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Relying on EU Soft Law Before National Competition Authorities: Hope for the Best, Expect the Worst

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I. INTRODUCTION

Instruments deprived of legally binding force according to Article 288 TFEU—notices, guidelines, communications, etc.—have been issued in EU competition law since the 1960s. Bearing a vast variety of names and coming in different forms, all these instruments can be gathered under the umbrella notion of "soft law." As experienced in international law contexts, the legal or practical effects that soft law can produce in the absence of legally binding force remain rather unclear, which makes the enforceability of such instruments problematic.[2]

This is particularly worrying given the current system of EU competition law enforcement. Following Regulation 1/2003,[3] the enforcement of EU competition law occurs in a multi-level setting, with cases being dealt with at the national or at the European level by authorities organized within the European Competition Network ("ECN"). In this context, national competition authorities, national courts, and the European Commission are all called to apply EU Treaty provisions and EU secondary legislation to competition cases. However, while the European Commission is required to observe EU notices and guidelines in the cases it deals with, no such obligation exists for national competition authorities.

This might result in inequality of treatment alongside the ECN, as individuals involved in cases decided at the central level may expect guidelines and notices to apply, but are not entitled to expect the same should their case be treated nationally. In the recent *Expedia* case[4] the Court of Justice of the European Union ("CJEU") failed to address this inequality, while favoring a large margin of discretion and autonomy for national competition authorities in the enforcement of EU law.

The case exposes the tension between, on the one hand, the need to accommodate diversity in the enforcement of EU competition rules by respecting the autonomy of national competition authorities operating within the ECN and, on the other hand, the imperative to preserve legal certainty for individuals, as well as effectiveness and consistency in the application of EU law.

II. THE CASE

Expedia concerned an agreement between the French State railway company (SNCF) and Expedia, a company specialized in the sale of travel services over the internet. The agreement

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[2] *See* Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 ICLQ 850, 862-865 (1989)..

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[4] *Expedia Inc. v Autorité de la concurrence and Others* Case C-226/11 ECR [2013] nyr.

aimed at establishing a joint subsidiary that operated as an online travel agency. Following a complaint by several competitors, the French Competition Authority decided that the agreement was against Article 81 EC (now 101 TFEU), as well as against national legislation, because it constituted a restriction of competition by object. Both Expedia and SNCF were fined, and Expedia challenged the decision before the French Courts, arguing that the agreement they concluded with the railway company was falling below the *de minimis* thresholds established by the European Commission in a notice.[5]

According to paragraph 7 of the notice, agreements between competitors do not appreciably restrict competition provided the aggregate market share held by the parties does not exceed 10 percent on any of the relevant markets concerned by the agreement. Consequently, such agreements are not prohibited under Article 101 TFEU, and the European Commission is not to institute proceedings against them.

No such thresholds are recognized under French competition law, but Expedia argued that, according to Article 3 (2) of Regulation 1/2003, the application of national competition law may not lead to the prohibition of agreements which do not restrict competition within the meaning of Article 101 (1) TFEU. The case reached the French Court of Cassation, who wondered whether the French Competition Authority was bound to apply the *de minimis* thresholds provided for in the EU notice, a soft law instrument deprived of legally binding force.

In preliminary ruling, the Court of Justice of the European Union advised a negative answer to this question: national authorities are not bound to apply EU soft law instruments, and they have complete discretion to take the thresholds mentioned in the *de minimis* notice into consideration.[6]

III. THE JUDGMENT: A CHALLENGE TO THE FUNCTIONS OF SOFT LAW

The arguments put forward by the CJEU were textual, as the *de minimis* notice underlines its non-binding nature with regards to Member State ("MS") authorities and courts; furthermore, it mentions that the thresholds provided therein are not absolute, and that agreements of undertakings exceeding these thresholds may, in certain cases, not restrict competition appreciably.[7] Another argument that the Court insists on in such cases[8] is that, since notices and guidelines are published in the C section of the Official Journal, they are not legally binding.[9] Furthermore, the Court mentions that the notice is not binding on the Member States, given that it does not contain any reference to declarations of national authorities agreeing to abide by the provisions thereof.

All these arguments appear reasonable at a first sight, and they are consistent with previous case law.[10] Soft law, issued by the European Commission without involving the Member States and EU institutions such as the Parliament or the Council, is deprived of legally binding

[5] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) [2001] OJ C368/13.

