EU soft law in the UK on the eve of Brexit: (not) much ado about nothing?

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Chapter 15

EU Soft Law in the UK on the Eve of Brexit: (not) Much Ado About Nothing?
Mary Dobbs and Oana Stefan*

I Introduction

This chapter investigates the role of EU soft law instruments within the UK legal order. It considers the legal effects of these instruments, through examining case law and administrative practice in selected fields. The SoLaR methodology was employed to gather data. The main challenge was obtaining interviews,1 increasing the significance of other sources of data. With regards to the documentary analysis, materials were mostly accessible online in official databases, or through the portal Westlaw. For case law we used the database of the British and Irish Legal Information Institute.2

The chapter investigates whether the nature of the UK’s legal system impacts upon the role of EU soft law. As shall be seen, one would expect that soft law would be utilised wherever relevant and useful, and that its effects would increase through use. However, whilst the data indicates that where these instruments are utilised, they have a strong interpretative role, it also indicates that the initial use of such instruments is haphazard and there is no guarantee that all instruments will be utilised where relevant. The chapter concludes with very brief consideration on the future of EU soft law in the UK in light of Brexit.

II Significance of the UK Legal System’s Nature

* Our thanks to Conor McCormick, Steffen Post, Ewan McGaughey, Andrea Biondi, Takis Tridimas, Alexander Turk, Napoleon Xanthoulis, Giulia Gentile, Mariolina Eliantonio, Emilia Korkea-aho, and the SoLaR-UK interviewees for their contribution to the project and/or comments on an earlier version of this chapter. Any errors or omissions are the authors’.

1 Some of the rejections we got were linked to Brexit, both as a sensitive topic and as a reason for increased workload and lack of time. Furthermore, we could not use some of the material as the consent form was not signed by some of the interviewees, even though they were open to very frank conversations. The reason given was the high political salience of topics connected to the EU. With regards to judges, while in principle some expressed informally their willingness to take part, we could not undertake any interviews as, to this date, we have not received any answer to our official application for the participation of judiciary to the SoLaR project. Our team interviewed eight public servants in financial regulation and competition. Out of these, one of the interviewees responded in personal capacity only, and was not included in this paper. Unfortunately, we have not received any positive reply for the environmental and social policy sectors.

2 www.bailii.org.
Before considering the approach to EU soft law within the UK, it is first necessary to sketch out briefly two contextual elements: first, the complex nature of the UK’s legal system itself together with its approach to EU law more generally, and second, their likely impact on the reception of EU soft law.

_A The UK Legal System – The Rule of (Hard) Law?_

i) Formal status of soft law instruments

The UK is a constitutional monarchy, based on the rule of law, parliamentary sovereignty and predominately common law traditions.\(^3\) This seeming bundle of contradictions leads to a hierarchy of norms, with Acts of Parliament and particularly ‘constitutional statutes’ at the pinnacle.\(^4\) Crucial from our perspective is that, while the law encompasses legislation, statutory instruments, judicial precedents, incorporated international treaties and so on,\(^5\) the UK and its courts clearly distinguish between binding law and all other non-binding elements.\(^6\) Unless incorporated via binding law, policy instruments, circulars, guidance documents etc are only ‘quasi-legislation’\(^7\) – they remain outside the hierarchy of (hard) norms.

The consequence of such a statement is significant. If even the lowliest of local bye-laws conflict directly, then the soft law instruments must be disregarded. They have no binding, legal force and indeed are not justiciable\(^8\) – as they are not ‘law’, they are not appropriate for adjudication by the courts. Consequently, one might expect them not to play a significant role within the UK – whether before the courts, or in executive or administrative decision-making. However, that is not the end of the story.\(^9\)

ii) The use of soft law instruments

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\(^3\) Scotland proves the exception, as it comprises a mixed tradition.


\(^5\) ibid Chapter 2.

\(^6\) ibid 147–148.


