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Common Practices of the EU Intellectual Property Network as Soft Law and Beyond

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This paper examines the Common Practices of the European Union Intellectual Property Network as instruments of soft law. The reform of trade mark law in 2015 authorised the Intellectual Property Offices who belong the Network to converge their practices. This is done in cooperation with stakeholders from the private sector, who are the users of trade mark system. The Common Practices adopted so far harmonize trade mark procedures across European Union, with the aim to enhance transparency, legal certainty, and predictability for both examiners and users. The study discusses the legal significance of Common Practices as European Union soft law in general, contemplating their validity and legitimacy within the European legal framework and highlighting that their effectiveness stems from both internal recognition in European law and normative expectations. The European Court of Justice has recognised legal effects that soft law instruments may have, including self-binding effect and the obligation of Member State courts to take such instruments into consideration while deciding cases. While Common Practices are not legally binding, they exert influence by creating normative messages that guide the behaviour of trade mark offices and applicants.

Keywords: *Soft Law; Trademarks; Common Practices; EU Intellectual Property Network*

Introduction

In the European Union (EU)[1] trademarks can be registered either in the Member States (MS), or at the EU level as EU trade marks (EUTM). The EUTM system, established by the regulation 40/94, enables applicants to achieve protection for their trademarks in all EU MSs. The applications for EUTM are processed by the EU Intellectual Property Office (EUIPO)[2]. MS laws have been initially harmonised by the directive 89/104. The EU and MS trade mark systems operate in parallel: EUTMs are valid throughout the EU and national trademarks are valid in the territory of the designated MS. Legal consequences arising from respective registrations are the same, therefore also the conditions of their validity ought to be without substantial variability.

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[1]The acronym EU is used anachronistically to denote its predecessor(s), the European communitie(s) and the European (Economic) Community, being aware of the imprecision. For the same reason, writing about the EU court(s) is to indicate the institution of the EU.

[2]Until 2016 the EU agency was known as the Office for Harmonization in the Internal Market (OHIM), and the EUTM as Community trade mark.

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EU trade mark law reform resulted in the directive 2015/2436 and regulation 2015/2424, codified as 2017/1001. The reformed instruments have recognised a path taken already in 2011 by the establishment of the EU Intellectual Property Network (EUIPN), *inter alia*, to further harmonise trade mark practices and standards in order to create a trade mark "system that is more efficient, predictable and accessible to its stakeholders"[3]. The output of the convergence projects in the area of trade marks consists currently of twelve Common Practice (CP) documents and an unnumbered Common Communication on the Representation of New Types of Trade Marks. Five of the trade mark CPs have been published before the trade mark reform, and seven CPs and the communication on New Types after that; some of the CPs have been updated, and more CPs are being prepared.

The CPs are qualified as *soft law* (SL), an oxymoronic phenomenon[4] discussed internationally for fifty years. In the EU, the discussion on SL has started later although the recommendations and opinions of the EU institutions have been mentioned in the treaties since the creation of the European communities[5], and the European Commission has used notices since 1961[6].

By asserting that the CPs are SL, I do not say anything clear and conclusive about their meaning or nature in law[7], their practical functions being outside of the scope of the article. In fact, whether SL is *in law*, is under debate. One could imply it from the very expression, and the EU court has recognised *some* legal effects of *some* SL instruments[8]. Indeed, the EU court has considered that guidelines of the Commission are law within the meaning of art 7(1) of the European Convention on Human Rights, and they are part of the *acquis communautaire*[9]. However, questions remain: subjects of the law can typically – without denying that legal rules are not applied mechanically and there is always some indeterminacy – anticipate how legal

[3]EUIPN was formerly known as Trademark and Design Network. The EUIPN connects the EUIPO, intellectual property offices (IPOs) responsible for trade mark registration in MSs, user associations, represented by professional representatives in trade mark field, and other intellectual property organisations. Information regarding the EUIPN and its CPs may be found at https://www.tmdn.org/publicwebsite/#/

[4]The EU court has avoided the use of the concepts of „hard" or SL in its decisions. Láncos (2018) at 759. It is used, however, in scholarly and political discourse. I will use the expression here, being aware of its imprecision.

[5]*Vid.* art 189 of the 1957 Rome Treaty establishing the European Economic Community http://data.europa.eu/eli/treaty/teec/sign. In Lisbon version from 2009 the now article 288 has been positioned under a chapter on "Legal acts [...]" and section "Legal Acts of the Union", in a briefer form: "[…] the institutions shall adopt regulations, directives, decisions, recommendations and opinions. [...] Recommendations and opinions shall have no binding force". The EU institutions are those enumerated in art 13(1) TEU. Recommendations and opinions are referred to as formal SL. See Láncos (2018) at 756.

[6]Ştefan (2008) at 757. SL instruments vary by title, function and other features. Data on the quantity of such documents have been given in Hofmann (2021) at 41.

[7]"[I]t is strikingly unclear what soft law really is, and what precise standing it enjoys within the EU legal system". Láncos & Arroyo Jiménez (2023) at 2.

[8]Láncos (2018) at 783.

[9]Ştefan (2012a) at 19. C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P & C-213/02 P [223]; T-115/94 [117].

norms will be applied[10]. If the legal status of norms is not determinate, there is a risk of arbitrariness.

The assertion that CPs are SL is comparable to if I would say that the CPs are common practices – without specifying if the notion has softly or strongly prescriptive or just descriptive meaning. The texts of CPs, issued in no form of legal acts, use sometimes imperative language, but so do technical and ethical texts, and sometimes even criminals and salesmen; some legal texts do not. What is their legal meaning? A group of experts may agree on anything, express and format the agreement in however mandatory fashion, and even start to use them. Something similar is done often at conferences, without the outcome having any recognised effect in law[11].

My purpose here is to progress in understanding the CPs as SL *in law*. I will not turn attention to their particular content[12], but I see them as norms aiming to influence behaviour. The CPs are intended to "increase transparency, legal certainty, and predictability for the benefit of examiners and users alike"[13], thus being agreements to achieve certain end, presumably successfully. I will look for the meaning of the CPs as SL from internal and external perspective, in connection with characteristics usually connected with law.

In the 2nd section of the article, I will review some aspects of the discussion on the phenomenon of SL, particularly in EU context. In the 3rd section I open the discussion on the meaning of CPs by distinguishing internal and external aspects of law. Validity and legitimacy of the CPs in the context of EU SL and law in general will be addressed in the 4th section, and respectively binding force and legal effect in the 5th and normativity and communication in the 6th section. The 7th section is intended to draw conclusions.

Discussion on Soft Law

I will now summarise some issues discussed in relation to the phenomenon of EU SL[14]. SL has use in international law and also in many national legal systems. Due to particular circumstances and their narrower areas of interest, the participants in the discussion on SL usually focus on specific legal system or subsystem, and issues relevant there[15]. EU law is a peculiar and effective legal environment: due to EU court system, the position of formal SL and a long practice some issues related

[10]Vinx & Zeitlin (2021) at 3.

[11]An example of such academic exercise is the European Copyright Code by the Wittem Project, a scholarly collaboration. https://www.ivir.nl/projects/copyrightcode/.

[12]Content refers to the action or activity the norms concern: command, allow *etc*. Von Wright (1963) at 71.

[13]As stated in, *e.g.*, CP3, CP8, CP9.

[14]EU SL has been addressed, *inter alia*, in monographs by Senden (2004), Knauff (2010), Ştefan (2013), Simoncini (2018), Láncos (2922) and Weismann (2024), and in collections of articles edited by Mörth (2004), Iliopoulos-Strangas & Flauss (2012), Eliantonio, Korkea-aho & Ştefan (2021), Eliantonio, Korkea-aho & Mörth (2023), Láncos, Xanthoulis & Arroyo Jiménez (2023). As far as known, little has been said about CPs as SL, except a thesis by Thomaser (2019).

[15]There are exceptions, *e.g.,* Knauff (2010) and Griesser (2016).

to SL, unresolved on the international level, have been sidelined in the EU[16]. There are relatively few opinions deploring relative normativity[17], or reasonable doubts regarding redundancy or undesirability[18] of SL in the EU[19]. Also, in the EU SL discussion there is no tendency to include vague and weak provisions of binding instruments unto the concept of SL[20].

Shaffer & Pollack divided literature on SL into three camps[21]. Positivists, emphasising a binding/nonbinding divide, tend to deny the concept of SL. Rationalists find that choice to prefer SL may be based on relevant considerations. Constructivists focus more on the effectiveness of law than its bindingness, distinguishing between the law-in-the-books and the law-in-action; they note that national law also varies in terms of its impact, so the binary distinction is illusory.

The phenomenon of SL has been explained by weakened obligation, precision, and/or delegation – components of the legalisation theory[22]. Guzman & Meyer have positioned hard law, SL, and purely political agreements on a continuum[23]. The non-binarist discourse is present also in EU SL literature. Peters has found that it is realistic to view legality (legalness) as distinct from validity; in the case of SL "the question is not whether the norm is valid, but how it is valid. […] Just as a norm can be more or less just or efficient, it can also be more or less legal". She held it to be proper to talk about harder and softer law[24]. Feguš has agreed that graduated normativity, the degrees of which depend on the type of instrument and on the circumstances of its adoption, does not affect the validity of SL as normative acts; if not illegal, SL is valid[25].