[6] Judgment in *Expedia*, ¶31.

[7] Judgment in *Expedia*, ¶s24-25.

[8] Judgment in Case C-410/09 *Polska Telefonia Cyfrowa*, [2011] ECR I-03853.

[9] Judgment in *Expedia*, ¶30.

[10] Judgment in Case C-360/09 *Pfleiderer AG v Bundeskartellamt,* [2011] ECR I-05161.

force in accordance to fundamental texts, such as Article 288 TFEU. Requiring national competition authorities to comply with the *de minimis* notice would blatantly disregard the Treaty provisions. It would allow rules issued by the European Commission in accordance to procedures questionable from the point of view of legitimacy or accountability to make their way through the backdoor into EU legislation. Consequently, as argued by some authors commenting on the *Expedia* case, attaching any kind of effects to soft law is dangerous.[11]

The present analysis invites a more nuanced approach, suggesting that the divide binding/not binding is too crude, and is limiting considerably the functions that soft law can play in the multi-level system of competition law enforcement.

Soft law instruments are issued by the European Commission in order to explain the existing EU law in a specific sector, to present its own views on the law, and to clarify legal provisions with an open and indeterminate character.[12] Thus, soft law is meant to enhance both the connections between European and national authorities, creating the premise for a consistent application of European law. It can boost the links between institutions and individuals, natural or legal persons, thus enhancing legal certainty and transparency of administrative activity.

The interpretative communications of the Commission have been found to constitute a source of doctrine, to guide public authorities in their activities, and also to provide a reference point for individuals, clarifying matters related to their rights and duties.[13] An important tool of EU administrative governance,[14] soft law limits institutional discretion, encouraging the administrators to take a consistent approach to decision making.[15] Finally, EU soft law is meant to achieve coherence and effectiveness within the multi-level system of competition law enforcement, by guiding national authorities in the application of EU rules.

All these functions of soft law have been recognized by the Court of Justice of the European Union in competition cases dealt by the European Commission, which is bound to take into consideration its own guidelines and notices in the decisions it issues. This is not because of the intrinsic legal force of such instruments—which remain, according to Article 288 TFEU, not legally binding—but because of the operation of general principles of law.[16]

Indeed, by publishing soft law instruments the Commission creates a legitimate expectation that it will apply them in cases it investigates. Therefore, the Commission limits its own discretion when issuing certain guidelines and cannot depart from such rules under pain of

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[11] Sánchez Graells, *This is not (well, yes) binding, but (maybe) you can disregard it. AG Kokott on soft law and EU competition policy*, blog post of 29/09/2012, *available at* http://howtocrackanut.blogspot.fr/2012/09/this-is-not-well-yes-binding-but-maybe.html (accessed 05/07/2013).

[12] Gardenes Santiago, *Las comunicaciones interpretativas de la Comision: concepto y valor nor*mativo, 19 REVISTA DE INSTITUCIONES EUROPEAs 933, 939-940 (1992).

[13] Tornberg, *The Commission's Communications on the General Good – magna carta or law-making*? EBL REV. 24 , 27 (1999).

[14] Hofmann, *Administrative Governance in State Aid Po*licy, EU ADMINISTRATIVE GOVERNANCE, 196-199 (Hofmann & Türk, eds., 2006).

[15] Cini, *The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime*, 8 J. EUR. PUBLIC POLICY 192, 194 (2001).

[16] On this point *see* the discussion in ŞTEFAN, SOFT LAW IN COURT: COMPETITION LAW, STATE AID, AND THE COURT OF JUSTICE OF THE EUROPEAN UNION (2012).

being found to be in breach of general principles of law, such as equal treatment or legal certainty.[17] Accordingly, soft law is neither binding nor not binding, as it does not completely constrain administrative discretion: the European Commission can depart from its guidelines and notices, provided it gives reasons that are consistent with general principles of law.

Interestingly, in *Expedia*, the Court admitted that the *de minimis* notice is meant to make transparent the manner in which the Commission applies Article 101 TFEU, and hence limits the discretion thereof. It also acknowledged that a departure from the notice by the Commission can potentially infringe legitimate expectations and equal treatment.[18] Given this discussion, it is surprising to note that the Court gave a strict interpretation to the effects of the *de minimis* notice, holding that it is not binding in relation to the Member States,[19] and, moreover, that national authorities' disregard of the notice could not interfere with principles such as legitimate expectations and legal certainty.[20]

It follows that legitimate expectations and legal certainty have a variable content in the multi-layered system of competition law enforcement at the European level. On the one hand, if their case is dealt with by the European Commission, undertakings are entitled to expect an application of EU soft law, or at least, to a statement of reasons as to why such instruments were not applied in their case. On the other hand, at the national level, the discretion of national competition authorities seems to have priority over individual expectations.