Firstly, it is possible for the soft law instruments to be incorporated by reference, even into Acts of Parliament, eg legislation may impose obligations to ‘have regard’ to national planning policy frameworks or to national policy statements, as proposed in the 2019 Environment (Principles and Governance) Bill regarding a policy statement on environmental principles. The soft law instrument would effectively be part of the law until the legislation is amended. Of concern however is the ease with which the soft law instrument itself may be amended or replaced, thereby bypassing ordinary scrutiny and accountability measures.10

Secondly, even without incorporation, this does not stop them being used – either expressly or implicitly, to a greater or lesser extent. Provided that there was no conflict with binding norms, decision-makers could avail of them daily – something that raises considerable concerns about democracy, legal certainty and the rule of law, especially if the soft law documents are not publicly available. Decision-makers generally ought to take account of any appropriate ‘relevant considerations’11 and disregard any irrelevant ones – begging the question as to whether the soft law instrument in question is a relevant consideration.

Thirdly, courts in a common law system must adjudicate on legal debates where the law is clear, but also where it is opaque or where there are effectively gaps. In contrast to a civil law system: the law is not codified to the same extent; judges are not restricted to stating what the law is; and binding judicial precedent is an essential component of the law. Therefore, the courts are both experienced in and must undertake the interpretation of law, including where highly challenging. In doing so, courts may turn to whatever seems reasonable to them to avail of and soft law instruments are an obvious source – as potentially directly relevant to the issue at hand and for instance providing insight into the objectives behind legislation or guidance on its implementation.12

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Therefore, where incorporated by reference, there is a heightened expectation that the soft law instruments referred to will be utilised by the decision-makers and raised before the courts – indeed the decision-maker may be obliged to utilise it. However, even without incorporation by reference, one might expect due to sheer convenience to see soft law instruments being utilised where useful and where not in conflict with the law.

iii) Burgeoning legal force

The regular use of soft law instruments by decision-makers or the courts may give them credence and potentially not merely legal effects but also legal force. This can occur via judicial precedent and also via the doctrine of legitimate expectation.

Within the common law system, a considerable source of binding law is in the form of case law whereby judicial precedent is developed over the centuries by the courts under the doctrine of *stare decisis*.\(^\text{13}\) *Stare decisis* (let the decision stand) means that the decisions of the superior courts (High Court, Court of Appeal and Supreme Court) are binding on lower courts and also usually courts of the same level. Not only are broad legal principles and doctrines developed by the courts, but the specific reasoning (the *ratio*) must be applied in similar cases. If a superior court refers positively to a soft law instrument in a case and relies on it in its reasoning, eg to help justify the outcome or in noting that the decision-maker must consider the soft law instrument, then this can become interwoven into the precedent. Thereby, the soft law instrument can both help develop binding precedent, even if not referred to in later cases, and even be given force for the future due to the precedent.

Another way through which soft law can be endowed with legal force is through the operation of the principle of legitimate expectations. Legitimate expectation arises in the context of UK public law. Where there is a legitimate expectation due to the prior actions, inactions or representations of decision-maker that they will behave in a certain way, then the courts may intervene to prevent them going against that expectation if it were unfair or inconsistent with principles of good governance to allow the decision-maker to depart from

that practice.\textsuperscript{14} Thus, if a decision-maker is known to avail of specific soft law instruments in their decision-making, then it might be possible to establish a legitimate expectation that they would continue to do so.\textsuperscript{15}

However, a significant issue remains due to the decision-makers being organs of the state. It is not at all clear whether legitimate expectation can be used effectively due to a combination of parliamentary sovereignty and a reasonably strict separation of powers. Firstly, an Act of Parliament is sacrosanct. Secondly, within the judicial review system, whilst there are reasonably tight controls of procedural elements, ie whether specific steps were taken including having regards to guidance documents where required, there is considerable deference when it comes to the substantive decision\textsuperscript{16} – something that is the focus of an Aarhus complaint currently.\textsuperscript{17} Consequently, even if soft law instruments were to be considered justiciable and used as a decisive, independent factor before the courts, this would not necessarily enable decision-makers to be held to account over the substantive decision.\textsuperscript{18}