The Commission has issued informal SL with variable titles on the basis of what are now the Art 4 and 17 TEU[26], that gave the institution, in its areas of competence and pursuant to its own view, "both the power and the duty to explain Court of Justice judgments and to spell out their implications for national governments and private

[16]Senden (2004) at 110; Cannizzaro & Rebasti (2012) at 218.
[17]Weil (1983).
[18]Klabbers (1996; 1998).
[19]The use of SL by the Commission has been criticised by the European Parliament, *e.g.*, in the resolution 2007/2028(INI). In 1968, the EP warned about the dangers associated with the proliferation of acts not mentioned in the Treaty. Ştefan (2017) at 215. In 2017, the Council's Legal Service expressed that SL measures of (an EU agency) may not be used "as a disguised instrument of harmonization", or serve the purpose "of completing Union law when the latter ... leaves options or discretions to the national legislator" Böttner (2023) at 187.
[20]Baxter did not distinguish between soft norms and norms of soft documents without legal form. Baxter (1980). D'Aspremont distinguished between soft *instrumenta* (instruments other than formal treaties or binding declarations) and soft *negotia* (non-normative though legal instruments failing to provide precise directives). He held it to be commonly agreed that "legal act ought not to be normative to be legal"; normative character of a treaty is not a condition of its validity. d'Aspremont (2008) at 1082, 1084, 1085.
[21]Shaffer & Pollack (2010) at 707, 712–713, 723.
[22]Abbott & Snidal (2001) at 39; Abbott, Keohane, Moravcsik, Slaughter & Snidal (2000); Finnemore & Toope (2001); Ştefan (2012b); Terpan (2015); Ştefan (2017).
[23]Guzman & Meyer (2009) at 519.
[24]Peters (2007) at 410–413; Láncos (2018) at 758; Láncos & Arroyo Jiménez (2023).
[25]Feguš (2023) at 67.
[26]*Ex* Art 5 and 155 TEEC, now amended. Ştefan (2008) at 757.

parties"[27]. The courts consider the SL in their decisions, and influence through their decisions the Commission's practice[28]. Even if the SL is construed by the court as statements of policies, neither law nor giving rise to legitimate expectations, it has been taken into account as guidelines the Commission had intended to follow; in turn, the Commission has used the language of the court decisions as a model for its later SL[29].

Stefan has qualified EU SL rather as governance than binding law; its legal effect is possible through judicial enforcement if there is hybridity between hard and SL[30]: an infringement of SL would be a violation of a rule with binding force. Stefan used another continuum, not of legality but of legal or regulation policy: if softer compliance strategies fail to achieve their aim, harder measures could be put in place[31]. In fact, the Commission has substantiated its preference of SL by the principles of subsidiarity and proportionality[32], pursuant to which more constraining strategies would be used if softer ones failed.

Sarmiento has provided another justification of SL, substantiated by the needs of free markets to have ample and non-regulated areas to develop competitive strategies; free societies and markets need self-regulation instead of hard rules. He continued, piling up paradoxes:

> "[SL] is not a declaration of intentions or an individual resolution stating a specific decision, but an exteriorized will to regulate. The fact that such rule lacks a formal source implies that the rule has been freed from its bond with the legal system, whilst it continues to exist as a relevant mandate within the legal system. [S]oft provisions that are not posited, but recognized by the system as rules of its own that hold interpretative effects, are introducing a new and autonomous source of law: interpretative mandates that must be taken into account, complementing the content of formal sources and, at times, determining their sense. [SL] thus becomes something equivalent to principled rules in laws or regulations that have no specific normative basis or consequence, with the substantial difference that [SL] is formally unconnected, but interiorized, by the legal system"[33].

Sarmiento saw EU SL also as a bridge between EU and MS legal systems, originally unbound. The obligation of MS courts to take EU SL into account does not serve the goal of legality, but of coherence and consensus; although the MS is not bound by SL, it is bound to take its contents into account and give a reason if it reaches a different solution. The existence of EU SL is "a mandatory possibility, inasmuch it must be taken into account. [… Such] interpretation is not only

[27]Snyder (1993a) at 33.
[28]Snyder (1993b) at 9. *E.g.*, C-310/85.
[29]Snyder (1993b) at 15, 18–19. The Commission has expressed intent to use a wide spectrum of instruments. *E.g.*, co-regulation would create a link between binding measures and action taken by the interested parties (COM(2001)726, at 7–8). See also COM(2001)428 and COM(2002)278.
[30]Ştefan (2017) at 201, 212–213. Eliantonio & Ştefan (2018) at 469.
[31]Ştefan (2018) at 204.
[32]Snyder (1993b) at 6. The Commission explained that if an "action is needed to achieve the objectives of the Treaty, it must not be disproportionate; this implies that recourse to the most binding instruments should be used as a last resort" (SEC(92)1990). Sarmiento (2012) at 264.
[33]Sarmiento (2012) at 287–289.

articulated in terms of deontic logic (ought to), but it must also include modal possibilities (*possibly* ought to) […]"[34].

From several definitions of SL, a choice must be made[35]. According to Gruchalla-Wiesierski, SL norms are "legal or non-legal obligations which create the expectation that they will be used to avoid or resolve disputes"[36]. Shelton held that SL texts are political commitments that can lead to law, but they are not law, and thus give rise only to political consequences[37]; they also express expected behaviour[38]. For Snyder, SL means "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects"[39]; he later added: "and also legal effects"[40]. Senden defined EU SL as rules of conduct laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and are aimed at and may produce practical effects[41]. Peters characterised EU SL as norms, as not legally binding in an ordinary sense, but not completely devoid of legal effects[42]. To summarise, there seems to be a majority opinion that SL consists of legally non-binding norms. Norms impose obligations, express expected behaviour and imply (admittedly political, not legal) commitment by the party obliged. In minority opinion, there could also be legal obligations, as an alternative. Also, there seems to be a majority opinion that SL may have at least some indirect legal effects or lead to law.

When characterising SL in a systematic manner, questions may be asked relating to their object and content, origin (norm-authority[43]), addressee (norm-subject), aims, functions and effects, etc. Not all of those issues are relevant here. The norm-authority of SL could be an EU institution or an EU agency (in those cases it would be institutional SL), or multiple organs belonging to one or more legal bodies (*e.g.,* EU institutions may conclude interinstitutional agreements, and EU and MSs organs form a network adopting SL documents). If the norm-authority of SL and its norm-subject coincide, the SL is considered self-binding (without evaluating here its bindingness); however, it may affect indirectly also third persons. These distinctions are used to define the legal effect of EU SL in the practice of EU courts.

Conceptual contradiction of legal effects without bindingness have been attempted to be clarified by suggesting that bindingness is not a bivalent but a gradual notion[44]. We saw the same being done (by Peters) with legality. I see no need for the both concessions; it is also hard to tell off the distinction in art 288 TFEU determining binding and non-binding formal acts. The parallel of directive in EU law could be

[34]*Ibid.*, at 290–292, 294–295.
[35]*Vid.* Terpan (2023).
[36]Gruchalla-Wiesierski (1984) at 44.
[37]Shelton (2011) at 68. She has in fact found also legal effects. *Ibid.*, at 72.
[38]She used a quote saying that soft law "expresses a preference and not an obligation that state should act, or should refrain from acting, in a specified manner". Shelton (2008) at 69.
[39]Snyder (1993a) at 32.
[40]The addition was suggested by Snyder in 2007, as reflected by Ştefan (2012b) at 880.
[41]SL consists of rules with either legal, practical or *de facto* effects, depending on factors other than legally binding force. Senden (2004) at 112.
[42]Peters (2007) at 407.
[43]In the language of von Wright's norm analysis. Von Wright (1963) at 70.
[44]Láncos & Arroyo Jiménez (2023) at 2.

given: it is an act unconditionally binding the MSs but without legal effect in vertical relationships to the benefit of the MS not complying with it; and with different legal effects depending on time before and after its transposition. Also, even illegal acts have legal effect. The concepts of bindingness and legal effect cannot be the same.[45] If, in the discussion "legally binding effects" of SL have been mentioned, it does not refer to the binding force in the sense of art 288 but rather to stronger legal effects[46].

Regarding functions, Senden used a division into (what she called) categories in EU SL[47]: preparatory and informative instruments; interpretative and decisional instruments, providing guidance as to the interpretation and application of existing law, particularly indicating in what way the author will apply law in individual cases when it has implementing and discretionary powers[48]; and steering instruments. She also used another categorisation of instruments into those with pre-law, post-law, and para-law functions. Post-law documents supplement and support EU law regarding its implementation or facilitation of its correct and uniform interpretation. There is an overlap of Senden's divisions into categories and functions, and indeed, SL instruments may have several functions at a time, and fit into many categories[49]. Informative, communicative functions of SL may be considered pervasive, if the instruments have been published. For a document intended to have any effect on the addressees, despite its other characteristics, it is vital to be communicated to them[50].

