Communities* [1991] ECR I-5315, para. 25; ECJ, case C-325/91 *French Republic v Commission of the European Communities* [1993] ECR I-3283, paras. 22-23; ECJ, case C-57/95 *French Republic v Commission of the European Communities* [1997] ECR I-1627, para. 23.

⁷² ECJ, case 22/70 *Commission of the European Communities v Council of the European Communities* [1971] ECR I-0263.

⁷³ *Ibid.*, paras 53-55.

⁷⁴ ECJ, case C-399/12 *Federal Republic of Germany v Council of the European Union* [2014] EU:C:2014:2258. For an analysis of the case see RAMOPOULOS Thomas, WOUTERS Jan, Charting the Legal Landscape of EU External Relations Post-Lisbon, Leuven Centre for Global Governance Studies, Working Paper No. 156 (2015) <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp151-160/wp156-ramopoulos-wouters.pdf> pp. 15-16, accessed 25 December 2017. See also GOVAERE Inge, *Novel issues Pertaining to EU Member States Membership of Other International Organisations: The OIV Case*, in GOVAERE Inge, LANNON Peter, VAN ELSUWEGE Erwan, ADAM Stanislas (eds), “The European Union in the World: Essays in Honour of Marc Maresceau”, Leiden, Martinus Nijhoff (2013), pp. 225-243.

⁷⁵ *Ibid.* para. 22.

⁷⁶ *Ibid.* para. 36.

heading of ‘soft law’.⁷⁷ The Advocate General, while acknowledging that “in recent years, the doctrine on the sources of international law has increasingly sought to also cover acts, which although not legally binding, none the less exhibit a degree of relevance through references made to them, the reliance placed on them for the purposes of interpreting binding law or their practical effectiveness ...”,⁷⁸ argued that “ ‘soft law’ is neither a legally relevant category of acts nor one that can be clearly circumscribed.”⁷⁹ On this basis, the Advocate General concluded that OIV resolutions cannot be considered as ‘acts having legal effects’.⁸⁰ However, the Court disagreed with this overly narrow approach and dismissed the application. It found that, despite their informal character and non-binding nature, EU legislation requires them to be taken into consideration when drawing up rules in the relevant field and, thus, such recommendations “are capable of decisively influencing the content of [EU] legislation.”⁸¹ The Court’s approach in relation to what constitutes a reviewable act as well as an ‘act having legal effects’ within the meaning of Art. 218(9) TFEU shows that it will not hesitate to ascribe legal consequences to informal instruments that may give rise to ‘normative ripples’ by affecting the legal position of their addressees, or by influencing the content of EU legislation.

In 1998 Klabbers concluded in a brief overview of the CJEU’s case-law that, as a general rule, the Court applied norms “with a benign neglect of the type of instrument in which the norm was laid down.”⁸² As this brief account has shown, in more recent years the situation has not changed much. Considerations of formality do not play a prominent role in the Court’s assessment of the normative contours of a given instrument. More recent case-law confirms that the Court consistently favours analysis of the contents of an instrument over its form.⁸³

B. The Distinction between Legal Acts and Legal Facts

Much of the critique levelled against accepting a bright line between law and non-law stems from the belief that this acceptance amounts to embracing a voluntarist outlook on international law.⁸⁴ However, insisting on a separation between law and non-law does not entail denying the relevance of instruments that are not *per se* binding. Bright line theorists accept

⁷⁷ ECJ, case C-399/12 *Federal Republic of Germany v Council of the European Union* [2014] EU:C:2014:289, Opinion of AG Cruz Villalón, paras. 84-99.

⁷⁸ *Ibid.* para. 97.

⁷⁹ *Ibid.* para. 98. (Emphasis in the original).

⁸⁰ *Ibid.*

⁸¹ ECJ, case C-399/12 *Federal Republic of Germany v Council of the European Union* [2014] EU:C:2014:2258, para.62.

⁸² KLABBERS (n 46) 388.

⁸³ KLABBERS Jan, *Informal Instruments Before the European Court of Justice*, C. M. L. Rev. (1994), pp. 997-1023, p. 1016.