\textit{B Relationship with EU Law?}

The second contextual element is the UK’s legal relationship to-date with the EU. For, despite the EU claiming supremacy of EU law over domestic law and developing doctrines such as direct effect, the UK has been less enthusiastic on this front – linked to the UK’s dualist system and Parliamentary sovereignty. Nonetheless, eventually the UK relied on the Parliament’s decision (under the European Communities Act 1972) to abide by EU law and concluded that any domestic legislation that directly conflicted with EU law would simply be disapplied in that instance.\textsuperscript{19}

\begin{itemize}
    \item \textsuperscript{14} D Feldman, \textit{English Public Law} (2\textsuperscript{nd} edn, Oxford, Oxford University Press, 2009) 681–684 and 730 et seq. Obviously limitations and exceptions can arise, eg where the decision-maker provides advance warning of a change in practice or where the legislation has since been amended.
    \item \textsuperscript{15} ibid 254–255.
    \item \textsuperscript{19} \textit{R v Secretary of State for Transport, ex p Factortame Ltd}, [1990] UKHL 7 with caveats noted later in \textit{R HS2 Action Alliance Ltd} [2014] UKSC 3. This is further supported by Section 18 of the European Union Act 2011.
\end{itemize}
Two points regarding EU soft law need highlighting. Firstly, as EU soft law remains ‘soft’, an obligation to transpose, implement and enforce EU law does not extend to EU soft law. Any adherence will depend on ancillary obligations created at the EU or domestic level, or just on what is useful nationally (see, for instance, the obligation to comply or explain with financial regulation soft law issued by the European Supervisory Authorities). Secondly, EU soft law may prove especially useful. EU law is influenced by its mixed origins – both common and civil law. It also remains relatively new, is growing continuously and is frequently technical. The creation of hard law becomes more politically challenging with increased numbers of Member States and the principle of subsidiarity also impacts on the level of detail of EU law in areas of shared competence especially. Consequently, soft law documents abound and may be very helpful (if also questionable democratically) – increasing the likelihood of their use.

Overall therefore, whilst neither domestic nor EU soft law is, in principle, binding on decision-makers or the courts in the UK, one would expect to see the instruments being used wherever useful by decision-makers or the courts to help interpret the hard law or develop policies – although this does not guarantee that they will be expressly referred to. Where they are referred to expressly, by decision-makers, courts or in legislation, then their influence and strength grow – to the point that they may end up with *de facto* binding force in the long-run. Thus, their role and weight will not be uniform, but instead will depend on how helpful they are and their use to date. However, the limitation remains that the legal system does not provide for effective substantive judicial review and thereby curtails the role of any hard or soft law instruments.

### III Findings Regarding the Impact of EU Soft Law on Specific Fields

This section is based on empirical research undertaken within the SoLaR project regarding the role of sample EU soft law instruments in the UK in the fields of competition, environment, financial regulation and social policy. The choice of fields is particularly interesting and provides for varying contexts. For instance, due to the extraordinary experience in regulating the biggest financial market in the EU, UK experts have played a leading role in drafting the soft law issued by the European Securities and Markets Authority (ESMA). For competition law, a blanket stipulation in the legislation provides that statutory
interpretation should pay due regard to statements issued by the European Commission. Environmental law is an area of devolved (decentralised) power in the UK, while, with social policy, the British exceptionalism is widely known. The data is gathered from interviews to a limited extent, but in particular from documentary analysis of official websites, laws, and cases. The results suggest a number of interesting trends, which can be grouped in three categories, relating to the transposition of EU soft law in the UK, the use made by administrations and courts, and finally the effects of EU soft law in the UK legal order.

A Status of EU Soft Law in the UK Legal Order

i) The transposition of EU soft law in the UK

Judging from their official websites and documents published, UK authorities consider that all types of EU soft law instruments are relevant, including everything from official guidance to even Q&As, preventing a ranking/taxonomy of EU soft law. However, EU soft law is not systematically or officially transposed in the UK legal order and the approach appears in part sector dependent and indeed in social policy our team could not retrieve any form of transposition of the targeted EU soft law.