Finally, the Court pointed out that the notice is intended to give guidance to the national authorities and courts in the application of Article 101 TFEU.[21] It attached no consequences to this important function of the *de minimis* notice, mentioned in paragraph 4 thereof. While discussing solely the issue of "binding" effects, the Court noted that soft law can bind national authorities only if the latter expressly endorse the text of a certain instrument, such as the notice on cooperation within the network of competition authorities,[22] referred to by the Court.[23]

However, such reasoning is not always straightforward: indeed, in the Sate aids case law, MS acceptance was just a factor in recognizing binding effect to soft law instruments. Such instruments needed additionally to have been adopted in the framework of the duty of the Member States to cooperate with the Commission, as streamlined in Article 108 TFEU.[24]

These arguments show that the grounds and the intensity of soft law effects vary in accordance to the level where they are invoked—European or national, as well as in accordance to the will of national authorities to endorse or not a certain instrument. This creates important concerns with respect to individual rights. In EU's multi-level governance system, the fact that

[17] Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri and others v Commission* [2005] ECR I-5425, ¶211.

[18] Judgment in *Expedia*, ¶28.

[19] Judgment in *Expedia*, ¶29.

[20] Judgment in *Expedia*, ¶32.

[21] Judgment in *Expedia*, ¶28.

[22] Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43.

[23] Judgment in *Expedia*, ¶26.

[24] Scott, *In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law*, 48 CML REV. 329, 343 (2011).

the individuals have different identities and belong to multiple polities seems to translate in a weakening of their rights as they move away from the center.

A solution to this problem was given by Advocate General Kokott in her *Expedia* opinion, not followed by the Court. While holding that national competition authorities cannot be bound by soft law, the view of the AG appears more nuanced than the judgment, and it can result in a similar degree of protection for individuals at all levels of EU law enforcement.

IV. THE AG OPINION: A MORE NUANCED VIEW

Like the Court, Advocate General Kokott found neither legally binding force, nor legally binding effects for the *de minimis* notice at the national level. This was for several reasons. Textually, the notice provides that it reflects only the Commission's view on the law; it is not binding on courts (EU or national) and on competition authorities.[25] Teleologically, the aim of the notice was only to provide transparency in the administrative practice of the Commission.[26] Contextually, the notice was issued not in the exercise of legislative powers, but in the Commission's capacity as competition authority of the European Union.[27] Finally, such instrument had no legally binding force in the first place, in accordance to Article 288 TFEU, as evidenced by the publication thereof in the C—and not the L—series of the Official Journal.[28]

However, unlike the Court, the AG drew important consequences from the guidance function of soft law, as provided for in paragraph 4 of the *de minimis* notice. She considered that the guidance offered by the notice to national authorities is decisive in order to ensure effectiveness, uniformity, and legal certainty in the multi-level system of enforcement of EU competition law.[29] According to the AG, soft law instruments may, in certain circumstances, produce effects for national authorities, without nevertheless being binding and without completely limiting their discretion.

The principles of loyal cooperation between the national authorities and the Commission, as well as of the principles of effectiveness and uniform application of European law, require national courts and authorities to "take due account" of Commission soft law instruments. Similar terms were used also by the CJEU when, in *Grimaldi*, it urged national judges to "take into consideration"[30] soft law whenever deciding on cases. No explanation was given by the Court regarding the meaning of this statement, which was repeated in subsequent cases,[31] thus the *Expedia* opinion is important for offering a clarification on this matter.