⁸⁴ PELLET Allain, *The Normative Dilemma in International Law: Will and Consent in International Law-Making*, Australian YBIL (1991), pp. 22-53, p. 25.

that normativity is a broader concept than legality⁸⁵ and that “a normative proposition can be legally relevant without being legally binding.”⁸⁶

The distinction between legal acts and legal facts is crucial in understanding this broad formulation of normativity. The relevant concepts are rooted in the civil law tradition and play a key role in the classification of the sources of obligation – especially under French law.⁸⁷ Verzijl’s⁸⁸ and D’Aspremont’s⁸⁹ studies on the topic are two of the few English-language works where the doctrinal distinction between legal acts and legal facts is treated at some length.⁹⁰ Legal acts allow subjects of international law to create new rules to the extent that they manifest the intention of their author/s to be bound. Thus, in order “to enable it to qualify as legal act, the legal effect of the act must *directly* originate in the will of the legal subject to whom the behaviour is attributed and not to any pre-existing rule in the system.”⁹¹ On the other hand, legal facts are acts the legal basis of which may be found in a pre-existing rule in the system. Thus, their legal effects “originate in the legal system itself, which provides for such an effect prior to the adoption of the act.”⁹²

This distinction allows bright line theorists to take into account the normative effect of conduct that is not *per se* binding and thus, to assimilate social reality in a much subtler way than they have been given credit for. Although the refined distinction between legal acts and legal facts has not found its way into EU law literature, the notion that normativity is a broader concept than legality is not alien to EU lawyers. According to Snyder:

[W]hat counts as ‘legally binding’ or ‘fully binding under Community law’ is a highly complex concept, even for those acts which are expressly provided in Article 189 EC ... To have legal effects does not necessarily mean to be legally binding *erga omnes*, in the sense of an EC regulation or of a law in the popular sense of the world.⁹³

Similarly Senden argues that the CJEU

has adhered to a broader concept of legal effect that legally binding force alone. It has done this by reasoning that the fact that an act does not (intend to) have legal effects does not mean that it has no legal effect at all ... As such, the concept of legal effect can be understood as an umbrella concept, covering not only the notion of ... legally binding force but also that of indirect legal effects.⁹⁴

⁸⁵ D’ASPREMONT Jean, *Epistemic Forces in International Law: Foundational Doctrines and Techniques of Legal Argumentation*, Cheltenham, Edward Elgar (2015), pp. 86-87; KLABBERS (n 53), pp. 230-234.

⁸⁶ ABI-SAAB Georges, *Lex Lata and Lex Ferenda*, in Cassese Antonio, Weiler Joseph (eds), “Change and Stability in International Law-Making”, Berlin, Walter De Gruyter (1988), pp. 76-77, p. 77.

⁸⁷ KASSOTI Eva, *The Juridical Nature of Unilateral Acts of States in International Law*, Leiden, Martinus Nijhoff (2015), pp. 121-125.

⁸⁸ See generally VERZIJL Jan H W, *International Law in a Historical Perspective, Vol. VI: Juridical Facts as Sources of International Rights and Obligations*, Leiden, Sijtoff (1973).

⁸⁹ See generally D’ASPREMONT Jean, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, EJIL (2008), pp. 1075-1093.

⁹⁰ For French-language literature on the topic, see SUY Eric, *Les Actes Juridiques Unilatéraux en Droit International Public*, Paris, LGDJ (1962); JACQUE Jean-Paul, *Elements pour Une Theorie de l’Acte Juridique en Droit International Public*, Paris, LGDJ (1972).

⁹¹ D’ASPREMONT (n 89), p. 1078. (Emphasis added).

⁹² *Ibid.* 1079.

⁹³ SNYDER Francis, *Interinstitutional Agreements: Forms and Constitutional Limitations*, in Winter Gerd (ed), “Sources and Categories of European Union Law: A Comparative and Reform Perspective”, Baden-Baden, Nomos (1996), pp. 453-466, pp. 461-463.

⁹⁴ SENDEN (n 29), pp. 240-241.

Practice abounds with manifestations of legal facts. The way in which the doctrine of estoppel operates in international law is a good example. Under the doctrine of estoppel, conduct, that may itself remain below the threshold of bindingness, may create legal effects to the extent that another party has relied thereon to its own detriment.⁹⁵ The CJEU has also accepted that induced reliance on informal instruments is not without normative significance.⁹⁶ In this sense, the EU Courts allow informal instruments to produce legal effects through the intermediary use of general principles law, including legitimate expectations, legal security, legal certainty, and equality.⁹⁷ In *Commission v Council*, the Council was held bound by a staff decision, the formal status of which was unclear, as the staff had legitimate expectations that the Council would respect the undertakings in question.⁹⁸