The most popular way of ‘transposing’ EU soft law is by way of reference within national guidance on various websites or in handbooks. Thus, Dobbs notes that when EU and national environmental protection systems overlap, the domestic guidance might make brief references to EU guidance. The key mechanism to transpose EU environmental soft law is through circulars, which should be considered by the decision-makers, but the reception across the UK varies. Similarly, national competition law guidance refers frequently to soft

22 The English national planning policy framework (NPPF) is mainly inward looking but does include reference to the EU regimes, see www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/2116950.pdf.
law. In State aid, the Manual published by the Department for Business, Energy, and Industrial Strategy (BEIS)\textsuperscript{25} includes reference to both hard and soft law. A civil servant stated in an interview that the Manual is a translation of formal EU documentation into a more practical guide to the rules. This is because EU guidance is written in a very continental, civil law fashion, which does not always translate in common law terms.\textsuperscript{26} In financial regulation, EU guidance is mostly included in the interactive handbook\textsuperscript{27} of the Financial Conduct Authority (FCA). Such non-binding guidance is influential, as FCA treats compliance thereto as compliance with the binding rule to which the guidance relates.\textsuperscript{28} As noted by Post in the UK financial regulation report, however, the targeted European Supervisory Authorities’ (ESAs) guidelines are ‘normally only added into the handbook by way of reference at the beginning of a section’.\textsuperscript{29}

Such unsystematic, selective presence of EU guidance documents in the UK regulatory landscape makes it difficult to track a certain pattern of soft law transposition. It also might negatively impact stakeholders, for instance by obscuring planning or licensing processes regarding environmental protection – despite non-transposition, soft law instruments may be relevant and used by decision-makers.

ii) Place of EU soft law in the hierarchy of legal sources

One serious consideration for transposition concerns the weight to be attached to EU soft law. In some sectors, such as financial regulation, authorities occasionally make clear that EU guidance is superior to the national guidance in the hierarchy of legal sources.\textsuperscript{30} This might be explained by the fact that the UK financial authorities are quite influential in drafting EU guidance themselves.\textsuperscript{31} However, as noted by Dobbs,\textsuperscript{32} EU soft law in contrast with EU hard

\textsuperscript{30} ibid 137.
\textsuperscript{31} M van Rijsbergen, EU agencies’ soft rule-making: Lessons learnt from the European Securities and Markets Authority (Dissertation, Utrecht University Repository, 2018).
\textsuperscript{32} Dobbs, ‘National Report’ (n 21) 147.
law will never directly trump national legislation. The interviews for competition and State aid confirmed that soft law is placed at the bottom of the hierarchy of legal sources. Hard law instruments (that are further explained by soft law), as well as case law rank higher. One interviewee mentioned that it is the duty of the administration to keep track of such clashes, as businesses (especially SMEs) will find it difficult to scrutinise everything.

iii) Mutual learning through soft law

Soft law shows once again that the EU and the UK legal systems coexist in an environment of dialogue and mutual exchange. On the one hand, EU soft law writing techniques might inspire UK authorities. For example, the FCA makes recourse to Q&As in its handbook in order to shed further light on the rules. Furthermore, some EU environmental guidance documents have heavily influenced the content of national or regional guidance in the UK. On the other hand, EU soft law is sometimes either UK inspired or drafted in collaboration with UK authorities. Some of the recent, most interesting developments in the compatibility of State aid for energy and environmental objectives have been modelled on UK cases approving the various forms of support foreseen by the Electricity Market Reform. These developments were later codified in the 2014 Energy and Environmental Aid guidelines.

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34 Stefan and Biondi (n 26) 189.
35 Post (n 29) 136.
With regards to social policy, McGaughey considers that the EU soft law studied by the SoLaR team has been influenced by policies developed in the UK under its most actively pro-EU government, namely the Tony Blair and the Gordon Brown administrations. Finally, regarding financial regulation, the weight that the UK representatives have in the board of the ESAs has been documented in the literature.