Peters has adopted Senden's classification of functions, to delineate the relations of EU SL to hard law. Regarding law-plus – term used instead of post-law – she described the complementation of hard by SL[51]. In international context Shelton has distinguished between primary SL (normative texts not adopted in treaty form) and secondary SL (texts applying primary norms, often by institutions created by a treaty applying norms contained in the same treaty)[52]. Shelton's concept of secondary SL is helpful to distinguish EU SL instruments supported by legal basis in primary or secondary EU law[53].

Regarding legal effects, Arroyo Jiménez has offered another typology of (a) ordinary or qualified interpretative effects, (b) indirect invalidating effects, related to the concept of hybridity; (c) compensatory effects, related to the right to claim compensation of those suffering because of an infringement of SL; and (d) disciplinary effects against public officials not complying with SL[54].

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[45]Recommendations without binding force have been recognised by the EU court to have some legal effect, in particular in C–322/88 [18]. Ştefan (2012b) at 879–887.
[46]Arroyo Jiménez (2023) at 10.
[47]Senden (2004) at 118–119.
[48]Arroyo Jiménez (2023) at 14.
[49]Senden (2004) at 120.
[50]Court published informative summaries of key jurisprudence have been considered as SL. Hoffmann (2025).
[51]Peters (2007) at 420–422. In my understanding not necessarily hybridity.
[52]Shelton (2011) at 70.
[53]On classifications, also Láncos (2022) at 16–19.
[54]Arroyo Jiménez (2023) at 12–31. Compensatory effect would be justified by the principle of legitimate expectations, accompanying invalidating effect. *Ibid.*, at 28. More legal effects of general application, not relevant here, may occur, particularly in international law context. *E.g.*, Shelton (2011) at 72.

Internal and External Standpoints

Legal meaning of CPs can only be evaluated from an internal standpoint of positive EU law. Internal method in law, "a species of practical reason[55]" is decision-oriented doctrinal analysis, requiring acceptance of the authority of legal texts, and manipulating them according prescribed interpretive canons[56]. What is legal is something legal practice has to define, and I have to trust (though I am allowed to check the circumstances). Internal statements themselves do not state facts but express legal judgments[57]; to say that "a rule is legally valid is […] to express the attitudes of the speaker […]"[58]. For practical value, "internal reading must have some degree of plausibility, […] take account of such desiderata as ease of application and consistency with established expectations"[59]. Not all aspects relevant to CPs in law consist in its legal meaning. For extra-legal respects, another standpoint with cognitive and theoretical purpose has to be used. External readings of legally authoritative texts are without constraints of legal doctrines, "free to draw on any field of knowledge which will illuminate the text, and is limited […] only by the boundaries of knowledge itself"[60]. External statements are fact-stating[61]; they claim something and may be true. Though initially independent, internal and external methods converge. Schwarz described the inward effect: to maintain the viability of its interpretive results, internal method must readjust them through the absorption of external insights. Internal method is renewed by connecting new reasons more fitted to the time with authoritative texts[62]. Simultaneously new internal statements developed in legal practice feed external observation.

There are several dichotomies and binarisms in the discourse *of law* and *about law*[63]. In legal philosophy the debate between positivist and non-positivist positions has taken place for millennia. Alexy has distinguished, in concise manner, two defining elements in the positivist concept of law: authoritative issuance and social efficacy[64]. The latter is the relatively external observer's perspective, entailing in turn an external (*viz.* sociological) aspect – the regularity of compliance with the norm and/or the imposition of a sanction – , and an internal (*viz.* psychological) one – the motivation for compliance with the norm and/or for application of the norm. Emphasising authoritative issuance of a norm, thus seeing a norm as part of a system or totality of valid norms, expresses the relatively internal participant's perspective. Alexy, defending a post-positivist position, recognises these elements but adds a third one, pertaining to correctness of the content of the norm[65]. The participant Alexy mentioned is primarily a legal professional, *viz.* a judge applying the norm.

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[55]Schwartz (1992) at 179.
[56]*Ibid.*, at 180.
[57]*Ibid.*, at 197.
[58]Shapiro (2006) at 1169.
[59]Schwartz (1992) at 197.
[60]*Ibid.*, at 180, 192–193.
[61]Shapiro (2006) at 1169.
[62]Schwartz (1992) at 197.
[63]Banakar (2003) at 3.
[64]Alexy (2002) at 3.
[65]Alexy (2002) at 14–17. What is internal to what, may be under debate.

Banakar has indicated that the lines between the internal (legal) and external (extra-legal), participant's and observer's standpoints are not binary: *e.g.*, judges are participants with insider's perspective, plaintiff participants with outsider's perspective, legal advisors and scholars observers with insider's perspective, and journalists and sociologists outsiders with outsider's perspective[66]. The insiders participate in the legal profession but have different roles. A judge applies law, an advisor gives learned guidance with the aim of avoiding legal troubles, and a scholar analyses and systematises legal matter. Juries and plaintiffs have a role in legal process but without legal expertise; journalists and sociologists observe legal process and phenomena from the standpoint of their professions. All professionals use their own methods but their standpoint may be different both due to their roles, and theoretical convictions. Thus, legal scholars of the positivist or post-positivist schools would not approve neither Alexy's quest for correctness, nor the legal realists' theory of prediction.

The prediction theory of Holmes is based on the finding that a legal duty is "nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court"[67]. Indeed, *juris providentia*, foresight of law, is the source of jurisprudence. Holmes continued: "[A] bad man has as much reason as a good one for wishing to avoid an encounter with the public force […] A man who cares nothing for an ethical rule […] is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can. If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it […]"[68] Holmes meant by the law "[t]he prophecies of what the courts will do in fact, and nothing more pretentious"[69].

Holmes, emphasising the role of adjudication, held statutes to be of secondary importance: they do not determine law, just attempt to predict it. Schmitt's (not a realist) theory of correctness of judicial decisions was built on prediction: a judicial decision is correct if it is to be assumed that another judge would have decided in the same way. "[T]he judge must know what reasons another judge would likely invoke, as well as how the other judge would likely interpret and apply them. […] A correct decision is simply one that conforms to the prevailing customs and conventions of legal practice and which is, as a result, calculable and predictable"[70]. The predictive approach has been followed by Claus who shifted the focus from judges to individuals mutually communicating their expectations: "Once we understand our community's legal system to be a purely predictive signaling system, we can see that its value to us does not depend on claims that those who contribute to law have a "because I said so" right to be obeyed"[71].

[66]Banakar (2003) at 45.
[67]Holmes (1897) at 1–2.
[68]*Ibid.*, at 2–3.
[69]*Ibid.*, at 4. Holmes was skeptical about reducing legal practice to logical analysis. "Logic somehow formalises legal reasoning, although it is not able to guarantee the right answer". Costa (2021) at 95.
[70]Vinx & Zeitlin (2021) at 10–11.
[71]Claus (2012) at 5.

Hart has criticised predictive (external) theory, finding that it fails to take into account the ways how those accepting a legal system regard it: as normatively compelling standards and reasons for action[72]. Shapiro, agreeing with Hart that sanction-centred accounts of law are untenable, did not fully subscribe to Hart's divide between internal and external. He found that the bad man, whose "curiosity about the law is aroused solely by his aversion to sanctions"[73], has as practical point of view to the law as an insider accepting the norms. In the other hand, one is external who "seeks to describe the law […] by reference to the insider's point of view. Hart himself, qua legal theorist, actually takes the external point of view"[74]. Hence, my standpoint has been defined by non-binarisms of Banakar and Shapiro – I observe the CPs from external standpoint, using legal method if necessary.

The question whether an external observer understands the normative beliefs of the insiders, may affect the quality of the analysis[75], but sharing the beliefs of the insiders does not always seem to be recommended for the sake of objectivity. As the binarism of legal and non-legal, so the binarism of internal and external is starting to fade into a continuum with graduated internal or external positions. As SL is not an authoritative text of law, less internal position seems even more justified.

The discussion about external and internal approaches has helped to understand the issue of efficacy of the CPs: it does not seem to be necessary, for practical purposes, that the IPOs (or other addressees) accept the CPs internally as something with a binding force. It is sufficient that they, as the bad man, presume them to be effective to avoid legal troubles or harder measures. The same applies to the informed trade mark applicants, who have reasons to presume that the IPOs apply the converged standards when they take decisions regarding their applications. I cannot evaluate how much the mentioned presumptions differ from the attitude that the CPs or are *de facto* or internally binding, *viz.* from the internal acceptance of the norms' bindingness.

Feguš has found that since it is too expensive for a MS not to take communicated SL into account, they are complied with; this 'regulation by information' refers to regulation of others without the use of (binding) coercive mechanisms whereas the addressees "adapt their behaviour semi-voluntarily in order to substantially reduce the possibility of a future negative decision" [76]. Indirectly also individuals act in accordance with SL to avoid the possibility of negative decision and its consequences[77].