Furthermore, the method of setting fines in the field of competition law is a case in point. In *Dansk Rørindustri* the Court ruled that the Commission's Guidelines on the method of setting fines for breaches of competition law are binding since they may create legitimate expectations on the parties concerned.⁹⁹ According to the Court:

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.¹⁰⁰

Thus, in the Court's view, the Guidelines constitute a form of auto-limitation on the part of the Commission, and any departure therefrom, would run counter to the principles of legitimate expectations and of legal certainty. In *JCB Service v Commission*, the Court confirmed that "the Guidelines determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed ... Those Guidelines, ... , consequently ensure legal certainty on the part of the undertakings."¹⁰¹

Based on the same rationale the Court has found that, in the area of State aid, the Commission is bound by the guidelines and notices that it issues to the extent that they do not depart from the rules in the Treaty.¹⁰²

⁹⁵ See generally BOWETT Derek, *Estoppel before International Tribunals and its relation to Acquiescence*, BYIL (1957), pp. 176-202; SINCLAIR Ian, *Estoppel and Acquiescence*, in LOWE Vaughan, FITZMAURICE Malgosia (eds), "Fifty Years of the International Court of Justice: Essays in honor of Sir R. Jennings" Cambridge, Cambridge University Press (1996), pp. 104-120.

⁹⁶ See generally STEFAN Oana, *Soft Law in Court: Competition Law, State Aid, and the Court of Justice of the European Union*, Alphen aan den Rijn, Wolters Kluwer (2013). GEORGIEVA Zlatina, *Soft Law in EU Competition Law and its Judicial Reception in Member States: A Theoretical Perspective*, GLJ (2015), pp. 223-260.

⁹⁷ ROSAS Allan, *Soft Law and the European Court of Justice*, in Iliopoulos-Strangas, Flauss (n 12), pp. 304-325, pp. 318-319.

⁹⁸ ECJ, case 81/72 *Commission of the European Communities v Council of the European Communities* [1973] ECR 575, paras 9-10.

⁹⁹ ECJ, joined cases C-189/02, C-202/02 P, C-205/02 P to C-208/02 P *Dansk Rørindustri et al v Commission of the European Communities* [2005] ECR I-5425, paras. 210-213.

¹⁰⁰ *Ibid*, para. 211.

¹⁰¹ ECJ, case C-167/04 P *JCB Service v Commission of the European Communities* [2006] ECR I-8935, para. 209.

¹⁰² ECJ, case 310/85 *Deufil GmbH & Co. KG v Commission of the European Communities* [1987] ECR 901, paras. 21-22; ECJ, case C-351/98 *Kingdom of Spain v Commission of the European Communities* [2002] ECR I-8031, para. 53; ECJ, case C-382/99 *Kingdom of the Netherlands v Commission of the European Communities* [2002] ECR I-5163, para. 24; General Court, case T-176/01 *Ferriere Nord SpA*

The protection of legitimate expectations has also heavily influenced the approach adopted by the Court towards other informal instruments in the field of EU competition law. In *Delimitis*, Advocate General van Gerven explained the legal status of the Commission Notice governing agreements which do not appreciably restrict competition (*‘De Minimis Notice’*)¹⁰³:

Without wishing to express a view on the exact legal force of such a notice, which constitutes in any event a declaration of intention from which it is possible to deduce the Commission’s policy on implementation and confers on the individuals for whom it is intended certain legitimate expectations, the national court may nevertheless find therein guidance as to how the Commission is applying Article 85(1), which may be of assistance in its assessment.¹⁰⁴

Advocate General Kokott also highlighted the important legal ramifications of the *De Minimis* Notice in her Opinion in the *Expedia* case.¹⁰⁵ The Advocate General stressed that although the Notice does not enjoy binding force *per se*, “it would be a mistake to regard it as of no importance at all in law for proceedings concerning cartels. Publications like the *de minimis* notice are in the nature of ‘soft law’ the relative importance of which in cartel proceedings, at the European and the national levels, should not be underestimated.”¹⁰⁶ The Advocate General went on to draw a distinction between the legal effects stemming from the Notice at EU level and at Member State level. According to the Advocate General, instruments issued by the Commission relating to its administrative practice create self-binding effects in the light of the general principles of equal treatment and the protection of legitimate expectations.¹⁰⁷ At Member State level however, the Notice, as expressly stipulated therein, is merely intended to give guidance on the application of Art. 101 TFEU and thus, it is not, as such, binding on national courts and competition authorities.¹⁰⁸ At the same time, the Advocate General issued a stern warning against disregarding informal instruments issued by the Commission in the relevant field. In her view, national courts and competition authorities are bound, on the basis of the duty of sincere cooperation, laid down in Art.4(3) TEU, to take due account of the Commission’s competition policy no-