**B Is EU Soft Law Referred to in the Case Law and Administrative Practice?**

Our empirical research shows that soft law does feature in the UK’s administrative practice and case law. One interviewee identified UK courts as generally ‘open minded when it comes to soft law’, while the Court of Appeal has noted that ‘[a]lthough the Guidance is not binding, it is nonetheless instructive and compelling’. Overall, interviewees agreed that the EU legal order is better off with soft law than without soft law. In the words of one interviewee, soft law is ‘not only a question of regulating, but a question of transparency, consistency, and certainty’. However, the references vary greatly.

Thus, in competition law, as already noted by Devine and Eliantonio, our empirical research shows that the Competition and Markets Authority (the CMA) relies on EU guidance when deciding on cases. Soft law is either referred to on its own, or in conjunction with case law. As observed by Post, the FCA relies on ESMA guidelines and Q&As in its enforcement actions in the UK; in fact, the FCA seems to consider such guidance to enforce the duties of the firms within the remit of ESMA. However, a complete vacuum arose in the context of social policy instruments.

This variation in use begs the question why are some instruments never referred to? In part, the answer may be sector-specific – in the social policy sector, McGaughey noted a complete lack of awareness towards EU soft law. The team contacted multiple sources from the Crown

41 Van Rijsbergen (n 31) 108.
42 Stefan and Biondi (n 26) 188.
44 Stefan and Biondi (n 26) 190.
46 Stefan and Biondi (n 26) 185–186.
47 Post (n 29) 138.
Commercial Service, the Child Poverty Unit of the Department of Work and Pensions, and the Government Equalities Office’s Gender Pay Gap Reporting staff. Unfortunately, there appeared to be nobody with sufficient knowledge or awareness of any EU soft law measure.\(^{48}\) However, this does not account for all variations.

A further cause could be the high degree of generality of EU guidance, as confirmed by an interviewee in relation to the Technology Transfer Guidelines.\(^{49}\) Interviews reveal that most people in the public sector recognise that a framework is needed in order to facilitate competition within the market and to limit financial expenses. However, this does not mean that they will use any framework – the uptake of soft law by decision-makers clearly depends on awareness, clarity and relevance.

These variations are accentuated when it comes to the results of the case law searches. In social policy and financial regulation the searches for the EU guidance documents chosen by the SoLaR team yielded no results. The former could be explained by the same reasons as for the uptake by decision-makers, or indeed as a knock-on effect of that vacuum. Regarding financial regulation, this might be related to the narrow scope of the research, but after expanding the searches to other EU soft law, only one financial regulation court case was found which dealt with one national guidance document that appeared to be drafted in identical terms to corresponding EU guidance.\(^{50}\) In State aid, three cases referred to soft law, mostly outside the SoLaR sample, yet, the situation is slightly different than for financial regulation and social policy, as UK courts rarely deal with State aid cases.\(^{51}\)

By contrast, numerous references were found in the fields of competition and environment. Substantial references to soft law are not rare, with some cases quoting them extensively.\(^{52}\) The UK courts seldom refer to EU guidance on its own, however, and always link it either with corresponding hard law or the case law of the Court. For example, in the *An Taisce* environment case, the High Court pointed out that the ‘definitive interpretation of Union law

\(^{48}\) McGaughey (n 40) 113.
\(^{49}\) Stefan and Biondi (n 26) 189.
\(^{50}\) Post, ‘EU Soft Law Effects’ (n 29) 140.
\(^{51}\) Stefan and Biondi (n 26) 186–188.
is the sole prerogative of the European Court’.\(^5^3\) At the same time, a Scottish Court considered the interpretation of the EU soft law document, then considered the jurisprudence briefly as confirming this approach and consequently interpreted a binding obligation upon the relevant parties.\(^5^4\) Guidance which is perceived particularly helpful might even be used in draft form (such as for instance the Notice on the Notion of Aid),\(^5^5\) while other guidance might not be used at all.