Validity and Legitimacy

Validity is a necessary quality of a legal norm. If a norm is not valid, it does not belong to the legal system. It is useful to think of money to draw parallels. Money,

[72]Schwartz (1992) at 183.
[73]Shapiro (2006) at 1159.
[74]*Ibid.*, 1160. External standpoint is useful to a theorist to notice the changes of meanings of legal concepts retaining their original form. *Vid.* Hamaiunova (2023) at 661.
[75]In Weber's view, sociologists of law should not avoid considering in depth the meaning of legal norms from the viewpoint of practical jurisprudence. Coutu (2018) at 23–24.
[76]Feguš (2023) at 57. Ştefan (2021).
[77]Feguš (2023) at 71.

similarly to law, is an institution[78] that has its value due to its acceptance. If money is counterfeit (not issued authoritatively) or has been put out of use, it is not valid. Similarly, if it has been minted or printed but not yet taken into use. Validity can thus depend on conditions of time and space but it is binary – partly or formerly valid money is not accepted as money. However, it may have other value than value as money; a counterfeit or antiquated coin can be collectible, or be melted and recast, or accepted instead of money for barter. In such case it has a function equivalent (*i.e.*, equally valid) to money. Indeed, in less centralised societies plurality of accepted coins (or means of payment) has been widespread, their value was evaluated on the basis of the substance or market value. In modern societies monetary systems are centralised, monopolised and exclusive; in most situations, exchange takes place by using money. Bartering is not impossible but is extensively discouraged, and sometimes not allowed (*e.g.*, if the means are illegal, like counterfeit money). Thus, valid money is officially and generally expected to have effect and value, and it has to be accepted on the market; nevertheless, validity does not ultimately determine the extent of value, and it is affected by market forces. Validity is also objective: it is not necessary that the individual have an internal, psychological recognition towards valid money; it suffices that they accept it in transactions. Analogically, validity causes a legal norm to exist in a legal system, and be accepted in society.

In Hartian approach, to claim legal validity of rule is to express the attitude of the speaker that the rule of recognition applies to that rule; the existence of the rule of recognition is a matter of fact that certain people act and think a certain way[79]. Hart emphasised that people accept certain rules as something requiring certain conduct or giving them a reason for action[80]. Though this interpretation may be possible for some individuals, it does not seem to be necessary. There are individuals with their actions and there are norms; reasons why people behave in a way or another is not explained by legal norms. The explanation given by legal realists is more probable: for them to say that a rule is legally valid, is "not to ascribe a "mysterious property" to a rule, but rather to make a prediction about the behavior of a court"[81]. Whatever the reason for action, a prudent (or bad) individual behaves in a way that avoids his actions from being hypothetically judged illegal or invalid. 'Court' in this context includes all relevant decision-making authorities, and in the context of CPs – the EU and MS courts; for the applicants the IPOs are 'courts'. When making the prediction, the norm-subject is not affected by the question whether a norm of a CP is valid as part of legal system, or by equivalence. Even though the CPs are not legally binding, they have probably legal and other effects, and it is reasonable to avoid those effects that would be unpleasant. In this sense the norms indeed give a reason for action.

Feguš has contended that validity, normativity, and bindingness are different concepts, not dependent on the 'hardness' or 'softness' of rules *per se*: a rule does not need to be binding to be valid or normative[82]. She analysed the validity of SL in

[78]Cotterrell (1992) at 3.
[79]Shapiro (2006) at 1169.
[80]*Ibid.*, at 1165 and 1167.
[81]*Ibid.*, at 1168.
[82]Feguš (2023) at 54.

terms of two positivist theories and concluded that SL are valid norms according both Kelsen's and Hart's theory[83].

Validity of CPs is conditional on their relation to the EU legal system. It can be established by *ex ante* or *ex post* recognition in law. Not knowing of *ex post* court practice, the CPs have been undeniably effectuated by the IPOs. The post-reform regulation 2017/1001, a legal act in EU secondary law, constitutes the *ex ante* legal basis for the process of adoption and implementation of the later CPs.

The EUIPO has been accorded the task to promote convergence of practices in the fields of trade marks, in cooperation with the central IPOs in the Member States (art 151(1)c) with an obligation to cooperate in relation to the tasks conferred on it (art 151(2)). The regulation mandates the EUIPO and also the IPOs to cooperate to promote convergence of practices and tools in the field of trade marks, in particular in the areas of the development of common examination standards, and the establishment of common standards and practices, with a view of ensuring interoperability between procedures and systems throughout the Union and enhancing their consistency, efficiency and effectiveness (art 152(1)a and d). The obligation has been accorded to the IPOs directly, not to the MSs.

Although cooperation is an obligation of the IPOs, participation in specific convergence projects and implementation of specific CPs remain voluntary for the IPOs, enhancing the agreement character and legitimacy of CPs. Freedom of the IPOs not to participate fully or in part in the common projects has been recognised, with a duty to provide a written statement explaining the reasons for the opt-out (art 152(3)). Those IPOs who have committed to participate in certain projects, are obligated to participate effectively therein, with a view to ensuring that they are developed, function, are interoperable and kept up to date (art 152(4)). The provisions do not include duties to implement CPs, the IPOs are free in this regard[84].

Legitimacy is an external reason supporting internal validity of an institution, though not a condition of its existence in my view. There are several complementary theories of legitimacy, defined by factual approval of those who are supposed to live in the affected group[85], conformity to the least controversial human rights and the ability by the institution to provide benefits that would otherwise not be obtained[86], and by the procedures institutions follow in issuing their directives[87]. Input legitimacy relies on trust in arrangements ensuring that "governing processes are generally responsive to the manifest preferences of the governed"[88].

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[83]*Ibid.*, at 68–69. In Weber's theory validity in the empirical sense overlaps with Kelsen's efficacy criterion: if it continues to be used, it is valid. Weber's validity in the ideal sense is more related to the normative meaning attributed to it. Coutu (2018) at 26.

[84]Directive (EU) 2015/2436 specifies that the IPOs shall be free to cooperate effectively with each other and with the EUIPO (art 51). In a different language, according to paragraph 39 of the preamble of the directive, "[i]t is desirable that [IPOs] cooperate with each other and with the [EUIPO …]". Thus, the directive does not add new obligations compared to the ones expressed in the regulation, but somewhat obscures the limits of the freedom and recommendability to cooperate.

[85]Meyer & Sanklecha (2009) at 2; Coutu (2018) at 168.

[86]Meyer & Sanklecha (2009) at 7.

[87]*Ibid.*, at 8.

[88]Output legitimacy is about capability to solve the problems of the governed. Scharpf (2006) at 1–2.

The procedure for the adoption of CPs starts with an agreement on the problematic area – its identification is based on the input by the members of EUIPN in a consultation process, and has to be endorsed by the directing boards of the EUIPO[89], including representatives from the IPOs. Regulation 2017/1001 stipulates that the projects are to be defined and coordinated by the Management Board on the basis of a proposal by the Executive Director of EUIPO, and be of interest to the Union and the MSs (Art 152(2) 1st alinea). The Board is also mandated to invite MSs to participate in defined projects. Also, the EUIPO shall consult with users in particular in the phases of definition of the projects and evaluation of their results (Art 152(2) 2nd alinea).

As established in practice, the structure, content and text of a CP are formulated by a working group of limited size, including representatives of IPOs that intend to implement the outcome of the project, and other members of the EUIPN. The members are expected to reach consensus. The agreed text is made available to all stakeholders for consultation; their observations are discussed by the working group, and feedback is provided. The procedure is expected not to take more than two years. The finalised document is discussed on a liaison meeting by all IPOs, and finally presented to the boards of EUIPO for endorsement. The adopted text is translated into all official languages and then, accompanied by a Common Communication, made public[90].

The procedure described is relatively strict, and also cooperative, transparent and engaging, in order to reflect the widest possible acceptance by all stakeholders[91]. This is an aspect related to input legitimacy and ensuring approval in the affected group. Though not democratic in common sense, direct engagement of, and opportunities to make observations provided to the users forms a viable substitute. The CPs are, despite involvement of EUIPO boards, not unilateral but cooperative acts. The element of participation of all MSs through their IPOs, at least in the boards of EUIPO if they opt out from a specific project, gives them a multilateral character transcending the working group members. The adoption of CPs is *de facto* agreement between parties mandated to cooperate, thus considered legally competent in EU secondary law, and willing to do so.

All the IPOs are invited to adhere to specific CPs and announce their intent to implement it from a certain date in a written communication. Information on the dates of implementation by IPOs is made public. When specific CP is being applied by an IPO in its procedures, it is recommended, where applicable, to cite the CP within the decisions[92]. Currently five CPs have been implemented by all IPOs members to the EUIPN, and in the case of four CPs there is one abstaining IPO; in

[89]The procedure is described based on personal experience and the document "Convergence Programme. Programme Brief" (2011) at 7–11. https://www.tmdn.org/network/documents/89965/91990/3-harmonization_programme-v1-1.pdf.

[90]"Convergence Programme. Programme Brief" (2011).

[91]Regarding legitimacy in EU SL: Senden (2013) at 59; Láncos & Arroyo Jiménez (2023) at 3; Kovács, Tóth & Forgács (2016); Ştefan (2021); Eliantonio (2021); Xanthoulis (2021).