v Commission of the European Communities [2004] ECR II-3931 para. 134; ECJ, case C-464/09 *Holland Malt BV v European Commission* [2010] ECR I-12443, paras. 46-47. For a more recent example, see ECJ, case C-667/13 *Estado português v Banco Privado Português S.A and Massa Insolvente do Banco Privado Português S.A* [2015] EU:C:2015:151, para. 69. The case concerned, *inter alia*, the legal effects of the Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (*‘Banking Communication’*) [2013] OJ C216/1. The Court ruled that: “As regards the assessment, in the light of Art. 107(3)(b) TFEU, of State guarantees granted to financial institutions in the context of the global financial crisis, the Commission imposed a limit on the exercise of its discretion by adopting the Banking Communication. The Commission cannot therefore depart from the rules set out in that Communication under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations.”

¹⁰³ For the latest version see Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU (*‘De Minimis Notice’*) [2014] OJ C291/01.

¹⁰⁴ ECJ, case C-234/89 *Stergios Delimitis v Henninger Bräu* [1991] ECR I-0935, Opinion of AG van Gerven, para. 22.

¹⁰⁵ ECJ, case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* [2012] EU:C:2012:544, Opinion of AG Kokott.

¹⁰⁶ *Ibid.* para. 35.

¹⁰⁷ *Ibid.* para. 36.

¹⁰⁸ *Ibid.* para. 37.

tices, such as the *De Minimis* Notice, when exercising their enforcement powers under Regulation 1/2003.¹⁰⁹ The Court largely endorsed Advocate General Kokott's position. It found that the purpose of the *De Minimis* Notice

is to make transparent the manner in which the Commission, acting as the competition authority of the European Union, will itself apply Article 101 TFEU. Consequently, by the *de minimis* notice, the Commission imposes a limit on the exercise of its discretion and must not depart from the content of that notice without being in breach of the general principles of law, in particular the principles of equal treatment and the protection of legitimate expectations ... Furthermore, it intends to give guidance to the courts and authorities of the Member States in their application of that article.¹¹⁰

Similar considerations underpin the attribution of legal effects to other informal instruments issued by the Commission in the field of competition law, such as the Commission Notice on Immunity from fines and reduction of fines in cartel cases ('Leniency Notice').¹¹¹ The Leniency Notice is deemed to produce legal effects via the intermediation of the principle of the protection of legitimate expectations. According to the Court, the Notice may have the effect of creating

legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission. In view of the legitimate expectations which undertakings intending to cooperate with the Commission are able to derive from the notice, the Commission must therefore adhere to the notice when, for the purpose of determining the fine to be imposed on the applicant, it assesses the applicant's cooperation.¹¹²

Informal instruments may also have normative significance to the extent that they are used to assist interpretation of other legal acts. As Hartley notes: "legal effect is not an all-or-nothing characteristic: an instrument may have some legal effects but not others – for example, an instrument may not have direct legal consequences in its own right, but may affect the interpretation of another instrument and thus have indirect legal consequences."¹¹³ In *Kasikili/Sedudu*, the ICJ expressly acknowledged the relevance of informal instruments for the interpretation of treaty provisions.¹¹⁴ Similarly, in *Diallo*, the Court opined that, in interpreting the International Covenant on Civil and Political Rights,¹¹⁵ great weight should be ascribed to the non-binding findings of the Human Rights Committee, since the latter "was established specifically to supervise the application of that treaty."¹¹⁶ The CJEU has also acknowledged that non-binding instruments may play an important role in the interpretation of other binding acts. In *Antonissen* the Court held that a Council declaration recorded in the minutes at the time of the adoption of a legislative act can be used

¹⁰⁹ *Ibid.* para. 38.

¹¹⁰ ECJ, case C-226/11 *Expedia Inc. v Autorité de la concurrence and Others* [2012] EU:C:2012:795, para. 28.

¹¹¹ Commission Notice on Immunity from fines and reduction of fines in cartel cases ('Leniency Notice') [2006] OJ C298/11.