Without clear insight into the courts’ reasoning via judicial interviews, it is not possible to determine precisely why the courts do not always refer to soft law instruments. This could be that the instruments are unnecessary, as the hard law is sufficiently clear or precise; that the instruments are controversial; or simply that the instruments are not useful. According to one of our interviewees, sometimes soft law is simply not relevant in a case.\(^5^6\) A good example is the Guidance Paper on Article 102 TFEU.\(^5^7\) As noted by Georgieva in 2016, this instrument was not very popular with UK courts, even though it was mentioned by the claimants, and this was explained on grounds it was highly controversial.\(^5^8\) The interviewee expressed a different view, with regards to the *Purple Parking* case, noting that the rejection of the Guidance paper was not a reflection of the quality of the instrument, but simply an illustration of its limits.\(^5^9\) Moreover, our searches show that the attitude towards the Guidance Paper might have changed. The Guidance was referred to in the recent *Socrates Training* case, to explain the subtle differences between tying and bundling.\(^6^0\) Most interestingly, in *British Telecommunications*, the Competition Appeal Tribunal (CAT) appears to be persuaded by the case law of the EUCJ (in particular, the *TeliaSonera* opinion)\(^6^1\) to use Guidance Paper on Article 102 as a ‘point of reference’ in assessing margin squeezes. The judgment notes that the Guidance is not binding on CAT or on Ofcom, and proceeds to assess it in conjunction.

\(^5^3\) An Taisce (The National Trust for Ireland), *R (on the Application of) v The Secretary of State for Energy and Climate Change & Anor* [2014] EWCA Civ 1111, para 144.


\(^5^6\) Stefan and Biondi (n 26) 189.


\(^5^9\) Stefan and Biondi (n 26) 189.

\(^6^0\) *Socrates Training Ltd v The Law Society of England and Wales* [2017] CAT 10.

\(^6^1\) Case C-52/09 *Telia Sonera* [2011] ECR I-527, Opinion of AG Mazak.
with the case law of the CJEU. Finally, in *Streetmap v Google*, Justice Roth has relied on the *Guidance Paper on Article 102* in order to determine the issue of objective justification in an abuse of dominance case. The Guidance was used in support of the argument that technical improvements in the quality of the goods are part of relevant efficiencies, and also in order to lay down the requirements of the proportionality test. This example shows that the attitude towards a certain soft law instrument might change over time, and we can hypothesise that this is a result of the evolution of the EU case law itself, the socialisation of national judges to soft law, or, simply, the relevance of an instrument for certain cases.

Overall, it appears that there is an openness to the use of soft law – where the decision-makers and judges consider it useful or appropriate. That can be linked to clarity, precision or acceptability, or simply awareness of the documents. There is no guarantee they will be used unless an obligation arises.

*Legal Effects and Mechanisms of Compliance*

As expected, soft law is used mostly as an interpretation aid, with the administration and courts not considering themselves bound by EU soft law. However, as noted by Dobbs in the environmental report, there is evidence within the cases that UK courts may be willing to go quite far in this respect. For example, in the environmental case of *Loader*, EU guidance was referred to as part of European and national authority. However, it is difficult to infer that UK courts consider soft law binding in and of itself, as also noted in a UK Supreme Court case: ‘[i]t is important to emphasise that the legal requirements must be found in the legislation, as interpreted by the CJEU itself, not (with respect) in the opinions of the Advocates General nor in guidance issued by the Commission (however useful it may be as an indication of good practice).’