[92]A description of the steps to implement CPs and the implementation dates communicated by the IPOs are made available, *e.g.*, https://www.tmdn.org/publicwebsite/#/practices/1819715

the remaining three cases the number of abstaining IPOs is two or three. Data on actual enforcement of the CPs are deplorably not known[93].

Binding Force and Legal Effect

I understand binding force to be a quality of legal norms depending on their validity. Normativity, legal effect, and legitimacy render the norms more efficient and acceptable, but they may be of different degree, and qualify also other than binding norms. Bindingness is a binary, all-or-nothing concept[94].

Binding force of EU instruments does not equal with their legal effect[95]. Legal effect, a more flexible quality, accompanies always the binding force deriving from law (*e.g.*, directives have binding force inherently and recommendations miss it). EU SL lacks direct legal effects[96]. Lacking direct effect, EU SL cannot have primacy over national law, except if a hard law act of EU or MS refers to the EU SL instrument.[97] Indirect legal effect may exist without bindingness, even against the will of the norm-authority if a MS court would use EU SL in its interpretation of Community law or national law[98].

Bindingness works in one direction, namely downwards. It is obvious that a SL instrument cannot change the effect of higher EU law[99]. Neither does non-binding SL become a legal basis of its own right: it is a practice to be followed, 'rule of practice', not legal rule[100], at least in strict sense.

Although binding force is a binary concept, it may be limited to some addressees only. The status of EU directives illustrates this limitation. The effects of missing binding force in law have been analysed in another context I find relevant. Namely, constitutional Bills of Rights traditionally do not bind private parties, though they may influence the application of private law by courts[101]. Fagan has referenced to a method introduced by Raz, distinguishing operative and auxiliary reasons. A right established in a horizontally non-binding Bill of Rights can serve to change private law only as an auxiliary reason. The operative reason in this case is the value of legal coherence. The task of the auxiliary reason is to transmit the force of that operative reason to a particular act[102]. Fagan explained the mechanism by the effect rights have when used to justify duties. Such duties are either corresponding or derivative. A duty is corresponding if its content can be inferred from the content of the right

[93]There are few studies on the compliance with EU SL. Hartlapp & Korkea-aho (2021) at 61.
[94]Arroyo Jiménez (2023) at 12.
[95]Ştefan (2012b) at 879–887.
[96]Láncos & Arroyo Jiménez (2023) at 4.
[97]Sarmiento (2012) at 271. Application of primacy depends on competence area, *locus* and manner of the reference. *Ibid.,* at 273. Reference in operative part of an EU hard law act, whether static or dynamic, results in primacy of EU SL.
[98]enden (2004) at 240.
[99]C-149/73. Senden (2004) at 245. C-266/90 [19].
[100]C-167/04 [207]. Ştefan (2008) at 763. Though, a SL agreement has (incidental) binding force and is a measure of general application. C-313/90. Láncos (2018) at 771.
[101]In Germany, *e.g.*, indirect horizontal application has been recognised by courts. Fagan (2001) at 73.
[102]Fagan (2001) at 75 & 77.

without additional premises. The content of derivative duties can be inferred from the content of the right only with reliance on additional premises[103]; in such case the right in question is the operative reason, and additional premises are auxiliary reasons[104]. A non-binding Bill of Rights cannot provide operative legal reasons: at the best they provide auxiliary reasons for changing private law; the operative reason has to be the value of legal coherence[105]. Judges have a reason to change law that lacks coherence[106]. Applying the theory to EU SL, the courts have to consider the non-binding SL norms as auxiliary reasons (or interpretative mandates[107]), if it would to serve to increase coherence of the legal system, by recognising its legal effects.

There are five principal scenarios of legal effect of EU SL, developed in the EU court practice. As the practice is not fully consistent and in some cases the court has been surprising[108], the classification ought to be used with care.

First, the EU court, not influenced by considerations of formality[109], has recognised bindingness of "mistitled" measures, whatever their form, if they are intended to have independent legal effects by an institution competent to issue such binding acts[110].

Second, informal agreements between EU institutions and other entities, including MSs are binding *pacta servanda* if provided in EU hard law[111] and if the law obligated the MSs to cooperate[112]. The agreement should be accepted by the parties[113], that implies they ought to be free to do so. Such agreements cannot be unilaterally amended[114]. Both scenarios are not genuine SL but binding law misnamed (incidental bindingness)[115].

Third, the highest normative value among genuine SL has been ascribed to self-binding informal SL instruments of EU institutions and agencies[116]. Its self-binding character for the norm-authority is due to the principles of legal certainty, legitimate expectations, and equality, but obviously not if it would go against law[117]. However, the court has admitted that an institution had to comply with self-imposed rules more

[103]*Ibid.*, at 78.
[104]*Ibid.*, at 80.
[105]*Ibid.*, at 81.
[106]*Ibid.*, at 82–83.
[107]Sarmiento (2012) at 289.
[108]*E.g.,* C-308/11. Korkea-aho (2018). Feguš (2023) at 62. Láncos (2022) at 62–81.
[109]Klabbers (1994) at 1016.
[110]Senden (2004) at 250, 255, 258, 260. C-22/70 [42], C-366/88 [24].
[111]Senden (2004) at 273. C-303/90, C-325/91. Mere acceptance of an act by its addressees or mutual agreement does not suffice. C-9/73 [40]. Senden (2004) at 271.
[112]Guidelines based on a treaty provision authorising "any appropriate measures", negotiated with and accepted by the MS, together with the treaty-based obligation to cooperate, have been considered binding. Senden (2004) at 274–279.
[113]C-311/94 [49].
[114]Láncos (2018) at 771. C-313/90 [44–45]. Feguš (2023) at 66.
[115]Senden (2004) at 235, 237–239.
[116]Feguš (2023) at 62.
[117]Ştefan (2008) at 769. C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P & C-213/02 P [211]. Senden (2004) at 418. Ştefan (2017) at 207. T-15/02 [541], T-27/02 [109]. Feguš (2023) at 65–66. An opposite example is given by Cannizzaro & Rebasti (2012) at 222. C-4/96 [31]. The principle of legitimate expectations applies at the MS level in their implementation of EU law (art 51(1) FRC). Weiß (2023) at 51. Case law does not allow to make conclusions. *Ibid.,* at 52.

stringent than those established by the case law[118]. Such SL cannot bind other parties, even if intended to harmonise MS policies[119]. It is not binding to courts, but the court may find appropriate to regulate in the same way as provided for in the SL[120]. This scenario is controversial as regards EU agencies. Limitation of discretion presumes discretionary competence and although decision-making power can be delegated[121], it is limited to clearly defined executive powers, to the exclusion of discretionary ones[122]. From this *Meroni* law it seems paradoxically, that the agencies are not bound by their guidelines despite there are 20 agencies whose founding Regulation explicitly empower them to issue SL[123]. Views differ regarding the current status. Some authors have interpreted today's law to include powers to draw up guidelines, technical and steering documents[124], and others have noted that the EU court has 'mellowed' the *Meroni* ruling[125]. Some have held that *ESMA* allows more powers to be delegated, including a competence for tertiary legislation[126].

Fourth, pursuant to EU court's guidance provided in *Grimaldi*, formal SL instruments (debatably all SL with legal basis[127]) of EU institutions (debatably also agencies) constitute not just voluntary interpretation aid for MS courts[128], but something the courts are bound to take into consideration when deciding disputes, 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"[129]. This obligation is not an equivalent to consistent interpretation standard applied in the case of directives[130], although even informal SL is an integral part of European law *lato sensu*, the body of norms to be used when deciding on cases[131]. Taking EU SL into consideration may extend application of EU law in MSs. Generally, direct effect of hard EU law may be used to fill gaps in MS law, or be applied instead of MS rules. If the EU rule is not sufficiently clear, use of EU law is inhibited; however, if such unclarity may be eliminated by taking into consideration EU SL, EU law might be made applicable in national courts[132].

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[118]Ştefan (2012a) at 19. T-7/89 [54]. Cannizzaro & Rebasti (2012) at 228.
[119]*Ibid.*, 29. *E.g.*, C-360/09 [21].
[120]*Ibid.*, 20. *E.g.*, T-230/00.
[121]Chiti (2013) at 95.
[122]Rocca & Eliantonio (2020) at 178. Chiti (2013) at 95. Simoncini (2018) at 25–29. C-9/56, C-98/80.
[123]Chiti (2013) at 99. Rocca & Eliantonio (2020) at 181. Regulation 2017/1001 mandates the Executive Director of EUIPO to adopt internal instructions and publish notices (art 157(4)(a)). T-523/10 [29].
[124]Jordana & Solanes Mullor (2023) at 212.
[125]Simoncini (2018) at 33. C-270/12 [41–45, 66].
[126]Böttner (2023) at 185. Vaughan (2023) at 224, 227.
[127]Only recommendations. Senden (2004) at 390–393. Later, where a SL measure "is foreseen or embedded in primary or secondary law, the *Grimaldi* obligation applies in full. If instead the [SL] instrument is not derived from primary or secondary law, national courts may decide whether or not to take it into account". Eliantonio & Ştefan (2018) at 463. Korkea-aho (2018) at 27. Arroyo Jiménez (2023) at 16. C-501/18 [80].
[128]But not EU courts. Arroyo Jiménez (2023) at 16.
[129]C-322/88 [97]. Senden (2004) at 386. Full extent of the wording 'to take into account' is not clear. Eliantonio & Ştefan (2018) at 463.
[130]Senden (2004) at 389; Arroyo Jiménez (2023) at 17; Ştefan (2008) at 767.
[131]Ştefan (2008) at 764.
[132]Sarmiento (2012) at 269–270.