¹¹² General Court, case T-26/02 *Daiichi Pharmaceutical Co. Ltd v Commission of the European Communities* [2006] ECR II-718, para. 147. See also General Court, case T-9/99 *HFB and Others v Commission of the European Communities* [2002] ECR II-1487, para. 608; General Court, case T-230/00 *Daesang Corp. and Sevon Europe GmbH v Commission of the European Communities* [2003] ECR II-2733, paras 121-145; General Court, case T-48/00 *Corus UK v Commission of the European Communities* [2004] ECR II-2325, paras 192-193; General Court, case T-151/07 *Kone Oyj, Kone GmbH and Kone BV v European Commission* [2011] ECR II-5313, paras 127, 130.

¹¹³ HARTLEY Trevor, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community*, Oxford, Oxford University Press (1998), 4th ed., p. 89.

¹¹⁴ *Case concerning Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045, paras. 47-50.

¹¹⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), UNTS (1976), p. 171.

¹¹⁶ *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639, para. 66.

for interpretative purposes provided that “reference is made to the content of the declaration in the wording of the provision in question.”¹¹⁷ Furthermore, in *The Queen v The Licensing Authority* the Court showed its willingness to use Council declarations as an interpretation aid for the purpose of establishing the meaning of a legislative act.¹¹⁸

In *Grimaldi*, the Court went even further by ascribing the quality of a mandatory interpretation aid to recommendations.¹¹⁹ The case concerned the legal effects of two recommendations on occupational diseases. The Court considered that the measures in questions, whilst not formally binding,

cannot be regarded as having no legal effects. 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.¹²⁰

The CJEU confirmed this position in the *Deutsche Shell* case.¹²¹ The case concerned a recommendation adopted on the basis of an international agreement. According to the Court such instruments are to be taken into consideration since they form part of the EU legal order.¹²² The Court went on to reaffirm that:

Although the recommendations ... cannot confer upon individuals rights which they may enforce before national courts, the latter are nevertheless obliged to take them into consideration in order to resolve disputes submitted to them, especially when, as in this case, they are of relevance in interpreting the provisions of the Convention.¹²³

Similarly, in *Criminal Proceedings against Gunnar Nilsson, Per Olov Hagelgren and Solveig Arrbor*, it was held that a recommendation relating to the Convention for the Protection of Animals kept for Farming Purposes did not contain any legally binding obligations;¹²⁴ it was, however, an act adopted on the basis of an international agreement concluded by the EU and, as such, it could be used in interpreting the provisions of that agreement.¹²⁵

¹¹⁷ ECJ, case C-292/89 *The Queen v The Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-745, para. 38. Note however that the Court has consistently refused to take into account similar declarations issued by Member States. See for example Case 143/83 *Commission v Denmark* [1985] ECR I-427, para. 12.

¹¹⁸ ECJ, case C-368/96 *The Queen v The Licensing Authority* [1998] ECR I-7967, para. 27. See also ARNULL Anthony, *The European Union and its Court of Justice*, Oxford, Oxford University Press (1999), pp. 521-522.

¹¹⁹ ECJ, case C-322/88 *Salvatore Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR I-04407. See also PETERS (n 56), p. 36.

¹²⁰ *Ibid.* para. 18. According to Arnall, the interpretative obligation formulated by the Court in *Grimaldi* is “reminiscent of *Von Colson*, where the European Court said that national courts were required to interpret their national legislation in the light of the wording and purpose of relevant directives.” ARNULL Anthony, *European Court (Second Chamber) Judgment of December 13, 1989, Case C-322/88 Salvatore Grimaldi v Fonds des Maladies Professionnelles*, E. L. Rev. (1990), pp. 318-321, p. 319. See also generally SARMIENTO Daniel, *European Soft Law and National Authorities: Incorporation, Enforcement and Interference*, in ILIOPOULOS-STRANGAS, Flauss (n 12), pp. 261-295.

¹²¹ ECJ, case C-188/91 *Deutsche Shell Aktiengesellschaft v Hauptzollamt Hamburg – Hamburg* [1993] ECR I-363.

¹²² *Ibid.* para. 17.

¹²³ *Ibid.* para. 18. See also ECJ, case C-207/01 *Altair Chimica SpA v ENEL Distribuzione SpA* [2003] ECR I-8875, para. 41; ECJ, case C-55/06 *Arvor AG & Co. KG v Bundesrepublik Deutschland* [2008] ECR I-2931, para. 95; ECJ, joined cases C-317/08, C-318/08, C-319/08, C-320/08 *Rosalba Alassini v Telecom Italia SpA* [2010] ECR I-2213, para. 40.