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62 British Telecommunications PLC v Office of Communications (VULA) (Judgment (Non-specified price control matters) [2016] CAT 3, paras 90–92.
63 Streetmap EU Ltd v Google Inc. [2016] EWHC 253 (Ch), paras. 145-146.
64 For environment, see the High Court judge in *Alternative A5 Alliance, Judicial Review [2013] NIQB 30*, para 81 stated that ‘In relation to these submissions I consider that assistance can be obtained in relation to the meaning of “integrity” from the Commission’s guidance on Article 6 of the Directive, “Managing Natura (2000)”. This is also seen in the Supreme Court judgment of *Champion, R (on the application of) v North Norfolk District Council & Anor* [2015] UKSC 52.
65 Dobbs (n 21) 145.
66 *Champion, R (on the application of) v North Norfolk District Council & Anor* [2015] UKSC 52, para 39. This is also reflected in the Court of Appeal stating that the EU guidance in question was not binding and that ‘(o)f much greater importance than the Guidance are, of course, the decisions of the ECJ which bind us’ in *Morge, R*
There are various reasons for which soft law is relied on by UK courts and administration. The first one relates to national statutory obligations. In competition, Section 60(3) of the UK Competition Act 1998 (CA '98) advises authorities to ‘have regard to any relevant decision or statement of the [European] Commission’. Indeed, Georgieva finds that the existence of such consistency obligation in the national legal order might make the application of soft law in court more likely. The point is made in relation with a CAT judgment in Cityhook, where, in the absence of relevant case law in the matter, the Court used Section 60 (3) of CA '98 in order to support its reliance on Commission guidance as an interpretation aid. As observed by Devine and Eliantonio, the administration feels also somewhat bound by soft law as a result of this statutory provision. In MasterCard the Office for Fair Trading (OFT; the predecessor of the CMA) has interpreted the duty of Section 60 (3) as having ‘to give serious consideration’ to the Commission’s statements. Most interestingly, this approach appears to have been relaxed ten years later, following Expedia judgment of the CJEU. In that case from 2011, the CJEU expressly stated that national authorities are not bound by EU’s de minimis notice. In its 2013 decision in Mobility Scooters the OFT noted that, ‘notwithstanding the potential application of the Commission’s De minimis Notice, the OFT will also consider a number of factors in determining whether the infringements are appreciable by reference to the actual circumstances of the agreement’.

Compliance might not only be the result of national statutory provisions, but of also EU statutory provisions. Article 16 (4) of the ESMA regulation, introducing a ‘comply or explain’ mechanism with regards to ESMA guidance, is one such example. While this does not provide, strictly speaking, for a binding enforcement mechanism, ESMA can use other soft enforcement tools to foster compliance of national authorities, such as ‘naming and shaming’ through compliance tables, or peer reviews according to Art 30 of the ESMA

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69 Georgieva (n 58).
70 Cityhook Ltd v Office of Fair Trading [2007] CAT 18, para 255.
71 Devine and Eliantonio (n 45) 57.
74 Mobility Scooters (Pride Mobility) CE/9578-12, A.76.
The high margin of discretion of the Commission appears also to be a factor that would influence administrative compliance with EU guidance. With regards to State aid, an area of exclusive competence of the Commission, an interviewee confirms that compliance with guidelines is triggered by the need to comply with EU State aid rules. Interestingly, in relation to the Guidelines on fines, the OFT clearly states that they do not feel bound by Commission guidelines ‘particularly where the Commission has itself a wide margin of discretion’. While both State aid and Competition are areas of exclusive competence, this diverging approach can be explained by the fact that in competition enforcement is nowadays decentralised, and the UK authorities have already adopted a different methodology on fines, for example.

Some instances show that the reliance on soft law is connected, in UK courts, to general principles of EU law, such as consistency or the duty of sincere cooperation. With regards to consistency, the Court of Appeal noted in Mastercard, in relation to Art 101(3) Guidelines that ‘although… they are not legally binding and therefore some flexibility in whether they should be applied and followed is permissible, we consider that, as with the nature of evidence required to satisfy the first condition, consistency of approach across Member States is important’. The judgment refers also to the fact that counsels for the parties did not suggest that ‘national courts in other Member States have departed from the Guidelines in considering the issue of exemption under article 101(3)’. Comparative approaches seem to be, therefore, of relevance in the case law. In environment, Dobbs did not find any clear evidence that the principle of consistency would play a role, although, in one case, it was considered that the courts’ use of the EU soft law, alongside references to ECJ judgments, leads to coherency and consistency. With regards to the duty of sincere cooperation, the early case of Intreprenneur v Crehan needs to be mentioned. Already in para 5, Lord Bingham of Cornhill underlines the ‘particular importance of wholehearted cooperation between national courts and the Commission in the field of competition’ as ‘reflected in the