Fifth, EU SL may serve as supplementary aid to interpretation, as useful points of refence, or be altogether without legal effects ('true' SL). However, Láncos has claimed that based on the case-law of the courts, even informal measures may become fully-binding where there is express consent on the side of the MSs to be bound[133].

Taking into consideration the flexible variety in case law, it is difficult to place the CPs under any of the scenarios; being in fact agreements, the second scenario is a strong candidate. However, *Grimaldi* criteria of interpretation may be relevant, or their self-binding character.

Normativity and Communication

The concept of normativity, though used extensively, is not used in a consistent way[134]. The reader may have noticed its mingled use in the 2nd section of the article. Here I use the meaning inferable from the following explanation: "[Normative propositions] convey information about the deontic status of certain actions or states of affairs"[135]. Normativity is a condition for the legal effect to be possible.

Analysing the content and first-hand meaning of the CPs in general, a couple of aspects are noticed. Non-bindingness has seldom been claimed *expressis verbis*: just in CP12 and in CP13. Implied legal non-bindingness, expressed by the lacking need to amend the MS laws, is pervasive. The CPs purport to apply law in converged practice, not to change it. The overall method used while formalising the CPs has been either to provide a systematised interpretation to a problem addressed by EU courts[136]; or to address analytically a new or topical horizontal issue, by providing systematised guidance[137]. The use of deontic vocabulary is remarkable feature[138]. In general the CPs recommend, in particular they often express obligations by "must". On other occasions softer modal verbs are used[139]. The use of language is, however, secondary to the nature of the source –indicative mood may often be used to communicate imperative message[140]. That is why the "Common Practices" carry simultaneously a descriptive and prescriptive message.

The CPs describe practices and, endeavouring to converge, aim to influence behaviour. They contain prescriptions, given by a norm-authority to a norm-subject[141]. I use the form of a norm analysed by von Wright to get a generalised understanding

[133]Láncos (2018) at 782.
[134]Hydén (2023).
[135]Alchourrón and Bulygin (2015) at 103.
[136]Particularly CP1, CP2, CP4, CP8, CP15.
[137]Particularly communication on New Type trademarks, CP11, CP13, CP14.
[138]Aust (2007) at 53. SL instruments „do not simply describe a manner to regulate conduct; to the contrary, soft law measures frequently make claims that are meant to prescribe the conduct of their addressee – to command, oblige, guide". Petropoulou Ionescu & Eliantonio (2023) at 81.
[139]The use of *should* has been considered by EU court a reliable indicator of a lack of obligation. Yet, it may convey obligation and necessity. Andone & Coman-Kund (2023) at 168.
[140]Cremona (2021) at 1244.
[141]Von Wright (1963) at 2–3, 7.

of the structure of the prescriptions contained in CPs. Von Wright distinguished several components of a norm, all of which are not relevant here[142].

The *character* of the prescriptions (the effect that something – this something constituting the *content* of the norm – ought to be done *etc.*), in most of the CPs, is about how the trade marks, certain features thereof, or the lists of goods and services in trade mark applications or registrations, ought to be evaluated or interpreted by an IPO. Sometimes it is the behaviour, motive or perception of the applicant or other persons that needs to be evaluated; occasionally the prescriptions address the applicants or other persons, *e.g.*, about how to format and submit evidence. The practices address the IPOs, not the applicants or users, who are affected by the practices only indirectly. It would be, however, misleading to conclude that the practices have little bearing on the users – the decisions made by the IPOs affect the users directly, and sometimes the norm-subjects include also them. The standardised practices allow the users to expect the reactions of the IPOs, and thereby affect the behaviour of the users.

The prescriptions are on a limited level autonomous, as the members of EUIPN as the norm-authority either are or represent the norm-subjects. However, as most of the CPs rely on court practice, they have a strong heteronomous element[143]. The prescriptions have hypothetical nature: their conditions of application are not determined solely by their content but depend on further conditions[144]. Those further conditions may be either substantive, containing variables not covered by the scope of the CPs, or legal arguments of strongly binding nature, that render the prescriptions of CPs at least partly inapplicable.

CPs miss an ambition to be binding – this feature has been repeatedly expressed by their shape, structure and text. The CPs do not follow the model of binding documents of the EU. Instead of being structured in articles or even being divided into sections and paragraphs, a rather hectic layout and partial numbering of text units have been used[145]. As the CPs rely heavily on the jurisprudence of EU courts, cited in footnotes, the layout of the CPs reminds more a legal paper than a legislative text. Due to provided hypothetical examples of interpretation of the agreed principles, the look of the CPs reminds a study manual; sometimes graphs and tables have been used in the text. Their title does not clarify further on the nature of the texts; after all, it is not conclusive to decide on the nature of the text by its form or title[146].

As texts, the CPs communicate a normative message, although softly. Communicating normative expectations is not only information but also a "speech act", a performative act through which a change in behaviour comes about[147]. Taking into account the obligation to cooperate, the expressed consent, and the formulated message on the content of expected behaviour, they have twofold character. First, the CPs constitute commissive speech act expressing the parties' intention of being committed to a stated

[142]*Ibid.*, at 70-71. Von Wright held that recommendations are not norms, but they are still related categories.
[143]*Ibid.*, at 76–77.
[144]*Ibid.*, at 74.
[145]Aust (2007) at 48, 431.
[146]The International Court of Justice has deduced the intentions of the parties from the circumstances. Chinkin (1989) at 224.
[147]Van Hoecke (2002) at 130; Onuf (2013) at 82; Costa (2021) at 96.

course of action[148], *viz.* accepting an obligation. This applies to the cooperation and implementation. Second, the CPs contain purposive speech acts conveying a purpose to take a certain course of conduct[149]. The parties have resolved to apply EU trade mark law in certain converged manner, as formulated in the CPs. Whether it will be given effect, depends on circumstances external to the commitment, including more binding norms that prevent the use of CPs.

Conclusions

The Common Practices of the European Union Intellectual Property Network have been established under European Union secondary law, which mandates cooperation between the European Union and Member State intellectual property offices (IPOs). This framework validates the Common Practices within European Union law. They are developed and adopted through an inclusive and transparent process that involves participation by and input from users of the trade mark system, enhancing their normative authority. IPOs express their commitment to implement these practices.

As multilateral agreements, the Common Practices aim to achieve a common objective: to harmonise practices and ensure consistency in IPO decisions. While this goal serves a practical purpose, it also has legal implications, as it shapes expectations for users and the public. The Common Practices are part of a broader palette of European Union soft law instruments. Although they are not legally binding, European Union courts have acknowledged that such instruments can still have legal effects. Currently the clarity regarding the legal implications of European Union soft law in general, and the Common Practices specifically, is somewhat ambiguous.

Internal and external endeavours to understand law converge, and insights from external sources help to refine internal methods. It is likely that both the IPOs and applicants take the Common Practices into account in order to achieve their aims and avoid troubles. The Common Practices convey a normative message that, while not legally binding, evoke changes in behaviour through commissive and purposive speech acts. These norms can be applied in practice, provided that they are not overridden by higher legal norms.

References

Abbott, K.W., R.O. Keohane, A. Moravcsik, A-M. Slaughter & D. Snidal (2000). 'The Concept of Legalization' in *International Organization* 54(3):401-419.

Abbott, K.W. & D. Snidal (2000). 'Hard and Soft Law in International Governance' in *International Organization* 54(3):37-72.

Alchourrón, C.E. & E. Bulygin (2015). 'On the Concept of a Legal Order' in Bulygin, E. (2015). *Essays in Legal Philosophy,* pp. 124-135. Oxford University Press.

[148]Onuf (2013) at 87.

[149]Ruiter (2001) at 5.