¹²⁴ Convention for the Protection of Animals kept for Farming Purposes (concluded on 10 March 1976, entered into force 10 September 1976) <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/087>> accessed 25 December 2017.

¹²⁵ ECJ, case C-162/97 *Criminal Proceedings against Gunnar Nilsson, Per Olov Hagelgren and Solveig Arrbor* [1998] ECR I-7477, para. 49.

Finally, it is worthwhile mentioning that the Court uses informal acts in order to confirm an interpretation already reached on the basis of binding law. Thus, in *Auer* it held that its conclusion regarding the *ratione personae* field of application of the provisions on free movement of services and the right of establishment

was fully confirmed by a declaration concerning the definition of the persons covered by the directives, which was recorded in the minutes of the meeting of the Council during which the directives relating to the mutual recognition of diplomas and the co-ordination of provisions laid down by law, regulation or administrative action in respect of the activities of veterinary surgeons were adopted.¹²⁶

In a similar vein, in the *Egle* case, the Court used a joint declaration of the Commission and the Council, contained in the minutes of the session in which the directive was adopted, in order to confirm its own interpretation thereof.¹²⁷ More recently, in the *Philippines PFCA* case, the Court was faced with the question as to whether certain provisions of the Framework Agreement on Partnership and Cooperation with the Philippines (PFCA) came within the scope of the EU's policy on development co-operation.¹²⁸ In its analysis, the Court used an informal instrument, the so-called European Consensus on Development,¹²⁹ in order to buttress the conclusion that the relevant provisions of the PCFA fell within the ambit of Article 208(1) TFEU.¹³⁰

V. Conclusion

What does this brief overview of the CJEU's treatment of informal law mean for the doctrine of international law-making? The CJEU's practice, and more particularly its substance-over-form approach in the context of law-ascertainment as well as its broad understanding of normativity, lends normative and explanatory force to the bright line school of thought. More broadly speaking, this means that we can only neglect this practice at our own peril: the Court's case-law confirms the existence of a wide array of tools for 'digesting' social reality - while leaving the traditional architecture of international law unscathed. On the flip side, what does the judicial recognition of the possible legal ramifications of informal instruments imply for the EU legal order and, more specifically, for the project of European integration? The Parliament, in its 2007 Resolution, seems to be of the view that the increasing use of informal instruments is hampering the overall integration process: recourse to informality may be a symptom of underlying tensions and lack of consensus.¹³¹ On the other hand, it could be argued that the judicial recognition of the fact that, while the threshold between law and non-law is something real and important, norm-creation is not merely

¹²⁶ ECJ, case 136/78 *Ministère Public v Auer* [1979] ECR 437, para. 25.

¹²⁷ ECJ, case C-310/90 *Nationale raad van de Orde van Architecten v Egle* [1992] ECR I-177, para. 12.

¹²⁸ ECJ, case C-377/12 *European Commission v Council of the European Union* [2014] EU:C:2014:1903, para. 35.

¹²⁹ Joint Statement of the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament, and the Commission on European Union Development Policy: 'The European Consensus' [2006] OJ C46/1.

¹³⁰ ECJ, case C-377/12 (n 128) paras 42-43, 49-50, 55.

¹³¹ European Parliament Resolution of 4 September 2007 (n 25) point 18.

a question of threshold is an indicator of the advanced stage of the integration process. As Peters argues:

In fact, the existence of a strong and broad political, social and cultural consensus in a polity may ... paradoxically render hard regulation unnecessary in some domains, because the societal consensus facilitates the functioning of soft rules. This also means that stable polities that are built on a solid political and cultural consensus can afford soft law better than unstable ones.¹³²

This view is confirmed by the 2003 Report from the Commission on European Governance.¹³³ According to the Commission, domains that are less secure and less transparent “are in greater need of ‘hard law’ providing the necessary security and transparency.”¹³⁴ *A contrario*, this implies recognition of the fact that the EU legal order is ‘advanced’ enough to sustain the co-existence of binding and non-binding acts. If this is true, then international law and EU law may have more in common than commonly assumed: both are mature legal orders that can afford the co-existence of binding and non-binding regulatory mechanisms without this undermining their normative power.

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¹³² PETERS (n 56) p. 43.

¹³³ Report from the Commission on European Governance [2003] <http://ec.europa.eu/governance/docs/comm_report_en.pdf> accessed 25 December 2017.

¹³⁴ *Ibid.* p. 26.

List of abbreviations

CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
ICJ	International Court of Justice
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

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