According to the AG, while not obliged to apply soft law as such, the national authorities and courts should "consider the Commission's assessment" and also "give reasons which can be

[25] Opinion in *Expedia*, ¶27.
[26] Opinion in *Expedia*, ¶28.
[27] Opinion in *Expedia*, ¶29.
[28] Opinion in *Expedia*, ¶30-32.
[29] Opinion in *Expedia*, ¶37.
[30] Case C-322/88 *Grimaldi* [1989] ECR I-4407, ¶18.
[31] *See* Judgment in Case C-207/01 *Altair Chimica v Commission* [2003] ECR I-8875, at [41], Judgment in Case C-415/07 *Lodato* [2009] ECR I-2599, at [32], Judgment in Joined cases 253/78 and 1 to 3/79 *Procureur de la République and others v Bruno Giry and Guerlain SA and others* [1980] ECR 2327, at [13]; Judgment in Case 99/79 *Lancôme v Etos* [1980] ECR 2511, at [11].

judicially reviewed for any divergences."[32] This duty to state reasons is considered satisfied by the Advocate General either by a discussion in each individual case, or through a general notice issued by the national authority laying down its practice.[33] The AG mentions also the grounds justifying any departure of national competition authorities and courts from the text of Commission's notices, such as particular economic circumstances that need to be assessed on a case by case basis,[34] and national specificities.[35]

The solution suggested by the AG could enhance legal certainty and help protect legitimate expectations and equality within the European system of competition law enforcement. Accordingly, EU soft law would be applicable by default by the national competition authorities, and individuals can expect to obtain an explanation in case of decisions that depart from notices and guidelines of the Commission. Furthermore, AG Kokott's solution would accommodate diversity within the ECN, as it allows national competition authorities to issue *their own soft laws* to explain the ways in which they will apply competition rules in case the national context requires different interpretation than that provided for in EU instruments.

Indeed, the practice of issuing soft law is not unusual at the level of the national competition authorities. The French Competition Authority publishes on its web page several communications, regarding compliance with competition rules, fines, leniency program, as well as competition commitments. The OFT has been producing an important number of guidance documents, while new Member States such as Romania and Poland have constructed a body of soft law instruments as well. The solution suggested by the AG encourages the national competition authorities to be more transparent about their work and ensure similar level of certainty as that ensured by the European Commission through its guidelines and notices.

V. CONCLUSION

Soft law is often considered undesirable, given the arguably blurred legal effects that it can produce in the absence of legally binding force.[36] In other comments on *Expedia*, the intrinsic nature of soft law was blamed for the legal uncertainty companies are facing.[37] This short analysis aims at presenting a different perspective, suggesting that the nature of soft law is not problematic; rather, one should question the rigid position that courts and authorities have with regards to these norms.

Instruments deprived of legally binding force are part of a reality nowadays that is difficult to ignore, as hybrid modes of regulation that combine soft and hard law instruments are put in place in many sectors,[38] including competition.[39] In this context, the strict divide binding

[32] Opinion in *Expedia*, ¶39.

[33] Opinion in *Expedia*, footnote 40.

[34] Opinion in *Expedia*, ¶41.

[35] Opinion in *Expedia*, ¶42.

[36] *See* Klabbers, *Informal Instruments Before the European Court of Justice*; Klabbers, *The Redundancy of Soft law*, NORDIC J. INT'L L. 65 (1996): 167; Klabbers, *The Undesirability of Soft Law*.

[37] Vincent, *La communication de minimis : un acte, a minima, doté d'une force obligatoire, note sous CJUE 13 déc. 2012*, DALLOZ 07 / 7544, 473 (2013).

[38] Trubek & Trubek, New Governance and Legal Regulation: Complementarity, Rivalry and Transformation, 13 COLUMBIA J. EUR. L. 539 (2007).

and not binding has lost its importance and the analysis of the legal effects of soft law needs to be tuned in on the functions that such instruments are meant to fulfill within the regulatory framework.

As illustrated by the *Expedia* case, when assessing the effects that EU soft law might have at the national level, the CJEU is reluctant to use similar arguments to those that it uses when admitting the effects of such instruments in EU enforcement settings. This creates important concerns in relation to individual rights, as individuals seem to be granted more protection at the EU level than at the national level.

Thus, *Expedia* generates the inverse of the situation created by the line of case law that led up to the *Solange I* decision[40] more than forty years ago. Back in the day, the German Constitutional Court was worried that the European Union system would undermine the national system of fundamental rights protection. It is the task of the CJEU now to nudge the national competition authorities to ensure a level of transparency and legal certainty similar—or indeed better!—than that offered by the European Commission through its soft law instruments.

[39] Maher, *Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement?* 31 FORDHAM INT'L L.J. 1713 (2008).

[40] Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und. Futtermittel, decision of 29 May 1974, BVerfGE 37, 271 [1974] CMLR 540.