Alexy, R. (2002). *The Argument from Iniustice. A Reply to Legal Positivism*. Clarendon Press.
Andone, C. & F. Coman-Kund (2023). 'A legal-argumentative framework for persuasive EU soft law: The case of the European Commission's recommendations' in Láncos, P.L., N. Xanthoulis, & L. Arroyo Jiménez (Eds). *The Legal Effects of EU Soft Law. Theory, Language and Sectoral Insights*, pp. 142-174. Edward Elgar Publishing.
Arroyo Jiménez, L. (2023). 'Beyond bindingness: A typology of EU soft law legal effects' in Láncos, P.L., N. Xanthoulis, & L. Arroyo Jiménez (Eds). *The Legal Effects of EU Soft Law. Theory, Language and Sectoral Insights*, pp. 9-32. Edward Elgar Publishing.
Aust, A. (2007). *Modern Treaty Law and Practice*. Cambridge University Press.
Banakar, R. (2003). *Merging Law and Sociology. Beyond the Dichotomies in Socio-Legal Research*. (Mobility and Norm Change, Vol. 5). Galda + Wilch Verlag.
Baxter, R.R. (1980). 'International Law in "Her Infinite Variety"' in *International and Comparative Law Quarterly* 29(4):549–566.
Böttner, R. (2023). 'The comply-or-explain mechanism in the European Supervisory Authorities, or: Does *Meroni* allow nudging?' in Láncos, P.L., N. Xanthoulis, & L. Arroyo Jiménez (Eds). *The Legal Effects of EU Soft Law. Theory, Language and Sectoral Insights*, pp. 176-192. Edward Elgar Publishing.
Cannizzaro, E. & E. Rebasti (2012). 'Soft law in the EU legal order in Iliopoulos-Strangas', J. & J-F. Flauss (Eds). *The Soft Law of European Organisations* (Societas Iuris Publici Europaei (Sipe) 7), pp. 209-232. Nomos & Stämpfli Verlag.
Chinkin, C.M. (1989). 'The Challenge of Soft Law: Development and Change in International Law' in *International and Comparative Law Quarterly* 38(4):850–866.
Chiti, E. (2013). 'European Agencies' Rulemaking: Powers, Procedures and Assessment' in *European Law Journal* 19(1):93–110.
Claus, L. (2012). *Law's Evolution and Human Understanding*. Oxford University Press.
Costa, R. de Oliveira (2021). 'Towards a Metatheoretical Postmodern Approach to Legal Reasoning' *Athens Journal of Law* 7(1):91-104.
Cotterrell, R. (1992). *The Sociology of Law. An Introduction*. 2nd Ed. Butterworths.
Coutu, M. (2018). *Max Weber's Interpretive Sociology of Law*. Routledge.
Cremona, E. (2021). 'Fonti private e legittimazione democratica nell'età della tecnologia' in *Diritto Pubblico Comparato ed Europeo*, 50, No. Sp.1235–1267.
d'Aspremont, J. (2008). 'Softness in International Law: A Self-Serving Quest for New Legal Materials' in *The European Journal of International Law* 19(5):1075–1093.
Eliantonio, M. (2021). 'Judicial Review of Soft Law before the European and the National Courts: A Wind of Change Blowing from the Member States?' in Eliantonio, M., E. Korkea-aho & O. Ştefan (Eds). EU *Soft Law in the Member States. Theoretical Findings and Empirical Evidence*. (EU Law in the Member States 8), pp. 283-301. Hart Publishing.
Eliantonio, M., E. Korkea-aho & O. Ştefan (Eds) (2021). *EU Soft Law in the Member States. Theoretical Findings and Empirical Evidence*. (EU Law in the Member States 8). Hart Publishing.
Eliantonio, M., E. Korkea-aho & U. Mörth (Eds.) (2023). *Research Handbook on Soft Law*. Edward Elgar Publishing.
Eliantonio, M. & O. Ştefan (2018). 'Soft law before the European courts: discovering a 'common pattern'?' in *Yearbook of European Law* 37(7):457–469.
Fagan, A. (2001). 'Determining the Stakes: Binding and Non-Binding Bills of Rights' in Friedmann, D. & D. Barak-Erez (Eds). *Human Rights in Private Law,* pp. 73-96. Hart Publishing.
Feguš, V.R. (2023). 'EU soft law: Validity, normativity and 'bindingness' reviewed' in Láncos, P.L., N. Xanthoulis, & L. Arroyo Jiménez (Eds). *The Legal Effects of EU Soft Law. Theory, Language and Sectoral Insights*, pp 53-74. Edward Elgar Publishing.

Finnemore, M. & S.J. Toope (2001). 'Alternatives to "Legalization": Richer Views of Law and Politics' in *International Organization* 55(3):743–758.
Griesser, E. (2016). *"Soft Law" in der Europäischen Union und Österreich*. Dissertation zur Erlangung des Akademischen Grades Dr.iur. an der Leopold-Franzens-Universität Innsbruck (2016). https://ulb-dok.uibk.ac.at/ulbtirolhs/download/pdf/1033358.
Gruchalla-Wesierski, T. (1984). 'Framework for Understanding "Soft Law"' in *McGill Law Journal*' 30(1):37-88.
Guzman, A.T. & T.L. Meyer (2009). 'International Common Law: The Soft Law of International Tribunals' in *International Common Law* 9(2):515–535.
Hamaiunova, V. (2023). 'Influence of Implicit and Visible Legal Cultures on Modernisation of Judicial Systems in European Countries' in *Athens Journal of Law* 9(4):653-666.
Hartlapp, M. & E. Korkea-aho (2021). ''Whatever-Law' and Teenage Member States? The National Reception of EU Soft Law and How to Study It' in Eliantonio, M., E. Korkea-aho & O. Ştefan (Eds). EU *Soft Law in the Member States. Theoretical Findings and Empirical Evidence*. (EU Law in the Member States 8), pp. 57-76. Hart Publishing.
Hoffmann, M. (2025). 'Adding to the Toolbox: Court Published 'Fact Sheets'' in *the EU Legal Order. – Goettingen Journal of International Law* 15(1): 113–146.
Hofmann, A. (2021). 'Types of EU Soft Law and Their National Impact' in Eliantonio, M., E. Korkea-aho & O. Ştefan (Eds). *EU Soft Law in the Member States. Theoretical Findings and Empirical Evidence.* (EU Law in the Member States 8), pp. 39-55.
Holmes, O.W., Jr. (1897). 'The Path of the Law' in *Harward Law Review* 457:10. https://mo glen.law.columbia.edu/LCS/palaw.pdf.
Hydén, H. (2023). 'Normativity as the Source of Norms' in Hydén, H., R. Cotterrell, D. Nelken & U. Schultz (Eds). *Combining the Legal and the Social in Sociology of Law. An Homage to Reza Banakar*, pp. 69-81. Oxford: Bloomsbury Academic.
Iliopoulos-Strangas, J. & J-F. Flauss (Eds) (2012). *The Soft Law of European Organisations*. (Societas Iuris Publici Europaei (Sipe) 7). Nomos & Stämpfli Verlag.
Jordana, J. & J. Solanes Mullor (2023). 'EU economic governance, agencies and soft law: an accountability challenge for the courts?' in Eliantonio, M., E. Korkea-aho & U. Mörth (Eds.). *Research Handbook on Soft Law*, 208-222. Edward Elgar Publishing.
Klabbers, J. (1994). 'Informal Instruments before the European Court of Justice' in *Common Market Law Review* 31(5):997–1023.
Klabbers, J. (1996). 'The Redundancy of Soft Law' in *Nordic Journal of International Law* 65:167–182.
Klabbers, J. (1998). 'The Undesirability of Soft Law' in *Nordic Journal of International Law* 67:381–391.
Knauff, M. (2010). *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem*. (Jus Publicum 193). Mohr Siebeck.
Korkea-aho, H.E. (2018). 'National courts and European soft law: Is Grimaldi still good law?' in *Yearbook of European law* 37(1):470–495.
Kovács, A., T. Tóth, & A. Forgács (2016). 'The Legal Effects of European Soft Law and Their Recognition at National Administrative Courts' in *ELTE Law Journal* (Eötvös Loránd University) 2:53–70.
Láncos, P.L. (2018). 'A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?' in *European Public Law* 24(4):755–784.
Láncos, P.L. (2022). *The Many Facets of EU Soft Law*. Pázmány Press.
Láncos, P.L., N. Xanthoulis & L. Arroyo Jiménez (Eds) (2023). *The Legal Effects of EU Soft Law. Theory, Language and Sectoral Insights*. Edward Elgar Publishing.

Láncos, P.L. & L. Arroyo Jiménez (2023). 'Introduction to *The Legal Effects of EU Soft Law*' in Láncos, P.L., N. Xanthoulis & L. Arroyo Jiménez (Eds). *The Legal Effects of EU Soft Law pp. 1-7. Theory, Language and Sectoral Insights*. Edward Elgar Publishing.

Meyer, L.H. & P. Sanklecha (2009). 'Introduction: Legitimacy, justice and public international law. Three perspectives on the debate' in Meyer, L.H. (Ed). *Legitimacy, Justice and Public International Law*, pp. 1-28. Cambridge University Press.

Mörth, U. (2004). *Soft Law in Governance and Regulation: An Interdisciplinary Analysis*. Edward Elgar Publishing.

Onuf, N.G. (2013). *World of Our Making. Rules and rule in social theory and international relations*. Routledge.

Peters, A. (2007). 'Typology, Utility and Legitimacy of European Soft Law' in Epiney, A., M. Haag & A. Heinemann (Eds). *Challenging boundaries. Festschrift für Roland Bieber*, pp. 405-428. Nomos & Dike.

Petropoulou Ionescu, D. & E. Eliantonio (2023). 'Words are stones: Constructing bindingness through language in EU environmental soft law' in Láncos, P.L., N. Xanthoulis & L. Arroyo Jiménez (Eds). *The Legal Effects of EU Soft Law. Theory, Language and Sectoral Insights*, pp. 76-107. Edward Elgar Publishing.