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75 Post (n 29) 133–134.
76 Stefan and Biondi (n 26) 188.
77 Dairy retail price initiatives CE/3094-03.
78 Sainsbury’s Supermarkets Ltd v MasterCard and others [2018] EWCA 1536 (Civ), para 106.
79 ibid.
80 Dobbs (n 21) 148–150.
Commission’s 1993 Notice on Cooperation between National Courts and the Commission in Applying Articles 81 and 82 of the EC Treaty, […] and in the Commission’s Notice on cooperation within the Network of Competition Authorities’. 82 The contribution that soft law can have towards clarifying certain aspects of the law, thus also fostering transparency, appears to be acknowledged as well by UK judges. Indeed, in Wye Valley, in relation to the Commission’s guidance on the interpretation of certain project categories in Annexes I and II to the EIA Directive, the Court of Appeal has stated ‘The objective of the guidance is twofold: first, the document aims to improve understanding of what can be reasonably considered to be covered by certain project categories that have proved particularly difficult to interpret in practice; secondly, it is intended to provide an overview of existing useful sources of information at EU level’. 83

IV Conclusion

Overall, the research indicates a significant willingness to avail of relevant soft law documents where the decision-makers or courts consider it useful and appropriate. When it comes to the role soft law plays in practice, sometimes the mentions are relatively tokenistic or in passing – but often the more frequent the mentions, the more the role increases and strengthens before the courts. However, the extent to which they are used varies across and even within the sectors, with a greater presence in the context of competition and environmental law than in social policy, for instance.

One solution for a more systematic reception of EU soft law might be to either transpose all relevant guidance into UK law, or create new domestic guidance. However, there has been a reluctance to transpose the targeted EU soft law within statute or as new national soft law, as noted by Dobbs in the environmental report. 84 This has been arguably done in the interest of simplification and as transposition has been considered unnecessary, with courts noting that an informed decision maker would know which guidance to take into account and where to

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82 Inntrepreneur Pub Company (CPC) & Ors v Crehan [2006] UKHL 38, para 5.
84 Dobbs (n 21) 128–140.
find it. According to one of our interviewees, inserting only brief references to EU financial guidance in the FCA handbook was done in order to keep the volume of the rules at a manageable level. It appears that incorporating soft law by reference is an appropriate alternative solution: not only does it keep the core documents briefer, but it might even increase the weight of EU soft law more generally, by demonstrating that the instruments are relevant and applicable internationally without the need for full transposition.

While these recommendations might work well for an EU Member State, in our case the elephant in the room is Brexit. The UK has undertaken significant preparatory work for Brexit, especially the EU Withdrawal Act. The objective of the Act is largely to plug the holes posed by Brexit, through enabling statutory instruments to amend existing legislation now and for the future. The Withdrawal Act even provides for continued application of existing CJEU judgments, as part of ‘retained EU law’, but with caveats. A major gap that has not been addressed at all is the future of EU soft law. A significant question is whether to transpose it domestically into either hard or soft law or just leave it lie. A factor in this debate is that current and future EU soft law would remain persuasive whether incorporated or not and decision-makers or courts could still avail of it where relevant if they so wished. The question remains how politic would it be for UK courts or administrators to still consider and apply EU soft law? Our crystal-ball prediction is that the application of EU soft law will remain at best haphazard in the UK in the following years. While judges and administrators might, in their work, find EU soft law instruments useful, express references to such instruments might indeed be fewer and fewer.

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85 Morge v Hampshire County Council [2009] EWHC 2940 (Admin), para 60 states that ‘it might be confidently expected that Natural England were aware of the terms of the Habitats Directive, the Commission Guidance and the Habitats Regulations, given that they were the authority responsible’.

86 Post (n 29) 135.