Rocca, P. & M Eliantonio (2020). 'European Union Soft Law by Agencies: An Analysis of the Legitimacy of their Procedural Frameworks' in de Bellis, M., G. della Cananea & M. Conticelli (Eds). *EU executive governance: Agencies and procedures*, pp. 177-203. Giappichelli.

Ruiter, D.W.P. (2001). *Legal Institutions*. (Law and Philosophy Library 55). Kluwer Academic Publishers.

Sarmiento, D. (2012). 'European Soft Law and National Authorities: Incorporation, Enforcement and Interference' in Iliopoulos-Strangas, J. & J-F. Flauss (Eds). 'The Soft Law of European Organisations'. (Societas Iuris Publici Europaei (Sipe) 7), pp. 261-295.

Scharpf, F.W. (2006). 'Problem Solving Effectiveness and Democratic Accountability in the EU' in *Political Science Series*, 107. Institute for Advanced Studies, Vienna. https://aei.pitt.edu/6097/1/pw_107.pdf.

Schwartz, R.L. (1992). 'Internal and External Method in the Study of Law' in *Law and Philosophy* 11(3):179-200.

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

Senden, L. (2013). 'Soft Post-Legislative Rulemaking: A Time for More Stringent Control' in *European Law Journal*, 19(1):57-75.

Shaffer, G.C. & M.A. Pollack (2010). 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' in *Minnesota Law Review* 94:706-799.

Shapiro, S.J. (2006). 'What Is the Internal Point of View?' in *Fordham Law Review* 75: 1157–1170.

Shelton, D. (2009). 'Soft Law' in Armstrong, D. (Ed). *Routledge Handbook of International Law*: 68–80.

Simoncini, M. (2018). *Administrative Regulation Beyond the Non-Delegation Doctrine. A Study on EU Agencies*. (Modern Studies in European Law 88). Hart Publishing.

Snyder, F. (1993a). 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' in *Modern Law Review* 56(1):19-5.

Snyder, F. (1993b). *Soft Law and Institutional Practice in the European Community*. (Working Paper Law No. 93/5). European University Institute.

Ştefan, O.A. (2008). 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' in *European Law Journal* 14(6):753–772.

Ştefan, O. (2012a). 'Hybridity before the Court: a Hard Look at Soft Law in the EU Competition and State Aid Case Law' in *European Law Review* 37(1):49-69. https://ssrn.com/abstract=2006729.

Ştefan, O. (2012b). 'European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects' in The Modern Law Review 75(5): 879–893.

Ştefan, O. (2013). *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union*. Wolters Kluwer.

Ştefan, O. (2017). 'Soft Law and the Enforcement of EU Law' in Jakab, A. & D. Kochenov (Eds). *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, pp. 200-217. Oxford University Press.

Ştefan, O. (2021). 'Soft Law and the Promise of Transparency in the Member States' in Eliantonio, M., E. Korkea-aho & O. Ştefan (Eds). *EU Soft Law in the Member States. Theoretical Findings and Empirical Evidence.* (EU Law in the Member States 8), at 323-342. Hart Publishing.

Terpan, F. (2015). 'Soft Law in the European Union—The Changing Nature of EU Law' in *European Law Journal* 21(1):68–96.

Terpan, F. (2023). 'The definition of soft law' in Eliantonio, M., E. Korkea-aho & U. Mörth (Eds.). *Research Handbook on Soft Law,* pp. 43-55. Edward Elgar Publishing.

Thomaser, D. (2019). *Soft Law and the Convergence of Practice in EU Trade Marks and Design Law*. Diplomarbeit zur Erlangung des akademischen Grads eines Magisters der Rechtswissenschaften an der Leopold-Franzens-Universität Innsbruck.

van Hoecke, M. (2002). *Law as Communication*. Hart Publishing.

Vaughan, S. (2023). 'Fictions and fuzziness: soft law rule-making among the EU's decentralized agencies' in Eliantonio, M., E. Korkea-aho & U. Mörth (Eds.). *Research Handbook on Soft Law*, pp. 223-236. Edward Elgar Publishing.

Vinx, L. & S.G. Zeitlin (2021). *Carl Schmitt's Early Legal-Theoretical Writings. Statute and Judgment and The Value of the State and the Significance of the Individual*. Cambridge University Press.

von Wright, G.H. (1963). *Norm and Action. A Logical Enquiry*. The Humanities Press.

Weil, P. (1983). 'Towards Relative Normativity in International Law?' in *American Journal of International Law* 77(3):413-442.

Weismann, P. (2024). *Soft Law and its Importance in Ensuring Member States' Compliance with Union Law*. Nomos.

Weiß, W. (2023). 'Reconsidering the legal effect of EU soft law in national implementation: Bindingness from an individual rights perspective' in Láncos, P.L., N. Xanthoulis & L. Arroyo Jiménez (Eds). *The Legal Effects of EU Soft Law. Theory, Language and Sectoral Insights*, pp. 33-52. Edward Elgar Publishing.

Xanthoulis, N. (2021). 'Legal Effects and Reviewability of EU Acts. Between Institutional Intentions and Perceptions of Concerned Parties' by Eliantonio, M., E. Korkea-aho & O. Ştefan (Eds). EU *Soft Law in the Member States. Theoretical Findings and Empirical Evidence*. (EU Law in the Member States 8). pp. 303-321. Hart Publishing.

Court Cases

C-9/56: *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* (1958) ECLI:EU:C:1958:7.

C-22/70: *Commission of the European Communities v Council of the European Communities* (1971) ECLI:EU:C:1971:32.

C-9/73: *Carl Schlüter v Hauptzollamt Lörrach* (1973) ECLI:EU:C:1973:110.
C-149/73: *Otto Witt KG v Hauptzollamt Hamburg-Ericus* (1973) ECLI:EU:C:1973:160.
C-310/85: *Deufil GmbH & Co. KG v Commission of the European Communities* (1987) ECLI:EU:C:1987:96.
C-98/80: *Giuseppe Romano v Institut national d'assurance maladie-invalidité* (1981) ECLI: EU:C:1981:104.
C-322/88: *Salvatore Grimaldi v Fonds des maladies professionnelles* (1989) ECLI:EU: C:1989:646.
C-366/88: *French Republic v Commission of the European Communities* (1990) ECLI:EU: C:1990:348.
C-303/90: *French Republic v Commission of the European Communities* (1991) ECLI:EU: C:1991:424.
C-266/90: *Franc Soba KG v Hauptzollamt Augsburg* (1992) ECLI:EU:C:1992:36.
C-313/90: *Comité International de la Rayonne et des Fibres Synthétiques and others v Commission of the European Communities* (1993) ECLI:EU:C:1993:111.
C-325/91: *French Republic v Commission of the European Communities* (1993) ECLI:EU: C:1993:245.
C-311/94: *IJssel-Vliet Combinatie BV v Minister van Economische Zaken* (1996) ECLI:EU: C:1996:383.
C-4/96: *Northern Ireland Fish Producers' Organisation Ltd (NIFPO) and Northern Ireland Fishermen's Federation v Department of Agriculture for Northern Ireland* (1998) ECLI:EU:C:1998:67.
C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P (joined cases): *Dansk Rørindustri A/S et al.* (2005) ECLI:EU:C:2005:408.
C-167/04: *JCB Service v Commission of the European Communities* (2006) ECLI:EU:C: 2006:594.
C-360/09: *Pfleiderer AG v Bundeskartellamt* (2011) ECLI:EU:C:2011:389.
C-270/12: *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* (2014) ECLI:EU:C:2014:18.
C-501/18: *BT v Balgarska Narodna Banka* (2021) ECLI:EU:C:2021:249.
T-7/89: *SA Hercules Chemicals NV v Commission of the European Communities* (1991) ECLI:EU:T:1991:75.
T-115/94: *Opel Austria GmbH v Council of the European Union* (1997) ECLI:EU:T:1997:3.
T-230/00: *Daesang Corp. and Sewon Europe GmbH v Commission of the European Communities* (2003) ECLI:EU:T:2003:196.
T-27/02: *Kronofrance SA v Commission of the European Communities* (2004) ECLI:EU:T: 2004:348.
T-15/02: *BASF AG v Commission of the European Communities* (2006) ECLI:EU: T:2006:74.
T-523/10: *Interkobo sp. z o.o. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (2012) ECLI:EU:T:2012:326.

Legislative Acts of EU

Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark. OJ L 11, 14.1.1994, p. 1–36.
Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (recast). OJ L 336, 23.12.2015, p. 1–26.

Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs). OJ L 341, 24.12.2015, p. 21–94.
Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification). OJ L 154, 16.6.2017, p. 1–99.

Other Documents of EU

(2007/2028(INI)): European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments.
COM (2001) 428 final: White Paper on European Governance. 12.10.2001.
COM (2001) 726 final: Communication from the Commission “Simplifying and improving the regulatory environment”. 5.12.2001.
COM (2002) 278: Communication from the Commission. Action plan "Simplifying and improving the regulatory environment". 5.6.2002.
“Convergence Programme. Programme Brief” (2011). https://www.tmdn.org/network/documents/89965/91990/3-harmonization_programme-v1-1.pdf
SEC(92)1990: Communication of the Commission to the Council and the European Parliament “The principle of subsidiarity”. 27.10.1992.